



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

---

## Judicial Branch and Administration of Justice Committee

Janet Gilligan Abaray, Chair  
Hon. Patrick F. Fischer, Vice-chair

Part I

March 9, 2017

Riffe Center for Government and the Arts  
Room 1948

## **OCMC Judicial Branch and Administration of Justice Committee**

Chair        Ms. Janet Abaray  
Vice-chair Justice Patrick Fischer  
              Mr. Jeff Jacobson  
              Sen. Kris Jordan  
              Mr. Charles Kurfess  
              Rep. Robert McColley  
              Mr. Dennis Mulvihill  
              Mr. Richard Saphire  
              Sen. Michael Skindell  
              Mr. Mark Wagoner



**OHIO CONSTITUTIONAL MODERNIZATION COMMISSION**  
**JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE**

---

**THURSDAY, MARCH 9, 2017**  
**2:30 P.M.**  
**RIFFE CENTER FOR GOVERNMENT AND THE ARTS ROOM 1948**  
**AGENDA**

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of January 12, 2017  
*[Draft Minutes – attached]*

IV. Presentations

- “Civil Forfeiture”

Robert Alt  
The Buckeye Institute

Mr. Robert Alt will provide his perspective on the topic of Civil Forfeiture in connection with the committee’s review of Article I, Section 12 (Transportation for Crime, Corruption of Blood, Forfeiture of Estate).

*[Draft Report and Recommendation – attached]*

V. Reports and Recommendations

- Article I, Section 8 (Writ of Habeas Corpus)
  - Review of Report and Recommendation
  - Public Comment

- Discussion
- **Possible Action Item: Consideration and Adoption**

*[Report and Recommendation – attached]*

➤ Article I, Section 15 (No Imprisonment for Debt)

- Review of Report and Recommendation
- Public Comment
- Discussion
- **Possible Action Item: Consideration and Adoption**

*[Report and Recommendation – attached]*

VI. Committee Discussion

➤ Article I, Section 10 – Grand Juries

The committee chair will lead a review and discussion of two draft reports and recommendations regarding grand juries. One draft recommends no change, and the other recommends possible changes to the existing provision.

*[Draft Reports and Recommendations – attached]*

➤ “Proposal to Amend Article IV, § 5(B) of the Ohio Constitution – Modern Courts Amendment”

The committee chair will lead a discussion of a proposal for changes to Article IV, Section 5(B) in order to gauge the committee’s position.

*[Letter from Michael L. Buenger, Administrative Director of the Supreme Court of Ohio, relating to proposed changes to Article IV, Section 5(B) - attached]*

*[Proposal to Amend Article IV, Section 5(B) – Modern Courts Amendment by Mark D. Wagoner and Richard S. Walinski – to be circulated at meeting]*

VII. Next Steps

➤ Planning Worksheet

The committee chair will lead discussion regarding the next steps the committee wishes to take in preparation for upcoming meetings.

*[Planning Worksheet – attached]*

VIII. Old Business

IX. New Business

X. Public Comment

XI. Adjourn

This page intentionally left blank.



**OHIO CONSTITUTIONAL MODERNIZATION COMMISSION**

---

**MINUTES OF THE  
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE  
FOR THE MEETING HELD  
THURSDAY, JANUARY 12, 2017**

**Call to Order:**

Vice-chair Patrick Fischer called the meeting of the Judicial Branch and Administration of Justice Committee to order at 12:39 p.m.

**Members Present:**

A quorum was present with Vice-chair Fischer and committee members Jacobson, Jordan, Kurfess, McColley, Mulvihill, and Skindell in attendance.

**Approval of Minutes:**

The minutes of the November 10, 2016 meeting of the committee were approved.

**Presentations and Discussion:**

*Article I, Section 8  
Writ of Habeas Corpus*

Vice-chair Fischer called on Shari L. O'Neill, counsel to the Commission, to provide a review of a draft report and recommendation on Article I, Section 8, relating to the writ of habeas corpus.

Ms. O'Neill said the report and recommendation indicates that Section 8 states the privilege of the writ of habeas corpus shall not be suspended unless, in the case of rebellion or invasion, public safety requires it. She said the report describes that 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, and that habeas corpus, short for *habeas corpus ad subjiciendum*, is Latin for "that you may have the body." She said the report continues that habeas corpus is a legal concept originating in early English common law, and was a key aspect of the Magna Carta. The report describes that the 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. As

currently understood in American criminal law, the writ commands a person detaining someone to produce the prisoner or detainee.

Ms. O’Neill said the report outlines the history of the writ, indicating that it is provided for in the United States Constitution as well as having been adopted as part of the first Ohio Constitution in 1802. She said the report and recommendation describes the statutory procedure governing application for a writ of habeas corpus, as well as indicating that the constitution identifies which courts have original jurisdiction over petitions for the writ. The report also discusses the proceedings of the Constitutional Revision Commission in the 1970s, stating that the 1970s Commission’s review did not “disclose any significant differences between federal and state interpretations or any reasons to recommend changes in the language,” and so recommended no changes. Ms. O’Neill said the report also briefly describes Ohio Supreme Court jurisprudence relating to the section, indicating that courts generally determine 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. The report adds that courts have found the writ to be appropriate when a defendant wishes to challenge the jurisdiction of the sentencing court, and that the writ also may provide a remedy in non-criminal cases, such as in involuntary commitment or child custody matters. Ms. O’Neill concluded her review by indicating the report and recommendation will be completed once the committee concludes its work on that section.

Vice-chair Fischer thanked Ms. O’Neill for the summary, and asked if committee members had questions or comments. There being none, he then asked for remarks on the report and recommendation relating to Article I, Section 12, which prohibits transportation for crime, corruption of blood, or forfeiture of estate.

*Article I, Section 12*

*Transportation for Crime, Corruption of Blood, Forfeiture of Estate*

Ms. O’Neill said the report indicates that Article I, Section 12 is unchanged since its adoption in 1851 and derives from two separate sections of the 1802 constitution, which provided, at Article VIII, Section 16 that “No ex post facto law, nor any law impairing the validity of contracts, shall ever be made; and no conviction shall work corruption of blood nor forfeiture of estate,” and, at Section 17, “That no person shall be liable to be transported out of this State for any offense committed within the State.” She continued that the report indicates the section embodies three separate concepts: that criminal suspects not be transferred outside the state for crimes committed in Ohio, that criminal convictions not result in “corruption of blood,” and that criminal convictions not cause a forfeiture of estate.

Discussing the report’s discussion of transportation for crime, also known as “banishment,” she said this was an extreme form of punishment that, historically, could mean death because it separated the individual from the community that provided resources for survival, a practice that most dramatically played out in the use of transportation for crime to send unwanted citizens to British colonies rather than to imprison them. She said the report continues that most courts have held transportation for crime to be illegal, and at least 15 state constitutions forbid banishing residents as punishment for crime.

Ms. O'Neill described that the report discusses "corruption of blood" as relating to an old concept in English law that a criminal act brought about a metaphorical stain or "taint" on the blood of the offender, and justified stripping him of his life, property, or title. She said the report provides additional details about the history of the concept of "parliamentary attainder," which was a way to punish political foes without subjecting them to judicial process. Ms. O'Neill said the report describes that the founders rejected attainder, outlawing it in the United States Constitution. She said the report also notes that, in outlawing "corruption of blood" for criminal convicts, the Ohio Constitution forbids the enactment of laws that serve to extend the punishment of the offender to the beneficiaries of his or her estate.

Ms. O'Neill continued that the report discusses that, like corruption of blood, forfeiture of estate deprives the criminal actor of his property interest, specifically his present ownership rather than his expected inheritance or his anticipated ability to transfer ownership to his heirs. She noted the report's discussion of the purpose of the provision, which is to prevent convicts from having to forfeit their estate.

Describing review of the 1970s Commission's recommendation for no change to the provision, Ms. O'Neill said the report indicates there was no Ohio case law on the transportation for crime portion of the provision because the General Assembly has never authorized imposition of banishment. She said the report also notes the 1970s Commission commentary relating to a probate court decision that a statute prohibiting convicted murderers from inheriting from their victims does not violate Article I, Section 12 because the applicable statute does not divest an heir of property but rather merely prevents him inheriting it.

Ms. O'Neill concluded her summary by indicating the report's description of litigation regarding the section, indicating the Supreme Court of Ohio has interpreted Article I, Section 12 on only one occasion since the 1970s, in a case in which the court found the confiscation and sale of personal property under a statute relating to illegal drug activity was not a 'forfeiture' for criminal activity, as that word is used in the constitutional provision, but rather a remedy designed to prevent the continuation of unlawful acts. She indicated that the report and recommendation would be completed once the committee concludes its review.

Vice-chair Fischer asked whether committee members had questions or comments. Committee member Dennis Mulvihill said he was aware of new legislation related to civil forfeiture that Representative Robert McColley sponsored in the 131<sup>st</sup> General Assembly. He asked Rep. McColley to speak further about that legislation.

Rep. McColley said the legislation in question, H.B. 347, addressed the problem that civil forfeiture permitted private property to be taken from a defendant in a civil case without the rights protections that would be afforded a defendant in a criminal prosecution setting. He said civil forfeiture procedure conflicted with other constitutional principles in that the defendant in such a case had no Fifth Amendment rights of due process, no right to an attorney, and no presumption of innocence. He said, in such cases, the defendant, not the plaintiff, had the burden of proof. Rep. McColley described that the legislation enacted changes to Revised Code Chapter 2981 that addressed these shortcomings. He acknowledged the work of Senator Kris Jordan in the Senate in helping pass the bill.

This new law being related to the subject of the report and recommendation, it was agreed that the report would be revised to include information about H.B. 347's changes to the civil forfeiture procedure.

Vice-chair Fischer then asked Ms. O'Neill to provide a summary of the report and recommendation for Article I, Section 15, prohibiting imprisonment for debt.

*Article I, Section 15*

*No Imprisonment for Debt*

Ms. O'Neill indicated that Section 15 prevents persons from being imprisoned for debt in any civil action unless in cases of fraud. She said the report and recommendation describes that the institution known as "debtors' prison" can be traced to early Roman law, when debtors who could not pay were subjected to death, enslavement, imprisonment, or exile. She said the report further discusses the history of debtors' prison in English law and early American practice, as well as the adoption of federal bankruptcy law that alleviated many of the problems surrounding how to address personal debt.

Ms. O'Neill said the report outlines the 1802 Ohio Constitution's prohibition of debtors' prisons, indicating that the prohibition was slightly revised and moved to its current location by the 1851 Constitutional Convention, which included a prohibition on the "mesne process," whereby a debtor could be imprisoned solely on the basis of a creditor's sworn statement that the debt was unpaid, the debtor had engaged in fraudulent concealment of property, or that the debtor was about to abscond.

She continued that the report describes the review of the Constitutional Revision Commission in the 1970s, which recommended no change to the section but noted case law that distinguished between imprisonment for debt and imprisonment for failure to pay alimony or child support, or for the willful failure to pay a tax obligation. She said the report indicates the 1970s Commission acknowledged that Ohio has outlawed imprisonment for failure to pay a fine where the failure was based on indigency.

Describing related litigation, Ms. O'Neill said the report notes that, although multiple Ohio appellate courts have had occasion to interpret Article I, Section 15 since the 1970s, the Supreme Court of Ohio rarely has addressed the section. The report describes several cases in which a child support arrearage was found not to constitute "debt" as that term is used in Section 15, and mentions cases indicating that alimony obligations and property division orders also do not qualify as "debts" within the purview of Section 15. She said the report would be completed once the committee concludes its review.

Vice-chair Fischer thanked Ms. O'Neill for her presentation, and indicated that the committee would continue its work on these sections at future meetings.

*Article I, Section 10  
Grand Jury Process*

Turning to the committee's review of the grand jury process, Vice-chair Fischer asked for the committee's views on the current status of that review and whether any changes would be recommended.

Committee member Jeff Jacobson said it would be important for the chair of the committee to be present for a vote. He said while the chair's views may not represent those of a majority of the committee, something like the Hawaii system of providing a grand jury legal advisor, in his view, has great merit and would not do violence to the ability of the prosecutor to prosecute the case to have a grand jury legal advisor.

Committee member Charles Kurfess commented that, based on his experience as a judge, he feels strongly that the grand jury needs something it currently lacks, and that the Hawaii system comes the closest to what he would like to do. He said, while he is not sure that a constitutional change is necessary, the legislature may not feel as strongly that Ohio needs a grand jury legal advisor and so may not wish to enact legislation providing it. Mr. Kurfess continued that his experience in working with grand juries is that they need something beyond the assistance provided by the prosecutor in terms of good solid legal advice. He noted a problem he had as a judge trying to get the grand jury the appropriate statutes. When he asked the prosecutor to provide what was needed, he was told the prosecutor could not provide the statutes, although the prosecutor told the press a week beforehand what he was planning to show the grand jury. Mr. Kurfess said nothing the committee has heard from the prosecutors has changed his view on this. He observed that the grand jury is a new experience for jurors, who have not been exposed to the process through media or television shows. He said jurors are going into a process that is totally new to them, they probably did not know it existed, and it takes them several sessions to get acclimated to what they can and cannot do. As a result, he said, they need good legal advice, and it is not enough to say the prosecutor is there to fill that role. He said he is not sure the issue requires a constitutional amendment, but it needs attention.

Mr. Mulvihill said he shares the concerns expressed by Mr. Kurfess, and would add that someone who is indicted is not provided with the transcripts that led to the indictment. He said he understands the rationale given by the prosecutors who testified to the committee, but he understood the prosecutors to be expressing they would be agreeable to allowing a defendant access to the grand jury transcript of witness testimony under some circumstances. Mr. Mulvihill said he has no sense that there is fairness in the system, and that it is fundamentally unfair and maybe even violates due process and the confrontation clause to deny the defendant the transcript. Mr. Mulvihill said he is not sure this concern rises to the level of requiring a constitutional amendment.

Rep. McColley said he does not see anything that would rise to the level of amending the constitution. He said prior inconsistent statements should be available to defense counsel, to use in defense of the client, and that is just fundamental fairness. He said that requirement could be something that is pursued legislatively.

Mr. Jacobson said the committee has two choices. If it wants to amend the constitution, it could recommend language that would require a system like Hawaii's. He said, alternately, the committee could explicitly authorize the General Assembly to enact such legislation. Whether necessary or not, that recommendation would send a strong signal. He said the committee could also recommend providing right of the defendant to have access to transcripts as part of the due process rights of a criminally-charged individual. He said there have been court decisions regarding the right to a transcript. He said all three of these possibilities would be worth acting on. He said a big concern about not allowing access to a transcript is that no one outside the grand jury room knows what instructions the prosecutor gave to the grand jury about what the law means. He said there are examples, not necessarily in Ohio, of miscarriage of the indictment power. He said either there should be access to a transcript afterward, or there should be a grand jury legal advisor who can tell the grand jury what the law is.

The committee having concluded its discussion, Vice-chair Fischer asked Steven C. Hollon, executive director, about the committee's next course of action. Mr. Hollon said the committee should determine what it would like to do with Article I, Sections 8, 12, and 15, giving a sense of how the reports and recommendations should be completed.

Rep. McColley said that, rather than simply approving the report and recommendation for Section 12 as being for "no change," he would like to see the committee review the civil forfeiture law in more detail, possibly considering whether to recommend a change to the section.

Mr. Jacobson moved that the committee recommend no change to Article I, Sections 8 and 15, and that the committee hear additional testimony and discuss civil forfeiture before voting on Article I, Section 12. Mr. Mulvihill seconded this motion.

Rep. McColley elaborated that the changes to civil forfeiture law are part of a movement across the country that is responsive to the rise of the use of civil forfeiture since the 1980s. He said the consensus is that if criminal wrongdoing is alleged, the person should be subject to criminal due process, yet the civil forfeiture context does not entitle someone to those protections.

Mr. Mulvihill asked whether the idea is that the constitutional provision as it reads now is not being applied by the courts, or whether the issue is that the provision needs to be stronger. Rep. McColley said he is not sure courts are misapplying the section, but rather just thinks it is a bad law, and that it has been extended beyond what the scope of the principles of justice would permit. He says the topic is ripe for discussion on the constitutionality of taking property civilly.

Senator Mike Skindell said he appreciates the work of Rep. McColley on this issue. He said a major flaw in civil forfeiture laws has been the ability of law enforcement agencies to use those seized assets to fund equipment for the agency, so the national reports on state civil forfeiture laws has strongly recommended that law enforcement not be allowed to use those funds in that way, and to have the assets go to another entity. Rep. Skindell said that is something that the General Assembly legislation addressed. Rep. Skindell noted, overall, that the committee should consider anything that can be done in the constitution to increase fairness. He said he would also emphasize there is no allegation in Ohio that any prosecutors or law enforcement agency has abused the grand jury process, but there is concern.

There being no further discussion regarding the motion to recommend no change to Article I, Sections 8 and 15, the unanimous sense of the committee was that no change is necessary to those sections. Thus, the committee generally consented to the motion.

With regard to recommending changes to the grand jury process, Vice-chair Fischer said there are three possible options that have been suggested. He said the first would be to recommend abolishing the grand jury altogether, which he does not think has support. The committee generally agreed that there is consensus that abolishment is not a possibility.

He said a second question is whether the committee wishes to recommend a section requiring the creation of a grand jury legal advisor, which some members support but he is not sure there is consensus on that question. He said a third question is whether the committee wishes to recommend that the accused be given the right to a copy of the transcript of grand jury witness testimony. Vice-chair Fischer asked for additional input from the committee, so as to give staff further guidance on completing the report and recommendation.

Mr. Jacobson agreed that Vice-chair Fischer properly summarized the status of the committee's work. He added that the issue of an independent counsel for the grand jury has gradations. He said the independent counsel idea could face opposition from people who do not like it. He said he is not necessarily comfortable with the idea of saying the power to appoint a grand jury legal counsel is already there, but is more comfortable in making it clear the power is there even if we do not demand that it happen.

Sen. Skindell said the committee should look at whether having a grand jury legal advisor instills a level of fundamental fairness that rises to the level of putting it into the constitution. He said the issue of access to the transcript is an issue of fundamental fairness, and it can be argued the issue of having independent counsel also goes to that level. He said the topic deserves greater conversation.

Mr. Jacobson said he does not believe the committee requires further testimony on the grand jury question, and thinks it would be better to be presented with draft language, both on the grand jury legal advisor and on the issue of requiring transcripts. He said the language could require that a grand jury transcript be prepared and available.

Vice-chair Fischer suggested that the committee and staff consult a task force report recently prepared by the Supreme Court of Ohio.

Mr. Mulvihill asked about the view of the Ohio Prosecuting Attorneys Association (OPAA) on the transcript question. John Murphy, executive director of the OPAA, who was in the audience, commented that his organization has not taken a position on that particular issue. He said the state has adopted "open file discovery," in which prosecutors have to turn over everything they have, including statements outside the grand jury. He said the OPAA might be amenable to providing transcripts so long as the provision is drafted so as to protect witnesses who need protection.

Rep. McColley said there could be an in camera disclosure of witnesses by the prosecution after the grand jury has concluded. He said, in the event any of the grand jury witnesses are called, the judge at least would know who is on the list and who is not. He said this would allow there to be an independent party to say who was in the grand jury and who was not.

Mr. Murphy said prosecutors do provide a witness list to the defendant.

Rep. McColley said the witness list is not provided as a cross reference. He said his point is there needs to be a system where someone other than the prosecutor knows who the witnesses were, so that if the defense has an objection the judge would know how to rule.

Mr. Jacobson said he concurs with that concern, but that he is personally concerned about what the prosecutor says to the grand jury. He said the committee has discussed whether there should be a judge there. He said requiring a transcript could allow the defense the opportunity to see the prosecutor's instructions to the grand jury, providing protection.

Vice-chair Fischer said he considers this to be a procedural matter and should be the subject of a rule change because it is very specific.

Mr. Jacobson disagreed, saying it is not procedural if one is providing the right to a transcript instead of the right to the testimony.

Sen. Skindell said the provision could read that either the legislature or the court would enact a law or rule requiring that a transcript be provided under certain circumstances.

Vice-chair Fischer called on Mr. Murphy to provide additional comments. Mr. Murphy said the OPAA is opposed to having a grand jury legal advisor in the grand jury room. He said it is not to any prosecutor's advantage to misrepresent what the law is, and there is no point in getting an indictment that is unprosecutable based on a faulty statement of the law.

Mr. Kurfess mentioned that the committee has not yet addressed a suggestion that judicial elections occur in odd-numbered years. He said, to consider that issue, the committee should hear from the secretary of state and the Ohio Judicial Conference. Vice-chair Fischer said the committee could put that topic on the agenda for a future meeting.

**Adjournment:**

With no further business to come before the committee, the meeting adjourned at 1:30 p.m.

**Approval:**

The minutes of the January 12, 2017 meeting of the Judicial Branch and Administration of Justice Committee were approved at the March 9, 2017 meeting of the committee.

---

Janet Gilligan Abaray, Chair

---

Judge Patrick F. Fischer, Vice-chair

This page intentionally left blank.



**Robert Alt**

President and Chief Executive Officer – Buckeye Institute

Robert Alt is the President and Chief Executive Officer of The Buckeye Institute, where he also serves on the Board of Trustees.

Alt is a nationally recognized scholar with expertise in legal policy including criminal justice, national security, and constitutional law. Prior to heading The Buckeye Institute, Alt was a Director in the Center for Legal and Judicial Studies serving under former U.S. Attorney General Edwin Meese III at The Heritage Foundation, where he regularly advised Members of Congress and Supreme Court litigants on complex legal arguments and strategy.

Alt has testified before Congress multiple times—including at the confirmation hearings for Supreme Court Justice Elena Kagan—before the Federal Election Commission regarding matters of constitutional and administrative law, and before numerous state legislatures and committees.

Alt graduated with his B.A. in political science and philosophy *magna cum laude* from Azusa Pacific University. He earned his J.D. from The University of Chicago Law School.

This page intentionally left blank.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

---

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

#### OHIO CONSTITUTION ARTICLE I, SECTION 12

#### TRANSPORTATION FOR CRIME, CORRUPTION OF BLOOD, FORFEITURE OF ESTATE

---

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 12 of the Ohio Constitution concerning transportation for crime, and corruption of blood or forfeiture of estate for criminal conviction. 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 recommends that Article I, Section 12 be retained in its present form.*

#### **Background**

Article I, Section 12 reads as follows:

No person shall be transported out of the state, for any offense committed within the same; and no conviction shall work corruption of blood, or forfeiture of estate.

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.

Article I, Section 12, unchanged since its adoption in 1851, derives from two separate sections of the 1802 constitution, which provided, at Article VIII, Section 16 that "No ex post facto law, nor any law impairing the validity of contracts, shall ever be made; and no conviction shall work corruption of blood nor forfeiture of estate," and, at Section 17, "That no person shall be liable to be transported out of this State for any offense committed within the State."<sup>1</sup>

Article I, Section 12 embodies three separate concepts: that criminal suspects not be transferred outside the state for crimes committed in Ohio, that criminal convictions not result in "corruption

of blood,” and that criminal convictions not cause a forfeiture of estate. Each of these concepts arises from different historical underpinnings.

### *Transportation for Crime*

Transportation for crime, also known as “banishment,” was an extreme form of punishment that, historically, could mean death because it separated the individual from the community that provided resources for survival.<sup>2</sup> The use of transportation as punishment rose dramatically in England in the 1700s, when it became preferable to transport unwanted citizens to British colonies rather than to bear the trouble and expense of housing them in prisons.<sup>3</sup> For some convicts, being transported to America provided a better life than prison would have afforded, but some commentators and courts have asserted the practice was a cruel and unusual form of punishment.<sup>4</sup>

Regardless, most courts have held transportation for crime to be illegal, and at least 15 state constitutions forbid banishing residents as punishment for crime.<sup>5</sup> As recognized by the Ohio Constitutional Revision Commission in the 1970s (1970s Commission), there is no federal counterpart to the prohibition against transportation as punishment for crime.<sup>6</sup>

### *Corruption of Blood*

In English law, the idea arose that a criminal act brought about a metaphorical stain or “taint” on the blood of the offender, and justified stripping him of his life, property, or title. The practice known as “parliamentary attainder” worked a “corruption of blood” that prevented the “attainted” person both from inheriting property or title and from leaving an inheritance to his heirs.<sup>7</sup> The British monarchy frequently used acts of attainder to punish political foes, with Henry VIII famously using it to exact revenge on wives and noblemen alike.<sup>8</sup>

The practice was extremely popular in the American colonies, when revolutionaries used bills of attainder to target British loyalists.<sup>9</sup> In one example, Thomas Jefferson issued a bill of attainder against a Tory loyalist who allegedly was wreaking havoc across the Virginia countryside, declaring it to be “lawful for any person with or without orders, to pursue and slay” Josiah Philips and any “associates or confederates,” on sight.<sup>10</sup> Despite the widespread use and acceptance of attainder as a way to prosecute and fund the Revolutionary War, some colonial leaders acknowledged concern about its use.<sup>11</sup> As Alexander Hamilton put it, the use of attainder creates an environment in which “no man can be safe, nor know when he may be the innocent victim of a prevailing faction.”<sup>12</sup> Rejecting attainder in favor of procedures promoting judicial process, the founders outlawed attainder in the United States Constitution at Article I, Section 9, Clause 3, and outlawed corruption of blood as punishment for treason at Article III, Section 3, Clause 2.<sup>13</sup> In outlawing “corruption of blood” for criminal convicts, the Ohio Constitution forbids the enactment of laws that serve to extend the punishment of the offender to the beneficiaries of his or her estate.<sup>14</sup>

### *Forfeiture of Estate*

Like corruption of blood, forfeiture of estate deprives the criminal actor of his property interest, specifically his present ownership rather than his expected inheritance or his anticipated ability to transfer ownership to his heirs. The constitutional provision's express purpose prevents convicts from having to forfeit their estate, and would seem to prohibit laws that permit government to seize property of offenders. Addressing the argument that Article I, Section 12 prohibits forfeiture of property on conviction for engaging in a pattern of corrupt activity as prohibited by state law pursuant to Ohio R.C. 2923.32, however, at least two state appellate courts have held a forfeiture under that law is of a limited nature, and does not constitute a forfeiture of an entire estate, but rather only of the property connected to the criminal enterprise. *See, e.g., State v. Thrower*, 62 Ohio App.3d 359, 575 N.E.2d 863 (1989); *State v. Lang*, Miami App. No. 92-CA-3, 1993 Ohio App. LEXIS 605.

### **Amendments, Proposed Amendments, and Other Review**

The 1970s Commission, in reviewing Section 12, commented there is no Ohio case law on the transportation for crime portion of the provision because the General Assembly has never authorized imposition of banishment.<sup>15</sup> Discussing corruption of blood and forfeiture of estate, the 1970s Commission noted a Franklin County Probate Court decision holding that a statute prohibiting convicted murderers from inheriting from their victims does not violate Article I, Section 12 because the applicable statute does not divest an heir of property but rather merely prevents him inheriting it.<sup>16</sup> The 1970s Commission recommended no change to Article I, Section 12.

### **Litigation Involving the Provision**

The Supreme Court of Ohio has interpreted Article I, Section 12 on only one occasion since the 1970s. In *State ex rel. Miller v. Anthony*, 72 Ohio St.3d 132, 1995-Ohio-39, 647 N.E.2d 1368, a nuisance abatement action involving a drug dealer, the trial court ordered the dealer's premises padlocked for one year. On appeal, the dealer argued, among other things, that Article I, Section 12 prevented the injunction, but the Supreme Court disagreed, stating "we decline to label the confiscation and sale of personal property under this statute a 'forfeiture.' It is instead a remedy designed to prevent the continuation of unlawful acts rather than a punishment for unlawful activity." *Id.*, 72 Ohio St.3d at 138, 647 N.E.2d 1372.

### **Presentations and Resources Considered**

### **Discussion and Consideration**

**Conclusion**

The Judicial Branch and Administration of Justice Committee finds that Article I, Section 12 \_\_\_\_\_ . Therefore, the committee concludes that the provision should be retained in its present form.

**Date Issued**

After formal consideration by the Judicial Branch and Administration of Justice Committee on \_\_\_\_\_, the committee voted to issue this report and recommendation on \_\_\_\_\_.

---

## Endnotes

<sup>1</sup> Isaac F. Patterson, *The Constitutions of Ohio: Amendments and Proposed Amendments*. (Cleveland: Arthur H. Clark Co., 1912), 93.

<sup>2</sup> William Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 New. Eng. J. on Crim. & Civ. Confinement 455, 460 (1998).

<sup>3</sup> *Id.* at 461.

<sup>4</sup> *Id.* at 462, citing A. Roger Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies 1718-1775*, 2-3 (1987). For a discussion of banishment as potentially violating the Eighth Amendment to the U.S. Constitution, see Snider, *supra*, n. 82 at 467; Andrew D. Leipold, *Targeted Loitering Laws*, 3 U. Pa. J. Const. L. 474, 492 (2001).

<sup>5</sup> Snider, *supra*, at 465-66.

<sup>6</sup> Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, 35 (Apr. 15, 1976), available at: <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf>, (last visited Dec. 28, 2016).

<sup>7</sup> Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 Cornell L.Rev. 355, 356-57 (1978).

<sup>8</sup> Matthew Steilen, *Bills of Attainder*, 53 Hous. L.Rev. 767, 775, 796-804 (2016); see also Berger, *supra*.

<sup>9</sup> *Id.* at 826-831.

<sup>10</sup> Matthew Steilen, *The Josiah Philips Attainder and the Institutional Structure of the American Revolution*, 3 Critical Studies of Law (2015). Available at: SUNY Buffalo Legal Studies Research Paper No. 2016-017. Available at SSRN:<https://ssrn.com/abstract=2730084>; [http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/Law-humanities-jr/steilen\\_matthew.pdf](http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/Law-humanities-jr/steilen_matthew.pdf) (last visited Dec. 28, 2016).

Ultimately, Philips was arrested, tried, and executed for robbery without resorting to use of the bill, but the issuance of the bill was viewed unfavorably by many, including the prosecutor of Philips' robbery case, Edmund Randolph, who, while a delegate to the Virginia ratifying convention for the U.S. Constitution, commented "if I conceived my country would passively permit a repetition of [the Philips attainder], dear as it is to me, I would seek means of expatriating myself from it." *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, (Jonathan Elliot, ed. 1888), as provided in *The Founders' Constitution*, vol. 3, 396 (Philip B. Kurland & Ralph Lerner, eds. 1987). Available at: [http://press-pubs.uchicago.edu/founders/print\\_documents/a1\\_10\\_1s7.html](http://press-pubs.uchicago.edu/founders/print_documents/a1_10_1s7.html) (last visited Dec. 28, 2016).

<sup>11</sup> Duane L. Ostler, *The Forgotten Constitutional Spotlight: How Viewing the Ban on Bills of Attainder as a Takings Protection Clarifies Constitutional Principles*, 42 U. Tol. L.Rev. 395, 396-97 (2011).

<sup>12</sup> Alexander Hamilton, *Letter from Phocion*, as reprinted in *The Papers of Alexander Hamilton*, Vol. 3, 485-86 (Harold C. Syrett et al., 3ds. 1961-79), also available at: [http://press-pubs.uchicago.edu/founders/print\\_documents/a1\\_9\\_3s5.html](http://press-pubs.uchicago.edu/founders/print_documents/a1_9_3s5.html) (last visited Dec. 28, 2016).

<sup>13</sup> Article I, Section 9, Clause 3 reads: "No Bill of Attainder or ex post facto Law shall be passed. Article III, Section 3, Clause 2 reads: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

---

<sup>14</sup> Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution*, 111-12 (2nd prtg. 2011), citing *Lessee of McMillan v. Robbins*, 5 Ohio 28, 34 (1831).

<sup>15</sup> Ohio Constitutional Revision Commission (1970-77), *Recommendations for Amendments to the Ohio Constitution*, *supra*, at 36.

<sup>16</sup> *Id.*, citing *Egelhoff v. Presler*, 1945 Ohio Misc. LEXIS 194, 32 Ohio Op. 252, 44 Ohio L. Abs. 376 (1945).



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

---

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

#### OHIO CONSTITUTION ARTICLE I, SECTION 8

#### WRIT OF HABEAS CORPUS

---

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 8 of the Ohio Constitution concerning the writ of habeas corpus. 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 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."<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> As currently understood in American criminal law, the writ commands a person detaining someone to produce the prisoner or detainee.<sup>4</sup>

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.<sup>5</sup>

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 beailable, 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.<sup>6</sup>

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.<sup>7</sup> 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 beailable 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.<sup>8</sup>

Like the U.S. Constitution, the 1802 Ohio Constitution used the phrase “may require,” a construction that initially survived the 1851 revision process.<sup>9</sup> 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.”<sup>10</sup> 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.”<sup>11</sup> This is the wording that now appears in the Ohio Constitution as published by the secretary of state and the General Assembly.<sup>12</sup>



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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

### **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 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.

### **Conclusion**

The Judicial Branch and Administration of Justice Committee concludes that Article I, Section 8 should be retained in its current form.

### **Date Issued**

After formal consideration by the Judicial Branch and Administration of Justice Committee on March 9, 2017, the committee voted to issue this report and recommendation on \_\_\_\_\_.

---

## Endnotes

<sup>1</sup> Bryan A. Garner, *A Dictionary of Modern Legal Usage*, (2d ed. 1995) 395.

<sup>2</sup> 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).

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

<sup>4</sup> *Habeas Corpus*, Black's Law Dictionary (10<sup>th</sup> ed. 2014).

<sup>5</sup> 31 Car. 2, c.2, 27 May 1679, available at: [http://press-pubs.uchicago.edu/founders/documents/a1\\_9\\_2s2.html](http://press-pubs.uchicago.edu/founders/documents/a1_9_2s2.html) (last visited Dec. 21, 2016).

<sup>6</sup> 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](http://avalon.law.yale.edu/18th_century/nworder.asp) (last visited Dec. 21, 2016).

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

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

<sup>9</sup> *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.

<sup>10</sup> *Id.* at 806, 826.

<sup>11</sup> 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).

<sup>12</sup> 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).

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

<sup>14</sup> 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).

<sup>15</sup> *Id.*

This page intentionally left blank.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

---

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

#### OHIO CONSTITUTION ARTICLE I, SECTION 15

#### NO IMPRISONMENT FOR DEBT

---

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 15 of the Ohio Constitution prohibiting imprisonment for debt. 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 recommends that Article I, Section 15 be retained in its present form.*

#### **Background**

Article I, Section 15 reads as follows:

No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

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.

The institution known as "debtors' prison" can be traced to early Roman Law, when debtors who could not pay were subjected to death, enslavement, imprisonment, or exile.<sup>1</sup> Although imprisonment sometimes resulted in repayment by the debtor or his relatives, more often it left the creditor without recourse, since an imprisoned debtor is separated from the source of income that could satisfy the debt. While more harsh punishments, such as death by dissection, or holding the corpse of the debtor for ransom, were practiced on the continent, they were not permitted by English law.<sup>2</sup> Nevertheless, debtors' prisons were a well-established British institution by the 17<sup>th</sup> century, and, like other British traditions, became a common American

practice.<sup>3</sup> Debtors in the New World could also be subject to “debt slavery,” a practice in which immigrants were subjected to indentured servitude for a term of years in exchange for debt forgiveness.<sup>4</sup>

By the time of the U.S. Constitution, a need was recognized for some form of bankruptcy law, and the framers drafted a provision to enable Congress to address the problem of debtors who could not meet their obligations.<sup>5</sup> Thus, Congress was given the power to “establish \* \* \* uniform Laws on the subject of Bankruptcies throughout the United States.”<sup>6</sup> Subsequent Bankruptcy Acts focused more on merchant debtors than individual debtors, and did nothing to eliminate the practice of imprisoning debtors, which persisted until states began to prohibit debtors’ prisons in their constitutions in the 1820s, and federal law addressed the problem in the 1830s.<sup>7</sup> By the 1870s, all states had abolished the practice, both in their constitutions and in enabling law.<sup>8</sup>

The 1802 Ohio Constitution prohibited debtors’ prisons, indicating at Article VIII, Section 15 that “The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditor or creditors, in such manner as shall be prescribed by law.”<sup>9</sup> The 1851 Constitutional Convention resulted in the section being moved to Article I, and revised to prohibit the “mesne process,” whereby the debtor could be imprisoned solely on the basis of a creditor’s sworn statement that the debt was unpaid, the debtor had engaged in fraudulent concealment of property, or that the debtor was about to abscond.<sup>10</sup>

### **Amendments, Proposed Amendments, and Other Review**

The Constitutional Revision Commission in the 1970s (1970s Commission) recommended no change to the section. In reviewing Section 15, the 1970s Commission noted case law that distinguished between imprisonment for debt and imprisonment for failure to pay alimony or child support, or for the willful failure to pay a tax obligation. Noting *Williams v. Illinois*, 399 U.S. 235 (1970), United States Supreme Court precedent holding that imprisonment for failure to pay a criminal fine and court costs violates the Fourteenth Amendment to the U.S. Constitution, the 1970s Commission acknowledged that Ohio has outlawed imprisonment for failure to pay a fine where the failure was based on indigency. *See In re Jackson*, 26 Ohio St.2d 51, 268 N.E.2d 812 (1971) (so long as a criminal defendant had the means to pay a fine but refused, imprisonment was justified).

### **Litigation Involving the Provision**

Although multiple Ohio appellate courts have had occasion to interpret Article I, Section 15 since the 1970s, the Supreme Court of Ohio rarely has addressed the section. In *Cramer v. Petrie*, 70 Ohio St.3d 131, 1994-Ohio-404, 637 N.E.2d 882, a defendant/father failed to pay court-ordered child support and was found in contempt. The trial court sentenced him to 60 days imprisonment, with 50 days suspended. On appeal, defendant argued his prison sentence violated Section 15’s prohibition against imprisonment for debt. Concluding the child support arrearage did not constitute “debt” as that term was used in Section 15, and that its decision conflicted with those of other appellate districts, the Hancock County Court of Appeals certified

the case to the Supreme Court of Ohio, which, on review, agreed the sentence was not “imprisonment for debt.” As the Court explained, child support orders compared to alimony obligations and property division orders, which prior cases had firmly established were not “debts” within the purview of Section 15. *Id.*, citing *State ex rel. Cook v. Cook*, 66 Ohio St. 566, 572, 64 N.E. 567, 568 (1902) (alimony); *Belding v. State ex rel. Heifner*, 121 Ohio St. 393, 169 N.E. 301 (1929) (expenses related to pregnancy and childbirth); and *Harris v. Harris*, 58 Ohio St.2d 303, 390 N.E.2d 789 (1979) (provisions in a separation agreement relating to the division of property).

### **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 committee discussed whether any changes were needed to Article I, Section 15. The committee determined that the section’s historic significance, as well as the important public policy it expresses, suggests that the provision does not require revision.

### **Conclusion**

The Judicial Branch and Administration of Justice Committee finds that Article I, Section 15 should be retained in its present form.

### **Date Issued**

After formal consideration by the Judicial Branch and Administration of Justice Committee on March 9, 2017, the committee voted to issue this report and recommendation on \_\_\_\_\_.

---

**Endnotes**

<sup>1</sup> Vern Countryman, *Bankruptcy and the Individual Debtor – And a Modest Proposal to Return to the Seventeenth Century*, 32 Cath. U. L.Rev. 809, 809-810 (1983).

<sup>2</sup> *Id.* at 810-11.

<sup>3</sup> Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 Md. L.Rev. 486, 495-96 (2016). *See also*, Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 Ohio St. L.J. 855, 872 (2003), citing J. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900*, at 249 (1974).

<sup>4</sup> V. Countryman, *supra*, note 1 at 812-13.

<sup>5</sup> *Id.* at 813.

<sup>6</sup> U.S. Const., art. I, §8, cl. 4 (1787).

<sup>7</sup> Tamar R. Birckhead, *The New Peonage*, 72 Wash. & Lee L.Rev. 1595, 1628-29 (2015).

<sup>8</sup> N. Sobol, *supra*, note 3 at 498; J. Kilborn, *supra*, note 3 at 875.

<sup>9</sup> Isaac F. Patterson, *The Constitutions of Ohio: Amendments and Proposed Amendments*. (Cleveland: Arthur H. Clark Co., 1912), 93.

<sup>10</sup> Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution*, 115 (2nd prtg. 2011), citing Andrew J. Duncan, *From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law*, Commercial L.J. 191 (Summer, 1995): 212-13.













## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

---

### **2017 Meeting Dates**

April 13

May 11

June 8

July 13

August 10

September 14

October 12

November 9

December 14