OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

OHIO CONSTITUTION
ARTICLE IV, SECTION 22

SUPREME COURT COMMISSION

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

Recommendation

The committee finds that Article IV, Section 22 is obsolete and therefore recommends its repeal.

Background

Article IV, Section 22, reads as follows:

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

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

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

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

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

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

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

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

Amendments, Proposed Amendments, and Other Review

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

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

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

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

Litigation Involving the Provision

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

Presentations and Resources Considered

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

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

Conclusion

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

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

Date Adopted

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

Endnotes

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

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

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

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

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

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

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

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

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

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

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

> Proposed Constitutional Amendment
>
> TO INCREASE THE MAXIMUM AGE AT WHICH A PERSON MAY BE ELECTED OR APPOINTED JUDGE, TO ELIMINATE THE AUTHORITY OF THE GENERAL ASSEMBLY TO ESTABLISH COURTS OF CONCILIATION, AND TO ELIMINATE THE AUTHORITY OF THE GOVERNOR TO APPOINT A SUPREME COURT COMMISSION.
>
> Proposed by Joint Resolution of the General Assembly:
>
> To amend Section 6 of Article IV and to repeal Sections 19 and 22 of Article IV of the Constitution of the State of Ohio. A majority yes vote is required for the amendment to Section 6 and the repeal of Sections 19 and 22 to pass.

This proposed amendment would:

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

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

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

If approved, the amendment shall take effect immediately.

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

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

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