OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Ohio Constitutional Modernization Commission

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Part II

March 9, 2017

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

OHIO CONSTITUTION
ARTICLE I, SECTION 8

WRIT OF HABEAS CORPUS

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

Recommendation

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

Background

Article I, Section 8 reads as follows:

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

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

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

From its appearance in the Magna Carta, the writ was preserved in various parliamentary enactments, and most notably was memorialized in the Habeas Corpus Act of 1679.[5]

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

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

Given this history, it was natural that the writ found a home in the United States Constitution in 1789, albeit not as part of the Bill of Rights (which was added later as a set of amendments), but at Article I, Section 9.[7] It reads:

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

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

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

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

In addition to changing the manner of reference to when the writ may be suspended, delegates to the Ohio Constitutional Convention of 1851 reorganized the Bill of Rights, placing it in Article I, separating the writ of habeas corpus from the requirement of bail, and placing provision for the writ in Section 8.[13]

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

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

Amendments, Proposed Amendments, and Other Review

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

Litigation Involving the Provision

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

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

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

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

Presentations and Resources Considered

There were no presentations to the committee on this provision.

Discussion and Consideration

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

Action by the Judicial Branch and Administration of Justice Committee

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

Presentation to the Commission

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

Action by the Commission

At the Commission meeting held April 13, 2017, _____ moved to adopt the report and recommendation for Article I, Section 8, a motion that was seconded by _____.

After general discussion, a roll call vote was taken, and the motion _____.

Conclusion

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

Date Adopted

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

Senator Charleta B. Tavares, Co-chair

Representative Jonathan Dever, Co-chair

Endnotes

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

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

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

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

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

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

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

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

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

[10] *Id.* at 806, 826.

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

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

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

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

[15] *Id.*

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

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

MEMBER QUALIFICATIONS AND VACANCIES IN THE GENERAL ASSEMBLY

The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Sections 3, 4, 5, and 11 of Article II of the Ohio Constitution concerning member qualifications and filling vacancies in the General Assembly. It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The Commission recommends that Article II, Sections 3, 4, 5, and 11 of the Ohio Constitution be retained in their current form.

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Amendments, Proposed Amendments, and Other Review

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

Section 3 (Residence Requirements for State Legislators)

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

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

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

Section 4 (Dual Office and Conflict of Interest Prohibited)

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

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

The recommendations regarding Section 4 were part of a package of revisions that included changes related to Article II, Sections 4, 6, 7, 8, 9, 11, 14, 16, 17, 18, 19, and 25.[19] Presented to voters on May 8, 1973, the issue passed by a vote of 680,870 to 572,980.[20]

Section 5 (Who Shall Not Hold Office)

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

Section 11 (Filling Vacancy in House or Senate Seat)

Section 11, relating to how the two chambers of the General Assembly fill vacant seats, has been amended three times since 1851.[25] The 1851 version of Section 11 reads: "All vacancies which may happen in either House shall, for the unexpired term, be filled by election, as shall be

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

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

Litigation Involving the Provisions

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

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

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

Presentations and Resources Considered

Hollon Presentation

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

Discussion and Consideration

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

Action by the Legislative Branch and Executive Branch Committee

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

Presentation to the Commission

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

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

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

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

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

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

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

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

Action by the Commission

At the Commission meeting held April 13, 2017, _____ moved to adopt the report and recommendation for Article II, Sections 3, 4, 5, and 11, a motion that was seconded by _____.

After general discussion, a roll call vote was taken, and the motion _____.

Conclusion

The Ohio Constitutional Modernization Commission recommends that Article II, Sections 3, 4, 5, and 11 be retained in their present form.

Date Adopted

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

_____ _____

Senator Charleta B. Tavares, Co-chair Representative Jonathan Dever, Co-chair

Endnotes

[1] *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio. 1850-51,* 2 vols. (Columbus: S. Medary, 1851), 102.

[2] *Id.* at 163-164.

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

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

[5] *Id.* at 230.

[6] *Id.* at 232.

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

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

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

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

[10] *Id.*, Vol. 2 at 1096.

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

[12] Id.

[13] Id.

[14] Id.

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

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

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

[18] Id.

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

See https://ballotpedia.org/Ohio_Procedures_of_the_General_Assembly,_Amendment_6_(May_1973) (last visited Oct. 6, 2016), citing the Toledo *Blade*, May 7, 1973, https://news.google.com/newspapers?id=8QhPAAAAIBAJ&sjid=RAIEAAAAIBAJ&pg=7444,4723240&hl=en (last visited Oct. 6, 2016).

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

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

[22] Id.

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

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

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

[26] Id.

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

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

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

[29] Id.

[30] Id.

[31] Id.

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

OHIO CONSTITUTION
ARTICLE II, SECTIONS 6, 7, 8, 9, 13, AND 14

CONDUCTING BUSINESS OF THE GENERAL ASSEMBLY

The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article II, Sections 6, 7, 8, 9, 13, and 14 of the Ohio Constitution concerning the organization of the General Assembly and the basic standards for conducting the business of the body. It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The Commission recommends that Article II, Sections 6, 7, 8, 9, 13, and 14 of the Ohio Constitution be retained in their current form.

Background

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

Article II, Section 6 outlines the powers of each house of the General Assembly, providing:

> Each House shall be judge of the election, returns, and qualifications of its own members. A majority of all the members elected to each House shall be a quorum to do business; but, a less number may adjourn from day to day, and compel the attendance of absent members, in such manner, and under such penalties, as shall be prescribed by law.
>
> Each House may punish its members for disorderly conduct and, with the concurrence of two-thirds of the members elected thereto, expel a member, but not the second time for the same cause. Each House has all powers necessary to provide for its safety and the undisturbed transaction of its business, and to obtain, through committees or otherwise, information affecting legislative action under

> consideration or in contemplation, or with reference to any alleged breach of its privileges or misconduct of its members, and to that end to enforce the attendance and testimony of witnesses, and the production of books and papers.

Section 7 provides for the organization of each house of the General Assembly, providing:

> The mode of organizing each House of the general assembly shall be prescribed by law.
>
> Each House, except as otherwise provided in this Constitution, shall choose its own officers. The presiding officer in the Senate shall be designated as president of the Senate and in the House of Representatives as speaker of the House of Representatives.
>
> Each House shall determine its own rules of proceeding.

Section 8 governs the calendar of the General Assembly, providing:

> Each general assembly shall convene in first regular session on the first Monday of January in the odd-numbered year, or on the succeeding day if the first Monday of January is a legal holiday, and in second regular session on the same date of the following year. Either the governor, or the presiding officers of the general assembly chosen by the members thereof, acting jointly, may convene the general assembly in special session by a proclamation which may limit the purpose of the session. If the presiding officer of the Senate is not chosen by the members thereof, the President pro tempore of the Senate may act with the speaker of the House of Representatives in the calling of a special session.

Section 9 requires the two chambers to keep and publish a journal of proceedings, and to record the votes:

> Each House shall keep a correct journal of its proceedings, which shall be published. At the desire of any two members, the yeas and nays shall be entered upon the journal; and, on the passage of every bill, in either house, the vote shall be taken by yeas and nays, and entered upon the journal.

Section 13 relates to the public nature of the legislative process, requiring open proceedings:

> The proceedings of both houses shall be public, except in cases which, in the opinion of two-thirds of those present, require secrecy.

Section 14 controls the ability of either house to adjourn, providing:

> Neither House shall, without the consent of the other, adjourn for more than five days, Sundays excluded; nor to any other place than that, in which the two Houses are in session.

Amendments, Proposed Amendments, and Other Review

An early agenda item for the Ohio Constitutional Revision Commission (1970s Commission) was to address the administration, organization, and procedures of the General Assembly. Consequently, the 1970s Commission issued a comprehensive report recommending the amendment of Article II, Sections 4, 6, 7, 9, 11, 14, 16, and 31; the repeal of Article II, Sections 5, 17, 18, 19, and 25; and the repeal and enactment of new sections for Article II, Sections 8 and 15.[1]

In relation to Section 6, the 1970s Commission recommended that the original section from the 1851 constitution (which had its genesis in the 1802 constitution), be amended to include portions of former Section 8 dealing with the ability of each chamber of the General Assembly to discipline and control its members. Thus, the 1970s Commission advocated adding the second paragraph of Section 6, which allows each house to punish members for disorderly conduct, to expel members, and to enforce rules and procedures promoting the orderly transaction of its business.[2]

Addressing Section 7, which derived from a provision in the 1802 constitution that was partially retained in the 1851 constitution, the 1970s Commission recommended the addition of a portion of former Section 8 that had described the procedure for selecting legislative officers, including the president of the senate and the speaker of the house of representatives. The 1970s Commission also supported a statement confirming that each house may determine its own procedural rules. The 1970s Commission's recommended changes were intended to correct an omission from the 1851 constitution that resulted in there being no reference to how the senate was to select its officers.[3]

With regard to Section 8, the 1970s Commission recommended repeal and replacement, explaining that its recommendations to split the section between Sections 6 and 7 resulted in there being no remaining portion of the section to retain.[4] To take its place, the 1970s Commission proposed a new section detailing what constitutes a "session" of the General Assembly, specifically describing a "regular session" and a "special session." Explaining its rationale, the 1970s Commission observed that, despite the provision in former Article II, Section 25 fixing the first Monday of January as the commencement of "all regular sessions," to occur biennially, the long practice of the General Assembly was to designate a "second regular session" on the same date of the following year. This resulted in the concept of the biennial General Assembly meeting in a first regular session, to be followed a year later by the second regular session. The 1970s Commission sought to clarify this practice by recommending that the constitution expressly recognize the practice of holding annual sessions, noting that it regarded the proposal as "an important element in strengthening the power of the legislative branch and insuring its ability to deal with problems as they arise."[5] The 1970s Commission also recommended the addition of a reference to the ability of the General Assembly to hold "special sessions," as convened by the governor or the presiding officers of the General Assembly.[6]

The 1970s Commission sought to maintain the journal-keeping requirement in Section 9, acknowledging that similar legislative recordkeeping requirements are standard in most, if not all, state constitutions, as well as in the United States Constitution. However, the 1970s Commission recommended that a portion of the section, which mandated that no law could be

passed without the concurrence of a majority of the members of each chamber, be moved to a proposed new Section 15.[7]

Section 13, requiring the General Assembly to hold open meetings, was not addressed by the 1970s Commission, and, in fact, has not been amended since its adoption in 1851. The current provision is based on a provision in the 1802 constitution literally expressing an "open door" policy, stating, in part, that the "doors of each house, and of committees of the whole, shall be kept open, except in such cases as, in the opinion of the house, require secrecy."[8]

Reviewing Section 14, which restricted the separate houses of the General Assembly from adjourning for more than two days without the consent of the other house, the 1970s Commission recommended expanding the original two-day requirement to five days. The purpose of the change was to accommodate the legislature's established practice of beginning a session week on a Tuesday, a practice that, in order to comply with the constitutional requirement, required the General Assembly to hold perfunctory, or "skeleton," sessions on Mondays. As observed by the 1970s Commission, "a requirement that is being observed through the device of a technicality deserves reconsideration."

The recommendations of the 1970s Commission with regard to Sections 6 through 9, and 14, were presented to voters on the May 8, 1973 ballot as part of a ballot issue package related to General Assembly operational reforms.[9] The measure passed by a margin of 54.30 percent to 45.70 percent.[10]

Litigation Involving the Provision

Two Supreme Court of Ohio cases addressing these sections have been decided since the 1970s Commission completed its work.

State ex rel. Hodges v. Taft, 64 Ohio St.3d 1, 591 N.E.2d 1186 (1992), was a mandamus action based on a statutory initiative proponent's claim that the secretary of state had forwarded the initiative petition to the General Assembly at a time that was not contemplated by Article II, Section 1b of the Ohio Constitution. Specifically, the case revolved around whether Article II, Section 8's stipulation that the General Assembly convene in first regular session in an odd-numbered year required the secretary of state to wait to forward the initiative petition until the next General Assembly convened, which was over a year after the proponents filed their initiative petition. Interpreting the statutory initiative petition requirements of Article II, Section 1b in conjunction with the definition of "first" and "second" regular session of the General Assembly in Article II, Section 8, the Supreme Court held that once the proponents presented the initiative petition to the secretary of state on December 11, 1991, the secretary of state was required by law to transmit the petition to the General Assembly at its next regular session, which was in January 1992, rather than when the next General Assembly convened in January 1993. As interpreted by the Court, Section 8 "restores a clear distinction between the *term* of a General Assembly, which coincides with the biennial election cycle, and the *sessions* of the General Assembly, which are annual and two in number during each biennial term." *Id.*, 64 Ohio St.3d at 21, 591 N.E.2d at 1193. Thus, the first regular session was said to convene when each house is called to order by its respective presiding officer on the relevant day in January in

the odd-numbered year, and the second regular session then convenes automatically on the same day of the following year. *Id.*

In *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 1999-Ohio-130, 716 N.E.2d 704, the Supreme Court considered joint legislative rules adopted pursuant to Article II, Section 7, which gives each house of the General Assembly the ability to independently choose its officers and its rules of procedure. In *Grendell*, the senate and house of representatives passed competing versions of a bill, which was then referred to conference committee to work out the differences. In doing so, the conference committee deleted a key provision, allegedly because it would have benefited the district of a state representative who had voted against the bill. The state representative then sought a writ of mandamus to compel the conference committee to include the provision. In rejecting the writ, the Court found the complaint to be nonjusticiable because Section 7 allows each chamber of the General Assembly to determine its own rules of proceeding. *Id.*, 86 Ohio St.3d at 633, 716 N.E.2d at 709. While the case holding hinged on the separation of powers principle, noting that "mandamus will not issue to a legislative body or its officers to require the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control," *Grendell* nevertheless confirms Section 7 as expressing the self-governing power of the General Assembly. *Id.*

Presentations and Resources Considered

Hollon Presentation

In his presentation to the Legislative Branch and Executive Branch Committee on July 14, 2016, Steven C. Hollon, executive director, said the sections in this category deal with the organization and power of the General Assembly, providing basic standards for conducting the business of the body. He observed that, 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. Mr. Hollon said the subject matter of these provision supports creating one report and recommendation to report the committee's work on the topics.

Discussion and Consideration

In considering Article II, Sections 6 through 9, 13, and 14, the Legislative Branch and Executive Branch Committee recognized the General Assembly's ability to determine how often it meets, noting that there is nothing in the constitution controlling the legislative calendar. The committee saw no need to alter that arrangement, based on its conclusion that the legislature is its own best authority for determining how often and how long it should meet.

Action by the Legislative Branch and Executive Branch Committee

After formal consideration by the Legislative Branch and Executive Branch Committee, the committee voted on December 15, 2016 to issue a report and recommendation recommending that Article II, Sections 6, 7, 8, 9, 13, and 14 be retained in their present form.

Presentation to the Commission

On March 9, 2017, Shari L. O'Neill, interim executive director and counsel to the Commission, on behalf of the Legislative Branch and Executive Branch Committee, presented a report and recommendation for Article II, Sections 6, 7, 8, 9, 13, and 14. Ms. O'Neill said the report describes that Section 6 outlines the powers of each house of the General Assembly, requiring each house to be the judge of the election, returns, and qualifications of its own members, setting the number of members for a quorum, allowing each house to prescribe punishment for disorderly conduct, and to obtain information necessary for legislative action, including the power to call witnesses and obtain the production of books and papers. She said the report describes that Section 7 provides for the organization of each house of the General Assembly, allowing the mode of organizing to be prescribed by law, and requiring each house to choose its own officers, with there being designated a president of the Senate and a Speaker of the House of Representatives. Ms. O'Neill indicated the report outlines that Section 8 governs the calendar of the General Assembly, and allows the governor, or the presiding officers of the general assembly chosen by the members thereof, acting jointly, to convene the general assembly in special session by a proclamation which may limit the purpose of the session.

Ms. O'Neill said the report states that Section 9 requires the two chambers to keep and publish a journal of proceedings, and to record the votes. The report also indicates that Section 13 relates to the public nature of the legislative process, requiring open proceedings except where, in the opinion of 2/3s of those present, secrecy is required. Finally, Ms. O'Neill stated, the report outlines that Section 14 controls the ability of either house to adjourn, providing that neither may adjourn for more than five days without the consent of the other. Ms. O'Neill indicated that the report and recommendation describes the work of the 1970s Constitutional Revision Commission on these sections, indicating where amendments were recommended and adopted. She said the report also outlines litigation involving the provisions before describing the discussion and consideration by the committee. She said the report indicates the committee's conclusion that Article II, Sections 6, 7, 8, 9, 13, and 14 should be retained in their current form.

Action by the Commission

At the Commission meeting held April 13, 2017, _____ moved to adopt the report and recommendation for Article II, Sections 6, 7, 8, 9, 13, and 14, a motion that was seconded by _____.

After general discussion, a roll call vote was taken, and the motion _____.

Conclusion

The Ohio Constitutional Modernization Commission recommends that Article II, Sections 6, 7, 8, 9, 13, and 14 be retained in their present form.

Date Adopted

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

Senator Charleta B. Tavares, Co-chair

Representative Jonathan Dever, Co-chair

Endnotes

[1] Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly (Dec. 31, 1971). Available at http://www.lsc.ohio.gov/ocrc/recommendations%20pt1%20general%20assembly.pdf (last visited Oct. 5, 2016). *See also* Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report (June 30, 1977). Available at: http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf (last visited Oct. 12, 2016).

[2] *Id.* at 25.

[3] *Id.* at 26-29.

[4] *Id.* at 30.

[5] *Id.* at 31-32.

[6] *Id.* at 32-33.

[7] *Id.* at 33-34.

[8] *See, e.g.,* Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution* 149 (2nd prtg. 2011).

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

See https://ballotpedia.org/Ohio_Procedures_of_the_General_Assembly,_Amendment_6_(May_1973) (last visited Oct. 6, 2016), citing the Toledo *Blade*, May 7, 1973, available at https://news.google.com/newspapers?id=8QhPAAAAIBAJ&sjid=RAIEAAAAIBAJ&pg=7444,4723240&hl=en (last visited Oct. 6, 2016).

[10] http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf (last visited Oct. 6, 2016).

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

OHIO CONSTITUTION
ARTICLE II
SECTIONS 10 AND 12

RIGHTS AND PRIVILEGES OF MEMBERS OF THE GENERAL ASSEMBLY

The Ohio Constitutional Modernization Commission adopts 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 adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The Commission recommends that no change be made to Article II, Sections 10 and 12 of the Ohio Constitution and that the provisions be retained in their current form.

Background

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

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 to the Legislative Branch and Executive Branch Committee 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, whose career included a position assisting the United States Senate's efforts to protect and enforce its privileges, 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 legislators are 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.

O'Neill Presentation

On February 9, 2017, Shari L. O'Neill, interim executive director and counsel to the Commission, presented to the committee on legislative privilege as applied to legislative staff. Based on a fifty-state survey, Ms. O'Neill said nearly all states provide some type of protection to legislators when performing their legislative duties, with most providing both 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. She noted 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. Ms. O'Neill indicated no state constitutions mention or protect legislative staff in their constitutional provisions relating to legislative privileges and immunities, although statutory protections are available in at least some states.

Reviewing state statutory provisions, Ms. O'Neill noted that several states expressly protect communications between legislators and their staff, particularly in the context of discovery requests in a litigation setting. She explained that, although Ohio's statute, R.C. 101.30, requires legislative staff to maintain a confidential relationship with General Assembly members and General Assembly staff, it does not expressly provide a privilege to legislative staff. She said R.C. 101.30 also does not indicate that legislative documents are not discoverable, and does not address whether legislative staff could be required to testify in court about their work on legislation. She added that the statute does not discuss oral communications between legislators and staff or expressly address communications that may occur between interested parties and legislative staff on behalf of legislators.

Pierce and Coontz Presentation

On February 9, 2017, the committee heard a presentation by two assistant attorneys general from the Constitutional Offices of the Office of the Ohio Attorney General, Sarah Pierce and Bridget Coontz. Ms. Pierce indicated that she and Ms. Coontz provide representation to General Assembly members in legal matters that arise in the course of legislators' official duties. She said there are few Ohio cases discussing legislative privilege, and Ohio courts often analyze the speech or debate clause as being co-extensive of the federal clause.

Ms. Pierce said the first case to discuss the topic at any length is *City of Dublin v. State*, *supra*, a case involving a challenge to a budget bill. In that case, the plaintiff noticed a sitting senator for deposition, and submitted interrogatories to General Assembly members and their staffs. She said the trial court quashed all of the discovery requests on the ground of privilege. Ms. Pierce indicated that when the case was appealed to the Tenth District Court of Appeals, the appellate court decision included an extensive analysis of legislative privilege, extending the privilege to all meetings and discussion. She said, however, the court did allow interrogatories to go to the lobbyists who had meetings with legislators.

Ms. Pierce described a second case relating to legislative privilege, *Vercellotti v. Husted*, 174 Ohio App.3d 609, 2008-Ohio-149, 883 N.E.2d 1112, in which the plaintiffs noticed depositions of sitting General Assembly members, as well as one legislative aide and one member of the Legislative Service Commission. The trial court granted a protective order preventing legislative members from having to appear for deposition. A Legislative Service Commission employee testified at a hearing about the committee meeting itself, but the state successfully asserted that conversations with legislators were privileged.

Ms. Pierce described that her office has raised legislative privilege in a number of cases in which motions to quash subpoenas were granted, or subpoenas were withdrawn, but said these issues were resolved without a court decision or analysis. She said when her office responds to discovery requests, it relies on R.C. 101.30 to assert a confidential relationship between the General Assembly and legislative staff.

Ms. Coontz said some legislatures voluntarily comply with discovery requests, adding that courts generally follow the wishes of the legislative member. She said, in the typical case, members are non-parties, and courts are reluctant to pull in members and staff for testimony.

Discussion and Consideration

In discussing Article II, Sections 10 and 12, the Legislative Branch and Executive Branch Committee considered research indicating that most states protect the right to protest as well as providing a legislative privilege against having to answer in court or other places for words undertaken in the furtherance of the legislator's official duties.

Addressing the right to register a protest in the journal, as described in Section 12, the committee noted that the procedure allows General Assembly members who disagree with a procedural ruling against them, or a procedure that was not followed, to hand a written protest to the clerk. The protest is then then included in the journal of that day's business, allowing a permanent record of that protest.

Regarding the committee report from the 1970s Commission recommending repeal of Section 10, committee members expressed that the section still has relevance despite the proliferation of multiple media and internet news outlets because the journal is the official record of the business of the General Assembly, and the member filing the protest can directly control the message being communicated. Committee members also noted that the protest allows legislators to counteract the fact that legislative minutes are vague, that legislative intent is not expressed in the legislation, and that bill sponsors are not required to explain their reasons for sponsoring the bill. Committee members also noted that a legislator may vote with the majority but may agree with the minority that the procedure for enacting the legislation was improper. In that case, because the legislator cannot speak through his or her vote, committee members indicated it is important to maintain the right to protest.

Regarding the issue of legislative privilege as provided in Section 12, some committee members expressed that because legislative members officially speak through their vote and their comments during session, other types of communications are properly viewed as being privileged. Members additionally indicated that legislative privilege helps to maintain the separation of powers, noting that many communications that occur in the executive and judicial branches of government are recognized as privileged. At the same time, committee members recognized that legislators are acting on behalf of citizens and should, as much as possible, maintain transparency as they conduct their duties. Addressing the confidentiality of communications between legislators and legislative staff, committee members observed that the privilege allows legislators to effectively perform their role.

Action by the Legislative Branch and Executive Branch Committee

After formal consideration by the Legislative Branch and Executive Branch Committee, the committee voted on March 9, 2017 to issue a report and recommendation recommending that Article II, Sections 10 and 12 be retained in their present form.

Presentation to the Commission

On March 9, 2017, Shari L. O'Neill, interim executive director and counsel to the Commission, on behalf of the Legislative Branch and Executive Branch Committee, presented a report and recommendation for Article II, Sections 10 and 12. Ms. O'Neill said the report and recommendation describes that Section 10 provides a right of legislative members to protest, and to have their objections recorded in the journal. Discussing Section 12, she said the report and recommendation describes the historic basis for 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. She said the report further describes the work of 1970s Commission, indicating that its Committee to Study the Legislature issued a report in which it concluded that because dissenting legislators now have the ability to publicize their views in the news media, the protest provision is "an anachronism and appropriate for removal." She said the report indicates that, despite this recommendation, the question was not taken up by the full 1970s Commission, and, so remains as it was adopted in 1851. The report indicates the 1970s Commission did not address Section 12, thus, it also remains in its 1851 form.

Ms. O'Neill continued that the report addresses litigation involving the provisions, as well as describing presentations related to the speech or debate clause in Section 12. She said the report and recommendation indicates the committee's discussion and consideration, documenting the committee's conclusion that, because the journal is the official record of the business of the General Assembly, and the member filing the protest can directly control the message being communicated, it is important to retain that right. She said the report also indicates the committee's conclusion that that Section 12 should be retained because legislative privilege helps to maintain the separation of powers, noting that many communications that occur in the executive and judicial branches of government are recognized as privileged. She said the report acknowledges the views of some of the committee that legislators are acting on behalf of citizens and should, as much as possible; maintain transparency as they conduct their duties. In addressing the confidentiality of communications between legislators and legislative staff, she said the report notes committee members' observation that the privilege allows legislators to effectively perform their role.

She said the report and recommendation indicates the Legislative Branch and Executive Branch Committee's conclusion that Article II, Sections 10 and 12 continue to serve the General Assembly and should be retained in their current form.

Action by the Commission

At the Commission meeting held April 13, 2017, _____ moved to adopt the report and recommendation for Article II, Sections 3, 4, 5, and 11, a motion that was seconded by _____.

After general discussion, a roll call vote was taken, and the motion _____.

Conclusion

The Ohio Constitutional Modernization Commission recommends that Article II, Sections 10 and 12 be retained in their present form.

Date Adopted

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

_____ _____

Senator Charleta B. Tavares, Co-chair Representative Jonathan Dever, Co-chair

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 & 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] *Ohio Constitutional Revision Commission*, *supra* note 7, 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).

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

OHIO CONSTITUTION
ARTICLE V, SECTION 2a

NAMES OF CANDIDATES ON BALLOT

The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article V, Section 2a of the Ohio Constitution concerning the names of candidates on the ballot. It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The Commission recommends that Article V, Section 2a be retained in its current form.

Background

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 2a reads as follows:

> The names of all candidates for an office at any election shall be arranged in a group under the title of that office. The general assembly shall provide by law the means by which ballots shall give each candidate's name reasonably equal position by rotation or other comparable methods to the extent practical and appropriate to the voting procedure used. At any election in which a candidate's party designation appears on the ballot, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in less prominent type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States, and other than candidates for governor and lieutenant governor) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Proposed by initiative in 1949, Section 2a was intended to bar straight-party voting by emphasizing the candidates for office rather than their political parties.[1] Previously, voters could cast a straight-party vote by marking a single "X" on the ballot, a method known as the "party column format." [2] With the adoption of Section 2a, boards of elections began using an office-bloc or office-type ballot by which voters would cast their vote for each individual candidate for office.[3]

Originally, the section required each candidate's name to appear, where reasonably possible, "substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs." [4] In 1974, the Supreme Court of Ohio addressed whether this requirement prohibited the use of voting machines and other means of voting that rotated names on a precinct-by-precinct basis. *See State ex rel. Roof v. Hardin Cty. Bd. of Commrs*, 39 Ohio St.2d 130, 314 N.E.2d 172 (1974). The Court held that "although the Constitution does not prohibit the use of voting machines, it does require that among the various methods of machine rotation that are economically and administratively feasible, the only method that may be utilized is the one which most closely approaches perfect rotation. Precinct-by-precinct rotation does not comply with this requirement and is, therefore, unconstitutional." *Id.*, 39 Ohio St.2d at 134, 314 N.E.2d at 176.

To address the issue, voters approved an amendment in 1975 that allowed the General Assembly "to provide by law the means by which ballots shall give each candidate's name reasonably equal position by rotation or other comparable methods to the extent practical and appropriate to the voting procedure used." [5]

In 1976, Section 2a again was amended to indicate the governor and lieutenant governor, like the United States president and vice president, are exempt from the requirement that candidates appear on the ballot and must be voted on as separate candidates.[6]

While most states require ballot rotation by statute, Ohio is the only state to prescribe ballot rotation by constitutional provision.[7]

Amendments, Proposed Amendments, and Other Review

In its March 1975 report, the Ohio Constitutional Revision Commission (1970s Commission) recommended removal of Section 2a's self-executing language that had been interpreted as requiring perfect rotation of names on the ballot, instead preferring to allow the General Assembly to enact law providing for rotation. [8] Acknowledging that no candidate should be able to gain an advantage by ballot position, the 1970s Commission found the "perfect rotation" requirement to be too restrictive in that it could be used to invalidate election results due to simple printing errors, prevent the use of emerging new technologies for voting, and cause other difficulties and expenses for county boards of elections. [9] The 1970s Commission further recommended that Section 2a be expanded to cover all elections, not merely general elections, removing a clause that could be interpreted as emphasizing party over candidate names in a primary or non-partisan election, and removing reference to type-size and appearance because future ballots may not be printed.[10] The 1970s Commission asserted its recommendations were

intended to "create a more flexible and workable approach to achieving fairness in the balloting process."[11]

Litigation Involving the Provision

The Supreme Court of Ohio has acknowledged that voting irregularities, such as the failure to properly rotate candidate names and problems with voting machines, may be grounds for setting aside the results of an election. *See In re Election of Nov. 6, 1990, for the Office of Attorney General of Ohio*, 58 Ohio St. 3d 103, 569 N.E.2d 447 (1991). However, before election results are invalidated, it must be established by "clear and convincing" evidence that such irregularities occurred and that they affected enough votes to change or make uncertain the result of the election. *Id*., 58 Ohio St.3d at 105, 569 N.E.2d at 450.

Presentations and Resources Considered

Damschroder Presentation

On February 9, 2017, Matthew Damschroder, assistant secretary of state and chief of staff for Ohio Secretary of State Jon Husted, and former director of the Franklin County Board of Elections, presented to the committee on the order of candidate names on the ballot.

Mr. Damschroder said in the 1950s and 60s, boards of elections in Ohio had hand-counted paper ballots. He said there were several forms of ballot: a presidential ballot, a party-type ballot, a nonparty ballot, and a question-and-issue ballot. He said the voter would sign in at the polling place and tear off a sheet from a pad for each of the different ballots. Mr. Damschroder said that process continued as counties implemented punch card systems, and other new technology, on into the 1980s and 90s when boards of elections began using optical scan sheets and touch screens. He continued that, within each of the ballot categories, contests appear in the order of statewide, then district, then county, then any offices within the county, noting that some counties have districts for their county commissions.

Regarding rotation of names, Mr. Damschroder said, within each office contest, candidate names are rotated. He said Ohio is the only state that has rotation built into the constitution. He described that other states require rotation by state law, and in some states all ballots are the same in alphabetical order. He noted that, in Illinois, names are drawn out of a hat to establish ballot order.

Mr. Damschroder said, in Ohio, the procedure is for the first precinct in the county to have a straight alphabetical order, and the next precinct shifts the list of candidate names down one, and so on through each of the precincts. He said the goal, within a county, is for every candidate in a contest to have the opportunity to have his or her name first. He said there is research indicating a statistical advantage to being first, so the idea behind rotation is to prevent any one candidate from having an advantage. He noted that, now that Ohio has no fault absentee voting and a larger percentage of ballots being cast early, Secretary of State Husted requires all counties to follow the same layout for absentee ballots that would appear on the ballot the voter would see at

the polls on Election Day. As a result, a precinct's voters receive the exact same ballot regardless of whether they are voting early, absentee, or in person.

Regarding ballot questions and issues, Mr. Damschroder said there is also a type of rotation that happens on an annual basis, with statewide questions always being the first to appear. However, he said the categories of other issues rotate year to year. For example, he said it is possible that this year if countywide issues are at the top, next year school levies or township issues would be first.

Engstrom Presentation

On February 9, 2017, Erik J. Engstrom, professor of political science from the University of California, Davis, presented to the committee on the politics of ballot choice, which is the topic of a recent law review co-authored by Prof. Engstrom.[12]

Prof. Engstrom began by noting Ohio has an interesting history related to ballot laws. Providing a brief history of how elections were conducted in the 19th century, he said balloting was not the responsibility of state governments. Rather, he said, the political parties themselves would print the ballots and distribute them to voters. The parties would print the candidates for their own party on that ballot, and a voter would get a ballot from a party and cast that ballot. He said balloting was quite different, so, in effect, voters were almost forced to vote a straight party ticket by default. He added that voting was not secret – others could observe and monitor voters as they cast their ballots. He said the lack of a secret ballot created the potential for vote buying.

Prof. Engstrom continued that, at the end of the 19th century, the states began to reform the way they conducted elections by adopting the Australian, or "secret" ballot, with Massachusetts being the first state to adopt the change. He said this new ballot has the format largely used now in the United States. In addition, he said ballots are now printed and distributed by the state, rather than the political parties. He noted an additional feature, which is that the ballot is consolidated so that, instead of just a Republican or Democratic party ballot, all the candidates are listed, allowing a voter to split his or her vote more easily. He said a final important feature is that now voting is conducted in secret, using a curtain or a voting booth. He said it took about 30 years for all states to adopt some form of the new secret ballot, with Ohio being an early adopter in 1891.

Prof. Engstrom said, despite these changes, the states still varied in the types or formats of ballots they chose to use. He said the ballot format most commonly in use now is the office-bloc format, which lists the candidates office by office. He said this is the format Ohio uses, as a result of a voter referendum in 1949 to switch from the party column to the office-bloc format. Prof. Engstrom said most states prescribe ballot order by statute, with Ohio being unique in setting out the requirement in the constitution.

Discussion and Consideration

After a brief discussion, the Bill of Rights and Voting Committee agreed that the various amendments to Section 2a, particularly the 1975 amendment that allows the General Assembly the flexibility to enact law to honor the provision's goal of ballot fairness while accommodating new voting methods and technologies, allow the section to continue to serve the state well. Thus, the consensus of the committee was that no changes to the section are warranted at this time.

Action by the Bill of Rights and Voting Committee

After formal consideration by the Bill of Rights and Voting Committee, the committee voted on March 9, 2017 to issue a report and recommendation recommending that Article V, Section 2a be retained in its present form.

Presentation to the Commission

On March 9, 2017, Christopher Gawronski, legal intern, on behalf of the Bill of Rights and Voting Committee, presented a report and recommendation for no change to Article V, Section 2a, relating to the order of names of candidates on the ballot. Mr. Gawronski said the report describes the current provision, deriving from a 1949 constitutional initiative, was intended to bar straight-party voting, emphasizing the candidates for office rather than their political parties by using an office-bloc format. He said the report indicates the provision was subsequently amended twice to clarify how rotation of names on ballots is to occur. He said the report outlines the presentations offered on the issue, and concludes with the committee's sense that the current wording provides the necessary flexibility to the General Assembly to provide for the specifics of name rotation based on the needs of new voting methods and technologies, so that no change is necessary.

Action by the Commission

At the Commission meeting held April 13, 2017, _____ moved to adopt the report and recommendation for Article V, Section 2a, a motion that was seconded by _____.

After general discussion, a roll call vote was taken, and the motion _____.

Conclusion

The Ohio Constitutional Modernization Commission recommends that Article V, Section 2a be retained in its present form.

Date Adopted

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

Senator Charleta B. Tavares, Co-chair

Representative Jonathan Dever, Co-chair

Endnotes

[1] Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution* 215 (2nd prtg. 2011); Erik J. Engstrom and Jason M. Roberts, *The Politics of Ballot Choice*, 77 Ohio St. L.J. 839, 854 (2016).

[2] *Id.*

[3] *Id.*

[4] As originally adopted in 1949, Section 2a read as follows:

> The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

[5] Amendment 6 appeared on the November 4, 1975 ballot as the "Ohio Rotation of Candidate Names on Ballots Amendment." Available at: https://ballotpedia.org/Ohio_Rotation_of_Candidate_Names_on_Ballots,_Amendment_6_(1975) (last visited Feb. 26, 2017); https://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110475.aspx (last visited Feb. 26, 2017).

The rotation requirements of Section 2a are effectuated by R.C. 3513.15, which provides:

> The names of the candidates in each group of two or more candidates seeking the same nomination or election at a primary election, except delegates and alternates to the national convention of a political party, shall be rotated and printed as provided in section 3505.03 of the Revised Code, except that no indication of membership in or affiliation with a political party shall be printed after or under the candidate's name. When the names of the first choices for president of candidates for delegate and alternate are not grouped with the names of such candidates, the names of the first choices for president shall be rotated in the same manner as the names of candidates. The specific form and size of the ballot shall be prescribed by the secretary of state in compliance with this chapter.
>
> It shall not be necessary to have the names of candidates for member of a county central committee printed on the ballots provided for absentee voters, and the board may cause the names of such candidates to be written on said ballots in the spaces provided therefor.
>
> The secretary of state shall prescribe the procedure for rotating the names of candidates on the ballot and the form of the ballot for the election of delegates and alternates to the national convention of a political party in accordance with section 3513.151 of the Revised Code.

R.C. 3505.03 sets out the requirements for use of the "office-type ballot," indicating, in part:

> On the office type ballot shall be printed the names of all candidates for election to offices, except judicial offices, who were nominated at the most recent primary election as candidates of a political party or who were nominated in accordance with section 3513.02 of the Revised Code, and the names of all candidates for election to offices who were nominated by nominating petitions, except candidates for judicial offices, for member of the state board of education, for member of a board of education, for municipal offices, and for township offices.

[6] Amendment 1 on the June 1976 Ballot, proposing, inter alia, to require the lieutenant governor to be elected jointly with the governor. The measure passed by a margin of 61.16 percent to 38.84 percent. Ballotpedia, "Ohio Joint Election of Governor and Lieutenant Governor, Amendment 1 (June 1976), available at https://ballotpedia.org/Ohio_Joint_Election_of_Governor_and_Lieutenant_Governor,_Amendment_1_(June_1976) (last visited Feb. 26, 2017); https://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110276.aspx (last visited Feb. 26, 2017).

[7] Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 7, Elections and Suffrage, 16 (March 15, 1975), http://www.lsc.ohio.gov/ocrc/recommendations%20pt7%20elections%20and%20suffrage.pdf, (last visited Feb. 26, 2017).

[8] *Id.* at 17.

[9] *Id.* at 18.

[10] *Id.* at 19.

[11] *Id.*

[12] *See* Engstrom & Roberts, *supra*, note 1.

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2017 Meeting Dates

May 11

June 8

July 13

August 10

September 14

October 12

November 9

December 14