OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Legislative Branch and Executive Branch Committee

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Part II

February 9, 2017

Ohio Statehouse
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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE
LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE

OHIO CONSTITUTION
ARTICLE II
SECTIONS 10 AND 12

RIGHTS AND PRIVILEGES OF MEMBERS OF THE GENERAL ASSEMBLY

The Legislative Branch and Executive Branch Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Sections 10 and 12 of Article II of the Ohio Constitution concerning General Assembly members' rights of protest, and their privileges against arrest and of speech. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article II, Sections 10 and 12 of the Ohio Constitution be _____.

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.

Section 10 (Rights of Members to Protest)

Section 10, unaltered since 1851, provides:

> Any member of either House shall have the right to protest against any act, or resolution thereof; and such protest, and the reasons therefor, shall, without alteration, commitment, or delay, be entered upon the journal.

Section 10 was slightly revised from the version adopted in the 1802 constitution, which reads:

> Any two members of either house shall have liberty to dissent from, and protest against, any act or resolution which they may think injurious to the public or any individual, and have the reasons of their dissent entered on the journals.

The right of legislative members to protest, and to have their objections recorded in the journal, has its origins in the House of Lords of the British Parliament, where the right of written dissent was recognized as a privilege of the upper house.[1] Recording the dissent in the house journal was the minority's recognized method of registering political objection, but the protests would also appear in the press, and for this reason the decision to protest, and the wording of the objection, were carefully considered.[2]

While the right of protest is ancient, its use was uncommon until the 18th century, when it was promoted by the rise of partisan factionalism in Parliament and a growing public interest in politics that encouraged dissenters to air their protests in the court of public opinion.[3] By the close of the century, American state constitutions began to include the right of legislative members to dissent and have their protest journalized, with several of the original 13 colonies adopting the measure in their state constitutions, including New Hampshire, North Carolina, and South Carolina.[4] Tennessee followed suit in its 1796 constitution, with Ohio's provision being included in the 1802 constitution.[5] [6]

Although about a dozen states maintain a similar provision in their constitutions, the United States Constitution contains no equivalent, merely providing at Article I, Section 5, Clause 3, that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may, in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal." Commenting on the absence of a similar provision in the U.S. Constitution, the Ohio Constitutional Revision Commission (1970s Commission) observed that dissents in Congress are preserved by the publication of debates in the Congressional Record.[7]

Section 12 (Privilege of Members from Arrest, and of Speech)

Section 12 has not been altered since its adoption in 1851. It provides:

> Senators and Representatives, during the session of the General Assembly, and in going to, and returning from the same, shall be privileged from arrest, in all cases, except treason, felony, or breach of the peace; and for any speech, or debate, in either House, they shall not be questioned elsewhere.

Section 12 is nearly identical to Article I, Section 13 of the 1802 constitution, which reads:

> Senators and Representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

The idea that legislative representatives must be able to freely engage in debate, consult with staff and constituents, and travel to and from legislative session without hindrance, was challenged in 17th century England when the Crown and Parliament clashed over their competing roles.[8] A particularly dramatic 1641 incident in which King Charles II stormed into Parliament demanding the arrest of members he deemed treasonous cemented the belief that an independent legislative body was essential to a democratic form of government, and the "freedom of speech and debates" for parliamentary members subsequently was included in the English Bill of Rights of 1689.[9]

By the time the U.S. Constitution was drafted, the privilege was accepted as a necessary democratic protection, and it was incorporated in Article I, Section 6, Clause 1, apparently without debate.[10] Various forms of the privilege also made their way into state constitutions, with nearly all states adopting constitutional provisions that protect legislative speech or debate.[11]

Amendments, Proposed Amendments, and Other Review

Section 10 was reviewed by the Committee to Study the Legislature of the 1970s Commission. On October 15, 1971, that committee issued a report in which it indicated the right to protest on the record originated in an era in which legislators had no other ability to communicate their objection to legislation. The committee concluded that because dissenting legislators now have the ability to publicize their views in the news media, the provision is "an anachronism and appropriate for removal."[12] Despite this recommendation, the question was not taken up by the full 1970s Commission, and, thus, the section remains as it was adopted in 1851.

The 1970s Commission did not address Section 12, thus, it also remains in its 1851 form.

Litigation Involving the Provisions

The Supreme Court of Ohio has not had occasion to review Article II, Section 10 since the 1970s, however, the Court has reviewed Article II, Section 12.

In *Costanzo v. Gaul*, 62 Ohio St.2d 106, 403 N.E.2d 979 (1980), the plaintiff sued a city councilman who, in explaining why the plaintiff's rezoning request had not been accepted, allegedly made defamatory statements about plaintiff to the press. In *Constanzo*, the Court considered whether the privilege of speech or debate was limited to the General Assembly, or whether communications by members of a city council also qualified for protection. The Court held the councilman, like a state legislator, was entitled to absolute privilege so long as his published statement concerned a matter reasonably within his legislative duties.

Two Ohio Court of Appeals cases also bear mentioning. In *Kniskern v. Amstutz*, 144 Ohio App.3d 495, 760 N.E.2d 876 (8th Dist. 2001), the Cuyahoga County Court of Appeals addressed whether a civil rights violation case could be maintained against 72 state legislators who voted in favor of tort reform legislation in 1996.[13] In dismissing, the appellate court emphasized that legislators acting in their legislative capacities enjoy immunity from lawsuit, even where, later, the enacted law is held unconstitutional. *Id.*, 144 Ohio App.3d at 497, 760 N.E.2d at 877-78.

In *City of Dublin v. State*, 138 Ohio App.3d 753, 742 N.E.2d 232 (10th Dist. 2000), the Franklin County Court of Appeals considered whether private meetings between legislators and corporate representatives were privileged from discovery in a case alleging portions of the state biennial budget bill unconstitutionally restricted municipalities from regulating public utilities. Noting that state court precedent primarily focused on immunity from suit – an issue not present in the facts of the case – the court sought guidance from federal case law holding that the speech or debate protection also provides evidentiary privilege against the use of statements made in the course of the legislative process. *Id.*, 144 Ohio App.3d at 758, 742 N.E.2d at 236. Following the rationale that the purpose of the speech or debate clause is to protect the legislator from the "harassment of hostile questioning," rather than to encourage secrecy, the court concluded that "requiring legislators to divulge the identity of corporate representatives with whom they have had private, off-the-public-record meetings" does not infringe on an integral part of the legislative process and so does not violate legislative privilege. *Id.*, 144 Ohio App.3d at 760, 742 N.E.2d at 237.

Presentations and Resources Considered

Hollon Presentation

In July 2016, Steven C. Hollon, executive director, described that Sections 10 and 12 were related in that both deal with the freedoms and privileges of legislators to express their views and to perform their legislative duties without interference. Mr. Hollon suggested that, because these provisions cover related subject matter, they could be reviewed together and addressed in a single report and recommendation.

Huefner Presentation

In November 2016, Steven F. Huefner, assistant professor of law at the Ohio State University Moritz College of Law, presented on legislative privilege as set forth in Article II, Section 12.

Prof. Huefner described that his career included a position with the United States Senate, where he assisted in the Senate's efforts to protect and enforce its privileges, including those provided by the speech or debate clause of the U.S. Constitution.

Prof. Huefner said the existence of the legislative privilege is about protecting the separation of powers, a concept that goes back to when the British Parliament was subservient to the Crown. He said the clause is intended to protect members of a legislative body from retaliation for actions taken in the performance of their official legislative duties. He noted the provision derives from the concept that, while all public representatives are subject to political retaliation, legislators should not be subject to retaliation by the executive or judicial branch, which could use their power to make the legislative branch subservient. Prof. Huefner said provisions protecting legislators from retaliation for speech or debate remain, even though the clashes in England have not been part of the American experience.

Noting there are justifications for continuing the privilege, Prof. Huefner nonetheless commented that the countervailing pressure is for legislative activities to be open and public. He said the privilege should apply to staff as well as to legislators, but it is not always interpreted that way in the states.

Addressing the section's additional privilege against arrest, Prof. Huefner explained the privilege is against a citizen's civil arrest, which was occasionally used to detain members of a legislative body to prevent them from performing their legislative duty. He said the privilege excuses members of the legislature from being subject to civil arrest in all cases except treason, felony, and breach of the peace.

Regarding the prohibition against legislators being questioned elsewhere for any speech or debate, Prof. Huefner described the conduct and types of questioning covered. He said, by its terms, the provision protects members of the legislature, but for that protection to be fully effective, legislative staff members ought to be within the scope of that privilege if the legislative member desires the privilege to cover the staffer. He said it is the member's privilege to encompass the staff that is serving the member in connection with the work. Prof. Huefner said the privilege should cover broadly all the essential legislative activities, a privilege that may go beyond the official duties of the legislators. He noted there are duties performed that may not be expressly legislative.

Prof. Huefner said the remaining question is whether the privilege protects legislators only against liability or whether it also protects them against having to testify. He remarked that, if the phrase indicating they shall not be questioned "elsewhere" is only taken at face value, it is easy to argue legislators cannot be subpoenaed about what they have done, even if they are not defendants. But, he said, although this is how federal courts construe the rule, this is not always how state courts have construed it. He said the privilege against questioning includes being required to produce documents.

Prof. Huefner added the privilege raises questions about freedom of information laws, commenting that an argument could be made that an individual legislator could extend his or her privilege to the entire legislative body. He said, at the same time, the privilege only provides that members should be free from questioning elsewhere, meaning outside the legislature, so that the legislature is always accountable to the public for what they do in legislative session, including ethics investigations, deciding what parts of the process to conduct in public session, and by videotaping floor and committee sessions. He said the legislature can choose to create paper documents as a way of making its activities more readily available to the public. Despite this, he said, it is his view that legislators need the ability to insulate themselves against the possibility that disgruntled constituents or other branches of government might be able to obtain information for harassment purposes.

Discussion and Consideration

In discussing Article II, Sections 10 and 12, the committee _____

Conclusion

The Legislative Branch and Executive Branch Committee concludes that Article II, Sections 10 and 12 _____.

Date Issued

After formal consideration by the Legislative Branch and Executive Branch Committee on _____the committee voted to issue this report and recommendation on _____.

Endnotes

[1] William C. Lowe, *The House of Lords, Party, and Public Opinion: Opposition Use of the Protest, 1760-1782*, 11 Albion 2 (1979) 143, 143-44. Available at: https://www.jstor.org/stable/4048271 (last visited Jan. 10, 2017).

[2] *Id.* at 144.

[3] *Id.* at 143; *A Short History of Parliament: England, Great Britain, the United Kingdom, Ireland and Scotland* 156 (Clyve Jones, ed. 2009).

[4] North Carolina Const., art. II, § 18 provides: "Any member of either house may dissent from and protest against any act or resolve which he may think injurious to the public or to any individual, and have the reasons of his dissent entered on the journal."

South Carolina Const. art. III, § 22 provides, in part: "Any member of either house shall have liberty to dissent from and protest against any Act or resolution which he may think injurious to the public or to an individual, and have the reasons of his dissent entered on the journal."

New Hampshire Const. Part II, Art. 24 provides, in part: "And any member of the senate, or house of representatives, shall have a right, on motion made at the time for that purpose to have his protest, or dissent, with the reasons, against any vote, resolve, or bill passed, entered on the journal."

[5] A copy of the Tennessee Constitution of 1796 is available at: http://teva.contentdm.oclc.org/cdm/fullbrowser/collection/tfd/id/380/rv/compoundobject/cpd/421/rec/7 accessed 1/9/17 (last visited Jan. 9, 2017).

[6] In fact, Tennessee's constitution is recognized as providing, or at least influencing, most of the text of Ohio's first constitution. Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution* 22 (2nd prtg. 2011), citing Howard McDonald, *A Study in Constitution Making – Ohio: 1802-1874*, Ph.D. Dissertation, Univ. of Michigan, 27 (1916).

[7] Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Proceedings Research, Volume 3, 1109, http://www.lsc.ohio.gov/ocrc/v3%20pgs%201098-1369%20legislative-executive%201370-1646%20finance-taxation.pdf (last visited Jan. 9, 2017).

[8] Michael L. Shenkman, *Talking About Speech or Debate: Revisiting Legislative Immunity: Introduction,* 32 Yale L. & Pol'y Rev. 351, 357-58 (2014).

[9] *Id.* at 358-59; Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures,* 45 Wm. & Mary L. Rev. 221, 229-30 (2003).

[10] U.S. Const. art. I, § 6, cl. 1 states that members of both Houses "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses, and in going to and from the same, and for any Speech or Debate in either House, they shall not be questioned in any other place."

For a comprehensive history of the speech or debate clause in the U.S. Constitution and the British Constitution, see Josh Chafetz, *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions* (2007).

[11] Huefner, *supra*, at 235-37.

[12] *Id.* at 1110.

[13] The full cite of this case is *Kniskern v. Amstutz*, 144 Ohio App.3d 495, 760 N.E.2d 876 (8th Dist. 2001), dismissed, 93 Ohio St.3d 1458, 756 N.E.2d 1235 (2001), cert. denied, 535 U.S. 990 (2002).

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: **Chair Fred Mills, Vice-chair Paula Brooks, and Members of the Legislative Branch and Executive Branch Committee**

FROM: **Shari L. O'Neill, Counsel to the Commission**

DATE: **February 9, 2017**

RE: **Legislative Privilege in Statutory Law**

The Legislative Branch and Executive Branch Committee has requested research on statutory provisions that relate to the legislative privilege.

Ohio

In 1999, the General Assembly enacted R.C. 101.30, which specifically protects legislative staff, under certain defined circumstances, from being required to produce legislative documents. The statute provides:

> **101.30 Maintenance of confidential relationship between legislative staff and general assembly members and staff.**
>
> (A) As used in this section:
>
> (1) "Legislative document" includes, but is not limited to, all of the following:
>
> (a) A working paper, work product, correspondence, preliminary draft, note, proposed bill or resolution, proposed amendment to a bill or resolution, analysis, opinion, memorandum, or other document in whatever form or format prepared by legislative staff for a member of the general assembly or for general assembly staff;
>
> (b) Any document or material in whatever form or format provided by a member of the general assembly or general assembly staff to legislative staff that requests, or that provides information or materials to assist in, the preparation of any of the items described in division (A)(1)(a) of this section;

(c) Any summary of a bill or resolution or of an amendment to a bill or resolution in whatever form or format that is prepared by or in the possession of a member of the general assembly or general assembly staff, if the summary is prepared before the bill, resolution, or amendment is filed for introduction or presented at a committee hearing or floor session, as applicable.

(2) "Legislative staff" means the staff of the legislative service commission, legislative budget office of the legislative service commission, or any other legislative agency included in the legislative service commission budget group.

(3) "General assembly staff" means an officer or employee of either house of the general assembly who acts on behalf of a member of the general assembly or on behalf of a committee or either house of the general assembly.

(B) Legislative staff shall maintain a confidential relationship with each member of the general assembly, and with each member of the general assembly staff, with respect to communications between the member of the general assembly or general assembly staff and legislative staff.

Except as otherwise provided in this division and division (C) of this section, a legislative document arising out of this confidential relationship is not a public record for purposes of section 149.43 of the Revised Code. When it is in the public interest and with the consent of the commission, the director of the commission may release to the public any legislative document in the possession of the commission staff arising out of a confidential relationship with a former member of the general assembly or former member of the general assembly staff who is not available to make the legislative document a public record as provided in division (C) of this section because of death or disability, whom the director is unable to contact for that purpose, or who fails to respond to the director after the director has made a reasonable number of attempts to make such contact.

(C) (1) A legislative document is a public record for purposes of section 149.43 of the Revised Code if it is an analysis, synopsis, fiscal note, or local impact statement prepared by legislative staff that is required to be prepared by law, or by a rule of either house of the general assembly, for the benefit of the members of either or both of those houses or any legislative committee and if it has been presented to those members.

(2) A legislative document is a public record for purposes of section 149.43 of the Revised Code if a member of the general assembly for whom legislative staff prepared the legislative document does any of the following:

(a) Files it for introduction with the clerk of the senate or the clerk of the house of representatives, if it is a bill or resolution;

> (b) Presents it at a committee hearing or floor session, if it is an amendment to a bill or resolution or is a substitute bill or resolution;
>
> (c) Releases it, or authorizes general assembly staff or legislative staff to release it, to the public.

The primary purpose of the statute appears to be to define "legislative documents" and to exempt those documents from the disclosure requirements of public records law. The statute expressly provides for the confidentiality of communications between members of the General Assembly and the Legislative Service Commission (LSC), essentially acknowledging important similarities between the relationship legislators have with their aides and their relationship with the state bill drafting agency.

However, the statute is also significant in what it does not do. For instance, although it specifically defines the relationship between legislators and staff as "confidential," the statute does not expressly provide a privilege to legislative staff. It does not indicate that, in a litigation setting, legislative documents would not be discoverable, although, certainly, such an argument could be made. It does not address whether legislative staff could be required to testify in court about their work on legislation. It does not discuss oral communications between legislators and staff. It does not expressly address communications that may occur between interested parties and legislative staff on behalf of legislators.

Ohio case law is not particularly helpful in understanding the limits of the statutory protection. The only case to cite R.C. 101.30 does so in relation to the question of whether Ohio affords a gubernatorial-communications privilege protecting executive branch communications. In *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, the Ohio Supreme Court held a similar executive privilege exists by analogizing communications between the governor and his staff to legislative and judicial branch communications that long have been recognized as confidential.

In at least one case litigated since the enactment of R.C. 101.30, LSC staff has been called on to testify as to communications between staff and legislators. In *Vercellotti v. Husted*, 174 Ohio App.3d 609, 2008-Ohio-149, 883 N.E.2d 1112, the plaintiff sued members of the Ohio House Judiciary Committee, alleging the committee held a closed meeting during a recess before voting out a bill, thus rendering the enactment invalid. The defendant legislators asserted legislative immunity as the basis for a motion to dismiss. However, the magistrate to whom the court referred the case did not rule on the motion in the course of finding for the defendants, and the trial court, in addressing objections to the magistrate's report, did not address defendant's argument that the magistrate failed to rule on the motion to dismiss. Instead, the trial court adopted the magistrate's recommendation, finding for the defendant legislators on the merits. In its appellate decision, the Tenth District Court of Appeals indicated that David Gold, an LSC staffer, provided testimony at the trial court about events surrounding the alleged violation of the open meetings law. However, the appellate decision does not provide background as to why Mr. Gold was required to testify. Nor is there indication in the appellate decision that the legislators

themselves testified, suggesting, perhaps, that the legislators were deemed immune. Further, the decision does not mention any review or ruling related to Article II, Section 12 or R.C. 101.30.

In short, while Ohio has a statute providing for the confidentiality of legislator/staff communications, the statute does not cover all potential instances in which those communications may be sought, nor does the statute appear to have been interpreted by a court of appeals or the Ohio Supreme Court.

Other States

A complete 50 state survey of all state statutory provisions relating to legislative staff privilege was not possible in the time available. However, research reveals several states that expressly extend a privilege to legislative staff.

Louisiana

Louisiana provides an extensive and detailed process relating to the discoverability of legislative testimony and materials in a litigation setting. Defining a "legislative employee" as including employees of the legislature and the Legislative Bureau (the Louisiana equivalent of LSC), La. R.S. 13:3667.3 permits a judge, on his own motion, to compel the attendance of a legislative employee in his official capacity if the judge is able to substantiate a belief that the employee has personal knowledge of the facts and that the testimony is not otherwise privileged under the Louisiana Constitution. A copy of the statute is provided as Attachment A.

Colorado

Using language similar to that found in state constitutional provisions, Colorado specifically extends a legislative privilege to legislative staff, providing at C.R.S. 2-2-304:

> No members of the general assembly will be questioned in any other place for any speech or word spoken in debate in either house or for conducting or performing any other legislative activity that relates to the drafting of bills and other legislative measures, including amendments to such bills or measures, and to the rendering of assistance or information to constituents on their personal and private matters that are not publicly known. In addition, no staff members of the general assembly will be questioned in any other place for conducting or performing any duties or functions directly related to such legislative activity when it is conducted or performed at the direction of members of the general assembly.

West Virginia

West Virginia's statutory law expands on the state's constitutional protection, describing the purpose of the law, defining "legislative acts," the "legislative sphere," what constitutes a "political act," and providing a detailed list of activities to which immunity attaches. Regarding legislative staff, W. Va. Code §4-1A-12 states:

> Legislative immunity extends to legislative staff, aides or assistants working on behalf of a legislator. Inquiry is prohibited into things done as a legislator's staff member, aide or assistant which would have been legislative acts if performed by the legislator personally.

Conclusion

While Ohio has provided for the confidentiality of legislative documents that are shared with legislative staff, clarifying that they are exempt from the normally-required disclosure under public records law, the statute does not expressly extend a testimonial privilege to legislative staff, and does not appear to be intended to statutorily provide staff the broad privilege afforded legislators themselves in the Ohio Constitution. Other state statutes appear to more specifically and extensively address a perceived need to protect legislative staff from having to disclose information, particularly in a litigation setting.

Thank you for the opportunity to facilitate the committee's discussion of this topic. If further research is required, staff is pleased to assist.

ATTACHMENT A

La. R.S. § 13:3667.3 (2017)

§ 13:3667.3. Statewide elected officials, members of the legislature, legislative personnel, appointed heads of state departments, compelled appearance as witness in court or at administrative proceeding, hearing required.

A. (1) A party litigant in a civil case or in a criminal misdemeanor case seeking to compel the attendance of a statewide elected official, or the head of any department of the state of Louisiana appointed to the position by the governor, as a witness in a suit that arises out of, or in connection with, the person's exercise of his duties as an official of the state, shall file a written motion with the proper court requesting a hearing on the matter. The motion shall set forth the facts sought to be proved by the person's testimony, the relevance of those facts to the case, and the basis for the mover's belief that such person has knowledge of those facts. This Subsection shall not apply to any person who is subpoenaed as a prospective factual witness to an incident resulting in criminal prosecution.

(2) If the judge determines that the motion is well-founded and that denial of the motion may prejudice the case of the mover, the judge shall order a hearing, and shall notify the mover and the witness of the hearing time and date by certified mail, return receipt requested, and the hearing shall be conducted in open court. At that time, the witness may present evidence or argument in opposition. After the hearing, if the court determines that the mover has established that the witness is necessary to the case, it shall issue a subpoena as sought. The court's ruling shall be an appealable order.

B. For purposes of this Section:

(1) "Legislative employee" means the clerk of the House of Representatives, the secretary of the Senate, or an employee of the House of Representatives, the Senate, or the Legislative Bureau.

(2) "Member" means a sitting or former member of the Louisiana Legislature.

C. (1) (a) Any party litigant seeking to compel the attendance of a member of the Louisiana Legislature, in his capacity as a state lawmaker, or a legislative employee in his official capacity, as a witness or deponent in any civil or criminal case shall file a written motion with the court requesting a hearing on the matter. The motion shall set forth in detail the facts sought to be proved by the member's or employee's testimony, the relevance of those facts to the case, the basis for the mover's belief that the member or employee has personal knowledge of those facts, and a statement as to why such testimony is not otherwise available or otherwise privileged under the privileges and immunities provision of Article III, Section 8 of the Louisiana Constitution. If after examination of the record, the judge determines that the motion is well-founded, that denial of the motion may prejudice the case of the mover, and that the mover has made a sound argument supported in law and jurisprudence that the legislative privilege is inapplicable to the facts sought to be proved, the judge shall order a hearing in accordance with Paragraph (2) of this Subsection.

(b) (i) Any judge on his own motion seeking to compel the attendance of a member of the Louisiana Legislature, in his capacity as a state lawmaker, or a legislative employee in his official capacity, as a witness or deponent in any civil or criminal case shall enter into the record his intent to compel such attendance. Thereafter, the court shall provide, in writing, the facts sought to be proved by the member's or employee's testimony, the relevance of those facts to the case, the basis for the judge's belief that the member or employee has

personal knowledge of those facts, and a statement as to why such testimony is not otherwise privileged under the privileges and immunities provision of Article III, Section 8 of the Louisiana Constitution.

(ii) In a district court having a single judge, the judge shall appoint a district judge of an adjoining district or a lawyer domiciled in the judicial district who has the qualifications of a district judge to conduct the hearing required in Paragraph (2) of this Subsection. In a district court having two judges, the other judge of the court shall conduct the hearing. Such order of the court appointing a judge ad hoc shall be entered on its minutes, and a certified copy of the order together with a written copy of the information required in Item (i) of this Subparagraph shall be sent to the judge ad hoc. In a district court having more than two judges, the hearing shall be conducted by another judge of the district court through the random process of assignment in accordance with the provisions of Code of Civil Procedure Article 253.1.

(2) Prior to the issuance of a subpoena commanding the appearance or testimony of a member or legislative employee, a hearing shall be conducted in accordance with the following provisions:

(a) Notice of the hearing must be provided to all parties, the member or legislative employee, and the attorney general. In the case of a member or employee of the House of Representatives, notice must also be made to the clerk of the House of Representatives, and in the case of a member or employee of the Senate, notice must also be made upon the secretary of the Senate at their respective offices in the State Capitol building.

(b) Notice may be served by sheriff or by certified mail, return receipt requested, and shall be served a minimum of fifteen days prior to the date of the hearing.

(c) The content of the notice shall include the facts sought to be proved by the member's or legislative employee's testimony, the relevance of those facts to the case, the basis for the belief that the member or employee has personal knowledge of those facts, and a supported statement as to why such testimony is not otherwise privileged under the privileges and immunities provision of Article III, Section 8 of the Louisiana Constitution.

(d) At the hearing, the member, legislative employee, or attorney general may each question the requesting party regarding the content of the notice and may present evidence or argument in opposition to the issuance of a subpoena or other order compelling discovery.

(e) The provisions of R.S. 13:3667.1 shall apply to the scheduling of the hearing and all other court proceedings.

(3) After the hearing, if the court determines that the member's or legislative employee's testimony is necessary to the case and that the testimony is not privileged, it shall issue the subpoena or order.

(4) A member or legislative employee may, by affidavit, waive the hearing requirement of this Subsection with respect to his appearance as a witness or deponent. In the case of an employee, if the testimony being sought is privileged or otherwise confidential under law belonging to or inuring to the benefit of the legislature or a member thereof, the waiver shall include the concurrence of the presiding officer of either house of the legislature or the member, as applicable, evidenced by his signature on the affidavit.

(5) Any subpoena to compel the attendance of a member of the Louisiana Legislature, in his capacity as a state lawmaker, or a legislative employee in his official capacity, as a witness or deponent in any civil or criminal case which is not issued in strict conformity with the provisions of this Subsection is void ab initio.

D. (1) (a) Any party to an administrative proceeding seeking to compel the attendance of a member of the legislature, in his capacity as a state lawmaker, or a legislative employee in his official capacity, as a witness or deponent in the proceeding shall file a written motion with the agency, subordinate presiding officer, or administrative law judge, as applicable, requesting a hearing on the matter. The motion shall set forth in detail the facts sought to be proved by the member's or employee's testimony, the relevance of those facts to the proceeding, the basis for the mover's belief that the member or employee has personal knowledge of those facts, and a statement as to why such testimony is not otherwise available or otherwise privileged under the privileges and immunities provision of Article III, Section 8 of the Louisiana Constitution. If after examination of the record, the agency, subordinate presiding officer, or administrative law judge, as applicable, determines that the motion is well-founded, that denial of the motion may prejudice the case of the mover, and that the mover has made a sound argument supported in law and jurisprudence that the legislative privilege is inapplicable to the facts sought to be proved, the agency, subordinate presiding officer, or administrative law judge, as applicable, shall order a hearing in accordance with Paragraph (2) of this Subsection.

(b) (i) Any agency on its own motion or any subordinate presiding officer or administrative law judge on his own motion seeking to compel the attendance of a member of the Louisiana Legislature, in his capacity as a state lawmaker, or a legislative employee in his official capacity, as a witness or deponent in any administrative proceeding shall enter into the record its or his intent to compel such attendance. Thereafter, the agency, officer, or judge shall provide, in writing, the facts sought to be proved by the member's or employee's testimony, the relevance of those facts to the proceeding, the basis for the agency's, officer's, or judge's belief that the member or employee has personal knowledge of those facts, and a statement as to why such testimony is not otherwise privileged under the privileges and immunities provision of Article III, Section 8 of the Louisiana Constitution.

(ii) The agency, subordinate presiding officer, or administrative law judge shall appoint or otherwise arrange for another subordinate presiding officer or administrative law judge to conduct the hearing required in Paragraph (2) of this Subsection.

(2) Prior to the issuance of a subpoena commanding the appearance or testimony of a member of the legislature or legislative employee pursuant to Paragraph (1) of this Subsection, a hearing shall be conducted in accordance with the following provisions:

(a) Notice of the hearing must be provided to all parties, the member, and the attorney general. In the case of a member or employee of the House of Representatives, notice must also be made to the clerk of the House of Representatives and in the case of a member or employee of the Senate, notice must also be made upon the secretary of the Senate at their respective offices in the State Capitol building.

(b) Notice may be served by sheriff or by certified mail, return receipt requested, and shall be served a minimum of fifteen days prior to the date of the hearing.

(c) The content of the notice shall include the facts sought to be proved by the member's or legislative employee's testimony, the relevance of those facts to the proceeding, the basis for the belief that the member or employee has personal knowledge of

those facts, and a supported statement as to why such testimony is not otherwise privileged under the privileges and immunities provision of Article III, Section 8 of the Louisiana Constitution.

(d) At the hearing, the member, legislative employee, or attorney general may each question the requesting party regarding the content of the notice and may present evidence or argument in opposition to the issuance of a subpoena or other order compelling discovery.

(e) The provisions of R.S. 13:3667.1 shall apply to the scheduling of the hearing and all other administrative proceedings.

(3) After the hearing, if the agency, subordinate presiding officer, or administrative law judge, as applicable, determines that the member's or legislative employee's testimony is necessary to the proceeding and that the testimony is not privileged, the agency, officer, or judge shall issue the subpoena or order.

(4) A member or legislative employee may, by affidavit, waive the hearing requirement of this Subsection with respect to his appearance as a witness or deponent. In the case of an employee, if the testimony being sought is privileged or otherwise confidential under law belonging to or inuring to the benefit of the legislature or a member thereof, the waiver shall include the concurrence of the presiding officer of either house of the legislature or the member, as applicable, evidenced by his signature on the affidavit.

(5) Any subpoena to compel the attendance of a member of the legislature, in his capacity as a state lawmaker, or a legislative employee in his official capacity, as a witness or deponent in any administrative proceeding which is not issued in strict conformity with the provisions of this Subsection is void ab initio.

E. The legislature, member, legislative employee, or attorney general may apply directly to the Supreme Court of Louisiana for supervisory writs upon:

(1) (a) A judge's decision to hold a hearing or to issue a subpoena commanding the attendance of the member or employee, or other order compelling discovery.

(b) An agency's, subordinate presiding officer's, or administrative law judge's decision to hold a hearing or to issue a subpoena commanding the attendance of the member or employee, or other order compelling discovery.

(2) (a) The failure of a judge to appoint a judge ad hoc to conduct the hearing when such appointment is required in Paragraph (C)(1) of this Section.

(b) The failure of an agency, subordinate presiding officer, or administrative law judge to appoint or otherwise arrange for an administrative law judge to conduct the hearing when such appointment or alternative arrangement is required in Paragraph (D)(1) of this Section.

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: **Chair Fred Mills, Vice-chair Paula Brooks, and Members of the Legislative Branch and Executive Branch Committee**

FROM: **Shari L. O'Neill, Counsel to the Commission**

DATE: **February 9, 2017**

RE: **Legislative Privilege in State Constitutions**

The Legislative Branch and Executive Branch Committee has requested research on state constitutional provisions relating to legislative privilege, specifically asking whether any state constitutions expressly extend the privilege to legislative staff.

Survey of State Constitutional Provisions

A survey of state constitutional provisions reveals that nearly all states provide some type of protection to legislators when performing their legislative duties. The survey is provided as Attachment A.

Most state constitutional provisions provide two separate protections, generally in one constitutional section:

- A speech or debate privilege that protects legislators from having to testify or answer in any other place for statements made in the course of their legislative activity; and
- A legislative immunity that protects legislators against civil or criminal arrest or process during session, during a period before and/or after session, and while traveling to and from session.

Several state constitutions provide only legislative immunity from civil or criminal arrest or process without also protecting legislative speech, while others only provide statutory protection for legislative speech.

Only Florida and North Carolina lack a constitutional provision relating to legislative privilege or immunity, although a North Carolina statute protects legislative speech and the Florida Supreme Court has recognized a legislative privilege as being available under the separation of powers doctrine.

Language Used

States vary in the ways they describe the protection being offered, but some similarities must be noted:

- Nearly all states reference the legislative session, or the period before or after session, as the time during which the protection is provided.
- Most states protect legislators while traveling to and from session.
- The protection usually extends simply to "speech or debate" but some states extend the privilege to votes cast, actions taken, exercise of legislative duties or functions, or for reports, motions, or propositions.
- States that provide legislative immunity generally exempt cases involving treason, felony, and breach of the peace, but may also exempt violations of the oath of office or theft.
- Most states expressly prevent legislators from being "questioned in any other place," or "elsewhere," but several states specifically prevent questioning in "any other tribunal."

Four New England states have provisions whose phrasing is so different from that of other states that they can be considered "outliers." Nevertheless, the constitutions of Massachusetts, Rhode Island, New Hampshire, and Vermont clearly provide a protection for legislative speech, with New Hampshire and Rhode Island additionally providing immunity from arrest.

A chart comparing some of the language used in state constitutional provisions is provided as Attachment B.

Protection for Legislative Staff

The committee was particularly interested in knowing whether any states mention or protect legislative staff in their constitutional provisions relating to legislative privileges and immunities. The review of state constitutions demonstrates that no state constitutions provide this protection, although statutory protections are available in at least some states. Statutory protections are discussed in a separate memorandum titled "Legislative Privilege in Statutory Law."

The fact that state constitutional provisions do not expressly protect legislative staff should not be interpreted as meaning that legislative staff is unprotected. Instead, courts interpret the constitutional privilege as belonging to the legislator, who then may assert that the privilege applies to communications between the legislator and staff. Thus, a constitutional protection that specifically mentions staff may be unnecessary.

Conclusion

While nearly all states provide a privilege for legislative speech or debate, as well as protecting legislators against civil or criminal process relating to their legislative acts, the descriptions of these protections vary. No state constitutions expressly extend either of these protections to legislative staff.

ATTACHMENT A

STATE CONSTITUTIONAL PROVISIONS RELATING TO LEGISLATIVE PRIVILEGE

ALABAMA

Article IV, Section 56

Members of the legislature shall, in all cases, except treason, felony, violation of their oath of office, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house shall not be questioned in any other place.

ALASKA

Article II, Section 6

Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session. Members attending, going to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace.

ARIZONA

Article IV, Part 2, Section 7

No member of the legislature shall be liable in any civil or criminal prosecution for words spoken in debate.

ARKANSAS

Article V, Section 15

The members of the General Assembly shall, in all cases except treason, felony, and breach or surety of the peace, be privileged from arrest during their attendance at the sessions of their respective houses; and, in going to and returning from the same; and, for any speech or debate in either house, they shall not be questioned in any other place.

CALIFORNIA

Article IV, Section 14

A member of the Legislature is not subject to civil process during a session of the Legislature or for 5 days before and after a session.

Cal. Civ. Code §47 provides, in part, that "A privileged publication or broadcast is one made (a) In the proper discharge of an official duty. (b) In any (1) legislative proceeding * * *."

COLORADO

Article V, Section 16

The members of the general assembly shall, in all cases except treason or felony, be privileged from arrest during their attendance at the sessions of their respective houses, or any committees thereof, and in going to and returning from the same; and for any speech or debate in either house, or any committees thereof, they shall not be questioned in any other place.

CONNECTICUT

Article III, Section 15

The senators and representatives shall, in all cases of civil process, be privileged from arrest, during any session of the general assembly, and for four days before the commencement and after the termination of any session thereof. And for any speech or debate in either house, they shall not be questioned in any other place.

DELAWARE

Article II, Section 13

The Senators and Representatives shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

FLORIDA

No constitutional provision.

In *League of Women Voters of Florida v. Florida House of Representatives,*132 So.3d 135 (Florida 2013), the Florida Supreme Court held that Florida should recognize a legislative privilege founded on the constitutional principle of separation of powers, rejecting an assertion that there is no legislative privilege in Florida. However, the court also determined the privilege is not absolute, and may be overcome by evidence of a compelling interest of effectuating the explicit constitutional mandate prohibiting partisan political gerrymandering and improper discriminatory intent in redistricting.

GEORGIA

Article III, Section IV, Paragraph IX

The members of both houses shall be free from arrest during sessions of the General Assembly, or committee meetings thereof, and in going thereto or returning therefrom, except for treason, felony, or breach of the peace. No member shall be liable to answer in any other place for anything spoken in either house or in any committee meeting of either house.

HAWAII

Article III, Section 7

No member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of the member's legislative functions; and members of the legislature shall, in all cases except felony or breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same.

IDAHO

Article III, Section 7

Senators and representatives in all cases, except for treason, felony, or breach of the peace, shall be privileged from arrest during the session of the legislature, and in going to and returning from the same, and shall not be liable to any civil process during the session of the legislature, nor during the ten days next before the commencement thereof; nor shall a member, for words uttered in debate in either house, be questioned in any other place.

ILLINOIS

Article IV, Section 12

Except in cases of treason, felony or breach of peace, a member shall be privileged from arrest going to, during, and returning from sessions of the General Assembly. A member shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. These immunities shall apply to committee and legislative commission proceedings.

INDIANA

Article IV, Section 8

Senators and Representatives, in all cases except treason, felony, and breach of the peace, shall be privileged from arrest, during the session of the General Assembly, and in going to and returning from the same; and shall not be subject to any civil process, during the session of the

General Assembly, nor during the fifteen days next before the commencement thereof. For any speech or debate in either House, a member shall not be questioned in any other place.

IOWA

Article III, Section 11

Senators and representatives, in all cases, except treason, felony, or breach of the peace, shall be privileged from arrest during the session of the general assembly, and in going to and returning from the same.

Iowa has a statutory provision: Iowa Code §2.17, providing "a member of the general assembly shall not be held for slander or libel in any court for words used in any speech or debate in either house or at any session of a standing committee."

KANSAS

Article II, Section 22

For any speech, written document or debate in either house, the members shall not be questioned elsewhere. No member of the legislature shall be subject to arrest -- except for treason, felony or breach of the peace -- in going to, or returning from, the place of meeting, or during the continuance of the session; neither shall he be subject to the service of any civil process during the session, nor for fifteen days previous to its commencement.

KENTUCKY

Part I, Section 43

The members of the General Assembly shall, in all cases except treason, felony, breach or surety of the peace, be privileged from arrest during their attendance on the sessions of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

LOUISIANA

Article III, Section 8

A member of the legislature shall be privileged from arrest, except for felony, during his attendance at sessions and committee meetings of his house and while going to and from them. No member shall be questioned elsewhere for any speech in either house.

MAINE

Article IV, Part 3, Section 8

The Senators and Representatives shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during their attendance at, going to, and returning from each session of the Legislature, and no member shall be liable to answer for anything spoken in debate in either House, in any court or place elsewhere.

MARYLAND

Article III, Section 18

No Senator or Delegate shall be liable in any civil action, or criminal prosecution, whatever, for words spoken in debate.

MASSACHUSETTS

Part 1, Article XXI

The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

MICHIGAN

Article IV, Section 11

Except as provided by law, senators and representatives shall be privileged from civil arrest and civil process during sessions of the legislature and for five days next before the commencement and after the termination thereof. They shall not be questioned in any other place for any speech in either house.

Michigan also has a statutory provision, Mich. Comp. Laws §4.551, providing: "A member of the legislature of this state shall not be liable in a civil action for any act done by him or her pursuant to his or her duty as a legislator."

MINNESOTA

Article IV, Section 10

The members of each house in all cases except treason, felony and breach of the peace, shall be privileged from arrest during the session of their respective houses and in going to or returning from the same. For any speech or debate in either house they shall not be questioned in any other place.

MISSISSIPPI

Article IV, Section 48

Senators and Representatives shall, in all cases, except treason, felony, theft, or breach of the peace, be privileged from arrest during the session of the Legislature, and for fifteen days before the commencement and after the termination of each session.

MISSOURI

Article III, Section 19

Senators and representatives shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during the session of the general assembly, and for the fifteen days next before the commencement and after the termination of each session; and they shall not be questioned for any speech or debate in either house in any other place.

MONTANA

Article V, Part V, Section 8

A member of the legislature is privileged from arrest during attendance at sessions of the legislature and in going to and returning therefrom, unless apprehended in the commission of a felony or a breach of the peace. He shall not be questioned in any other place for any speech or debate in the legislature.

NEBRASKA

Article III, Section 15

Members of the Legislature in all cases except treason, felony or breach of the peace, shall be privileged from arrest during the session of the Legislature, and for fifteen days next before the commencement and after the termination thereof.

NEVADA

Article IV, Section 11

Members of the Legislature shall be privileged from arrest on civil process during the session of the Legislature, and for fifteen days next before the commencement of each session.

Nev. Rev. Stat. Ann. §41.071 provides, at subsection 2: "For any speech or debate in either House, a State Legislator shall not be questioned in any other place."

NEW HAMPSHIRE

Part 2, Article 21

No member of the house of representatives, or senate shall be arrested, or held to bail, on mesne process, during his going to, returning from, or attendance upon, the court.

Part 1, Article 30

The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever.

NEW JERSEY

Article IV, Section IV, Paragraph 9

Members of the Senate and General Assembly shall, in all cases except treason and high misdemeanor, be privileged from arrest during their attendance at the sitting of their respective houses, and in going to and returning from the same; and for any statement, speech or debate in either house or at any meeting of a legislative committee, they shall not be questioned in any other place.

NEW MEXICO

Article IV, Section 13

Members of the legislature shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and on going to and returning from the same. And they shall not be questioned in any other place for any speech or debate or for any vote cast in either house.

NEW YORK

Article III, Section 11

For any speech or debate in either house of the legislature, the members shall not be questioned in any other place.

NORTH CAROLINA

No constitutional provision.

However, N.C. Gen. Stat. §120-9 provides: "The members shall have freedom of speech and debate in the General Assembly, and shall not be liable to impeachment or question, in any court or place out of the General Assembly, for words therein spoken."

NORTH DAKOTA

Article IV, Section 15

Members of the legislative assembly are immune from arrest during their attendance at the sessions, and in going to or returning from the sessions, except in cases of felony. Members of the legislative assembly may not be questioned in any other place for any words used in any speech or debate in legislative proceedings.

OHIO

Article II, Section 12

Senators and Representatives, during the session of the General Assembly, and in going to, and returning from the same, shall be privileged from arrest, in all cases, except treason, felony, or breach of the peace; and for any speech, or debate, in either House, they shall not be questioned elsewhere.

OKLAHOMA

Article V, Section 22

Senators and Representatives shall, except for treason, felony, or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same, and, for any speech or debate in either House, shall not be questioned in any other place.

OREGON

Article IV, Section 9

Senators and Representatives in all cases, except for treason, felony, or breaches of the peace, shall be privileged from arrest during the session of the Legislative Assembly, and in going to and returning from the same; and shall not be subject to any civil process during the session of the Legislative Assembly, nor during the fifteen days next before the commencement thereof: Nor shall a member for words uttered in debate in either house, be questioned in any other place.

PENNSYLVANIA

Article II, Section 15

The members of the General Assembly shall in all cases, except treason, felony, violation of their oath of office, and breach of surety of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

RHODE ISLAND

Article VI, Section 5

The persons of all members of the general assembly shall be exempt from arrest and their estates from attachment in any civil action, during the session of the general assembly, and two days before the commencement and two days after the termination thereof, and all proves served contrary hereto shall be void. For any speech in debate in either house, no member shall be questioned in any other place.

SOUTH CAROLINA

Article III, Section 14

The members of both houses shall be protected in their persons and estates during their attendance on, going to and returning from the General Assembly, and ten days previous to the sitting and ten days after the adjournment thereof. But these privileges shall not protect any member who shall be charged with treason, felony or breach of the peace.

SOUTH DAKOTA

Article III, Section 11

Senators and representatives shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same; and for words used in any speech or debate in either house, they shall not be questioned in any other place.

TENNESSEE

Article II, Section 13

Senators and representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

TEXAS

Article 3, Section 14

Senators and Representatives shall, except in cases of treason, felony, or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same.

UTAH

Article VI, Section 8

Members of the Legislature, in all cases except treason, felony or breach of the peace, shall be privileged from arrest during each session of the Legislature, for fifteen days next preceding each session, and in returning therefrom; and for words used in any speech or debate in either house, they shall not be questioned in any other place.

VERMONT

Chapter I, Article 14

The freedom of deliberation, speech, and debate, in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

VIRGINIA

Article IV, Section 9

Members of the General Assembly shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during the sessions of their respective houses; and for any speech or debate in either house shall not be questioned in any other place. They shall not be subject to arrest under any civil process during the sessions of the General Assembly, or during the fifteen days before the beginning or after the ending of any session.

WASHINGTON

Article II, Section 16

Members of the legislature shall be privileged from arrest in all cases except treason, felony and breach of the peace; they shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement of each session.

WEST VIRGINIA

Article VI, Section 17

Members of the Legislature shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during the session, and for ten days before and after the same; and for words spoken in debate, or any report, motion or proposition made in either house, a member shall not be questioned in any other place.

WISCONSIN

Article IV, Section 15

Members of the legislature shall in all cases, except treason, felony and breach of the peace, be privileged from arrest; nor shall they be subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.

Article IV, Section 16

No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate.

WYOMING

Article 3, Section 16

The members of the legislature shall, in all cases, except treason, felony, violation of their oath of office and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

ATTACHMENT B

CHART OF STATE CONSTITUTIONAL PROVISIONS RELATING TO LEGISLATIVE PRIVILEGE

Provision	**State**
Privileged from Arrest During Session	Alabama, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming
Privileged from Civil Arrest/Process	Alaska, California, Connecticut, Idaho, Kansas ("during session nor 15 days before"), Michigan, Nevada, Oregon, Virginia, Washington, Wisconsin
Not Subject to Civil Arrest	Michigan
Not Liable for Criminal Prosecution	Arizona, Maryland
During Legislative Committee	Colorado, Georgia, Illinois, Louisiana, New Jersey
During Legislative Commission Proceedings	Illinois
During Session and X Days Before/After Session	California (5 days), Connecticut (4 days), Idaho (10 days), Indiana (15 days before), Michigan (5 days), Mississippi (15 days), Missouri (15 days), Nebraska (15 days), Nevada (15 days before), Oregon (15 days before), South Carolina (10 days), Utah (15 days "next preceding"), Virginia (15 days), Washington (15 days before), West Virginia (10 days), Wisconsin (15 days)
While Traveling to/from Session	Alabama, Alaska, Arkansas, Colorado, Delaware, Georgia, Hawaii, Iowa, Kansas ("and during continuance of session"), Kentucky, Louisiana, Maine, Minnesota, Montana, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Wyoming
For Speech or Debate, Words Spoken/Uttered in Debate, Statements	Alabama, Alaska ("statement made"), Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia ("anything spoken"), Hawaii ("statement made"), Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wisconsin, Wyoming
For Any Vote Cast	New Mexico
For Statements Written or Oral	Illinois, Kansas ("written document")
For Exercise of Legislative Duties/Functions	Alaska, Hawaii
For Action Taken	Hawaii
For Any Report, Motion or Proposition Made in Either House	West Virginia
Except as Provided by Law	Michigan

Except for Treason	Alabama, Arkansas, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, Missouri, Nebraska, New Jersey ("treason and high misdemeanor"), New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming
Except for Felony	Alabama, Alaska, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming
Except for Breach of Peace	Alabama, Alaska, Arkansas, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming
Except for Violations of Oath of Office	Alabama, Pennsylvania, Wyoming
Except for Theft	Mississippi
Shall Not be Questioned in Any Other Place	Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Idaho, Indiana, Kentucky, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wyoming
Shall Not be Questioned Elsewhere	Kansas, Louisiana, Maine ("in any court or place elsewhere"), Ohio
Shall Not be Questioned in Any Other Tribunal	Alaska, Georgia, Illinois
No Provision	Florida, North Carolina
Outliers	Massachusetts: The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever. New Hampshire: No member of the house of representatives, or senate shall be arrested, or held to bail, on mesne process, during his going to, returning from, or attendance upon, the court. The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever. Rhode Island: The persons of all members of the general assembly shall be exempt from arrest and their estates from attachment in any civil action, during the session of the general assembly, and two days before

	the commencement and two days after the termination thereof, and all proves served contrary hereto shall be void. For any speech in debate in either house, no member shall be questioned in any other place. Vermont: The freedom of deliberation, speech, and debate, in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE
LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE

OHIO CONSTITUTION
ARTICLE II
SECTIONS 15, 16, 26, AND 28

ENACTING LAWS

The Legislative Branch and Executive Branch Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Sections 15, 16, 26, and 28 of Article II of the Ohio Constitution concerning enacting laws. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article II, Sections 15, 16, 26, and 28 of the Ohio Constitution be _____.

Background

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

Article II, Sections 15, 16, 26, and 28, address the process of enacting laws by the General Assembly, providing the requirement for the governor's signature, how laws are to be applied, and restrictions for their enactment. While subject to several proposals for change since 1851, only a few amendments have been approved by the electorate.

Section 15, adopted in 1973, details how bills shall be passed in the General Assembly, including requirements relating to the style of the laws, the one subject rule, and signing by the presiding officer:

> (A) The general assembly shall enact no law except by bill, and no bill shall be passed without the concurrence of a majority of the members elected to each

house. Bills may originate in either house, but may be altered, amended, or rejected in the other.

(B) The style of the laws of this state shall be, "be it enacted by the general assembly of the state of Ohio."

(C) Every bill shall be considered by each house on three different days, unless two-thirds of the members elected to the house in which it is pending suspend this requirement, and every individual consideration of a bill or action suspending the requirement shall be recorded in the journal of the respective house. No bill may be passed until the bill has been reproduced and distributed to members of the house in which it is pending and every amendment been made available upon a member's request.

(D) No bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.

(E) Every bill which has passed both houses of the general assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for passage have been met and shall be presented forthwith to the governor for his approval.

(F) Every joint resolution which has been adopted in both houses of the general assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for adoption have been met and shall forthwith be filed with the secretary of state.

Section 16, adopted in 1851 and amended in 1903, 1912, and 1973, details the requirements for the governor's signature on bills, the veto of bills, veto overrides by the General Assembly, and bills becoming law without the governor's signature. It provides:

If the governor approves an act, he shall sign it, it becomes law and he shall file it with the secretary of state.

If he does not approve it, he shall return it with his objections in writing, to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage. If three-fifths of the members elected to the house of origin vote to repass the bill, it shall be sent, with the objections of the governor, to the other house, which may also reconsider the vote on its passage. If three-fifths of the members elected to the second house vote to repass it, it becomes law notwithstanding the objections of the governor, and the presiding officer of the second house shall file it with the secretary of state. In no case shall a bill be repassed by a smaller vote than is required by the constitution on its original passage. In all cases of reconsideration the vote of

> each house shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered upon the journal.
>
> If a bill is not returned by the governor within ten days, Sundays excepted, after being presented to him, it becomes law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it becomes law unless, within ten days after such adjournment, it is filed by him, with his objections in writing, in the office of the secretary of state. The governor shall file with the secretary of state every bill not returned by him to the house of origin that becomes law without his signature.
>
> The governor may disapprove any item or items in any bill making an appropriation of money and the item or items, so disapproved, shall be void, unless repassed in the manner prescribed by this section for the repassage of a bill.

Section 26, unchanged since 1851, states that laws of a general nature will have uniform operation throughout the state, and prohibits laws from taking effect on approval of an authority other than the General Assembly, except as provided in the constitution:

> All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in this constitution.

Section 28, unchanged since 1851, states that the General Assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts:

> The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Amendments, Proposed Amendments, and Other Review

Section 15 of the 1851 constitution was repealed and replaced in the 1970s to consolidate multiple sections of Article II. Sections 16, 26, and 28 all date to the 1851 constitution, with Section 16 being amended in the early 1900s before undergoing revision in the 1970s as part of the effort to consolidate sections of Article II. During that era, The Ohio Constitutional Revision Commission (1970s Commission) studied Article II in depth and made extensive recommendations concerning how bills shall be passed by the General Assembly and signed by the governor.

Section 15 (How Bills Shall be Passed)

In 1973, by a margin of 54.3 percent to 45.7 percent, voters approved a measure to repeal and replace Section 15 with a new version.[1] The new Section 15 is a composite of the then-existing sections 9, 15, 16, 17, and 18 of Article II, and follows a modern constitutional formatting scheme in which all elements pertaining to enactment of legislation are combined. The new Section 15 was divided into five divisions: (A), (B), (C), (D), and (E).[2]

Division (A) combines language from the previous Sections 9 and 16, and contains the requirement that "no law shall be enacted except by bill." This exact language is new to the Ohio Constitution, but other state constitutions include a version of it. The second clause of Division (A) includes language from the previous Section 9 of Article II: "No law shall be passed without the concurrence of a majority of the members elected to each house." This language originated in 1851 when delegates argued for a majority requirement because General Assembly members were missing voting sessions due to business or pleasure. The second sentence of Division (A) is the only remaining part of the 1851 version of Section 15.[3]

The rationale for combining clauses of Sections 9 and 16 in Division (A) was to consolidate constitutional provisions. The committee amending this section discussed adding exceptions to the provision that called for a majority vote, but they reasoned that an exception would add confusion and so decided against it.[4]

Division (B) of Section 15 came directly from Section 18 of Article II. It requires that each law begin with the enacting clause. The reason for transferring the language was to consolidate all bill enactment procedures into one section.[5]

Divisions (C) and (D) are based on procedural requirements that were incorporated in Section 16 of Article II before being transferred to Section 15 in 1973.

Debating Division (C), the 1970s Commission indicated that the traditional "three-reading" rule was unpopular and virtually never observed. However, because the original reasons for the rule included maintaining safeguards against hasty consideration of legislation, the 1970s Commission hesitated to recommend abandoning this safeguard, and looked to the New York Constitution and the Model State Constitution for ideas. Ultimately, instead of recommending repeal of the three-reading rule, the 1970s Commission recommended requiring, on request of a member, the reproduction and distribution of all bills before passage. This requirement was perceived to be a fair and feasible way to minimally protect a member's right to see all amendments before passage. The 1970s Commission also recommended lowering the extraordinary majority vote of three-fourths attached to the three-different-day reading rule. The 1970s Commission found no justification for the extraordinary majority vote requirement and so chose to lower it to two-thirds, which is in line with other special majorities required in the Ohio Constitution.[6]

The one-subject rule requirement from the previous Section 16, adopted in 1851, was retained in Division (D) of Section 15. Because courts have rarely rejected legislation that may contain more than one subject, the 1970s Commission considered repealing the one-subject rule

language. At the time, the reviewing committee suggested that the one-subject rule provided a "minimum guarantee for an orderly and fair legislative process."[7] After looking at scholarly commentary as well as historical content from other states having a similar provision, the 1970s Commission agreed with its committee's conclusion that the one-subject rule should be retained.[8]

The language prohibiting a law's revival or repeal by reference detailed in Division (D) was added to the Ohio Constitution in 1851. Debates from the convention of 1851 reveal the prohibition was meant to allow the public to know what was and was not the law.[9] As explained by the 1970s Commission, the restriction is meant to convey that "if a law has expired by its terms or has been repealed or declared unconstitutional, it cannot be made viable by referring to it without setting forth the exact language of the law or former law."[10] Other than transferring the language from Section 16 of Article II to Division (D) of Section 15, the 1970s Commission changed the style slightly by dividing the language into two separate sentences.[11]

Division (E) covers the requirement that bills be signed by the presiding officer of each house and forthwith presented to the governor. As reported by the 1970s Commission, the requirement dates back to the constitution of 1802, and was retained in the 1851 constitution at Section 17 of Article II, which required the presiding officer to sign publicly, during session, "in the presence of the House over which he presides."[12] Considering this requirement, the 1970s Commission perceived that the practice of requiring bills to be signed in open session was a remnant of a time when many people could not read and so felt a need to publicly witness such signings.[13] The 1970s Commission reasoned that, in the modern age, the act of signing is purely administrative, and a bill's authenticity does not depend on who has witnessed its signing.[14] A further question was whether the section should continue to require bills to be signed while the General Assembly was in session, a requirement that commonly would result in delayed signing when months may elapse between the end of a legislative session and the transmission of the bill to the governor for approval. Keeping the committee's report in mind, the 1970s Commission decided to eliminate any reference to "session," and amend the language to include the requirement that presentation to the governor for approval occur "forthwith."[15]

The intent of the 1970s Commission in recommending Division (E) was to consolidate procedural steps involved in passing legislation, modernize outdated requirements, and improve the style of the section. The only substantive change that the recommended language of Division (E) made is to allow bills to be signed by presiding officers in their offices rather than in chamber.[16]

Division (F) applies the signature requirements set out in Division (E) to joint resolutions that have been adopted by both houses of the General Assembly. Division (F) was not discussed nor made part of the 1970s Commission report, but it was included in the joint resolution presented as a ballot issue on May 8, 1973 and approved by voters.[17]

On November 8, 1983, a constitutional amendment was proposed through the citizen initiative petition process to amend Section 15 of Article II to require a three-fifths majority of the General Assembly to raise taxes, but the amendment failed with a vote of 41 percent for and 59 percent against.[18]

Section 16 (Bills to be Passed by Governor)

Section 16 was amended in 1903, 1912, and 1973. The 1903 amendment to Section 16 prescribed the procedure that the governor must follow after bills are passed in the General Assembly and presented to the governor for passage or veto. The 1913 amendment of Section 16 reduced the vote required to override the governor's veto from two-thirds, established in 1903, to three-fifths.[19] The 1970s Commission's recommended amendments to Section 16 included transferring the first three sentences of the section that contains the three-day reading requirement, the one-subject rule, and governor presentment-after-passage requirements to Section 15. For the remainder of Section 16, only minor changes were recommended by the 1970s Commission.[20]

The committee charged with reviewing Section 16 noticed gaps and inconsistencies with other sections of the Ohio Constitution. These gaps included procedural requirements such as when the law will go into effect (noting an inconsistency with Section 1(c) of Article II), and who files the bill after the expiration of ten days if the governor fails to sign. The committee handled the first inconsistency by requiring that the presiding officer of the second house file the bill with the secretary of state. The committee also suggested that amendments to Section 1(c) may be needed in the future. The committee's recognition of a need to indicate who should file is corrected by the recommendation to require the governor to file the bill.[21]

Other issues that the committee discussed involved expanding the governor's powers to include reduction of appropriation items, and whether to raise the special majority required from three-fifths to two-thirds. For gubernatorial power, the committee rejected making changes, preferring to consider broadening the governor's budgetary controls if necessary. The committee also rejected changing the special majority because raising the required majority could potentially cause problems in an evenly-divided state like Ohio.[22]

The changes made to Section 16 were intended to be non-substantive in nature. The 1970s Commission did not intend to affect the role of the governor by these changes, but rather only sought to fill gaps in procedure and clarify language.[23]

Section 26 (Laws to Have Uniform Operation)

Section 26 has not been amended since its adoption in 1851. The purpose of Section 26 when adopted was to prevent "special legislation that favored one group or locality, most often a particular corporation or municipality" and to "confine the Legislature to general regulations exclusively."[24] The 1970s Commission did not recommend revising Section 26, stating that the section had a "long history of interpretation and should be left alone."[25] Instead, the 1970s Commission used Section 26 as a reference when amending other sections of the Ohio Constitution.

Interpretation of Section 26 has been largely left up to the courts since its adoption in 1851.[26] Section 26 has not been presented to the citizens of Ohio for amendment.

Section 28 (Retroactive Laws)

Section 28, adopted in 1851, states that the General Assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts. The prohibition against retroactive laws in the Ohio Constitution is purposely broader than the prohibition in Article I, Section 10 of the United States Constitution, which uses the term "ex post facto" rather than retroactive.[27] Debates during the 1851 convention reveal that delegates expressly rejected substituting "ex post facto" for "retroactive" in this section.[28] The 1970s Commission did not discuss amending Section 28 during proceedings.

Litigation Involving the Provisions

The Supreme Court of Ohio has issued significant decisions regarding each of these sections of Article II.

Section 15(C) (The Three Readings Rule)

In *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d 225, 1994-Ohio-1, 631 N.E.2d 582, the Supreme Court of Ohio addressed a case challenging the constitutionality of a statute that was altered in committee, and therefore arguably did not receive the three readings required by the Ohio Constitution. The Court ruled that a bill that was amended after being read three times does not need to be read an additional three times if the amendment did not "vitally alter" the original bill. *Id.* at 233. The original bill and the amended version must still share a "common purpose or relationship." *Id.*

Section 15(D) (One-Subject Rule)

In *State ex rel. Dix v. Celeste*, 11 Ohio St.3d 141, 464 N.E.2d 153 (1984), the Court ruled that Am. Sub. S.B. 227 did not violate the one-subject rule because the appropriations provision being contested was "reasonably necessary" for implementing the programs created in the bill. The statute in question replaced the Ohio Development Financing Commission, giving its duties to the Director of Development. The statute also contained an appropriations provision that provided direct funding for these activities and programs. Concluding that the appropriations related directly to the programs being created and established, the Court held that the appropriations did not violate the one-subject rule because they were "simply the means by which the act is carried out." *Id.*, 11 Ohio St.3d at 146, 464 N.E.2d at 158.

Emphasizing that the one-subject rule is designed to prevent logrolling and the use of riders to pass provisions that otherwise would not have enough support to pass on their own, *Dix* nevertheless held that the rule is merely directory, not mandatory, with a purpose of creating a fair and orderly legislative process. The Court noted that, by limiting bills to a single subject, the rule allows legislators to focus on a single issue without being distracted by extraneous questions. As a result, the goal of the rule is to enhance the legislative process, not to hamper it.

As the Court explained, the General Assembly has the power to create laws, limited only by the Ohio and United States Constitutions. The legislative oath to uphold the constitution acts as a

safeguard that legislators will follow this limitation, leading to a strong presumption that the laws passed by the General Assembly are constitutional. However, *Dix* recognized a caveat, stating that "a manifestly gross and fraudulent violation" of the one-subject rule would render a statute unconstitutional. *Id.*, 11 Ohio St.3d at 145, 464 N.E.2d at 157, following *Pim v. Nicholson*, 6 Ohio St.176, 180 (1856). Thus, a statute lacking "a common purpose or relationship between specific topics in an act," with "no discernible practical, rational, or legitimate reasons for combining the provisions in one act" would establish "a manifestly gross and fraudulent violation," suggesting that the statute was drafted for the tactical purpose of logrolling. *Id.*

Starting in the 1990s, the Ohio Supreme Court began to enforce the one-subject rule. In some cases, the Court has severed the offending provisions of the legislation, but in other cases the Court has chosen to strike the legislation in its entirety.[29]

In *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*, 62 Ohio St.3d 145, 580 N.E.2d 767 (1991), the Court considered Am. Sub. H.B. 200, a bill that contained four separate provisions related to the functioning of the court system but then contained an unrelated provision defining a "residence district" within the liquor control law. Addressing the argument that the "residence district" provision violated the one-subject rule, the Court held that this connection was "merely coincidental" and severed the "residence district" definition provision from the bill. *Id.*, 62 Ohio St.3d at 148-49, 580 N.E.2d at 770. Relying on *Dix*, the Court upheld the directory nature of the one-subject rule and emphasized that assertions by the General Assembly that the provision complies with the constitution would be considered during court review. In so holding, the Court reiterated that the one-subject rule will allow a plurality of topics but not a disunity of subjects. *Id.*, citing *ComTech Systems, Inc. v. Limbach*, 59 Ohio St.3d 96, 99, 570 N.E.2d 1089, 1093 (1991).

In *State ex rel. Ohio AFL-CIO v. Voinovich*, *supra*, the bill at issue made structural changes to both the Industrial Commission of Ohio and the Ohio Bureau of Workers' Compensation, appropriated funds for these institutions, altered workers' compensation claims procedures, created an intentional tort for employment, and created a child labor exception for the entertainment industry. The Court declared that the appropriations provision of the bill was allowed because it was the method by which the bill would be carried out, but invalidated the child labor provision and the intentional tort provisions because they did not relate to the bill's common purpose.

Simmons-Harris v. Goff, 86 Ohio St.3d 1, 1999-Ohio-77, 711 N.E.2d 203, questioned the constitutionality of a biennial appropriations bill because it contained provisions establishing the school voucher program. *Id.* at paragraph 17. The Court deemed the provisions establishing the program to be a rider because they only accounted for ten pages of a more-than-one-thousand-page bill, concluding the rider established a substantive program within an appropriations bill and so violated the one-subject rule.

State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451, 1999-Ohio-123, 715 N.E.2d 1062, concerned Am. Sub. H.B. 350, a broad-ranging tort reform bill. Applying the one-subject rule, the Court held the bill unconstitutional *in toto*, despite the Court's stated reliance on the strong presumption in favor of constitutionality and the "manifestly gross and

fraudulent" caveat as outlined in *Dix*. *Id.*, 86 Ohio St.3d at 495-97, 715 N.E.2d at 1098-99. In enacting the legislation, the General Assembly attempted to ensure the constitutionality of the bill by including in the title that "The General Assembly further recognizes the holdings in" *Voinovich* and *Dix*, "and finds that a common purpose or relationship exists among the sections, representing a potential plurality but not disunity of topics, notwithstanding that reasonable minds might differ in identifying more than one topic contained in the bill." *Id.* Undeterred by the legislature's attempt to endorse the bill's constitutionality, the Court concluded the legislation was an unconstitutional exercise of legislative authority, both under the one-subject rule and on the grounds that it violated the separation-of-powers doctrine. *Id.*, 86 Ohio St.3d at 499, 494, 715 N.E.2d at 1101, 1097.

Reflecting on syllabus law in *Dix*, the Court stated that the one-subject rule is merely directory, but "it is within the *discretion* (emphasis added) of the courts to rely upon the judgment of the General Assembly as to a bill's compliance with the constitution." *Id.*, 86 Ohio St.3d at 494, 715 N.E.2d at 1097. Although the Court continued to recognize the strong presumption in favor of constitutionality, it also acknowledged the potential presence of logrolling, explaining it as a separation-of-powers issue.

Addressing the tenuous nature of the multi-topic provisions in the bill, the Court reasoned that one could pick out two provisions from the bill with the goal of creating a common purpose, but that the bill as a whole had no common purpose, stating "The various provisions in this bill are so blatantly unrelated that, if allowed to stand as a single subject, this court would be forever left with no basis upon which to invalidate any bill, no matter how flawed." *Id.*, 86 Ohio St.3d at 498, 715 N.E.2d at 1100. The Court explained the danger of this inability to uphold the constitutional restriction: "If we accept this notion, the General Assembly could conceivably revamp all Ohio law in two strokes of the legislative pen – writing once on civil law and again on criminal law." *Id.*, 86 Ohio St.3d at 499, 715 N.E.2d at 1101. Therefore, the Court chose to declare the entire law unconstitutional because it was deemed too large an undertaking to try to find a common purpose among the many provisions of the bill. *Id.*, 86 Ohio St.3d at 500, 715 N.E.2d at 1101.

State ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd., 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, involved whether the one-subject rule was violated when a bill loosely classifying itself as an appropriations bill included a provision that excluded Ohio School Facilities Commission employees from the collective bargaining process. The Court declared this provision a violation of the one-subject rule because the bill did not explain how the exclusion of these employees would clarify or alter the appropriation of state funds, and so a common purpose or relationship between the provisions was absent. The Court concluded that a provision's impact on the state budget does not automatically authorize its constitutional inclusion in an appropriations bill just because the other provisions in the bill also impact the budget.

In *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335, the Court held the inclusion of former R.C. 5301.234 in Am. Sub. H.B. No. 163 was unconstitutional under the one-subject rule. The case stands out as the first time the Court concluded the one-subject rule is mandatory, not directory. Again taking a separation-of-powers approach to the one-subject rule,

the Court reaffirmed a historical point noted in *Sheward*, that the one-subject rule was created in order "to rein in the inordinate powers that were previously lodged in the General Assembly and to ultimately achieve a proper functional balance among the three branches of our state government." *Nowak, supra*, at paragraphs 29-30. In addition, the Court reviewed prior one-subject rule cases in light of this fact, finding that the Court's prior holdings sent a mixed message. The Court concluded its rulings over the years had failed to appreciate the "painfully obvious" fact that the rule could not be merely directory and yet, at the same time, be used to declare unconstitutional an enactment that is determined to be a "manifestly gross and fraudulent violation" of the rule. *Id.* at paragraphs 35, 36.

In *Nowak*, the Court reviewed the definition of a "directory" provision, stating that these provisions do not give a court the power to invalidate a statute that violates the directory provision. *Id.* at paragraph 37. Therefore, by labeling the one-subject rule as directory while also allowing the invalidation of statutes that violate the caveat, the directory label was, as the Court called it, "an oxymoron." *Id.* at paragraph 38. The Court then reviewed dicta from *Dix* that acknowledged that both the Court's goal of creating a strong presumption of legislative legitimacy and the goal of preventing logrolling could all be accomplished through a mandatory label of the rule and the use of the manifestly gross and fraudulent caveat. *Nowak* at paragraph 46; *Dix, supra*, 11 Ohio St.3d at 144, 464 N.E.2d at 156. The Court held in *Nowak* that the one-subject rule is mandatory in nature because it is capable of invalidating a statute. Nevertheless, the Court said its holding in *Nowak* did not reverse any other portion of the Court's prior jurisprudence in the area of the one-subject rule. *Id.* at paragraph 55. As for the statute at issue, the Court found no common purpose to unite the subject provision to the rest of the bill, and so held the statute to be unconstitutional and severed it from the bill.

Section 16 (Bills to be Signed by Governor; Veto)

In *State ex rel. Ohio Gen. Assembly v. Brunner*, 2007-Ohio-3780, 114 Ohio St. 3d 386, 872 N.E.2d 912,[30] the successor governor vetoed a bill after his predecessor had filed the same bill with the office of the secretary of state. *Id.* at 387. The Ohio General Assembly sought a writ of mandamus to compel the secretary of state to treat the bill as enacted law even though the successor governor vetoed it. According to Section 16, the governor has a ten-day period after presentment to sign or veto a bill and file it with the secretary of state, unless the General Assembly has adjourned. Reviewing when the ten-day period in Section 16 begins, the Supreme Court of Ohio held that the ten-day period began on the date the General Assembly adjourned. *Id.* at 394.

Section 26 (Uniform Operation of Laws)

On numerous occasions, the Ohio Supreme Court has reviewed Section 26 in the context of allegations that various legislative acts have violated its requirement that laws of a general nature have uniform operation throughout the state. Thus, the Court has concluded the section was violated by legislation relating to collective bargaining, the creation of an island taxing district, and the inclusion of sales tax in the calculation of the value of stolen property in connection with the classification of a theft offense. *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Rel. Bd.*, 22 Ohio St.3d 1, 488 N.E.2d 181 (1986); *Put-in-Bay Island Taxing Dist.*

Auth. v. Colonial, Inc., 65 Ohio St.3d 449, 1992-Ohio-15, 605 N.E.2d 21; *State v. Adams*, 39 Ohio St.3d 186, 529 N.E.2d 1264 (1988).

In other cases, however, the Court held Section 26 was not violated. *Clermont Environmental Reclamation Co. v. Wiederhold*, 2 Ohio St.3d 44, 442 N.E.2d 1278 (1982) (hazardous waste facility permit law); *Desenco, Inc. v. City of Akron*, 84 Ohio St.3d 535, 1999-Ohio-368, 706 N.E.2d 323 (authorizing joint economic development districts); *Canton v. Whitman*, 44 Ohio St.2d 62, 337 N.E.2d 766 (1975) (local option election provision); *Austintown Twp. Bd. of Trustees v. Tracy*, 76 Ohio St.3d 353, 1996-Ohio-74, 667 N.E.2d 1174 (motor vehicle tax revenue allocations to political subdivisions); *State ex rel. Brown v. Summit Cty. Bd. of Elections*, 46 Ohio St.3d 166, 545 N.E.2d 1256 (1989) (municipal residency requirements for city council members); *Kelleys Island Caddy Shack, Inc. v. Zaino*, 96 Ohio St.3d 375, 2002-Ohio-4930, 96 Ohio St.3d 375 (resort area tax); *State ex rel. Morrison v. Beck Energy Corp.*, 143 Ohio St.3d 271, 2015-Ohio-485, 37 N.E.3d 128 (oil and gas drilling and production operations); *City of E. Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, 870 N.E.2d 705 (law having a uniform geographic effect does not violate Section 26); *State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130, 568 N.E.2d 1206 (1991) (uniform law applies to any taxing district containing an electric plan meeting express criteria); and *Sechler v. Krouse*, 56 Ohio St.2d 185, 383 N.E.2d 572 (1978) (workers' compensation).

Several cases relating to school legislation have resulted in the Court finding no violation of Section 26. *State ex rel. Taft v. Franklin Cty. Court of Common Pleas*, 81 Ohio St.3d 480, 1998-Ohio-333, 692 N.E.2d 560 (school funding); *State ex rel. Harrell v. Streetsboro City School Dist. Bd. of Edn.*, 46 Ohio St.3d 55, 544 N.E.2d 924 (1989) (relating to territory transfers); and *Bd. of Edn. of Grandview Hts. v. State Bd. of Edn.*, 45 Ohio St.2d 117, 341 N.E.2d 589 (1976) (relating to territory transfers).

Section 28 (Retroactive Laws)

In *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 103, 522 N.E.2d 489, 493 (1988)[31] the Supreme Court of Ohio held that to determine whether a statute violates Section 28, a court must first discover if the statute affects a substantive right, in other words, a right that "impairs or takes away vested rights." *Id.* at 107. In *Van Fossen*, the question was whether a new provision, which placed conditions on employer-employee intentional tort actions, could be applied retroactively. *Id.* at 103. The Court held that the new conditions imposed by the provision constituted a limitation or denial of a substantive right, causing the provision to be unconstitutional. *Id.* at 109.

Presentations and Resources Considered

O'Neill Presentation

In September 2015, Shari L. O'Neill, Counsel to the Commission, presented to the committee on Ohio Supreme Court case precedent interpreting the one-subject rule found in Article II, Section 15(D). Ms. O'Neill described that, over the years, the Court has moved from interpreting the one-subject rule as being merely directory to now being mandatory, saying that where there is a

"manifestly gross and fraudulent violation of the rule," an enactment can be stricken as unconstitutional. She said a one-subject rule violation is frequently argued in the context of general appropriations bills, in which thousands of pages of text can include provisions that create substantive changes in the law. Summarizing the Court's jurisprudence in this area, she said that the earmarks of an unconstitutional enactment are that it lacks a common purpose or relationship between specific topics, has no discernible practical, rational, or legitimate basis for the combination, and is a manifestly gross and fraudulent violation. She added that a substantive program created in an appropriations bill is not immune from a one-subject-rule challenge just because funds are also appropriated for that program; and that where there is no rational connection between the specific provision and the broader enactment, with no commonality of subject matter, an enactment would be unconstitutional.

Kulewicz Presentation

In November 2015, Attorney John Kulewicz, of the law firm of Vorys, Sater, Seymour & Pease, presented to the committee on the topic of the one-subject rule. Mr. Kulewicz said while Ohio courts originally took a hands-off approach and the legislature enforced the rule itself, recently Ohio courts have shown a significant interest in the rule, and it has gained traction outside the legislature. He said courts now invalidate legislation that goes against the rule, and this is a new era for the one-subject rule.

Describing the history of the rule, he said there was little substantive debate about the purpose of it at the 1851 Constitutional Convention. He said the intent of the framers, as discussed by the relevant case law, is that its purpose is to prevent logrolling, and that, traditionally, courts held it to be a directory provision that should be enforced by the General Assembly rather than the courts. Mr. Kulewicz described how, in the 1980s, that approach changed, with the Ohio Supreme Court playing a larger role in determining when legislation violated the rule. He indicated that, eventually, the Court began to impose a remedy when the rule was violated, and, in so doing would sever the offending portion of the act. Referencing *State ex rel. Ohio Academy of Trial Lawyers v. Sheward, supra*, Mr. Kulewicz discussed the Court's conclusion that a tort reform bill dealt with so many different topics that the entire bill had to be rejected. He identified the Court's rationale as being that any attempt to identify a primary subject would constitute a legislative exercise. Mr. Kulewicz also discussed the Court's "tipping point" case of *In re Nowak, supra*, in which the Court rejected precedent suggesting that the one-subject rule was directory in favor of a conclusion that the rule is mandatory. He said that decision redefined the interpretation of the one-subject rule, creating a new generation of litigation.

Summarizing the tests courts apply when legislation is challenged as contradicting the one-subject rule, Mr. Kulewicz said the analysis centers on: (i) whether there is disunity but not a plurality of subject matter; (ii) whether there is a common purpose to the legislation; and (iii) whether the combination of subjects in the challenged bill is rational. He said the result is that the General Assembly now must consider the breadth of the legislation it is passing.

Identifying national trends regarding one-subject rules, Mr. Kulewicz said Ohio is one of 43 states that have such a rule, but that there are categorical differences. He said Ohio is one of a few states that regarded the rule as directory. He said 14 states, including Ohio, exempt

appropriations bills from application of the one-subject rule, while six states confine appropriations bills to appropriations. He said in two states the rule is limited only to the appropriations bill, while 13 states exempt codification and revision bills from application of the rule.

Discussion and Consideration

In considering Article II, Sections 15, 16, 26, and 28, the committee _____

Conclusion

The Legislative Branch and Executive Branch Committee concludes that Article II, Sections 15, 16, 26, and 28 _____.

Date Issued

After formal consideration by the Legislative Branch and the Executive Branch Committee on _____, and _____, the committee voted to issue this report and recommendation on _____.

Endnotes

[1] Ohio Secretary of State, *Amendments and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws and Challenged by Referendum, Submitted to the Elector*, 14 (updated May, 23, 2016). Available at: https://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf (last visited Dec. 6, 2016).

[2] 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 Dec. 6, 2016).

[3] *Id.* at 120.

[4] *Id.* at 121.

[5] *Id.*

[6] *Id.* at 123-24.

[7] *Id.* at 125.

[8] *Id.*

[9] *Id.* at 122.

[10] *Id.* at 125-26.

[11] *Id.* at 126.

[12] *Id.*

[13] *Id.* at 127.

[14] *Id.* at 127.

[15] *Id.* at 128.

[16] *Id.*

[17] Ohio Secretary of State, *Amendments and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws and Challenged by Referendum, Submitted to the Elector*, 14 (updated May, 23, 2016). Available at: https://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf (last visited Jan. 10, 2017).

[18] *Id.* at 19.

[19] Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution* 142 (2nd prtg. 2011).

[20] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, (June 30, 1977) at 130.

[21] *Id.* at 130-32.

[22] *Id.* at 132.

[23] *Id.*

[24] Steinglass, *supra* note 19, at 157.

[25] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Proceedings Research, Volume 5, 2209 (July 23, 1974).
Available at: http://www.lsc.ohio.gov/ocrc/v5%20pgs%202195-2601%20elections-suffrage%202602-2743%20local%20govt.pdf (last visited Dec. 6, 2016).

[26] Steinglass, *supra* note 19, at 146-47, citing *Desenco, Inc. v. Akron*, 84 Ohio St. 3d 535, 1999-Ohio-368,706 N.E.2d 323 (holding that a statute must operate uniformly throughout the state and be general in nature to satisfy the uniformity clause, but the law does not need to apply to all persons and localities as long as the law can potentially apply to all).

[27] Steinglass, *supra* note 19, at 148.

[28] *Id.*

[29] Steinglass at 141, citing *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*, 62 Ohio St. 3d 145, 580 N.E.2d 767 (1991), and *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 1999-Ohio-77, 711 N.E.2d 203.

[30] *Amended on reconsideration*, 2007-Ohio-4460, 115 Ohio St. 3d 103, 873 N.E.2d 1232.

[31] *Holding modified by Fyffe v. Jeno's, Inc.*, 59 Ohio St. 3d 115, 570 N.E.2d 1108 (1991) *holding modified by Bielat v. Bielat*, 2000-Ohio-451, 87 Ohio St. 3d 350, 721 N.E.2d 28.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: **Fred Mills, Chair; Paula Brooks, Vice-chair; and Members of the Legislative Branch and Executive Branch Committee**

FROM: **Steven C. Hollon, Executive Director**

DATE: **April 7, 2016**

RE: **Grouping of Article II Sections by Topic for Review by the Committee**

This memorandum provides summaries of the various sections contained in Article II that have been assigned to the Legislative Branch and Executive Branch Committee. The summaries are grouped into topical categories that might aid the committee in its review of the provisions.

It is very important to note that this is not a proposal, but merely a means of categorizing the topics in this and other articles that might aid the committee in its review and analysis of these provisions.

Category I – Section 1 (Legislative Power)

There is just one section in this category. It deals with vesting the legislative authority of government in the General Assembly and reserving to the people certain powers, such as the initiative and referendum. The sections on the initiative and referendum are closely related to the legislative authority and contain related numbering in the constitution, but they have been separately assigned to the Constitutional Revision and Updating Committee.

Section 1 – In Whom Power Vested (1851, amend. 1912, 1918, and 1953)

- This section states that the "legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives" and then goes on to state that the people reserve to themselves the power of the initiative and referendum to propose and reject laws passed by the General Assembly. The section also states that the limitations place on the General Assembly by the constitution shall also "be deemed limitations on the power of the people to enact laws."

The committee may wish to consider revising this provision into a more readable format. One possible format is provided at Attachment A. The suggested format sets out the powers in a cleaner fashion, which aids in reader comprehension without changing the meaning. However, suggesting that this section be amended for the sole purpose of clarity may not be a sufficient reason to change it.

Sections 1a through 1g – General Powers of Initiative and Referendum; Ballot Board (1912, amend. 2008)

- These sections deal with the powers of the initiative and referendum. They have been assigned to the Constitutional Revision and Updating Committee. An overriding question is whether the seven sections dealing with this topic should be removed from Article II and placed in a new article dealing with this topic specifically or whether they should be retained in this article as numbered. This question may require some discussion between the chairs of the Legislative Branch and Executive Branch Committee (Mills) and the Constitutional Revision and Updating Committee (Mulvihill) or a joint meeting of the committees.

Category II – Section 2 (Election of Legislators)

There is just one section in this category which deals with the election and terms of the members of the General Assembly.

Section 2 – Election and Term of State Legislators (1967, amend. 1992)

- This section deals with the election and terms of state legislators, including the term limitation language that was added to the constitution in 1992. The committee has already dealt with this topic and passed two separate reports and recommendations on the issue of term limits which have not yet been considered by the full Commission.

There is no need for the committee to take any further action on this section.

Category III – Sections 3, 4, 5, 11, and 31 (Qualifications, Vacancy, and Compensation of Members of General Assembly)

Sections 3, 4, 5, 11, and 31 deal with residency requirements and restrictions on those who serve in the General Assembly, the method for filling a vacancy of a member of the General Assembly, and the compensation of the members and officers of that body.

When reviewing these sections, and before preparing a single report and recommendation on these provisions, the committee may wish to consider whether some of the provisions should remain in Article II or whether they should be moved to another article dealing with officeholders in general. See Category VIII (Officeholders) below.

Section 3 – Residence Requirements (1851, amend. 1967)

- This section states that senators and representatives shall have lived in their districts for one year prior to their election.

Section 4 – Dual Office and Conflict of Interest Prohibited (1851, amend. 1973)

- This section sets out restrictions that no member of the General Assembly shall hold any other public office while serving as a member, except for an office in a political party, as a notary public, or an officer in the militia or of the United States armed forces. This is one of the topics the committee may wish to consider moving out of Article II and placing in an article dealing with officeholders in general. See Category VIII (Officeholders) below.

Section 5 – Who Shall Not Hold Office (1851)

- This section states that no person holding money for public disbursement shall have a seat in the General Assembly until accounting for and paying moneys into the treasury. It also states that no person convicted of embezzlement of public funds shall hold any office in the state. This last disability goes beyond just those serving in the General Assembly and applies to all offices. The committee may wish to consider removing this restriction from this section, and placing it in an article dealing with officeholders in general. See Category VIII (Officeholders) below.

Section 11 – Filling Vacancy in House or Senate Seat (1851, amend. 1961, 1968, 1973)

- This fairly lengthy section deals with how vacancies shall be filled in the Senate and House of Representatives.

Section 31 – Compensation of Members and Officers of the General Assembly (1851)

- This section states that members and officers of the General Assembly shall receive a fixed compensation to be prescribed by law and no other allowances and perquisites, and that no change in their compensation shall take place during their term in office.

Category IV – Sections 6, 7, 8, 9, 13, and 14 (Conducting Business of General Assembly)

The sections in this category deal with the organization and power of the General Assembly and some basic standards for conducting the business of the body. Of the six sections in this category, four were adopted in 1851 and then amended in 1973, one was adopted in 1851 and has never been amended, and one was adopted in 1973, at the time the first four sections noted above were amended. The sections in this category could be considered in the same report and recommendation.

Section 6 – Powers of Each House (1851, amend. 1973)

- This provision provides for several, somewhat unrelated items, such as (i) each house shall be the judge of the election and qualifications of its members; (ii) each house may punish its members for disorderly conduct; (iii) a majority shall constitute a quorum to do business; and (iv) each house has all powers necessary to obtain information affecting legislative action, including the powers to enforce the attendance and testimony of witnesses.
-

Section 7 – Organization of Each House of the General Assembly (1851, amend. 1973)

- This section states that the mode of operating each house of the General Assembly shall be prescribed by law, sets out the titles for the presiding officer of each house, and indicates that each house shall determine its own rules of proceeding.

Section 8 – Sessions of the General Assembly (1973)

- This section provides when regular and special sessions of the General Assembly may be convened, who may convene them.

Section 9 – House and Senate Journals (1851, amend. 1973)

- This section states that each house of the General Assembly shall keep a correct journal of its proceedings, and that on the passage of every bill the vote shall be taken by yeas and nays.

Section 13 – Legislative Sessions to be Public (1851)

- This section provides that the proceedings of both houses shall be public, except when two-thirds of those present find that secrecy is required.

Section 14 – Power of Adjournment (1851, amend. 1973)

- This provision states that neither house shall adjourn for more than five days without the consent of the other, nor reconvene in any place other than which the two houses are in session.

Category V – Sections 10 and 12 (Rights and Privileges of Members of General Assembly)

Sections 10 and 12 deal with the rights and privileges of the members of the General Assembly, specifically noted in the constitution. It makes sense that they should be considered by the committee at the same time and reviewed in the same report and recommendation.

Section 10 – Rights of Members to Protest (1851)

- This section states that any member of either house has the right to protest against any act or resolution, and that such protest shall be entered upon the journal.

Section 12 – Privileges of Members from Arrest (1851)

- This section deals with the immunity of members of the General Assembly (i) from arrest in going to or returning from a session, except for treason, felony or breach of the peace, and (ii) for any speech or debate.

Category VI – Sections 15, 16, 26, and 28 (Enacting Laws)

The four sections in this category deal with the process for enacting bills by the General Assembly, the requirement for the Governor's signature, how laws are to be applied, and restrictions on their enactment. These sections can be dealt with at the same time and in one report and recommendation. However, since these sections refer to actions by both the General Assembly and the Governor, and the effect of laws generally, a question the committee may wish to address is whether this grouping of provisions should be removed from Article II and placed in its own separate article that deals with enacting laws. I have provided at Attachment B a version of what this new separate article might look like.

Section 15 – How Bills Shall Be Passed (1973)

- This section details how bills shall be passed in the General Assembly, including requirements on the style of the laws, the one subject rule, and signing by the presiding officer.

Section 16 – Bills to be signed by Governor (1851, amend. 1903, 1912, 1973)

- This section details the requirements for the governor's signature on bills, the veto of bills, veto overrides by the General Assembly, and bills becoming law without the governor's signature.

Section 26 – Laws to have Uniform Operation (1851)

- This section states that laws of a general nature will have uniform operation throughout the state.

Section 28 – Retroactive Laws (1851)

- This section states that the General Assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts.

Category VII – Sections 33, 34, 34a, 35, 37 (Employee and Worker Protections)

The sections in this category deal with topics that concern protecting the interests of employees and workers. There are also two other provisions that have been proposed by a private citizen that broadly fall into this category and which have been assigned to the committee for its review. One question the committee may wish to consider is whether there are enough sections on this topic that would warrant removing this group of provisions from Article II and place them in a new and separate article dealing exclusively with this topic, in order to provide for greater clarity, transparency, and ease of comprehension by the reader.

Section 33 – Mechanics' and Contractor's Liens (1912)

- This section states that laws may be passed to allow for labors and materialmen to place liens on property for which they have provided labor or material.

Section 34 – Welfare of Employees (1912)

- This section states that laws may be passed regulating the hours of labor, and providing for the comfort, health, safety and general welfare of employees.

Section 34a – Minimum Wage (2006)

- Sets a minimum wage for every employer in the state to pay their employees.

Section 35 – Workers' Compensation (1912, amend. 1923)

- This section states that laws may be passed to provide compensation for workers and their dependents for death, injuries, and occupational disease occurring in the course of one's employment.

Section 37 – Workday and Workweek on Public Projects (1912)

- This section states that not more than eight hours shall constitute a day's work and not more than 48 hours shall constitute week's work on public work projects.

Proposed Section – No Public Resources in Collection of Labor Dues

- This proposal, submitted to the Commission by a private citizen, would prohibit the use of public resources to assist a labor organization in collecting dues or service fees from wages of public employees.

Proposed Section – Right to Work/Workplace Freedom

- This proposal, submitted to the Commission by a private citizen, would prohibit a person, as a condition of employment, from becoming a member of a labor organization or paying dues to a union organization.

Category VIII – Sections 4, 5, 20, 23, 24, 27, 38 (Officeholders)

The sections noted below deal with various topics that concern officers and officeholders, including their term, compensation, impeachment and removal, and filling of vacancies.

Section 20 – Term of Office, and Compensation of Officers in Certain Cases (1851)

- This section provides that the General Assembly, in cases not provided for in the constitution, shall fix the term of office and compensation for all officers.

Section 23 – Impeachments (1851)

- This section states the general procedures for impeachment including that the House of Representatives shall have the sole power of impeachment, which shall be tried by the Senate and require the concurrence of two-thirds of the senators.

Section 24 – Officers Liable to Impeachment (1851)

- This section states the offices liable to impeachment, including the governor, judges, and all state officers.

Sections 27 – Election and Appointment of Officers; Filing of Vacancies (1851)

- This section states that the election and appointment of all officers not provided by the constitution shall be as directed by law.

Section 38 – Removal of Officials for Misconduct (1912)

- This section states that laws shall be passed providing for the prompt removal from office of all officers, including state officers, judges, and members of the General Assembly, for misconduct involving moral turpitude, in addition to the method of impeachment.

In addition to these five sections, there are two other sections in Article II (as noted in Category III above) that might be combined with these sections to form a new and separate article that focuses on the topic of officeholders. The two sections in Article II (as noted in Category III above) are as follows:

Section 4 – Dual Office and Conflict of Interest Prohibited (1851, amend. 1973)

- This section sets out that no member of the General Assembly shall hold any other public office while serving as a member, except for an office in a political party, as a notary public, or an officer in the militia or of the United States armed forces. The committee may wish to consider making this a requirement as to all officeholders in the state.

Section 5 – Who Shall Not Hold Office (1851)

- This section states that no person holding money for public disbursement shall have a seat in the General Assembly until accounting for and paying moneys into the treasury. It also states that no person convicted of embezzlement of public funds shall hold any office in the state. This last disability goes beyond just those serving in the General Assembly and applies to all offices.

There are also two other sections in the constitution, at Article XV (Miscellaneous), that might be combined with the sections noted above to round out a separate article on officeholders. They are as follows:

Section 4 – Qualified Electors (1851, amend. 1913, 1953)

- This section states that no person shall be elected or appointed to any office in the state unless they are qualified as an elector.

Section 7 – Oaths of Officers (1851)

- This section states that every person chosen or appointed to any office shall, before entering into office, shall take an oath or affirmation to support the Constitution of the United States, and Ohio, and also an oath of office.

Finally, one other topic the committee may want to consider is the creation of a salary commission and, in so doing, whether such a section should be added to the sections noted above in the creation of a new article setting out the general requirements for all officeholders in state and local government.

Category IX – Sections 21, 22, 30, 32, 39 (Miscellaneous Topics)

The following sections deal with miscellaneous powers the constitution grants to the General Assembly, but which do not deal with a common topic. These sections perhaps more logically belong in other articles in the constitution and could be transferred to other committees for review, or they could be grouped with the sections noted in Category VI above (Enacting Legislation), either in a new and separate article or contained within Article II.

Section 21 – Contested Elections (1851)

- This section states that the General Assembly shall determine before what authority and in what manner elections shall be conducted. While this affirmative granting of authority may not be necessary in order for the General Assembly to enact legislation regarding elections, if the Commission wishes to retain this grant then perhaps it should be reviewed by the Bill of Rights and Voting Committee and the section transferred to Article V (Elections).

Section 22 – Appropriations (1851)

- This section states that no money shall be drawn from the treasury, except in pursuance of a specific appropriation, and that no appropriation shall be made for more than two years. This does not fit neatly into other articles or for review by other committees. The closest one that might be considered would be the Finance, Taxation, and Economic Development Committee, but neither Article VIII (Public Debt and Public Works) nor Article XII (Finance and Taxation) seem like clean places for this provision to land.

Section 30 – New Counties (1851)

- This section deals with the creation of new counties. It states that no new county shall contain less than 400 square miles or be reduced below that level, and notes that any changes as to county lines and county seats shall be submitted to the electors of the counties to be affected. The question is whether this section should remain in this article for review by this committee or whether review of the provision should be transferred to the Education, Public Institutions, and Local Government Committee which has been tasked with reviewing Article X (County and Township Organizations) to determine whether his provision should be transferred to that article.

Section 32 – Divorces and Judicial Power (1851)

- This section states that the judicial branch shall grant no divorce or exercise any judicial power not granted in the constitution. This section could be transferred to the Judicial Branch and Administration of Justice Committee for its review and perhaps a suggestion that it recommend the adoption of a provision in Article IV that states the issuance of a divorce shall be the sole determination of the judicial branch as provided by law.

Section 39 – Expert Testimony in Criminal Trials (1912)

- This section states that laws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal proceedings. The committee should consider transferring this provision to the Judicial Branch and Administration of Justice Committee for its review. With the passage of the Modern Courts Amendment in 1968, rule-making authority was largely transferred to the Supreme Court, with some oversight

by the General Assembly. This provision is largely, if not totally, obsolete and the committee could also recommend its repeal.

Category X – Section 36 and Other Provisions (Natural Resources)

Section 36 deals with the topic of natural resources, as set out below. There are also other provisions located in different articles of the constitution that deal with the topics of (i) private property and eminent domain; (ii) the protection of private property rights in ground water, lakes, and water courses; and (iii) Ohio Livestock Care Standards Board, also as set out below.

Collectively, these four topics deal with the larger issue of the preservation of natural resources and rights in private property versus the interest of the state in conserving natural resources and regulating methods for their use and extraction.

Two of the provisions noted above are assigned to the Legislative Branch and Executive Branch Committee, and are as follows:

Section 36 – Conservation of Natural Resources (1912, amend. 1973)

- This section focuses on two topics. The first part of the provision deals with taxation of forestry and agriculture. The second section deals with the conservation of natural resources and the regulation of their use and extraction.

Article XIV, Section 1 – Ohio Livestock Care Standards Board (2009)

- This section, as passed by initiative in 2009, deals with the creation and operation of the Ohio Livestock Care Standards Board, governing the care and well-being of livestock and poultry.

The other two topics provisions mentioned above are assigned to the Bill of Rights and Voting Committee, and are as follows:

Article I, Section 19 – Eminent Domain (1851)

- This section discusses the foundational principle of eminent domain as placed in Article I of the constitution dealing with the Bill of Rights.

Article I, Section 19b – Preservation of Private Property Rights in Ground Water, Lakes, and Other Watercourses (2009)

- This section discusses the protection of Ohio property owners' riparian rights.

The question is whether it makes sense to place all of these items in one article in the constitution for the convenience of the reader or whether it would be too difficult a task to have the voters approve moving these provisions around, thus making more sense to leave well enough alone and just let the two committees complete their work on these topics as assigned.

Conclusion

There is plenty of work for the committee's consideration and determining the order and grouping of topics for its review will aid staff in the preparation of reports and recommendations for the committee's approval and submission to the full Commission.

ATTACHMENT A

ARTICLE II – LEGISLATIVE BRANCH

Section 1 – Legislative Power

(A) The legislative power of the state shall be vested in a General Assembly, consisting of a Senate and House of Representatives, and in the people, as they shall specifically reserve to themselves in the constitution. ~~but the~~

(B) The people reserve ~~to themselves~~ the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote, as ~~hereinafter~~ provided in the constitution.

(C) ~~They also~~ The people reserve the power to adopt or reject any law, section of any law, or any item to any law, appropriating money passed by the General Assembly, except as ~~herein after~~ provided in the constitution ~~;~~ .

(D) The people reserve the power, ~~and~~ independent of the General Assembly, to propose amendments to the constitution and to adopt or reject the same at the polls, as provided in the constitution.

(E) The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

Currently Art. II, Sec. 1 – (1851, amend. 1912, 1918, 1953)

ATTACHMENT B

ARTICLE ___ - ENACTING LAWS

Section 1 – Bills

The General Assembly shall enact no law except by bill, and no bill shall be passed without the concurrence of a majority of the members elected in each house. Bills may originate in either house, ~~but~~ and may be altered, amended, or rejected in the other.

Currently Art. II, Sec. 15(A) – (1973)

Section 2 – Style of Laws

The style of the laws of this state shall be, "be it enacted by the General Assembly of the state of Ohio."

Currently Art. II, Sec. 15(B) – (1973)

Section 3 – Consideration of Bills

Every bill shall be considered by each house on three different days, unless two-thirds of the members elected to the house in which it is pending suspend this requirement~~, and every~~. Every individual consideration of a bill or action suspending the requirement shall be recorded in the journal of the respective house. No bill ~~may~~ shall be passed until ~~the bill~~ it has been reproduced and distributed to members of the house in which it is pending and every amendment been made available upon a member's request.

Currently Art. II, Sec. 15(C) – (1973)

Section 4 – One Subject (1973)

No bill shall contain more than one subject, which shall be clearly expressed in its title.

Currently part of Art. II, Sec. 15(D) – (1973)

Section 5 – Vote (1973)

On the passage of every bill, the vote ~~in either~~ of each house~~, the vote~~ shall be ~~taken~~ determined by yeas and nays, and ~~entered upon~~ the names of the members voting for and against the bill shall be ~~the~~ entered upon the journal.

Currently part of Art. II, Sec. 9 – (1973)

Section 6 – Entire Act (1973)

No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.

Currently part of Art. II, Sec, 15(D) – (1973)

Section 7 – Certifying Passage of Bill

Every bill which has passed both houses of the General Assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for passage have been met and shall be presented forthwith to the governor for his approval.

Currently Art. II, Sec. 15(E) – (1973)

Section 8 – Certifying Passage of Joint Resolution

Every joint resolution which has been adopted in both house of the General Assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for adoption have been met and shall forthwith be filed with the secretary of state.

Currently Art. II, Sec. 15(F) – (1973)

Section 9 – Signing by Governor; Filing with Secretary of State

If the governor approves an act passed by the General Assembly, ~~he~~ the governor shall sign it~~, it becomes law~~ and ~~he shal~~l file it with the secretary of state, whereupon it becomes law.

Currently part of Art. II, Sec. 16 – (1973)

Section 10 – Veto by Governor; Reconsideration by General Assembly

(A) If ~~he~~ the governor does not approve ~~it~~ an act passed by the General Assembly, ~~he~~ the governor shall return it, with ~~his~~ the governor's objections in writing, to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage.

(B) If three-fifths of the members ~~elected to~~ of the house of origin vote to repass the bill, it shall be sent, with the objections of the governor, to the other house, which may also reconsider the vote on its passage. If three-fifths of the members ~~elected to~~ of the second house vote to repass it, ~~it~~ the bill becomes law notwithstanding the objections of the governor, and the presiding officer of the second house shall file it with the secretary of state. In no case shall a bill be repassed by a smaller vote that is required by the constitution on its original passage. In all cases of reconsideration, the vote of each house shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered upon the journal.

(C) If a bill is not returned by the governor within ten days, Sundays excepted, after being presented to ~~him~~ the governor, it becomes law in like manner as if ~~he~~ the governor has signed it, unless the General Assembly by adjournment prevents its return; in which case, it becomes law unless, within ten days after adjournment, it is filed by ~~him~~ the governor, with ~~his~~ the governor's objections in writing, in the office of the secretary of state. The governor shall file with the secretary of state every bill not returned by ~~him~~ the governor to the house of origin that becomes law without ~~his~~ the governor's signature.

(D) The governor may disapprove any item or items in any bill making an appropriation of money and the item or items, so disapproved, shall be void, unless repassed in the manner prescribed by this section for the repassage of a bill.

Currently Art. II, Sec. 16 – (1851, amend. 1903, 1912, 1973)

Section 11 – Laws Shall Have Uniform Operation

All laws, of a general nature, shall have a uniform operation throughout the state; nor shall any act, except as it relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except as otherwise provided in this constitution.

Currently Art. II, Section 26 – (1851)

Section 12 – Retroactive Laws

The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of the state.

Currently Art. II, Section 28 – (1851)

Section 13 – Tax Levies, Appropriations, and Emergency Laws; Immediate Effect (1912)

(A) Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect.

(B) ~~Such~~ Emergency laws shall require the vote of two-thirds of ~~all~~ the members ~~elected to~~ in each ~~branch~~ house of the General Assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a yea or nay vote, upon a separate roll call vote thereon.

(C) Laws mentioned in this section shall not be subject to the referendum as set out in Article ___, Section ___ of this constitution.

Currently Art. II, Sec. 1d – (1912)

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2017 Meeting Dates

March 9

April 13

May 11

June 8

July 13

August 10

September 14

October 12

November 9

December 14