STATE OF OHIO

OHIO CONSTITUTIONAL REVISION COMMISSION

Recommendations for Amendments to the Ohio Constitution

PART 7

ELECTIONS AND SUFFRAGE

March 15, 1975

Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

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national
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CORPORATION

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41 South High Street
COLUMBUS, OHIO 43215

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Ann M. Eriksson, *Director*

Letter of Transmittal

Gentlemen:

This is the seventh report of the Constitutional Revision Commission to the General Assembly regarding its study of the Ohio Constitution. This report concerns the provisions of the Constitution relating to elections and suffrage, and arises from the study of the Elections and Suffrage Committee, chaired by Katie Sowle, of Columbus.

The recommendations for change were presented in an earlier report to the General Assembly in February, 1975. This report reviews the recommendations for amendment in greater detail, and, in addition, discusses the Commission's rationale for proposing no change in some of the sections in Articles V, XVII, II, and III.

The Commission believes that its recommendations concerning the elections and suffrage provisions of the Ohio Constitution will enable this basic document to meet the future needs of the people of the State of Ohio without the need for revision of specific details, most of which have been removed by the Commission's proposals.

Very truly yours,

Richard H. Carter

Richard H. Carter
Chairman

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INTRODUCTION

ELECTIONS AND SUFFRAGE

This is the second report of the Constitutional Revision Commission to the General Assembly arising from the study of its Elections and Suffrage Committee. The first report, dated December 31, 1973, discussed aspects of the constitutional amending process, and proposed the amendment of Section 1 of Article XVI to facilitate voter understanding of legislatively proposed constitutional amendments and establishing a time frame prior to an election for submitting proposals and court actions. The subjects of this report, Part 7 of the Commission's Report to the legislature, are the elective franchise; procedures for the conduct of elections; and matters of terms of elective officers and filling of vacancies. The Elections and Suffrage Committee was chaired by Katie Sowle, of Columbus, Ohio.

History confirms the fact that, in America, the elective franchise and process have consistently been prized as being of fundamental value to a democratic form of government. And, as with all things of great value, the people have sought to safeguard the process by erecting a system of regulations to protect it from those who might misuse it. The right to vote, which was originally granted to a very small segment of the people — white adult male freeholders, today is granted to virtually all people over 18 years of age.

The expansion of the franchise has resulted from several factors: legislative action, constitutional amendment, and changing public attitude, which has been reflected in decisions of the United States Supreme Court. The evolution of thinking regarding the right to vote is dramatically illustrated in the following: "We now think that participating in elections is part of our birthright, but this has not always been the case. Even now, there is nothing in the United States Constitution that explicitly requires any state to conduct a popular election for the selection of a President. Presumably, should a state so decide it could provide that its presidential electors (to the Electoral College) be appointed by the state legislature. Of course, no state is likely to abandon the popular election of presidential electors, but it is sobering to stop and think how far we have come in allowing broad participation in the electoral process." [1] Changes in the electoral franchise and electoral process have led to the inclusion in the franchise of groups once excluded, such as females, negroes, eighteen to twenty year olds, and nonproperty owners. Four constitutional amendments adopted between 1913 and 1965 expanded the franchise.[2] In 1965 Congress enacted the Voting Rights Act to protect the right of negroes to vote in areas where racial discrimination had been prevalent. More recently, laws denying access to the ballot to certain military personnel[3] and prisoners awaiting trial[4] have been revised or declared unconstitutional. The Twenty-Sixth amendment to the United States Constitution, adopted in 1971, extends the right to vote to citizens eighteen years of age or older.

The importance of attitude and public opinion toward the elective franchise should not be understated. At one time, voting was considered the right of a privileged few but the courts today have begun to view the elective franchise as a fundamental right[5] and laws excluding groups from the voting process are viewed with greater stringency than ever before. Studies[6] reveal that the desire to safeguard the elective process by, for example, requiring registration of voters, have sometimes resulted in overly restrictive laws disfranchising and discouraging many potential voters. Recent federal and state legislation indicated a trend toward achieving universal suffrage; the trend includes proposals to make registration easier.

The Commission, in reviewing the constitutional provisions concerning the electoral process, recognizes the role of public attitude in the process and realizes that a fundamental document which contains much statutory material will not be able to tolerate expected change without constantly being in need of revision. The Constitution, ideally, should be flexible enough to accommodate changes, while continuing to state basic principles.

The recommendations contained in this report have in common a guideline: to construct the most flexible constitutional framework possible consistent with safeguarding the elective process.

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[1] James F. Blumstein, The Supreme Court and Voter Eligibility, reprinted in *Issues of Electoral Reform*, National Municipal League, 1974, p. 33.

[2] The seventeenth amendment (1913) mandated the popular election of United States senators; the nineteenth amendment. (1920) prohibited discrimination in voting on the basis of sex; the twenty-third amendment (1961) extended the franchise to residents of the District of Columbia for presidential elections; and the twenty-fourth amendment (1964) banned the use of the poll tax in federal elections.

[3] *Carrington v. Rash*, 380 U.S. 85, 89 S. Ct. 775 (1965) *Evans v. Cornman* 39 U.S. 49, 90 S. Ct. 1752 (1970); *Stencel v. Brown* U.S.D.C. Southern District of Ohio (#72 331)1973)).

[4] H.B. 73, effective Oct. 31, 1973, amended sections 3509.02, 3509.03, 3509.032, 3509.04 and 3509.08 to permit a person confined in a jail or workhouse under sentence for a misdemeanor or awaiting trial on a felony or misdemeanor to vote by absentee ballot.

[5] *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 89 S. Ct. 1886 (1969).

[6] See, for example: League of Women Voters, *Administrative Obstacles to Voting, a report of the Elections System Project*, 1972, the League of Women Voters Education Fund; Ohmdahl, Lloyd B., *Fraud Free Elections are Possible Without Voter Registration—A Report on North Dakota's Experience*, Bureau of Governmental Affairs, 1971.

The Elections and Suffrage Committee found some statutory material in the sections of the Ohio Constitution it has studied. The Commission considers that such matters should be removed from the Constitution, wherever possible, to provide needed flexibility.

The following detailed description of each section includes:

1. The section as it presently reads and, next to it, the section as it would read if adopted by the General Assembly and the voters as proposed by the Commission.

2. The Commission recommendation, which shows a draft of the section with the old material to be omitted stricken through with a horizontal line and new material shown in capital letters, conforming with Ohio bill drafting rules.

3. History and Background of Section.

4. Effect of Change.

5. Rationale of Change.

6. Intent of Commission.

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Summary of Recommendations
Part 7
ELECTIONS

The Commission recommends to the General Assembly the following action with respect to Article V of the Constitution of the State of Ohio:

Section 1.	Amend
Section 2.	No change
Section 2a.	Amend; renumber
Section 3.	Repeal
Section 4.	Amend
Section 5.	Repeal
Section 6.	Repeal; transfer provisions as changed to new section 5.
Section 7.	No recommendation

The Commission recommends the following changes in Article XVII, III, and II:

Article XVII,	Section 1	Amend
Article XVII,	Section 2.	Amend
Article III,	Section 18.	No change
Article III,	Section 3.	Amend
Article III,	Section 4.	Repeal
Article II,	Section 21.	No change

ARTICLE V

Section 1

Present Constitution

Section 1. Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state six months next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections.

Every citizen of the United States being twenty-one years of age who is not entitled to vote at all elections shall be entitled to vote for the choice of electors for President and Vice President of the United States if he shall have been a resident of the state, county, township or ward in which he desires to vote such time as may be provided by law, provided that he is not entitled to vote for the choice of electors for President and Vice President of the United States in any other state.

Commission Recommendation

Section 1. Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, in which he resides, such time as may be provided by law, has the qualifications of an elector, and is entitled to vote at all elections.

Commission Recommendation

The Commission recommends the amendment of Section 1 of Article V as follows:

Section 1. Every citizen of the United States, of the age of ~~twenty-one~~ EIGHTEEN years, who ~~shall have~~ HAS been a resident of the state, ~~six months next preceding the election, and of the~~ county, township, or ward, in which he resides, such time as may be provided by law, ~~shall have~~ HAS the qualifications of an elector, and ~~be~~ IS entitled to vote at all elections.

~~Every citizen of the United States being twenty-one years of age who is not entitled to vote at all elections shall be entitled to vote for the choice of electors for President and Vice President of the United States if he shall have been a resident of the state, county, township or ward in which he desires to vote such time as may be provided by law, provided that he is not entitled to vote for the choice of electors for President and Vice President of the United States in any other state.~~

History and Background of Section

The elective franchise was granted in the Ohio Constitution of 1802[1] to white male inhabitants above 21 years of age who resided in the state for one year prior to an election and were eligible to pay a state or county tax. An elector was permitted to vote only in the county or district in which he actually resided at the time of the election. The 1802 Convention Reports indicate that a motion to strike the word "white" from the Constitution was defeated.[2] By the time of the 1850 Constitutional Convention, sentiment for extending the franchise to non-whites and women had strengthened. The report of the Standing Committee on the Elective Franchise retaining the restriction of suffrage to white males was debated extensively; the movement for female suffrage had support from some delegates, especially from the northern and eastern counties of the state, although the movement for non-white suffrage had fewer supporters. Section 1, as adopted by the convention, restricted the franchise to white males, aged 21, who resided in the state for one year preceding an election and resided in their county, township or ward such time as was provided by law. The initial report of the Standing Committee on the Elective Franchise did not include as a condition to vote the eligibility to pay a state or county tax, as was required in the 1802 Constitution. There was no discussion of why the taxation requirement was omitted.

The 1873-74 Constitutional Convention also considered extending suffrage to women, non-whites, and to aliens who had declared their intentions to

[1] Constitution of Ohio, 1802, Article IV, Section 1.
[2] 1802 Constitutional Convention page no. 21 as reprinted in *The Historical Magazine*, July 1869.

become citizens of the United States. The female suffrage movement had support and opposition from all parts of the state, and some delegates proposed letting women who would be eligible voters were they males decide the issue, but the proposal was defeated by the convention.[3] In the post-Civil War era, pro-Negro sentiment influenced the delegates to remove the restriction of the vote to "white" males. Several years earlier, the Fifteenth Amendment to the United States Constitution, prohibiting disfranchisement on the basis of race, creed, color, or previous condition of servitude, had been adopted. The rejection of the proposed Ohio Constitution by the voters in 1874 left the language restricting suffrage to white males intact.

The extension of the vote to non-whites and females was again considered by the 1912 Constitutional Convention. A proposal to submit female suffrage to a referendum by women alone was again defeated.[4] Two amendments proposed by the convention — one restricting the vote to males of requisite age and residence and omitting "white", and one enfranchising all state citizens meeting the age and residency requirements — were both defeated in 1913 by the electors. In 1920, the Nineteenth Amendment to the United States Constitution was adopted, prohibiting the denial or abridgement of the right to vote to United States citizens on account of sex. Article V, Section 1 was finally amended in 1923 to remove "white" and "male".

The second paragraph of present Section 1 of Article V, providing for the election of President and Vice-President of the United States by electors who are not entitled to vote at all elections, was added in 1957. In 1971, the section was further amended to provide for a residency requirement of six months rather than one year.

Effect of Change

The Commission proposal reduces the age requirement for voting from twenty-one years to eighteen years, deletes the six month residency requirement, and omits the provision enabling persons not entitled to vote at all elections to vote for President and Vice-President of the United States. Grammatical changes are made to conform with the rules of bill drafting in Ohio.

Rationale for Change

The provision of Section 1 that sets twenty-one as the minimum age to vote has been rendered unconstitutional by the Twenty-Sixth Amendment to the United States Constitution, ratified in 1971. It provides, "The right of the citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." Durational residency requirements for voting were held unconstitutional as violating the equal protection clause of the Fourteenth Amendment to the United States Constitution in *Dunn v. Blumstein,* 405 U.S. 330, 92 S. Ct. 995 (1972). Ohio's six month state residency requirement was specifically ruled unconstitutional in *Schwartz v. Brown,* by the United States District Court for the Southern District of Ohio in Civil Action 72-118 on August 7, 1972.

The Elections and Suffrage Committee considered recommending the repeal of Section 1 entirely, since it probably grants no power to the General Assembly that it does not already have, but concluded that it should be retained because of the importance of stating the basic right to vote in the Constitution. In addition, the Constitution makes reference elsewhere to the qualifications of an elector as a prerequisite to holding public office, and the committee felt that it was necessary to retain a statement of the qualifications in Section 1. Therefore, the recommendation is to retain the section but lower the voting age to eighteen and

[3]Debates, Ohio Constitutional Convention 1873-74, Vol. II, Pt. 3, p. 2808.
[4]Proceedings and Debates of the 1912 Ohio Constitutional Convention, Vol. II, p. 1856.

remove reference to a durational residency requirement. A state may impose a reasonable length of time for registration — perhaps thirty days. The recommendation gives the legislature the flexibility to impose residency requirements that are in accord with the requirements of the Federal Constitution as interpreted.

The second paragraph of Section 1 provides that if an elector does not qualify to vote for state and local officials, he may nevertheless be qualified to vote for President and Vice-President, in Ohio, if he has fulfilled the residency requirements provided by law. Since durational residency requirements have been declared unconstitutional, different residency requirements for voting in state, local and federal elections are no longer needed.

Intent of the Commission

The Commission, recognizing the importance of stating the basic right to vote in the Constitution, believes that Section 1 of Article V should conform with the Twenty-Sixth Amendment to the United States Constitution, and with judicial decisions on residency requirements. Commission members agree that reasonable residency requirements may be desirable to enable potential voters to register.

ARTICLE V

Section 2

Present Constitution	Commission Recommendation
Section 2. All elections shall be by ballot.	No change.

Commission Recommendation

The Commission recommends that no change be made in present Section 2 of Article V.

History and Background of Section

The Ohio Constitution of 1802 provided for elections to be by ballot in Article IV, Section 2. The 1851 Ohio Constitution retained the same language in Article V, Section 2. Court interpretation of the provision has occurred on two issues. In *State ex rel. Bateman v. Bode,* 55 Ohio St. 224, 45 N.E. 195 (1896), the Court affirmed that the discretion to prescribe the form of the ballot resided in the General Assembly. The question whether the constitutional requirement for elections by ballot prohibited the use of voting machines was resolved in *State ex rel. Automatic Registering Mach. Co. v. Green,* 121 Ohio St. 301, 168 N.E. 131 (1929). In that case, the Court interpreted "ballot" to designate a manner of conducting elections to insure secrecy as opposed to viva voce vote, concluding that the use of voting machines was not in violation of Article V, Section 2.

Rationale for Retaining Section

The Ohio Constitution states the fundamental principle of the secret ballot in Article V, Section 2, permitting electors to express their views on election matters without fear of retaliation. The Ohio Supreme Court has held that the use of voting machines conforms with the constitutional requirement for a secret ballot. The Commission believes that this fundamental principle is a proper matter for the Ohio Constitution and should be retained.

ARTICLE V
Section 2a

Present Constitution

Section 2a. The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Commission Recommendation

Section 3. The names of all candidates for an office at any election shall be arranged in a group under the title of that office. The general assembly shall provide by law the means by which ballots shall give each candidate's name reasonably equal position by rotation or other comparable methods to the extent practical and appropriate to the voting method used. At any election in which a candidate's party designation appears on the ballot, the name or designation of each candidate's party, if any, shall be less prominent than the candidate's name. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Commission Recommendation

Section ~~2a~~ 3. The names of all candidates for an office at any ~~general~~ election shall be arranged in a group under the title of that office~~,~~ ~~and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs.~~ THE GENERAL ASSEMBLY SHALL PROVIDE BY LAW THE MEANS BY WHICH BALLOTS SHALL GIVE EACH CANDIDATE'S NAME REASONABLY EQUAL POSITION BY ROTATION OR OTHER COMPARABLE METHODS TO THE EXTENT PRACTICAL AND APPROPRIATE TO THE VOTING PROCEDURE USED. ~~Except at a Party Primary or in a non-partisan election,~~ AT ANY ELECTION IN WHICH A CANDIDATE'S PARTY DESIGNATION APPEARS ON THE BALLOT, the name or designation of each candidate's party, if any, shall be ~~printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed~~ LESS PROMINENT THAN THE CANDIDATE'S NAME. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

History and Background of Section

Section 2a of Article V was added to the Ohio Constitution in 1949, making Ohio the only state to provide for rotation of candidates' names on the ballot in its Constitution. In addition to the rotation feature, the section also requires that candidates be listed by office on the ballot and that the voter vote for each candidate separately, except for electors for President and Vice-President of the United States, who run in tandem. The requirement that voters must vote for each candidate separately prohibits straight party voting, thus precluding casting a vote for all of the candidates of one political party by pulling one lever. Of the several provisions contained in Section 2a, only the language on ballot rotation appears to have raised any significant problems, and it has been the subject of judicial interpretation as recently as 1974.

The Ohio Supreme Court, in *State ex rel. Russell v. Bliss,* 156 Ohio St.

147 (1951) held that the constitutional provision is self-executing and a statute varying the prescribed procedure is unconstitutional and void. Since 1951, two statutes prescribing rotational procedures have been held to violate this section.[1]

Section 2a has been construed to require perfect rotation of names on the ballot, in so far as may be reasonably possible. The issue has been raised in Ohio Courts whether the use of voting machines complies with the constitutional mandate, since this method of voting raises peculiar problems for rotation of names on the ballot. The use of paper ballots permits the voters to be presented with numerous configurations of candidates' names. Statutes require that paper ballots be printed and compiled in planned sequences. Voting machines, however, do not permit rotation in this manner; the order is fixed once the machine is locked, and all voters using the same machine will be presented with the same sequence of candidates' names. Moreover, the expense of a voting machine may result in there being only one or two at a polling place, and many, if not all, voters are exposed to the same order of candidates on the ballot.

In the opinion of the Court of Common Pleas of Mahoning County in *Bees v. Gilronen,* 66 OLA 130 (1953), and of the Attorney General (1957 OAG 984), the constitutional provision permits the use of voting machines, since it requires perfect rotation in so far as may be reasonably possible and perfect rotation may not be reasonably possible, when voting machines are used. In 1974, the Ohio Supreme Court affirmed that Section 2a of Article V of the Ohio Constitution does not absolutely prohibit the use of voting machines (*State ex rel. Roof v. Bd. of Commrs.,* 39 Ohio St. 2d 139 (1974)). In that case, the Court found that statutory language concerning rotation of machine ballots on a precinct by precinct basis (Section 3507.07 of the Ohio Revised Code) was not in compliance with Article V, Section 2a. In its opinion, the Court offered an acceptable way of using voting machines to comply with the Constitution, stating that each precinct using voting machines must have at least two or an even number of machines which, prior to the general election, have been arranged by the board of elections in a serial sequence throughout the county. Voters would be directed to alternate machines so that the various voting machines at a polling place would be used in serial sequence. In the formula proposed by the Court, although the number of alternative sequences in a given precinct is limited by the number of voting machines, when the use of machines by voters is regulated by a planned serial sequence, compliance with the constitutional requirement for rotation in Section 2a is achieved.

Effect of Change

The Commission recommendation removes the self-executing language which has been held to require perfect rotation of names on the ballot, as far as reasonably possible. The amendment, using relative rather than absolute terms, places the responsibility of providing for rotation with the General Assembly. In addition, the amendment removes the words "except at a Party Primary or in a non-partisan election . . .". This misleading language could imply that, in these elections, the political party may be given more prominence than the candidate's name. The word "general" has been removed from "general elections" in the first sentence, so that the provision will apply to all elections. The section number of the provision is changed from 2a to 3, and present Section 3 is being recommended for repeal. A discussion of the reasons for repeal will be found under present Section 3. Throughout, language referring to the method

[1]A provision for voting machine rotation in Section 3507.07 of the Revised Code was declared void in *State ex. rel. Wesselman v. Bd. of Elections of Hamilton County,* 170 Ohio St. 30 (1959). *Bliss* invalidated General Code 4785-80.

of voting has used very general terms to permit the section to apply to new methods of voting and technological changes.

Rationale for Change

The Elections and Suffrage Committee considered several alternative ways of dealing with the rotation provision of Section 2a. Most agreed that ballot rotation is a statutory matter, nothing that Ohio is the only state to provide for rotation in its Constitution. The idea of repeal was rejected because it would open the possibility of the enactment of a law like one in California which places the incumbent's name first on the ballot. The author of a Southern California Law Review article[2] suggests that the California statute violates the Fourteenth Amendment to the United States Constitution. His research indicates that the first-listed candidate has an advange: ". . . as a minimum, one can attribute at least a 5 percent increase in the first listed candidate's vote total to positional bias, and . . . this will be exceeded in most elections." He views this positional advantage as in violation of the one-man, one-vote rule, giving citizens voting for the first person listed an advantage over a group of equal strength with less favorable ballot position.

All shared a desire to retain the principle that no candidate should have an undue advantage or disadvantage by virtue of ballot position. However, the Commission viewed the present language as too restrictive on several accounts. When the constitutional provision is read as an absolute standard of rotation, there are unfortunate consequences. One paper ballot with a printing error or out of order may result in an entire election being invalidated. While fair treatment on the ballot is desirable, the invalidation of an election because in a small number of instances proper rotation did not occur exaggerates the importance of rotation. The constitutional language as presently interpreted restricts the use of new methods of voting, as evidenced by the difficulties encountered in trying to conform the use of voting machines to the rotation language in Section 2a. The tremendous difficulties and expenses boards of elections were encountering in the effort to conform with the Supreme Court ruling in the *Roof* decision were described in detail to the Commission.

One alternative is rotation by precincts rather than rotation by individual ballots. The Court of Appeals in the *Roof* decision suggested that equalization of population by precincts would be acceptable. Precinct population equalization, however, presents considerable problems for election officials, especially in areas with a highly mobile population. In any event, it seemed unwise to write such a specific provision into the constitution.

The Commission's proposal is more flexible than either the present language or the precinct equalization proposal; at the same time, it retains the principle of equal treatment in order to preclude a situation like that of California. The substitution of a relative standard of fairness to candidates for the rigid standard of perfect rotation wherever possible, the Commission thought, would enable the General Assembly and the courts to judge whether the value of a new voting technique might outweigh the advantages of exact rotation. A recent Florida election employed telephonic voice prints, and cable television holds out the possibility of voting by digital return systems. These and other electronic voting methods are being discussed and tested. The Commission felt that Ohio should be free to explore new technology, and believes that the proposed language permits the positional treatment to correspond to the voting method used.

There is a change in the first sentence of the section, "The names of

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[2]W. James Scott, Jr. "California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents", 45 So. California Law Review 365 (1972).

all candidates for an office at any general election . . ." The word "general" has been deleted in order to make the provision applicable to all elections. The Commission believes that fair treatment on the ballot by rotation or other comparable methods should be available at all elections, including special elections, which are not included under the present language.

The second part of Section 2a concerns the appearance of the office-type ballot, and permits electors to vote only for candidates individually, except for electors for President and Vice-President of the United States who run as a team. The Commission recommends a language change to remove a misleading statement. The section presently reads "Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed". The sentence could be read to mean that at a party primary or non-partisan election the candidate's party can be more prominent than the candidate's name. The Commission did not believe that this was the intention of the authors of the section, but that the exception had been included because at a party primary or non-partisan election, the political party does not appear on the ballot. The Commission recommends removing the clause excepting party primaries and non-partisan elections to remove the apparent ambiguity. The Commission recommendation also removes reference to the size and darkness of type, because election methods of the future may not use the printed media for balloting.

The Commission notes that, should a prior recommendation for the joint election of Governor and Lieutenant Governor be adopted, Section 2a will have to be amended to enable voters to vote for these two executive officers jointly.

Intent of the Commission

The proposed revision of Article V, Section 2a is intended to afford every candidate, by law, equitable treatment appropriate to the kind of ballot used in his election. The Commission views the removal of an absolute standard of rotation and the substitution of a relative standard as a more flexible and workable approach to achieving fairness in the balloting process — a result deemed desirable by all Commission members.

ARTICLE V

Section 3

Present Constitution

Section 3. Electors, during their attendance at elections, and in going to, and returning therefrom, shall be privileged from arrest, in all cases, except treason, felony, and breach of the peace.

Commission Recommendation

Repeal

Commission Recommendation

The Commission recommends the repeal of Section 3 of Article V.

History and Background of Section

First included in the 1802 Constitution,[1] the electors' privilege from arrest was retained in the 1851 Constitution. The 1912 Constitutional Convention Debates contain no discussion or interpretation of the provision. There is no case law in Ohio interpreting the provision, and information on the limitations of the privilege implied by the exceptions of treason, felony, and breach of the peace is inferred from cases having to do

[1]Constitution of Ohio, 1802, Article IV, Section 3.

with a similar privilege from arrest extended to legislators in Article II, Section 12 of the Ohio Constitution, and to other groups who are granted the privilege from arrest by statute. Article II, Section 12 grants senators and representatives the privilege from arrest, except for treason, felony, and breach of the peace, during their attendance at or going to and from a legislative session. Section 2331.11 of the Ohio Revised Code grants a similar privilege to many groups of individuals, including electors, going to, attending or returning from an election; and others not granted the privilege in the constitution: e.g., judges, attorneys, clerks of courts, sheriffs, coroners, constables, criers, suitors, jurors, and witnesses, while going to, attending or returning from court; a person doing militia duty or going to or returning from the performance of such duty. The privileged groups seem to have in common the fact that the performance of the duties during which time they are so privileged is essential to the progress of government or protection of religious freedom.

An investigation of the historical basis for the provision revealed a desire to permit elected officials to do the job to which they were elected, without constant interruption of having to answer to creditors, much like the earlier privilege given to members of Parliament under English law. By implication, electors should not be obstructed from exercising their franchise by having to answer to minor offenses. The privilege from arrest granted a Senator by the United States Constitution was examined in *Long v. Ansell*, 69 F. 2d 386, 94 A.L.R. 1467 (1934). The plaintiff charged Senator Long with publishing a false and malicious libel by distributing a publication containing a report of a speech made by the defendant on the floor of the Senate. Senator Long claimed immunity from service of summons on account of Article I, Section 6 of the United States Constitution: "Senators and Representatives . . . 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 . . ." The Court of Appeals held that the Senator was not exempt from service of civil process by virtue of the constitutional provision. The opinion states, in part, "At the time of the adoption of the Constitution, there were laws in the states authorizing imprisonment for debt in aid of civil process. Undoubtedly, it was to meet this condition that the exemptions in federal and state Constitution; were aimed."[2]

The actual privilege granted to electors (and other persons immune from arrest for crimes other than treason, felony, and breach of the peace) has been limited by court decisions and other constitutional provisions. The phrase "breach of the peace" has been interpreted to include all criminal offenses by the United States Supreme Court in connection with Article I, Section 6 of the United States Constitution in *Williamson v. U.S.* 207 U.S. 425 (1908). The Ohio Supreme Court in *Akron v. Mingo*, 169 Ohio St. 511 (1969), stated that the interpretation in *Williamson* of "treason, felony, and breach of the peace" is applied to the same words appearing in the Ohio Constitution, Article II, Section 12, and in Revised Code Section 2331.13. In Ohio, therefore, there can be no immunity from arrest for a criminal offense, because the exception to the immunity provision includes all crimes and misdemeanors of every character.

If "treason, felony, and breach of the peace" are interpreted to include all criminal offenses, then it would seem that the privilege extends only to civil arrest. The instances where one is liable for civil arrest are limited. Section 15 of Article I of the Ohio Constitution says "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." The Ohio Revised Code, in Chapters 2713. and 2331., provides for arrest in civil actions before judgment and in the case of a judgment debtor when attempts at fraud are involved. Thus, the reason

[2]*Long v. Ansell*, C.A.D.C. 69 F. 2d 386, 94 A.L.R. 1467 (1934).

for the privilege from arrest offered in *Long v. Ansell* has been substantially nullified by Article I, Section 15 of the Ohio Constitution and by judicial interpretation of "breach of the peace" to include all criminal offenses. *Long v. Ansell* observes "The reason for incorporating this provision in the Constitution has largely disappeared . . . That which at the time of the adoption of the Constitution was of substantial benefit to a member of Congress has been reduced almost to a nullity."[3]

Effect of Change

The Commission's recommendation to repeal Article V, Section 3 would have no substantive effect on the privilege of electors from arrest while going to, attending, or returning from, elections. The Ohio statutes grant this privilege to electors as well as other groups of people who are not granted this privilege in the Constitution.

Rationale for Change

The Commission considers Article V, Section 3 obsolete and of little, if any, effect. The privilege from arrest has been restricted by other constitutional provisions and by court interpretations so that the section has very limited application. Some Commission members suggested that the constitutional language was potentially misleading to the voters, making them think they were privileged when, in all likelihood, they were not. Recognizing that the legislature has provided a similar privilege for persons not mentioned in the constitution, e.g., jurors, witnesses, attorneys, and noting that electors have been included in the statute granting the privilege, the Commission views the constitutional privilege as unnecessary. Research did not uncover any evidence that the erroneous arrest of an elector on his way to or from the election booth would affect the outcome of an election. The apparent absence of any consequence to the election from denying an elector his constitutional privilege strengthened the Commission's opinion that the section should be removed from the Constitution.

Intent of the Commission

The Commission recommends the repeal of Article V, Section 3, which it considers ineffective. The constitutional privilege has been rendered insignificant by Article I, Section 15 of the Ohio Constitution and judicial interpretation of its language. The Commission recognizes that if the privilege were removed from the Constitution, the legislature may provide for the privilege, and, in fact, has done so, for electors, and for other groups not mentioned in the Constitution.

[3]*Ibid.*, p. 1468.

ARTICLE V

Section 4

Present Constitution

Section 4. The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime.

Commission Recommendation

Section 4. The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony.

Commission Recommendation

The Commission recommends the amendment of Article V, Section 4 as follows:

Section 4. The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of ~~bribery,~~ ~~perjury,~~ ~~or~~ ~~other~~ ~~infamous~~ ~~crime~~ A FELONY.

History and Background of Section

The Ohio Constitution of 1802[1] included a provision giving the General Assembly full power to disfranchise persons convicted of bribery, perjury, or other infamous crime, and to bar them from any elected office. There is no parallel provision in the Federal Constitution. A comparable provision was included in the 1851 Ohio Constitution with no mention of the provision in the Debates of 1850. "Infamous crime" has generally been interpreted to mean a felony. Section 2961.01 of the Ohio Revised Code formerly denied the right to vote, to hold an office of honor, trust, or profit, and to serve on a jury, to any person convicted of a felony in this state, unless the conviction was reversed or annulled, or the rights restored by pardon. An effect of the statute was to provide mandatory restoration of rights to a person serving the maximum term of his sentence or granted release by the adult parole authority, but, with respect to a convicted person on probation, the Common Pleas Court could restore to the defendant his rights of citizenship. The new criminal code, effective January 1, 1974, amends Section 2961.01, retaining the provision disfranchising any person convicted of a felony, and expanding it to include felonies of other states or the United States. The section now provides that when a convicted felon is granted probation, parole, or conditional pardon, he is competent to be an elector during such time and until his full obligation has been performed and thereafter following his final discharge. Full pardon of a convict restores all rights and privileges forfeited under this section.

Effect of Change

The language recommended by the Commission defines the offenses for which a person may be denied the rights of suffrage or eligibility to office by the word "felony" instead of the present language, "bribery, perjury, or other infamous crime".

Intent of the Commission

The Commission desires to preserve the flexibility now available to the General Assembly to expand or restrict the franchise in relation to felons in accordance with social and related trends. The retention of permissive language enables the legislature to respond to changes in criminal rehabilitation; at the same time, the electors are assured that the purity of the elective process will be regulated by the General Assembly in this regard.

[1]Constitution of Ohio, 1802, Article IV, Section 4.

ARTICLE V

Section 5

Present Constitution

Section 5. No person in the Military, Naval, or Marine service of the United States, shall, by being stationed in any garrison, or military, or naval station, within the State, be considered a resident of this State.

Commission Recommendation

Repeal of present Section 5 and enactment of a new Section 5, unrelated in subject matter. For discussion of the proposed new section, see Section 6.

Commission Recommendation

The Commission recommends repeal of present Section 5 and enactment of a new Section 5, unrelated in subject matter. The proposed new section is discussed under Section 6.

History and Background of Section

Ohio and other states have denied voting residence to persons living in a federal enclave. Ohio's provision was first included in the 1851 Constitution. The reason for such a provision may have been suggested in *Carrington v. Rash*, 380 U.S. 89 (1965), where Texas argued that its interest in prohibiting servicemen stationed in the state from voting was to prevent the small local civilian community vote from being over-

whelmed by the collective vote of military personnel, and to protect the franchise from infiltration by transients. The Court rejected this reasoning saying that "Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." The United States Supreme Court, in *Evans v. Cornman*, 389 U.S. 49, 90 S. Ct. 1752 (1970), held that such restrictions violated the Fourteenth Amendment equal protection clause. In 1973, a United States District Court declared Section 5 of Article V of the Ohio Constitution unconstitutional insofar as it denies a person the right to register because he lives on the grounds of a federal enclave (*Stencel v. Brown*, U.S.D.C., Southern District of Ohio, #72-331).

Rationale for Change

The Commission believes this language should be removed from the Constitution because it is unconstitutional and because the Commission agrees with the principle of an expanded franchise.

ARTICLE V

Section 6

Present Constitution

Section 6. No idiot, or insane person, shall be entitled to the privileges of an elector.

Commission Recommendation

Repeal and enact new section 5:
Section 5. The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency.

Commission Recommendation

The Commission recommends the repeal of Section 6, and enactment of a new section 5 as follows:

Section 5. THE GENERAL ASSEMBLY SHALL HAVE POWER TO DENY THE PRIVILEGES OF AN ELECTOR TO ANY PERSON ADJUDICATED MENTALLY INCOMPETENT FOR THE PURPOSE OF VOTING ONLY DURING THE PERIOD OF SUCH INCOMPETENCY.

History and Background of Section

The Ohio Constitution of 1851 contained a provision disfranchising idiots and insane persons, who were not denied the vote in the 1802 Constitution. The language of section 6, "No idiot, or insane person, shall be entitled to the privileges of an elector", is self-executing, requiring no action by the General Assembly to implement the prohibition. The terms "idiot" and "insane" are not defined in the Constitution, and their application arises from legislation and judicial determination. Although most state constitutions at one time used the words "idiot" and "insane", these have become archaic and devoid of standard meaning. Newer state constitutional provisions regarding competence to vote use terms such as "mentally incompetent."[1] Scientific progress has revealed that the myriad of mental impairments do not fall into just two groups, and even the currently acceptable terms "mentally retarded" and "mentally ill" are thought to blur the distinctions among many types and extremes of mental disabilities.

The body of legislation which has been created regarding mental illness and mental retardation has several consequences for the constitutional prohibition against idiots and insane persons voting. The Ohio Revised Code contains provisions regarding mentally ill patients in Chapters 5122., 5123., and 5125. An earlier movement to promote treatment for mental illness advocated voluntary as well as involuntary admittance procedures to encourage persons to seek help, and the 1952 Draft Act, proposed by the National Association of Mental Health, recommended the retention of all civil rights by patients, unless adjudicated incompetent and not re-

[1]E.g. Constitution of Virginia, Article II, Section 1.

stored to capacity. The Ohio statutes reflect these recommendations. Voluntary patients do not appear before the probate court for a determination of the need for hospitalization and therefore retain their civil rights. A person who is involuntarily committed appears before the court and, after a finding of the need for indeterminate hospitalization, the person is declared legally incompetent and loses such civil rights as the right to vote. As a consequence, a voluntary patient who may be severely disabled is, theoretically, able to vote. This result contravenes the intent of the constitutional prohibition of idiots and insane persons voting.

The General Assembly is not expressly given the power to determine which mental conditions are such that a person should not vote nor to establish procedures for determining who does or does not fall into the categories. A voter could be challenged at the polls on the grounds that he is an idiot or insane person. In the absence of standards to be used in making the determination, a person could be denied his right to vote without benefit of any medical testimony on his mental fitness, with the determination heavily dependent on the judge's personal opinion of what an idiot is.

Effect of Change

The Commission recognizes that the present constitutional language is antiquated and probably too broad to pass the Fourteenth Amendment equal protection and due process requirements for depriving a person of a fundamental right.[2] Therefore, the Commission recommends language that will give the General Assembly authority to create some useful standards to determine incompetency for the purpose of voting. Testimony presented to the Commission included cogent reasons why a person incompetent to serve on a jury or to drive may be competely competent to vote.

Rationale for Change

The Commission believes that the present constitutional provision is unacceptable for several reasons. The Elections and Suffrage Committee suggested, in its report to the Commission, that large scale and possibly arbitrary exclusion from voting is a greater danger to the democratic process than including in the franchise some who may be mentally incompetent. Repeal of present Section 6 and omission from the Constitution of any provision excluding persons from voting on the basis of mental incompetence was considered but rejected on the grounds that the Constitution should contain a recognition of the problem, leaving a specific solution to the General Assembly. The Commission's approach is to rewrite the provision so it will exclude only those persons who should not participate in the electoral process, and specifically to give the legislature the right to regulate the procedures for determining that one is mentally incompetent for the purpose of voting. An important factor in the Commission's decision to repeal the prohibition against idiots and insane persons voting was the testimony received from Professor Michael Kindred, a professor of law at The Ohio State University and an expert on the legal rights of mentally ill and mentally retarded persons. Professor Kindred suggested that Section 6 of Article V was probably unconstitutional under the equal protection clause of the Fourteenth Amendment to the United States Constitution and possibly unconstitutional under the due process clause of the Fourteenth Amendment. "It seems to me very clear at the present time that the provision is unacceptable. It's unacceptable because it is ambiguous, it's unacceptable because if it has any substance to it it's too broad, and it's unacceptable because the terms that it uses are basically insulting, stigmatizing terms."[3] The United States Supreme Court has begun to recognize the right to vote as a fundamental right, and restrictions on the right to vote must bear a necessary and rational relation to a compell-

[2] *Kramer v. Union Free School District* No. 15, 359 U.S. 621 (1969).

ing state interest.[4] Because the terms "idiot" and "insane" are ambiguous, it would be difficult to show how they meet the test for exclusion. In addition, it was suggested that the mentally retarded might qualify as a "suspect class", having certain relevant characteristics from birth, so that the due process clause of the Fourteenth Amendment might present another constitutional barrier to excluding them from exercising a fundamental right.

The Commission desires to preclude any wholesale exclusion from the electoral process on the basis of mental incompetence. The proposed language requires an adjudication of mental incompetence. The Commission also believes that the restoration to competency should restore the right to vote, and this restoration should be guaranteed by the Constitution. Hence, disfranchisement is limited by the words "only during the period of such incompetency."

Intent of the Commission

The Commission recommends the repeal of present Section 6 and enactment of a new Section 5 to fill the section vacated by the repeal of present Section 5 proposed earlier. The language disfranchising persons "adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency", is deemed a sufficient safeguard of the electoral process with less likelihood of excluding persons who should vote than the present prohibition of Section 6 appears to permit. The Commission believes that by placing these procedures under the auspices of the General Assembly, new attitudes regarding mental illness can be implemented and more uniform standards for determination and review will be possible than are provided under the present language.

[3]Minutes of the Ohio Constitutional Revision Commission, June 17, 1974. p. 11.
[4]*Kramer v. Union Free School District No. 15*, supra.

ARTICLE V

Section 7

Present Constitution

Section 7. All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors. Each candidate for such delegate shall state his first and second choices for the presidency, which preferences shall be printed upon the primary ballot below the name of such candidate, but the name of no candidate for the presidency shall be so used without his written authority.

Commission Recommendation

No recommendation.

Commission Recommendation

The Commission has no recommendation with regard to Section 7 at the present time.

History and Background of Section

A provision regarding the selection of delegates to political party conventions first appeared in the Ohio Constitution in 1912. At the 1912 Constitutional Convention, the evils of the convention method of nominating candidates were discussed. Delegates expressed their preference for direct primaries and Theodore Roosevelt, addressing the convention, advocated direct preferential primaries for the election of delegates to national nominating conventions. He referred to the use of the convention

system by "adroit politicians" to thwart the popular will. Suggestions regarding the application of the direct primary included one that officers such as school board members and judges be nominated by petition to remove these offices from politics, and that townships of less than two thousand population not be required to go to the expense of an election for township offices. The Convention proposed Section 7, which has remained unchanged since approved by the voters in 1912. The section requires, concerning presidential nominations, that all delegates to national conventions be chosen by direct vote of the electors. Each candidate for delegate must state his first and second choice for president, which preferences appear on the ballot below the name of the candidate. In addition, the name of no candidate may be used without his written authority.

The listing of the names of all candidates for delegate on the ballot has resulted in the problem of the "bedsheet" ballot, occasionally presenting voters with a sizeable list of candidates, and at times making the use of electronic voting machines impossible in those circumstances. In the primary election in May, 1972, the Democratic Party departed from the earlier tradition of both parties to bring one slate of delegates and alternates before the voters at the party primary, pledged to a "favorite son". Numerous slates of delegates were offered, and when voting machines could not accommodate all of the names, some precincts used paper ballots instead of or in addition to machines. The confusion that occurred led some groups to call for an end to the individual listing of delegates and alternates of each candidate.

The Elections and Suffrage Committee, together with the Assistant Secretary of State studied several proposed solutions for dealing with the "bedsheet ballot" problem. Committee members felt that the Delegates to the 1912 Constitutional Convention wished to offer voters maximum flexibility, but that they did not anticipate the resultant problem of the extremely long and complicated ballot. A consensus developed to eliminate the requirement that delegates be listed individually with their first and second preferences for president, and substitute language whereby the voters would be able to express their wishes by a variety of methods, as provided by law. The proposal stated that the names of candidates for delegate need not be separately identified on the ballot and may be identified in the manner provided by law. The recommendation, however, failed to secure the 2/3 majority necessary for adoption by the Commission.

ARTICLE XVII

Section 1

Present Constitution

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

Commission Recommendation

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

The term of office of all elective county, township, municipal, and school officers shall be such even number of years not exceeding four as may be prescribed by law.

The general assembly may extend existing terms of office so as to effect the purpose of this section.

Commission Recommendation

The Commission recommends the amendment of Section 1 of Article XVII as follows:

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

THE TERM OF OFFICE OF ALL ELECTIVE COUNTY, TOWNSHIP, MUNICIPAL, AND SCHOOL OFFICERS SHALL BE SUCH EVEN NUMBER OF YEARS NOT EXCEEDING FOUR AS MAY BE PRESCRIBED BY LAW.

THE GENERAL ASSEMBLY MAY EXTEND EXISTING TERMS OF OFFICE SO AS TO EFFECT THE PURPOSE OF THIS SECTION.

History and Background of Section

Article XVII, which consists of only 2 sections, was adopted in 1905. Section 1 fixes the date of a general election for state and county officers in even years on the first Tuesday after the first Monday in November, and states that all other elective offices shall be filled in the odd-numbered years at elections to be held on the first Tuesday after the first Monday in November.

In 1954, the Elections Article and related sections of the Constitution were amended when the terms of executive officers were increased from 2 to 4 years with the auditor's term remaining at 4 years.

Effect of Change

The Commission proposal attaches to Section 1 two sentences which are presently in Section 2 of Article XVII, making no substantive change from existing constitutional provisions. As a result of the Commission's decision to repeal the language in Section 2 regarding terms of office for offices covered elsewhere in the Constitution (discussed following this section), the language regarding the term of office of elective county, township, municipal and school officers presently in Section 2 was considered more appropriate for inclusion in Section 1. The amended section also includes language from present Section 2 empowering the General Assembly to extend existing terms of office in order to effect the purpose of the section - viz., that state and county officers be elected in even years, and all other officers mentioned in the odd-numbered years.

Rationale for Change

The retention of language regarding the terms of office of elective county, township, municipal and school officers is deemed desirable because these officers are not covered elsewhere in the Constitution. There was discussion about the appropriate length of the term of office for these offices, or whether this matter should be left to the General Assembly. The proposed language specifies the length as "such even number of years not exceeding four . . ." The final resolution of the matter was to leave the language regarding terms of office as it is since there seemed to be no compelling reason for making any change.

The language giving the General Assembly the power to extend the terms of existing offices to effect the purpose of Section 1 has value since some are provided by statute, and, should they be changed, the General Assembly's power would prove useful.

Intent of the Commission

The Commission's recommendation for amending Section 1 contemplates no substantive change from the authority presently in the Constitution. The proposal is based in interests of better constitutional drafting and a desire to have all relevant information in the same section. The changes recommended are consistent with the proposed revision of Article XVII, Section 2, discussed below.

ARTICLE XVII

Section 2

Present Constitution

Section 2. The term of the office of the Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer of State and the Auditor of State shall be four years commencing on the second Monday in January, 1959. 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 this office for a four year term. The term of office of judges of the Supreme Court and Courts of Appeals shall be such even number of years not less than six years as may be prescribed by the General Assembly; and that of the Judges of the Common Pleas Court six years and of the Judges of the Probate Court six years, and that of other Judges shall be such even number of years not exceeding six years as may be prescribed by the General Assembly. The term of office of the Justices of the Peace shall be such even number of years not exceeding four years, as may be prescribed by the General Assembly. The term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four years as may be so prescribed.

And the General Assembly shall have power to so extend existing terms of office as to effect the purpose of Section 1 of this Article.

Any vacancy which may occur in any elective state office other than that of a member of the General Assembly or of Governor, shall be filled by appointment by the Governor 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. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

Commission Recommendation

Section 2. Any vacancy which may occur in any elective state office created by Article II or III or created by or pursuant to Article IV of this Constitution shall be filled only if and as provided in such articles. Any vacancy which may occur in any elective state office not so created shall be filled by appointment by the Governor 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. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

Commission Recommendation

The Commission recommends the amendment of Section 2 as follows:

Section 2. ~~The term of the office of the Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer of State and the Auditor of State shall be four years commencing on the second Monday in January, 1959. 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 this office for a four year term. The term of office of judges of the Supreme Court and Courts of Appeals shall be such even number of years not less than six years as may be prescribed by the General Assembly; and that of the Judges of the Common Pleas Court six years and of the Judges of the Probate Court, six years, and that of other Judges shall be such even number of years not exceeding six years as may be prescribed by the General Assembly. The term of office of the Justices of Peace shall be such even number of years not exceeding four years, as may be prescribed by the General Assembly. The term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four years as may be so prescribed.~~

~~And the General Assembly shall have power to so extend existing terms of office as to effect the purpose of Section 1 of this Article.~~

ANY VACANCY WHICH MAY OCCUR IN ANY ELECTIVE STATE OFFICE CREATED BY ARTICLE II OR III OR CREATED BY OR PURSUANT TO ARTICLE IV OF THIS CONSTITUTION SHALL BE FILLED ONLY IF AND AS PROVIDED IN SUCH ARTICLES. Any vacancy which

may occur in any elective state office NOT SO CREATED ~~other than that of a member of the General Assembly or of Governor,~~ shall be filled by appointment by the Governor 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. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

History and Background of Section

Section 2 of Article XVII, adopted in 1905, specifies the terms of office for elected executive officials and for some judges, and limits the terms of justices of the peace and of all elective county, township, municipal and school officers to not more than four years, and of Common Pleas Judges to not more than six years. The section empowers the General Assembly to extend existing terms of office to comply with the times for holding elections in Article XVII, Section 1. Provisions for filling of vacancies are set forth, requiring that the Governor fill vacancies in any elective state office other than that of a member of the General Assembly or of Governor until the disability is removed or a successor elected and qualified. It specifies when successors will be elected.

Prior to the adoption of Article XVII, the terms of office of and filling of vacancies in the executive, legislative and judicial departments were provided in Articles II,[1] III, and IV, pertaining to these three branches of government. For example, Article III, Section 18, adopted in 1851, stated, "Should the office of auditor, treasurer, secretary 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." Article IV, Section 13 empowers the governor to fill vacancies in judicial offices. Article XVII, adopted in 1905, changes some judicial terms. The terms of probate court judges were set at three years in Article IV, Section 8, adopted in 1851, and Article XVII, Section 2, set the terms at four years. Amendments to the judicial article in 1883 specified the terms of supreme court and circuit court (court of appeals) judges as not less than five years as provided by the General Assembly (Art. IV, Sec. 2) and as provided by law (Article IV, Sec. 6) respectively: Article XVII, Section 2 stated that the terms of supreme court and circuit court judges shall be terms of an even number of years, not less than six years, as prescribed by the General Assembly. In some cases, Article XVII contains difference in language that could result in different interpretations. In 1947, Article XVII, Section 2 was amended, changing reference to circuit courts to the new words "courts of appeals". The term of office of a probate judge was increased to six years and reference to members of the board of public works was omitted from the 1947 version. In 1954, an increase in the terms of members of the executive branch from 2 to 4 years, involved a revision of Article XVII, Section 2 and related sections of the constitution. In 1970, Section 2 was amended to prevent filling a short-term vacancy by an election, and in the same year, Article III, Section 18 was also amended to conform with the change.

Effect of Change

The Commission's recommendations with respect to Section 2 do not propose any substantive change in existing constitutional powers; rather, the proposal eliminates duplication and inconsistent language, and some language is transferred to Section 1 of Article XVII as a matter of style.

[1]Article II, Section 11 provides for filling of vacancies in the General Assembly.

Rationale for Change

Much of the subject matter in Article XVII, Section 2 is dealt with in other sections of the Constitution. The Commission is of the opinion that the terms of office and filling of vacancies in legislative, executive and judicial offices is a proper subject for those articles, individually, and notes that the Constitution already provides for these matters in Article II, III, and IV.

The Commission recommends the repeal of the first and second sentences of the first paragraph of Section 2, pertaining to executive officers. Article III, Section 2 contains the same provisions (four year terms for governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and attorney general), and has already been approved by the Commission.

The third sentence of the first paragraph pertains to judicial terms. Article IV, Section 6 defines the terms of Supreme Court justices and Courts of Appeals judges as does Section 2 of Article XVII — not less than six years. Common Pleas and Probate judges are assigned terms of six years in Article XVII, thus differing from Article IV, Section 6 which specifies their terms as "not less than six years". Terms for other judges are not covered elsewhere. The fourth sentence defines the terms of Justics of the Peace, which no longer exist in Ohio. The Commission believes that judicial terms is an appropriate topic for the Judiciary Article, and recommends removal of the provisions from this section.

The final sentence in the first paragraph, regarding terms of office of other elective officers, has been transferred to Article XVII, Section 1, as has the second paragraph empowering the General Assembly to extend terms of elective office to conform to the prescribed election dates.

The third paragraph is concerned with filling vacancies in the offices of state elected officials other than Governor and members of the General Assembly. The filling of a vacancy in the office of a member of the General Assembly is provided for in Section 11 of Article II. Vacancies in the office of the secretary of state, auditor of state, treasurer of state, and attorney general are to be filled by the Governor, as provided in Article III, Section 18. The latter section does not include the office of lieutenant governor as one to be filled by the Governor in case of a vacancy. The Commission, in recommendations dealing with the Executive Branch, provides for succession to the office of governor in the event of a vacancy, but does not recommend that a vacant office of lieutenant governor be filled unless both offices become vacant before the middle of the term. Article XVII, Section 2 could be construed to empower the Governor to fill the vacancy in the office of lieutenant governor, in the language "Any vacancy which may occur in any elective state office other than that of a member of the General Assembly or of Governor, shall be filled by appointment by the Governor . . ." and this is not entirely consistent with Article III, Section 18. The language proposed by the Commission retains the method of filling vacancies in legislative, executive and judicial offices provided in their respective articles, and, in addition, empowers the Governor to fill vacancies in statutorily created elective offices which may be created at some future time in the manner specified in Section 2.

Intent of the Commission

The amendments proposed with respect to Section 2 do not make any substantive changes in the existing constitutional provisions. The Commission desires to remove duplicative and inconsistent language, and to retain authority granted by Section 2 that is not provided for elsewhere in the Constitution.

ARTICLE III

Section 18

Present Constitution

Section 18. 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.

Commission Recommendation

No change.

Commission Recommendation

The Commission recommends that no change be made in Article III, Section 18.

Comment

Article III, Section 18 was referred to the Elections and Suffrage Committee for consideration because its provisions overlap those of Section 2 of Article XVII, and is included in this report for that reason. No change is recommended in the section. The Commission proposes changes in Section 2 of Article XVII to make it clear that Article III governs filling of vacancies in the offices of elected executive officials. A more detailed explanation can be found under the discussion of Article XVII, Section 2.

ARTICLE III

Section 3

Present Constitution

Section 3. The returns of every election for the officers, named in the foregoing section, shall be sealed up 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 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 person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by the joint vote of both houses.

Commission Recommendation

Section 3. The returns of every election for the officers, named in the foregoing section, shall be sealed up 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 person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by the joint vote of both houses.

Commission Recommendation

Section 3. The returns of every election for the officers, named in the foregoing section, shall be sealed up and transmitted to the seat of ~~Government~~ 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 person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by the joint vote of both houses.

History and Background of Section

The language of this section, unchanged since adopted in 1851, resembles a provision of the 1802 Constitution concerning the returns of the election for governor.[1] Prior to 1851, the members of the executive branch were not constitutional officers, or, as in the case of the secretary

[1]Constitution of Ohio, 1802, Article II, Section 2.

of state, were appointed rather than elected. The 1851 Constitution required that the lieutenant governor, secretary of state, auditor of state, treasurer of state and attorney general, be elected at a general election. These are the officers "named in the foregoing section" in Article III. At the time the section was drafted, the state had no state elections officer. The legislature, being a body with continued existence, was a likely choice to receive, open, and publish statewide election results. Ohio statutes currently designate the secretary of state as chief elections officer and contain detailed procedures as to how the Secretary shall declare election results.

Section 3 also provides for the resolution of tie votes. The constitution provides that both Houses of the General Assembly shall choose the winner of a tie by joint vote. The section states, in addition, that "the person having the highest number of votes shall be declared duly elected" — a stipulation which prevents run-off elections for those offices.

Effect of Change

The Commission proposes a modification of the section concerning the time when the election results would be presented to the General Assembly. By specifying that the presentation be made at the next regular session, the Commission intends to preclude the possibility of a special session being called in the event of a tie vote, or the vote being decided by a General Assembly already in session.

Rationale for Change

The initial recommendation considered by the Commission was to repeal this section. The Secretary of State, as the chief elections officer, is empowered by statute to publish and declare the results of the election, which are known before January. The Secretary of State has statutory authority to decide who is elected in case of tie votes for all officers other than executive officers. However, many Commission members favored retention of the ceremonial function of the General Assembly regarding declaration of election results. Moreover, the Commission wishes to retain the language defining the winner as the person having the highest number of votes, in order to preclude the possibility of run-off elections. The Commission, therefore, recommends retaining the ceremonial and tie-breaking functions of the General Assembly and precluding run-off elections. The Commission recommends the addition of language specifying that the declaration of election results and tie-breaking votes should be made at the next regular session of the legislature. Section 8 of Article II provides that the General Assembly shall meet in "first regular" and "second regular" session. The six executive officers and members of the General Assembly, except approximately half of the state senators, will usually be elected at the same time. The Commission believes that should there be a tie vote for any of the six elected officers, the General Assembly elected at the same election should be the General Assembly to resolve that tie-vote. By requiring that such resolution be at the *next regular* session, it is intended to preclude the calling of a special session to resolve the tie and prohibit the vote from being decided by a General Assembly already in session.

Intent of the Commission

The recommendation of the Commission is intended to retain all of the powers of the present section, and to modify the procedures of declaring election results and resolving tie votes by requiring that these procedures be performed by the General Assembly elected at the same election as those elected officials who might have received an equal number of votes for the same office.

ARTICLE III

Section 4

Present Constitution

Section 4. Should there be no session of the General Assembly in January next after an election for any of the officers aforesaid, the returns of such election shall be made to the Secretary of State, and opened, and the result declared by the Governor, in such manner as may be provided by law.

Commission Recommendation

Repeal.

Commission Recommendation

The Commission recommends the repeal of Article III, Section 4.

History and Background of Section

Section 4, proposed by the 1851 Constitutional Convention, had no parallel in the 1802 Constitution. The original language was introduced as an amendment to Section 16 of the Executive Article which provided that members of the executive branch be elected for 2 year terms and that the Governor would fill any vacancies for the remainder of the term or until the disability was removed. Revision of the article by the committee on drafting severed the two sections. Article II, Section 25 provided that the legislature would commence on the first Monday of January, *biennially*, commencing in 1852. A problem arose if an election was held in a November before a January when the legislature was not in session. In this event, the President of the Senate would be unable to declare the results to the legislature. Section 4 was adopted as a solution. Pertinent statutes detailing the method in which election returns are made to the Secretary of State are found in Sections 3505.33 to 3505.35, inclusive, of the Ohio Revised Code.

Rationale for Change

The Commission recommends the repeal of Section 4. The problem to which it was proposed as a solution no longer exists. The adoption of a constitutional amendment by the voters in 1972 to Section 8 of Article II requires the General Assembly to be in session every January. Thus, there would not arise an election for statewide officers occurring in a November immediately preceding a January when the legislature would not be in session.

ARTICLE II

Section 21

Present Constitution

Section 21. The General Assembly shall determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted .

Commission Recommendation

No change.

Commission Recommendation

The Commission recommends that no change be made in Article II, Section 21.

History and Background of Section

With the expansion of the executive department proposed by the 1851 Constitutional Convention, and all state officials being elected by the voters of the state at large, it was considered important to provide for an orderly way of resolving contested election results. The legislative committee of the Convention considered two methods of resolving election contests. The first proposal allowed contested elections for the executive department, judges of the Supreme Court and all officers elected by the voters of the state at large to be determined by both houses of the General

Assembly in the manner provided by law. The proposal was not well received because some members feared that the law might allow the board of county commissioners, for example, to decide contested election cases regarding its own membership, since such persons were not elected by the voters of the state at large. The second alternative empowered the General Assembly to provide by law for the conduct of all election contests, with the proviso that no election be contested before the legislature except with reference to its own body. The proviso was omitted when it was observed that it was merely a repetition of the legislature's power under Article II, Section 6 to judge its own elections, returns, and qualifications of members. The language finally agreed to remains unchanged in the present Constitution.

Rationale for Retention of Section

The power to determine the conduct of contested elections granted to the General Assembly in Article II, Section 21 is not believed to be a significant addition to powers the legislature already possesses. The Commission considers it a plenary power of the legislature by virtue of Section 1 of that article, "The legislative power of the state shall be vested in a General Assembly". Consistent with the Commission's philosophy of making no changes in areas that are not presenting problems, however, it recommends that no change be made in this section.


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