OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

THURSDAY, JANUARY 15, 2015
1:30 P.M.
STATEHOUSE ROOM 116

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of November 13, 2014

IV. Presentations

- "Evaluating Judicial Elections"
  Chief Justice Maureen O'Connor
  Supreme Court of Ohio

V. Reports and Recommendations

- Article IV, Section 19 (Courts of Conciliation)
  - Second Presentation
  - Public Comment
  - **Action Item: Consideration and Adoption**
- Article IV, Section 22 (Supreme Court Commission)
  - Second Presentation
  - Public Comment
  - **Action Item: Consideration and Adoption**

VI. Committee Discussion

- Presentations by Justice Paul E. Pfeifer and
  Chief Justice Maureen O'Connor

VII. Adjourn

Ohio Constitutional Modernization Commission

Thursday, January 15, 2015
Statehouse
Remarks by Chief Justice Maureen O'Connor

Thank you Chairwoman Abaray and Vice Chairman Judge Fischer for the invitation to speak about judicial reform.

Since I spoke to the constitutional commission in August 2013, there has been significant progress on this issue. I'm pleased to share that progress today.

I have said it many times and it's worth repeating: Ohio has one of the best judiciaries anywhere, and that's because of the men and women serving on the bench.

But, I am as convinced as ever that we can improve the way we select judges and enhance confidence in our judiciary

There are three reasons we must act:

One: Polls show that even though Ohioans want to continue to elect judges they believe that judges are influenced by politics, by contributions, and by other factors.

Two: The numbers are clear that at least one quarter of the electorate does not participate in judicial races.

Three: The level of knowledge and understanding about the judiciary among the general public is inadequate. Voters do not have easy access to quality information.

It became clear in discussing my original eight-proposal plan that advocating for all eight would not be productive.

So, I arrived at a three-point plan that I believe has broad consensus, that taken together, would significantly strengthen democracy and judicial elections in Ohio and support the rule of law.

The three points of my plan are as follows:

One: Elevate judicial elections by moving them to odd years and moving them to the top of the ballot.

Two: Educate voters about judicial elections by encouraging them to participate and giving them the information they need to make informed decisions.

Three: Increase the basic qualifications to serve as a judge to make an outstanding judiciary even better.

I will run through each of these very briefly here for you today. I encourage you to read more by visiting **OhioJudicialReform.org.**

First, we need to *elevate* judicial elections. We need to lift them up. We need to make them more visible to Ohio voters and also demonstrate that they are no less valued or no less important than races in the legislative and executive branches.

How do we do this? By taking two of the ideas I proposed previously and combining them into one.

I propose that we amend the Ohio Constitution to move all judicial races to odd years while at the same time making some modest changes in the Ohio Revised Code to place these races at the top of the ballot.

This would make the odd years in Ohio not the "off-year elections" as they are so often called. Instead, these years would come to be known as the ***judicial years***, the years when we go about the important business of electing the men and women to serve on the bench in Ohio at every level.

Judges would appear in a less crowded field, and judicial elections would get the attention they deserve. The first thing voters would see would be judicial races.

As it stands now – during presidential and mid-term elections – judicial races get lost in the shuffle.

The judiciary competes for attention with partisan candidates for president, senator, congress, governor and others who are able to shout their messages while judicial candidates can only whisper.

Many Ohioans don't even vote for judges because they get tired by the time they reach judges' names at the end of the ballot.

My research found that on average 25 percent of the time when voters show up at the polls, they do not bother to cast a vote for judges down the ticket. In 2012, in Cuyahoga County the drop off was 40 percent.

Preliminary research from the election just past suggests that the drop off may be even worse. These results will be ready for release at the end of the month.

When often half of all eligible voters aren't coming to the polls at all, this judicial drop off means that judges are being selected by in some cases one quarter of the electorate.

This is unacceptable. If we elevate judicial races by moving them to odd years and to the top of the ballot, voter participation will increase.

But elevating judicial elections is not enough.

We must also give voters the information they need to make informed choices.

So, we will launch a comprehensive voter engagement and information program by early summer.

The program I envision will for the first time provide voters statewide with a website that will be a one-stop-shop for quality information about the candidates for judge at every level.

The program also will use traditional media, social media, and other methods throughout the year to educate voters about the responsibility they have to participate in judicial elections and to actively encourage them to meet this responsibility.

When taken together with my proposal to move judicial elections to separate years and up to the top of every ballot, the result will be *more* citizens voting for judge and doing so in an *informed* way.

And, more citizens will vote based on quality, substantive information about the candidates and their qualifications for office.

Let's put an end to the name game.

We have secured three important partners in this effort:, the Ohio State Bar Association, the League of Women Voters of Ohio, and the Bliss Institute of Applied Politics at the University of Akron, which will serve as the home for Ohio's first ever statewide judicial voter education and outreach program.

By combining the existing resources and abilities of these organizations, we will be able to launch this program for the 2015 judicial races without the use of any tax dollars. Moving forward, we envision that this will become a permanent fixture of Ohio judicial elections.

I believe this has the potential to be a national model.

The third piece of my plan is to increase the basic qualifications to serve as a judge.

Over the years, several pieces of legislation have addressed increasing the number of years of practice necessary to run for or be appointed to a judgeship.

Currently, an attorney needs only six years experience before assuming the bench.

Three recent legislative proposals would have implemented longer years of practice requirements for the common pleas bench (8 years), the appellate bench (10 years), and Supreme Court Justices (12 years), although some argue that trial judges need more experience than appellate judges.

This is not a new idea, and many groups for years have advocated for better equipped judges stepping into the courtroom for the first time

So, today I ask you to consider moving forward on the constitutional elements of my 3-point plan to strengthen judicial elections and empower Ohio voters.

Let's elevate judicial races by moving them to their own year and to the top of the ballot. Let's educate Ohio voters by building the best ongoing judicial election information and engagement program this country has ever seen. And let's increase the level of experience we require of our judicial candidates.

I continue to meet with legislative leaders and the governor to urge them to move forward with the necessary legislation to enact these ideas.

Please visit **OhioJudicialReform.org** to read more about my plan.

Thank you for inviting me to speak with you today. Thank you as well for your leadership in undertaking the monumental task of reviewing, vetting, and recommending changes to Ohio's foundational document. God bless.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

OHIO CONSTITUTION ARTICLE IV, SECTION 19

COURTS OF CONCILIATION

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article IV, Section 19 of the Ohio Constitution concerning courts of conciliation. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee finds that Article IV, Section 19 is obsolete and therefore recommends its repeal.

Background

Article IV, Section 19 reads as follows:

> The General Assembly may establish courts of conciliation, and prescribe their powers and duties; but such courts shall not render final judgment in any case, except upon submission, by the parties, of the matter in dispute, and their agreement to abide such judgment.

Article IV governs the judicial branch, specifically vesting judicial power in the state supreme court, courts of appeals, courts of common pleas, and other courts as may be established by law.[1]

Section 19, which is original to the 1851 Constitution, was proposed at the 1850-51 Constitutional Convention to allow the resolution of disputes without resorting to the traditional legal process.[2]

George B. Holt, a delegate from Montgomery County whose long career in the law included

serving terms as a state representative, state senator, and common pleas court judge, was the leading proponent of the proposal to permit the General Assembly to create courts of conciliation. Holt's comments during the discussion of courts of conciliation suggest that the adoption of Section 19 was motivated by concern over the adversarial and formal nature of litigation under the established court system:

> The plan of a court of conciliation has many advocates, who desire to see it established. It has been tried in other countries, with excellent effect—greatly diminishing litigation, and subduing a litigious spirit—a spirit which is the bane of a community. It sets neighbor against neighbor, brother against brother and even father against son, and son against father. Such litigation have I often witnessed, and in some cases seen it prosecuted with an embittered spirit, little short of devilish. Every means which promises only a mitigation of the evil should be employed. The expense and time wasted in such controversies, employing judges, jurors, witnesses, lawyers and suitors, is but a little of the mischief. The monstrous evil consists in the engendering and perpetuating of strife and contention among neighbors, begetting and nursing discord and hatred in families, and in disturbing the harmony and peace of society. A judicious peace loving and peace making officer of this kind may be more useful, far more useful than the first judge of your State, whom you propose to dignify with title of Chief Justice of Ohio.[3]

Despite the authority provided by Section 19, the General Assembly has never established courts of conciliation; rather it has created arbitration proceedings and other methods for litigants wishing to avoid using the courts.[4]

Amendments, Proposed Amendments, and Other Review

Article IV, Section 19 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Ohio Constitutional Revision Commission recommended the repeal of Section 19, based upon its conclusion that the General Assembly had never exercised its constitutional authorization to establish courts of conciliation. In making this recommendation, the commission noted that its repeal would not affect current or future alternative dispute resolution provisions under Ohio law.[5] Despite this recommendation, the General Assembly did not submit the proposed repeal of Section 19 to the voters.

In 2011, the 129th General Assembly adopted Amended House Joint Resolution Number 1, intended, in part, to repeal Section 19.[6] The question was presented to voters as "Issue 1" on the November 8, 2011 ballot, which also included a proposal to repeal Article IV, Section 22 (authorizing the creation of supreme court commissions) as well as a proposal to amend Article IV, Section 6 to increase the maximum age for assuming elected or appointed judicial office from 70 to 75. This last proposal, involving age eligibility requirements for judicial office, was

the principal focus of the opposition to Issue 1 and perhaps was the reason for its sound defeat at the polls.[7]

Litigation Involving the Provision

There has been no litigation involving this provision, and no court of conciliation has ever been established by the General Assembly.

Presentations and Resources Considered

On September 11, 2014, Jo Ellen Cline, Government Relations Counsel for the Ohio Supreme Court, presented to the committee on Article IV, Section 19. Ms. Cline noted that it is unlikely under the current structure of the judicial branch that courts of conciliation would be necessary.

Also on September 11, 2014, William K. Weisenberg, Senior Policy Advisor to the Ohio State Bar Association, presented his perspective on Section 19. He observed that the judicial and legislative branches have collaborated to enact laws and encourage alternative dispute resolution measures such as arbitration, mediation, and private judging. Mr. Weisenberg stated that he does not believe Section 19 is necessary to allow for alternative dispute resolution but, instead, the section is a remnant of history and properly should be repealed.

Conclusion

The Judicial Branch and Administration of Justice Committee finds that Article IV, Section 19 has not been used since its adoption in 1851, and determines it is not necessary to authorize any existing or future alternative dispute resolution mechanisms. Therefore, the committee concludes that the provision is obsolete and recommends that Article IV, Section 19 be repealed.

Date Adopted

After formal consideration by the Judicial Branch and Administration of Justice Committee on November 13, 2014, and_____, the committee voted to adopt this report and recommendation on _____.

Endnotes

[1] Ohio Constitution, Article IV, Section 1.

[2] Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), p. 207.

[3] Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio 1850-51 (Columbus: S. Medary, 1851), p. 391.

[4] Steinglass & Scarselli, *supra*, p. 208, citing R.C. Chapter 2711, and R.C. 2701.10.

[5] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 10, The Judiciary, March 15, 1976, p. 65, and p. 420 of Appendix J of the Final Report.

[6] As it appeared on the ballot, Issue 1 read as follows:

> Proposed Constitutional Amendment
>
> TO INCREASE THE MAXIMUM AGE AT WHICH A PERSON MAY BE ELECTED OR APPOINTED JUDGE, TO ELIMINATE THE AUTHORITY OF THE GENERAL ASSEMBLY TO ESTABLISH COURTS OF CONCILIATION, AND TO ELIMINATE THE AUTHORITY OF THE GOVERNOR TO APPOINT A SUPREME COURT COMMISSION.
>
> Proposed by Joint Resolution of the General Assembly:
>
> To amend Section 6 of Article IV and to repeal Sections 19 and 22 of Article IV of the Constitution of the State of Ohio. A majority yes vote is required for the amendment to Section 6 and the repeal of Sections 19 and 22 to pass.
>
> This proposed amendment would:
>
> 1. Increase the maximum age for assuming elected or appointed judicial office from seventy to seventy-five.
>
> 2. Eliminate the General Assembly's authority to establish courts of conciliation.
>
> 3. Eliminate the Governor's authority to appoint members to a Supreme Court Commission.
>
> If approved, the amendment shall take effect immediately.
>
> A "YES" vote means approval of the amendment to Section 6 and the repeal of Sections 19 and 22.
>
> A "NO" vote means disapproval of the amendment to Section 6 and the repeal of Sections 19 and 22.

[7] The voters rejected Issue 1 by a vote of 2,080,207 to 1,273,536, a margin of 62.03 percent to 37.97 percent. Source: Secretary of State's website; State Issue 1: November 8, 2011 (Official Results); https://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2011results/20111108Issue1.aspx (last visited 10-27-2014).

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

OHIO CONSTITUTION
ARTICLE IV, SECTION 22

SUPREME COURT COMMISSION

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article IV, Section 22 of the Ohio Constitution concerning supreme court commissions. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee finds that Article IV, Section 22 is obsolete and therefore recommends its repeal.

Background

Article IV, Section 22, reads as follows:

> A commission, which shall consist of five members, shall be appointed by the governor, with the advice and consent of the senate, the members of which shall hold office for the term of three years from and after the first day of February, 1876, to dispose of such part of the business then on the dockets of the supreme court, as shall, by arrangement between said commission and said court, be transferred to such commission; and said commission shall have like jurisdiction and power in respect to such business as are or may be vested in said court; and the members of said commission shall receive a like compensation for the time being, with the judges of said court. A majority of the members of said commission shall be necessary to form a quorum or pronounce a decision, and its decision shall be certified, entered, and enforced as the judgments of the supreme court, and at the expiration of the term of said commission, all business undisposed of shall by it be certified to the supreme court and disposed of as if said commission had never existed. The clerk and reporter of said court shall be

> the clerk and reporter of said commission, and the commission shall have such other attendants not exceeding in number those provided by law for said court, which attendants said commission may appoint and remove at its pleasure. Any vacancy occurring in said commission, shall be filled by appointment of the governor, with the advice and consent of the senate, if the senate be in session, and if the senate be not in session, by the governor, but in such last case, such appointment shall expire at the end of the next session of the general assembly. The general assembly may, on application of the supreme court duly entered on the journal of the court and certified, provide by law, whenever two-thirds of such [each] house shall concur therein, from time to time, for the appointment, in like manner, of a like commission with like powers, jurisdiction and duties; provided, that the term of any such commission shall not exceed two years, nor shall it be created oftener than once in ten years.[1]

Article IV governs the judicial branch, specifically vesting judicial power in the state supreme court, courts of appeals, courts of common pleas, and other courts as may be established by law.[2]

Section 22 is not original to the 1851 Constitution, but it was adopted by Ohio voters in 1875.

The creation of a supreme court commission to alleviate the court's backlog was a topic of considerable discussion at the 1873-74 Constitutional Convention. Some delegates felt that the creation of a commission to assist the court in dealing with its burgeoning docket would dilute the authority of the court; others were concerned that it would be difficult to recruit lawyers willing to leave successful practices in order to render this public service. Proponents of the use of commissions pointed out the difficulties faced by the court in attempting to keep up with the workload: despite 14-hour workdays and diligent attention to its responsibilities, the court was unable to reduce its significant backlog.[3]

After extensive debate, the Convention approved provisions to create an initial commission for a three-year term and to authorize the General Assembly to create subsequent commissions.[4] The voters, however, rejected the proposed Ohio Constitution of 1874.

In 1875, after the rejection of the 1874 Constitution, the General Assembly proposed Section 22, a variant of the earlier plan to create supreme court commissions. Voters approved the amendment on October 12, 1875[5] by a 77.5 to 22.5 percent margin of those voting on the proposal.[6] This was the first amendment approved by the voters under the authority given the General Assembly in the 1851 Constitution to propose amendments directly to the voters.[7]

The first supreme court commission was created by direct operation of this largely self-executing amendment. Section 22 required the governor to appoint the five members of the initial commission with advice and consent of the Senate for a three-year term beginning in February 1876. Additionally, the amendment gave the General Assembly authority to create subsequent commissions for two-year terms by a two-thirds vote (after application by the Ohio Supreme Court), and the General Assembly created a second commission in 1883. The second commission ceased operation in 1885, and since then there have not been any commissions to provide docket relief to the Ohio Supreme Court.[8]

Amendments, Proposed Amendments, and Other Review

Article IV, Section 22 has not been amended since its approval by voters in 1875.

In the 1970s, the Ohio Constitutional Revision Commission twice recommended that Section 22 be repealed. It first recommended the change as part of its review of the General Assembly's administration, organization, and procedures. In May 1973, however, the voters rejected a ballot issue proposing repeal of Section 22. The 1970s Commission attributed this rejection to a lack of appropriate voter education.[9] Then, in 1976, it again recommended the repeal of this provision,[10] but the General Assembly did not resubmit this renewed recommendation to repeal Section 22 to the voters.

In recommending repeal of the authority to create commissions, the 1970s Commission noted that the case backlog in the 1870s arose out of an organizational system that expected supreme court judges to hear cases in multiple districts around the state. At the time, the delegates thought that the use of commissions could help resolve the problem. Subsequent to adoption of Section 22 in 1875, the voters approved an amendment in 1883 reorganizing the court system and relieving the judges of their remaining circuit-riding responsibilities. Finally, in 1912, the voters again amended Article IV to create courts of appeals, thus significantly reducing the caseload burden on the Ohio Supreme Court and removing the need for supreme court commissions.

In 2011, the 129th General Assembly adopted Amended House Joint Resolution Number 1, intended, in part, to repeal Section 22.[11] The question was presented to voters as "Issue 1" on the November 8, 2011, ballot, which also included a proposal to repeal Article IV, Section 19 (authorizing the General Assembly to create courts of conciliation), as well as a proposal to amend Article IV, Section 6 to increase the maximum age for assuming elected or appointed judicial office from 70 to 75. This last proposal involving age eligibility requirements for judicial office was the principal focus of the opposition to Issue 1 and perhaps was the reason for its defeat at the polls.[12]

Litigation Involving the Provision

During the relatively brief existence of supreme court commissions, there was no significant litigation concerning the operation of commissions and their relationship to other constitutional courts.

Presentations and Resources Considered

On September 11, 2014, Jo Ellen Cline, Government Relations Counsel for the Ohio Supreme Court, presented to the committee on the topic of Article IV, Section 22. Ms. Cline noted that, in practice, the section essentially allows for the simultaneous operation of two supreme courts. She observed that the requirement that the Ohio Supreme Court hold court in each county annually was not an onerous requirement in 1803, when Ohio only had nine counties. However, by 1850, Ohio had 87 counties and a fast-growing population, thus resulting in a heavier burden

for the court and a backlog of cases. The elimination of most circuit-riding responsibilities for members of the Ohio Supreme Court in 1851 Constitution did not solve the problem of delay, and by the 1870's the court was four years behind in its docket. Based upon 2013 statistics showing that the current court has a 99 percent clearance rate for cases, Ms. Cline asserted that "the need for such a drastic docket management tool no longer exists."

Conclusion

The Judicial Branch and Administration of Justice Committee concludes that Article IV, Section 22 has not been utilized since 1885 and no longer is necessary to assist the Supreme Court in reducing any backlog. Further, the committee observes that subsequent changes to the Ohio Constitution have resolved the challenges created by the judicial branch's former organizational structure, and so a future need to create a supreme court commission is unlikely.

Therefore, the committee concludes that the provision is obsolete and recommends that Article IV, Section 22 be repealed.

Date Adopted

After formal consideration by the Judicial Branch and Administration of Justice Committee on November 13, 2014, and_____, the committee voted to adopt this report and recommendation on _____.

Endnotes

[1] This provision is sometimes erroneously referred to as Section 21[22]. There has never been a Section 21 of Article IV of the 1851 Constitution, but for reasons that are not clear some commentators treat Section 22 as once having been Section 21 and thus use a bracketed citation. *See, e.g.,* Isaac F. Patterson, The Constitution of Ohio: Amendments and Proposed Amendments (Cleveland: Arthur H. Clark Co. 1912), p. 238 (referring to section "21[22]).

[2] Ohio Constitution, Article IV, Section 1.

[3] Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio (Cleveland: W.S. Robison & Co., 1873-74), pp. 751-74.

[4] *See* Patterson, *supra*, Proposed 1874 Constitution, Article IV, Sections 4-6, pp. 198-99.

[5] *See* Laws of Ohio, vol. 72, p. 269-70 (1874).

[6] There were 339,076 favorable votes, comprising 57.3 percent of the 595,248 votes that were cast in that election, thus satisfying the super-majority requirement. *Id.*, p. 238.

[7] Article XVI, Section 1, as it existed from 1851 to 1912, provided that an amendment proposed by the General Assembly had to receive a majority of votes cast in the election, as opposed to a majority of votes on the proposed amendment. All seven amendments proposed by the General Assembly under the 1851 Constitution between 1857 and 1874 failed because they did not receive a majority of the votes cast at the election; six of the proposed amendments that failed received more affirmative than negative votes but still failed under the super-majority requirement. See Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), pp. 373-74.

[8] *See id.* at p. 209.

[9] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, Part 1, Administration, Organization, and Procedures of the General Assembly, December 31, 1971, pp. 65-67.

[10] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, Part 10, The Judiciary, March 15, 1976, pp. 67-68, and pp. 422-23 of Appendix J of the Final Report.

[11] As it appeared on the ballot, Issue 1 read as follows:

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This proposed amendment would:

1. Increase the maximum age for assuming elected or appointed judicial office from seventy to seventy-five.

2. Eliminate the General Assembly's authority to establish courts of conciliation.

3. Eliminate the Governor's authority to appoint members to a Supreme Court Commission.

If approved, the amendment shall take effect immediately.

A "YES" vote means approval of the amendment to Section 6 and the repeal of Sections 19 and 22.

A "NO" vote means disapproval of the amendment to Section 6 and the repeal of Sections 19 and 22.

[12] Issue 1 was defeated by a vote of 2,080,207 to 1,273,536, a margin of 62.03 percent to 37.97 percent. Source: Secretary of State's website; State Issue 1: November 8, 2011 (Official Results); https://www.sos.state.oh.us/SOS/