OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Legislative Branch and Executive Branch Committee

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Part II

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE
LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE

OHIO CONSTITUTION
ARTICLE II
SECTIONS 10 AND 12

RIGHTS AND PRIVILEGES OF MEMBERS OF THE GENERAL ASSEMBLY

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

Recommendation

The committee recommends that 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 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 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.

Conclusion

The Legislative Branch and Executive Branch Committee concludes that Article II, Sections 10 and 12 continue to serve the General Assembly by facilitating the need for members to register their dissent or protest in the journal, by allowing them privately to consult and obtain the advice of staff as they consider policy and prepare legislation, and by preventing legislators from having to answer in court for speech undertaken in their legislative capacity.

Therefore, the committee concludes that Article II, Sections 10 and 12 should be maintained in their present form.

Date Issued

After formal consideration by the Legislative Branch and Executive Branch Committee on March 9, 2017, the committee voted to issue this report and recommendation on _____.

Endnotes

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

[2] *Id.* at 144.

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

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

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

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

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

[6] In fact, Tennessee's constitution is recognized as providing, or at least influencing, most of the text of Ohio's first constitution. Steven H. Steinglass & 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).

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE
LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE

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

ENACTING LAWS

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

Recommendation

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

Background

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

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

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

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

> house. Bills may originate in either house, but may be altered, amended, or rejected in the other.
>
> (B) The style of the laws of this state shall be, "be it enacted by the general assembly of the state of Ohio."
>
> (C) Every bill shall be considered by each house on three different days, unless two-thirds of the members elected to the house in which it is pending suspend this requirement, and every individual consideration of a bill or action suspending the requirement shall be recorded in the journal of the respective house. No bill may be passed until the bill has been reproduced and distributed to members of the house in which it is pending and every amendment been made available upon a member's request.
>
> (D) No bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.
>
> (E) Every bill which has passed both houses of the general assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for passage have been met and shall be presented forthwith to the governor for his approval.
>
> (F) Every joint resolution which has been adopted in both houses of the general assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for adoption have been met and shall forthwith be filed with the secretary of state.

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

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

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

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

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

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

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

Amendments, Proposed Amendments, and Other Review

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

Section 15 (How Bills Shall be Passed)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 26 (Laws to Have a Uniform Operation)

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

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

Section 28 (Retroactive Laws)

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

Litigation Involving the Provisions

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

Section 15(C) (Three Readings Rule)

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

Section 15(D) (One-Subject Rule)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 26 (Laws to Have a Uniform Operation)

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

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

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

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

Section 28 (Retroactive Laws)

In *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 103, 522 N.E.2d 489, 493 (1988)[31] the Supreme Court of Ohio held that to determine whether a statute violates Section 28, a court must first discover if the statute affects a substantive right, in other words, a statute that "impairs or takes away vested rights." *Id.* at 107. In *Van Fossen*, the question was whether a new provision, which placed conditions on employer-employee intentional tort actions, could be applied retroactively. *Id.* at 103. The Court held that the new conditions imposed by the provision constituted a limitation or denial of a substantive right, causing the provision to be unconstitutional. *Id.* at 109. In *Toledo City Bd. of Edn. v. State Bd. of Edn.*, 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, the Court held that Section 28 does not apply to political subdivisions, such as school districts.

Presentations and Resources Considered

O'Neill Presentation

In September 2015, Shari L. O'Neill, Counsel to the Commission, presented to the committee on Ohio Supreme Court case precedent interpreting the one-subject rule found in Article II, Section 15(D). Ms. O'Neill described that, over the years, the Court has moved from interpreting the one-subject rule as being merely directory to now being mandatory, saying that where there is a "manifestly gross and fraudulent violation of the rule," an enactment can be stricken as unconstitutional. She said a one-subject rule violation is frequently argued in the context of general appropriations bills, in which thousands of pages of text can include provisions that create substantive changes in the law. Summarizing the Court's jurisprudence in this area, she said that the earmarks of an unconstitutional enactment are that it lacks a common purpose or relationship between specific topics, has no discernible practical, rational, or legitimate basis for the combination, and is a manifestly gross and fraudulent violation. She added that a substantive program created in an appropriations bill is not immune from a one-subject-rule challenge just because funds are also appropriated for that program; and that where there is no rational connection between the specific provision and the broader enactment, with no commonality of subject matter, an enactment would be unconstitutional.

Kulewicz Presentation

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

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

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

Identifying national trends regarding one-subject rules, Mr. Kulewicz said Ohio is one of 43 states that have such a rule, but that there are categorical differences. He said Ohio is one of a few states that regarded the rule as directory. He said 14 states, excluding Ohio, exempt appropriations bills from application of the one-subject rule, while six states confine appropriations bills to appropriations. He said in two states the rule is limited only to the appropriations bill, while 13 states exempt codification and revision bills from application of the rule.

Discussion and Consideration

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

Conclusion

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

Date Issued

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

Endnotes

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

[2] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, (June 30, 1977). Available at: http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf (last visited Dec. 6, 2016).

[3] *Id.* at 120.

[4] *Id.* at 121.

[5] *Id.*

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

[7] *Id.* at 125.

[8] *Id.*

[9] *Id.* at 122.

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

[11] *Id.* at 126.

[12] *Id.*

[13] *Id.* at 127.

[14] *Id.* at 127.

[15] *Id.* at 128.

[16] *Id.*

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

[18] *Id.* at 19.

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

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

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

[22] *Id.* at 132.

[23] *Id.*

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

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

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

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

[28] *Id.*

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

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

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

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

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

FROM: **Shari L. O'Neill, Interim Executive Director and Counsel to the Commission**

DATE: **February 24, 2017**

RE: **Summary of Sections of Article III (Executive Branch)**

To aid the Legislative Branch and Executive Branch Committee in its consideration of Article III (Executive Branch), below are three suggested groupings of the sections, along with the text of those sections.

The first grouping is of sections that create and describe the office of the governor and the officers of the executive branch. The second grouping relates to sections that describe the privileges and duties of the office of the governor. The third grouping describes the eligibility to office of the governor, the method for filling a vacancy in the office of the governor and lieutenant governor, and the Ohio Supreme Court's jurisdiction over questions involving the disability of the governor.

GROUP I
The Office of the Governor and Officers of the Executive Branch
Sections 1, 1a, 1b, 2, 3, 18, 19, 20, and 21

Section 1 – (Executive department)

The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general, who shall be elected on the first Tuesday after the first Monday in November, by the electors of the state, and at the places of voting for members of the General Assembly.
(As amended October 13, 1885; 82 v 446.)

Section 1a – (Joint vote cast for governor and lieutenant)

In the general election for governor and lieutenant governor, one vote shall be cast jointly for the candidates nominated by the same political party or petition. The General Assembly shall provide by law for the nomination of candidates for governor and lieutenant governor.
(Enacted June 8, 1976; SJR No.4.)

Section 1b – (Lieutenant governor duties assigned by governor)

The lieutenant governor shall perform such duties in the executive department as are assigned to him by the governor and as are prescribed by law.
(Enacted effective Jan. 8, 1979; SJR No.4.)

Section 2 – (Term of office)

The governor, lieutenant governor, secretary of state, treasurer of state, and attorney general shall hold their offices for four years commencing on the second Monday of January, 1959. Their terms of office shall continue until their successors are elected and qualified. The auditor of state shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963 and thereafter shall hold his office for a four year term. No person shall hold the office of governor for a period longer than two successive terms of four years.
No person shall hold any one of the offices of lieutenant governor, secretary of state, treasurer of state, attorney general, or auditor of state for a period longer than two successive terms of four years. Terms shall be considered successive unless separated by a period of four or more years. Only terms beginning on or after January 1, 1995 shall be considered in determining an individual's eligibility to hold the office of lieutenant governor, secretary of state, treasurer of state, attorney general, or auditor of state.
In determining the eligibility of an individual to hold an office in accordance with this article, (A) time spent in an office in fulfillment of a term to which another person was first elected shall not be considered provided that a period of at least four years passed between the time, if any, in which the individual previously held that office, and the time the individual is elected or appointed to fulfill the unexpired term; and (B) a person who is elected to an office in a regularly scheduled general election and resigns prior to the completion of the term for which he or she was elected, shall be considered to have served the full term in that office.
(Adopted November 3, 1992.)
(Amended November 2, 1954.)

Section 3 – (Election returns)

The returns of every election for the officers, named in the foregoing section, shall be sealed and transmitted to the seat of government, by the returning officers, directed to the President of the Senate, who, during the first week of the next regular session, shall open and publish them, and declare the result, in the presence of a majority of the members of each House of the General Assembly. The joint candidates having the highest number of votes cast for governor and

lieutenant governor and the person having the highest number of votes for any other office shall be declared duly elected; but if any two or more have an equal and the highest number of votes for the same office or officers, one of them or any two for whom joint votes were cast for governor and lieutenant governor, shall be chosen by joint vote of both houses.
(Amended June 8, 1976, SJR No.4; November 2, 1976, SJR No.17, 111th General Assembly.)

Section 18 – (What vacancies governor to fill)

Should the office of Auditor of State, Treasurer of State, Secretary of State, or Attorney General become vacant, for any of the causes specified in the fifteenth section of this article, the Governor shall fill the vacancy until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.
(Amended, effective Jan. 1, 1970; HJR No.26.)

Section 19 – (Compensation)

The officers mentioned in this article shall, at stated times, receive for their services, a compensation to be established by law, which shall neither be increased nor diminished during the period for which they shall have been elected.

Section 20 – (Officers to report to governor, and when)

The officers of the executive department, and of the public state institutions shall, at least five days preceding each regular session of the general assembly, severally report to the governor, who shall transmit such reports, with his message to the General Assembly.

Section 21 – (Appointment subject to advice and consent of Senate)

When required by law, appointments to state office shall be subject to the advice and consent of the Senate. All statutory provisions requiring advice and consent of the Senate to appointments to state office heretofore enacted by the General Assembly are hereby validated, ratified and confirmed as to all appointments made hereafter, but any such provision may be altered or repealed by law.
No appointment shall be consented to without concurrence of a majority of the total number of Senators provided for by this Constitution, except as hereinafter provided for in the case of failure of the Senate to act. If the Senate has acted upon any appointment to which its consent is required and has refused to consent, an appointment of another person shall be made to fill the vacancy.
If an appointment is submitted during a session of the General Assembly, it shall be acted upon by the Senate during such session of the General Assembly, except that if such session of the

General Assembly adjourns sine die within ten days after such submission without acting upon such appointment, it may be acted upon at the next session of the General Assembly.
If an appointment is made after the Senate has adjourned sine die, it shall be submitted to the Senate during the next session of the General Assembly.
In acting upon an appointment a vote shall be taken by a yea and nay vote of the members of the Senate and shall be entered upon its journal. Failure of the Senate to act by a roll call vote on an appointment by the governor within the time provided for herein shall constitute consent to such appointment.
(As enacted Nov. 7, 1961.)

GROUP II
Privileges and Duties of the Office of the Governor
Sections 5, 6, 7, 8, 9, 10, 11, 12

Section 5 – (Executive power vested in governor)

The supreme executive power of this state shall be vested in the governor.

Section 6 – (He may require written information, etc.)

He may require information, in writing, from the officers in the executive department, upon any subject relating to the duties of their respective offices; and shall see that the laws are faithfully executed.

Section 7 – (He shall recommend measures, etc.)

He shall communicate at every session, by message, to the general assembly, the condition of the state, and recommend such measures as he shall deem expedient.

Section 8 – (Limiting part of General Assembly in extra session)

The governor on extraordinary occasions may convene the general assembly by proclamation and shall state in the proclamation the purpose for which such special session is called, and no other business shall be transacted at such special session except that named in the proclamation, or in a subsequent public proclamation or message to the general assembly issued by the governor during said special session, but the general assembly may provide for the expenses of the session and other matters incidental thereto.
(As amended September 3, 1912.)

Section 9 – (When he may adjourn the General Assembly)

In case of disagreement between the two houses, in respect to the time of adjournment, he shall have power to adjourn the general assembly to such time as he may think proper, but not beyond the regular meetings thereof.

Section 10 – (Commander-in-chief of militia)

He shall be commander-in-chief of the military and naval forces of the state, except when they shall be called into the service of the United States.

Section 11 – (May grant reprieves, commutations and pardons)

The Governor shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the Governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law. Upon conviction for treason, the Governor may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. The Governor shall communicate to the general assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with the Governor's reasons therefor.
(As amended January 1, 1996)

Section 12 – (Seal of the state, and by whom kept)

There shall be a seal of the state, which shall be kept by the governor, and used by him officially; and shall be called "The Great Seal of the State of Ohio."

Section 13 – (How grants and commissions issued)

All grants and commissions shall be issued in the name, and by the authority, of the state of Ohio; sealed with the great seal; signed by the governor, and countersigned by the secretary of state.

GROUP III
Eligibility for Office, Filling Vacancies
Sections 14, 15, 17, 17a, 22

Section 14 – (Who is ineligible for governor)

No member of congress, or other person holding office under the authority of this state, or of the United States, shall execute the office of governor, except as herein provided.

Section 15 – (Who shall fill his place when vacancy occurs)

(A) In the case of the death, conviction on impeachment, resignation, or removal, of the Governor, the Lieutenant Governor shall succeed to the office of Governor.
(B) When the Governor is unable to discharge the duties of office by reason of disability, the Lieutenant Governor shall serve as governor until the Governor's disability terminates.

(C) In the event of a vacancy in the office of governor or when the Governor is unable to discharge the duties of office, the line of succession to the office of governor or to the position of serving as governor for the duration of the Governor's disability shall proceed from the Lieutenant Governor to the President of the senate and then to the Speaker of the House of Representatives.
(D) Any person serving as governor for the duration of the Governor's disability shall have the powers, duties, and compensation of the office of governor. Any person who succeeds to the office of governor shall have the powers, duties, title, and compensation of the office of governor.
(E) No person shall simultaneously serve as Governor and Lieutenant Governor, President of the senate, or Speaker of the House of Representatives, nor shall any person simultaneously receive the compensation of the office of governor and that of lieutenant governor, president of the Senate, or speaker of the House of Representatives.
(Enacted November 2, 1976. Former **§** 15 repealed, see HJR No.37, 111th General Assembly.)

Section 17 – (If a vacancy shall occur while executing the office of governor, who shall act)

When a vacancy occurs in both the office of governor and lieutenant governor because of the death, conviction on impeachment, resignation, or removal of the persons elected to those offices prior to the expiration of the first twenty months of a term, a governor and lieutenant governor shall be elected at the next general election occurring in an even-numbered year after the vacancy occurs, for the unexpired portion of the term. The officer next in line of succession to the office of governor shall serve as governor from the occurrence of the vacancy until the newly elected governor has qualified.
If by reason of death, resignation, or disqualification, the governor-elect is unable to assume the office of governor at the commencement of the gubernatorial term, the lieutenant governor-elect shall assume the office of governor for the full term. If at the commencement of such term, the governor-elect fails to assume the office by reason of disability, the lieutenant governor-elect shall serve as governor until the disability of the governor-elect terminates.
(Enacted November 2, 1976. Former **§** 17 repealed, see HJR No.37, 111th General Assembly.)

Section 17a – (Filling a vacancy in the office of lieutenant governor)

Whenever there is a vacancy in the office of the lieutenant governor, the governor shall nominate a lieutenant governor, who shall take office upon confirmation by vote of a majority of the members elected to each house of the General Assembly.
(Adopted November 7, 1989)

Section 22 – (Jurisdiction to determine disability; succession)

The supreme court has original, exclusive, and final jurisdiction to determine disability of the governor or governor-elect upon presentment to it of a joint resolution by the general assembly, declaring that the governor or governor-elect is unable to discharge the powers and duties of the office of governor by reason of disability. Such joint resolution shall be adopted by a two-thirds vote of the members elected to each house. The supreme court shall give notice of the resolution

to the governor and after a public hearing, at which all interested parties may appear and be represented, shall determine the question of disability. The court shall make its determination within twenty-one days after presentment of such resolution.

If the governor transmits to the supreme court a written declaration that the disability no longer exists, the supreme court shall, after public hearing at which all interested parties may appear and be represented, determine the question of the continuation of the disability. The court shall make its determination within twenty-one days after transmittal of such declaration.
The Supreme Court has original, exclusive, and final jurisdiction to determine all questions concerning succession to the office of the governor or to its powers and duties.
(Enacted November 2, 1976; HJR No.37, 111th General Assembly.)

* Schedule of HJR 37 (136 v --) reads as follows: If, on the effective date of this amendment, section number 16 is already assigned to a section in Article III of the Constitution of Ohio, the Secretary of State shall assign section number 22 to the section in Article III that would be numbered section 16 by this amendment, and such number shall be the official number of such section and shall be so published in any publication of the Constitution and shall be cited and referred to by such number.

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