2008

AMENDMENTS TO SECTION 6 OF ARTICLE IV AND SECTION 6 OF ARTICLE XVIII, OHIO CONSTITUTION, HAVING RECEIVED THE FAVORABLE VOTE OF ITS PEOPLE OF THIS STATE AT THE NOVEMBER ELECTION ARE NOW A VALID PART OF THE OHIO CONSTITUTION.

SYLLABUS:

The amendments to Section 6 of Article IV and Section 6 of Article XVIII, Ohio Constitution (submitted to a vote of the people pursuant to Senate Joint Resolution No. 28 and Amended House Joint Resolution No. 11 of the 103rd General Assembly, respectively), having received the favorable vote of the people of this state at the November 3, 1959 general election, are now a valid part of the Ohio Constitution.

Columbus, Ohio, February 16, 1961

Ohio Senate, State House
Columbus, Ohio

To the Senate:

I am in receipt of Senate Resolution No. 18 adopted January 30, 1961, which requests my opinion as follows:

"Be it Resolved by the Senate that:

"WHEREAS, Section 109.13 of the Revised Code provides: 'When so required by resolution, the attorney general shall give his written opinion on questions of law to either house of the general assembly.'; and

"WHEREAS, there has been introduced into the Senate of the 104th General Assembly Senate Bill No. 4 which seeks to enact Section 2501.012 to read as follows:

'Sec. 2501.012. There shall be three additional judges of the court of appeals in the eighth district of Ohio, composed of Cuyahoga County, and one additional judge of the court of appeals in the tenth district of Ohio, composed of Franklin County.

'Such additional three judges in the eighth district court of appeals shall be elected at the general election in 1962, one for a term of six years, one for a term of four years, and one for a term of two years, said terms beginning February 9, 1963. Such additional judge in the tenth district court of appeals shall be

elected at the general election in 1962 for a term of six years beginning February 9, 1963. Such additional judges in such districts shall thereafter be elected to hold terms of six years.

'In such districts any three judges shall comprise the court of appeals in the hearing and disposition of cases in accordance with such local rules and practice and procedure as may be adopted by the judges of such courts.'; and

"WHEREAS, Section 6 of Article 4 of the Ohio Constitution provides in part that 'The state shall be divided into appellate districts of compact territory bounded county lines in each of which there shall be a court of appeals consisting of three judges.'; and

"WHEREAS, during the 103rd General Assembly there was introduced into the Senate Joint Resolution No. 28 which sought to amend said section 6 of the article 4 by inserting therein the following language: 'Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case.'; and

"WHEREAS, on August 1, 1959 the president of the Senate and the speaker of the House of Representatives signed Amended Senate Joint Resolution No. 28 and forwarded the same to the Secretary of State; and

"WHEREAS, the Ohio General Assembly adjourned sine die on August 14, 1959; and

"WHEREAS, on the afternoon of August 28, 1959 while the General Assembly was not in session the clerks of the House of Representatives and Senate of the Ohio General Assembly, through their assistant clerks, inserted the full texts of A.S.J.R. No. 28, Amended House Joint Resolution No. 11 and Amended House Joint Resolution No. 31 in the original daily journal in the House of Representatives and in the original daily journal of the Senate; and

"WHEREAS, on August 28, 1959 it was the first time that the full texts of A.S.J.R. No. 28, A.H.J.R. No. 11 and A.H.J.R. No 31 appeared in the original journals of either house These corrected journals, for the first time containing the texts of said resolutions, were received by the Secretary of State on August 28, 1959; and

"WHEREAS, section 1 of article 16 of the Ohio Constitution provides in part 'such proposed amendments shall be entered on the journals'; and

"WHEREAS, on August 20, 1959 the Secretary of State certified to all Boards of Election the official election ballot which

included forms to be used and submitted to the electors at the general election in November, 1959 the constitutional amendments proposed in S.J.R. No. 28, A.H.J.R. No. 11 and A.H.J.R. No. 31; and

"WHEREAS, the Supreme Court of Ohio on October 20, 1959, in the Case of Wichterman vs. Brown, 170 O.S. 25, which involves the proposed constitutional amendment contained in A.H.J.R. No. 31 declared with respect to the procedure followed by the clerks in inserting the proposed constitutional amendments set forth in A.S.J.R. No. 28, A.H.J.R. No. 11 and A.H.J.R. No. 31 in the journals after the Legislature had adjourned sine die, the court stating on page 29 as follows: 'the proposed constitutional amendment was not timely entered on the journals of the House and Senate. There was no journalization of the complete text of the proposal at any time during the sessions of the 103rd General Assembly, and the attempt on August 28, 1959, after final adjournment, to supply the fatal omission by then making the insertions in the original daily journal of the House for June 3, 1959, and in the original daily journal of the Senate for July 8, 1959, came too late. Those material and important insertions had to be made at appropriate prior times.' At the November, 1959 election following the decision in Wichterman vs. Brown, a majority of electors voted in favor of the proposed constitutional amendments contained in the A.S.J.R. No. 28 and A.H.J.R. No. 11; and

"WHEREAS, there is a doubt in the minds of some members of the Senate as to whether the proposed constitutional amendments contained in A.S.J.R. No. 28 and A.H.J.R. No. 11 are now a part of the Ohio Constitution and whether proposed S.B. No. 4 will be constitutional if enacted; and

"WHEREAS, if it were enacted and later declared unconstitutional it would create a great amount of confusion in the appellate courts of this state.

"*Now, Therefore, Be it Resolved:* That the Senate, in accordance with the provisions in Section 109.13 of the Revised Code, hereby requests the attorney general for a written opinion as to whether or not the proposed constitutional amendments contained in A.S.J.R. No. 28 and A.H.J.R. No. 11 of the 103rd Ohio General Assembly are now a valid part of the Ohio Constitution."

Section 1 of Article XVI, Ohio Constitution, referred to in Senate Resolution No. 18, provides:

"Either branch of the general assembly may propose amendments to this constitution; and, if the same shall be agreed to

by three-fifths of the members elected to each house, *such proposed amendments shall be entered on the journals, with the yeas and nays,* and shall be submitted to the electors, for their approval or rejection, on a separate ballot without party designation of any kind, at either a special or a general election as the general assembly may prescribe. Such proposed amendments shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately." (Emphasis added)

It must first be noted that both the proposed amendment contained in Amended Senate Joint Resolution No. 28 and pertaining to Section 6 of Article IV, Ohio Constitution, and the amendment proposed by Amended House Joint Resolution No. 11 pertaining to Section 6 of Article XVIII, Ohio Constitution, were submitted to the voters of the State of Ohio at the general election held on November 3, 1959; that the vote on these issues at such election was canvassed and the result of such vote was announced by the Secretary of State of Ohio on November 24, 1959, and that the result so announced shows that the majority of the electors voting on such issues voted in favor of the adoption of these amendments. Thus, pursuant to the provisions of Section 1 of Article XVI, *supra,* said amendments thereupon became a part of the Ohio Constitution. (*The State, ex rel. McNamara v. Campbell, et al.,* 94 Ohio St., 403.)

At this time, therefore, it must be presumed that these amendments to the Ohio Constitution are valid, existing parts of the organic law of this state. Thus, the question to be answered is what effect, if any, the actions (or inactions) of the clerks of the House of Representatives and the Senate, in failing to promptly spread the entire resolutions upon their respective journals, could have upon these now effective constitutional amendments. In answering this question, we must first consider whether the adoption of these constitutional amendments is now subject to any court challenge on the basis of the requirement pertaining to the spreading of a proposed resolution on the journals.

As noted in Senate Resolution No. 18, the Ohio Supreme Court in the case of *Wichterman* v. *Brown,* 170 Ohio St., 25, decided on October

20, 1959, held that the constitutional amendment proposed by Amended House Joint Resolution No. 31 of the 103rd General Assembly could not be placed on the ballot at the November 3, 1959 general election because the proposed amendment was not timely entered on the journals of the House and Senate. In this regard, it is stated at page 29 of the *per curiam* opinion:

> "There was no journalization of the complete text of the proposal at any time during the sessions of the 103rd General Asembly, and the attempt on August 28, 1959, after final adjournment, to supply the fatal omission by then making the insertions in the original daily journal of the House for June 3, 1959, and in the original daily journal of the Senate for July 8, 1959, came too late. Those material and important insertions had to be made at appropriate prior times.
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> "Although the facts in the case of *Leach v. Brown, Secy. of State,* 167 Ohio St., 1, 145 N.E. (2d), 525, are not the same as here, there is significant language in the *per curiam* opinion in that case which lends support to the position we take in the instant case."

It will be noted that both *Wichterman v. Brown* and *Leach v. Brown,* referred to in *Wichterman,* were cases decided *before* the particular amendments concerned could be submitted to the people for vote—and such amendments were, therefore, never so submitted. As discussed in the request for my opinion, Senate Resolution No. 18, the *Wichterman* case dealt with the amendment proposed by Amended House Resolution No. 31 of the 103rd General Assembly. *Leach* v. *Brown* dealt with an amendment proposed by Amended House Joint Resolution No. 34 of the 102nd General Assembly, the court holding that there was a difference between the amendment as spread upon the Senate journal and as proposed to be submitted to the electors, and that the provisions of Section 1 of Article XVI, Ohio Constitution, had not been complied with. Of significance in *Leach* v. *Brown* is the statement appearing at page 3 of the *per curiam* opinion of that case (167 Ohio St.) and reading:

> "It should be noted further that we would have a different question before us if timely action had not been taken in the present cause and the purported amendment to the Constitution had been submitted to the voters and ratified by them before the legality of such action was challenged."

The full meaning of the above statement is, of course, not certain. It seems, however, that the court would have considered the question in

a different light if the amendment had been submitted to, and ratified by, the voters prior to the time that the court had the matter before it. In this regard, your attention is called to the case of *State, ex rel. Commissioners of the Sinking Fund, et al. vs. Brown, Secretary of State,* 167 Ohio St., 71. In that case the relator prayed for a writ of mandamus against the Secretary of State to require him to execute promissory notes to finance certain capital improvements enumerated in Section 2e of Article VIII, Ohio Constitution. The suit was filed in 1957, approximately two years *after the adoption* by the people of Ohio of Section 2e of Article VIII, Ohio Constitution. The respondent (Secretary of State) contended that said amendment was void and of no legal effect for the reason that the language appearing on the ballot describing said amendment was misleading to the electorate. The court held that the writ of mandamus should issue. In a *per curiam* opinion three members of the court held that the writ of mandamus should issue for the reasons that (1) the language on the ballot was not misleading and (2) that the objection should have been raised in the form of an election contest. Three other members of the court held that the writ of mandamus should be allowed only on the basis that the question should have been raised in an election contest. Judge Taft, in a concurring opinion, said beginning at page 75 of that decision:

> "Taft, J., concurring. The question now raised, relative to the condensed text of Section 2e of Article VIII of the Constitution as it appeared on the November 1955 ballot, might have been raised by contesting, in the manner provided for in Section 3515.08, *et seq.,* Revised Code, the portion of the election wherein the electors apparently approved that proposed constitutional provision. If that question had been so raised, I have grave doubt whether this court could reasonably have sustained the validity of the approval of that constitutional provision by the electors. See *Beck* v. *City of Cincinnati,* 162 Ohio St., 473, 124 N.E. (2d), 120; *Leach* v. *Brown, Secy. of State, ante,* 1; and *Thrailkill, a Taxpayer,* v. *Smith, Secy. of State,* 106 Ohio St., 1, 138 N.E., 532.
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> "However, it would be intolerable if there were no limitation on the right to question whether the electors had approved a proposed constitutional amendment; and especially if there were no limitation upon the time within which such approval might be questioned. In the absence of such limitations, could it ever be determined with any degree of certainty what the provisions of our fundamental law were?
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> "Fortunately, this court has usually recognized that any question, as to the validity of what the electors apparently did in

an election, must be raised in the manner and within the time specified by the General Assembly in providing for election contests.

"Thus, in *Peck* v. *Weddell,* 17 Ohio St., 271, where it was sought to enjoin the clerk of courts from recording the abstract of the vote upon the question of the removal of the county seat from one town to another, it was held upon demurrer 'that allegations of fraud and illegality in conducting the election, constitute no sufficient ground for such injunction,' and that 'wrongs of such a nature can be inquired into and redressed, only by means of a contest of the election, pursuant to the provisions of the' statutes. To the same effect see *Link v. Karb, Mayor,* 89 Ohio St., 326, 104 N.E., 632. See also *State, ex rel. Ingerson,* v. *Berry, Clerk,* 14 Ohio St., 315; *State, ex rel. Grisell* v. *Marlow,* 15 Ohio St., 114; *State, ex rel. Wetmore,* v. *Stewart,* Clerk, 26 Ohio St., 216; *State, ex rel. Shriver, County Engineer* v. *Hayes,* 148 Ohio St., 681, 76 N.E. (2d), 869.

"* * * * * * * * *

"In the instant case, the question is merely whether Section 2e of Article VIII is now a part of our Constitution. That depends upon whether it was approved by the electors at the November 1955 election (Section 1 of Article XVI of the Constitution), as their votes apparently indicated it was. Since that apparent approval was not even questioned in an election contest, it cannot be collaterally attacked in this proceeding."

Section 1 of Article XVI, Ohio Constitution, which requires that proposed constitutional amendments be entered on the journals of each house, also requires that such amendments be adopted by a majority of the electors of the state voting upon them. Referring to the procedure for such voting, Section 3505.06, Revised Code, provides:

"The questions and issues ballot need not contain the full text of the proposal to be voted upon. A condensed text that will properly describe the question, issue, or amendment shall be used as prepared and certified by the secretary of state for statewide questions or issues or by the board for local questions or issues. * * *

The action required of the Secretary of State pursuant to Section 3505.06, *supra,* like the action required of the respective legislative clerks, as to entering proposed amendments on the journals, must occur prior to the vote of the people on any proposed amendment to the Constitution of Ohio. Since the court in the above-discussed case of *State, ex rel. Commissioners of the Sinking Fund* had before it a question of the effect of the

action required of the Secretary of State under Section 3505.06, as it relates to a constitutional amendment, I am of the opinion that the decision in that case is applicable to the question raised by Senate Resolution No. 18, here concerned.

Of particular interest, therefore, are the words of Judge Taft in that case (page 75) which I repeat:

> "Fortunately, this court has usually recognized that any question, as to the validity of what the electors apparently did in an election, *must be raised in the manner and within the time* specified by the General Assembly in providing for election contests.
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> "* * * * * * * * *
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> "In the instant case, the question is merely whether Section 2e of Article VIII is now a part of our Constitution. That depends upon whether it was approved by the electors at the November 1955 election (Section 1 of Article XVI of the Constitution), as their votes apparently indicated it was. *Since that apparent approval was not even questioned in an election contest it cannot be collaterally attacked in this proceeding."*
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> (Emphasis added)

A contest of an election must be comemnced within fifteen days after the results of such election have been ascertained and announced by the proper authorities (Section 3515.09, Revised Code). The results of the election at which the amendments under consideration herein were adopted were announced on November 24, 1959, no election contest was brought thereon, and it is now too late to commence such a proceeding. Accordingly, in view of the rules set forth in *State, ex rel. Commissioners of the Sinking Fund, supra,* as well as the cases cited therein by Judge Taft in his concurring opinion, I am of the opinion that the validity of the constitutional amendments here concerned cannot now be attacked because of any action, or non-actions, of the legislative clerks in the 103rd General Assembly.

In view of the above conclusion, I do not deem it necessary to further discuss the effect of the alleged failure of the clerks to timely enter the resolutions in question on their respective journals. I might note, however, that even if an election contest had been brought on the validity of the adoption of the amendments, the fact that the voters had approved the amendments would have been a consideration for the court to take

into account. In this regard it is stated in 11 American Jurisprudence 638, Sec. 32:

> "The general rule is that an amendment to a Constitution does not become effective as such unless it has been duly adopted in accordance with the provisions of the existing Constitution. The procedure and requirements established for the amendment of the fundamental law are mandatory and must be strictly followed, in order to effect a valid amendment. None of the requisite steps may be omitted.
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> "On the other hand, the rule has been laid down that after ratification by the people, every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to a state Constitution or the legality of a new Constitution; and unless the courts are satisfied that the Constitution has been violated in the submission of a proposed amendment, they should uphold it. The view is taken that substance is more important than form, and that the will of the legislature lawfully expressed in proposing an amendment and the will of the people expressed at the proper time and in the proper manner in ratifying such amendment ought not to be lightly disregarded. This liberal interpretation applies rather to the manner of compliance with constitutional requirements in regard to amendments than to a total omission or disregard of such a requirement, for it has not generally been held that an essential requirement may be entirely omitted."

Thus, the courts of other states have held in cases brought *after* the people have voted in favor of a constitutional amendment that there need not be absolute compliance with the required mode of proposing amendments to the constitution, but that substantial compliance with such requirements will suffice. (*Swanson v. State, et al* (Neb. 1937) 271 N.W. 264; *Palmer v. Dunn, et al.* (S. Car. 1950) 59 S.E. 2nd 158; *State, ex rel Landis v. Thompson* (Fla. 1935) 163 So. 270). That this might also be the case in Ohio is indicated by the previously quoted language found in *Leach v. Brown, supra,* that the court would have had a different question before it if timely action had not been taken and the amendment had been ratified by the voters.

In any event, however, the amendments to Section 6 of Article IV, Ohio Constitution and Section 6 of Article XVIII, Ohio Constitution, were adopted by the voters at the November 3, 1959 general election; such amendments are now a part of the Ohio Constitution and the time during which such adoption may be challenged by an election contest under

Section 3515.09, Revised Code, having elapsed, their adoption may not be challenged because of an alleged failure of the legislative clerks to timely spread the resolutions proposing such amendments on the legislative journals.

In specific answer to the question asked in Senate Resolution No. 18, therefore, it is my opinion that the amendments to Section 6 of Article IV and Section 6 of Article XVIII, Ohio Constitution (submitted to a vote of the people pursuant to Senate Joint Resolution No. 28 and Amended House Joint Resolution No. 11 of the 103rd General Assembly, respectively), having received the favorable vote of the people of this state at the November 3, 1959 general election, are now a valid part of the Ohio Constitution.

Respectfully,
MARK MCELROY
Attorney General