OPINION NO. 74-087

Syllabus:

1. Neither Article II, Section 28, Ohio Constitution, nor any other constitutional provision prohibits the Elections Commission from taking jurisdiction of an alleged violation of the election laws which occurred prior to the effective date of Am. Sub. S.B. No. 46, which established the Commission.

2. The Elections Commission has statutory authority to investigate a statement of expenditures which was filed on June 19, 1974.

3. The investigative procedure set forth in Am. Sub. S.B. No. 46 is applicable to an investigation, after the effective date of that Act, of an alleged violation which occurred before its effective date, in order to determine whether the election laws as they read on such earlier date were violated.

4. Unless otherwise specified, the two-year limitation of R.C. 3599.40 and 2901.13(A) applies tc prosecutions of violations of the elections laws which occurred after January 1, 1974; the one-year limitation of former R.C. 3599.40 applies to those which occurred before that date.

To: Nolan W. Carson, Chairman, Elections Commission, Cincinnati, Ohio
By: William J. Brown, Attorney General, October 18, 1974

I have before me your request for my opinion on several questions concerning the jurisdiction of the Elections Commission. The Commission was created by Am. Sub. S.B. No. 46, effective July 23, 1974. Your questions arise from an affidavit filed with the Commission on September 27, 1974, which charged that a certain committee had failed to comply with the requirements of R.C. 3517.10 in a statement filed June 19, 1974. R.C. 3517.10 was in effect at the time of such filing, although it has since been extensively amended by Am. Sub. S.B. No. 46, but the Elections Commission was not yet in existence.

Your questions can be summarized as follows:

1. Does Article II, Section 28, Ohio Constitution, prohibit the retrospective application of Am. Sub. S.B. No. 46 to a statement filed prior to the effective date of that Bill?

2. If the answer to question one is negative, does Am. Sub. S.B. No. 46 actually apply to the statement in question, in view of the presumption of prospective operation of statutes (R.C. 1.48)?

3. Does the amendment have any effect on penalties to be imposed for acts which occurred prior to its effective date? Note R.C. 1.58(A)(4).

4. Which investigative procedure should be used in connection with possible violations which occurred before the effective date of Am. Sub. S.B. No. 46 - that in effect at the time, or that specified by the Bill?

5. Is the applicable statute of limitations provided by R.C. 3599.40, which makes a violation of R.C. Title 35 not otherwise specified a misdemeanor of the first degree; and R.C. 2901.13(A), which states that the limitation in prosecution of a misdemeanor other than a minor misdemeanor is two years?

I. Article II, Section 28 of the Ohio Constitution, 1851, reads as follows:

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

Standing alone, the above language might be subject to an interpretation which would produce an affirmative response to the first question presented herein. However, there exists a substantial body of case authority holding that said language "refers to substantive rights and has no reference to laws of a remedial nature providing rules of practice, courses of procedure, or methods of review." Kilbreath v. Rudy, 16 Ohio St. 2d 70 (1968), first syllabus; State, ex rel. Slaughter v. Industrial Commission, 132 Ohio St. 537 (1937), third syllabus.

Beginning more than a century ago, the Ohio Supreme Court has consistently drawn a distinction between remedial laws and those affecting substantive rights in determining the applicability of the provisions of Article II, Section 28. Rairden v. Holden, Adm'r., 15 Ohio St. 207 (1865), involved a statute which authorized a successor administrator to bring an action for recovery on the bond of a previous administrator, whereas prior law had authorized such actions only by creditors, legatees and distributees. Although the statute in question was enacted after the bond was written, the court held that the substantive rights of the insurer were not affected and that the statute was purely remedial. In ruling Article II, Section 28, inapplicable to the issue, the Court stated at 211:

> "Laws of this character are not within the mischiefs against which the prohibitory clause of our constitution was intended to guard. * * *"

In Kilbreath v. Rudy, supra, the Court had before it a suit initiated by a local resident against a foreign corporation in the Common Pleas Court of Franklin County, claiming jurisdiction under R.C. 2307.382 and 2307.383, the "long-arm" statutes. A motion to quash the service of summons on the grounds that the cause of action arose before the "long-arm" statutes were enacted was sustained by the Common Pleas Court and the action was dismissed. The Franklin County Court of Appeals reversed that judgment, holding that the statutes were applicable to causes of action accrued but not filed before their effective date, and it certified the record to the Ohio Supreme Court on the ground that it was in conflict with two unreported decisions of the Cuyahoga County Court of Appeals.

In affirming the judgment of the Court of Appeals, the court again held that Article II, Section 28 of the Ohio Constitution had no application to laws of a remedial nature. At page 72 of its decision, the court distinguished substantive law and remedial law as follows:

> "Substantive law is that which creates duties, rights and obligations, while procedural or remedial law prescribes the methods of enforcement of rights or obtaining redress. * * *"

In responding to the argument that the "long-arm" statutes are substantive because they impose new obligations and duties, the court stated at pages 72-73:

> "* * *These statutes do not create new wrongs, they merely let local courts reach farther for personal jurisdiction over those who have committed

> established wrongs. If appellant's actions gave rise to a cause of action, they did so at the time they were done, and the only immunity that appellant could possibly have relied upon was that he was outside the jurisdiction of local courts. This kind of reliance does not seem worthy of judicial protection." (Emphasis added.)

In Lawrence R. Co. v. Comm'rs, 35 Ohio St. 1 (1879), the Supreme Court held in the first two branches of the syllabus as follows:

> "1. The legislature can not create a liability for acts as to which there was no liability when they were committed; but where a remedy exists, the legislature may change it, as well as to acts theretofore as those thereafter done.
>
> "2. The act of March 7, 1873 (70 O.L. 53), which provided a new remedy against those who place obstructions in public highways, applied as well to existing obstructions as to those subsequently placed therein."

This case concerned an amendment which became effective six years after the action which gave rise to the liability, and which gave boards of county commissioners power to enjoin such actions and sue for damages. The Court upheld the application of this remedy to a nuisance which was created long before the remedy existed.

This line of cases is directly applicable to the instant question. Prior to the enactment of Am. Sub. S.B. No. 46, and at the time of the filing of the statement on June 19, 1974, R.C. 3517.10 required every "* * *candidate, campaign committee * * *", to file a sworn statement of receipts and expenditures within 45 days after an election. Included in the requirements specified therein was the following:

> "(J) All receipts and expenditures shall be itemized separately regardless of the amount except a receipt of funds from an individual contributor in the sum of twenty-five dollars or less in money or things of value at one social or fund-raising activity. The total receipts from such social or fund-raising activity shall be listed separately, together with the expenses incurred and paid in connection with such activity."

The affidavit filed with the Commission charges a violation of R.C. 3517.10, as it existed on June 19, 1974 when the statement was filed. At that time, R.C. 3517.13 provided that a person seeking to test the accuracy of such a statement could file a petition in a common pleas court and obtain a summary investigation of his charges. If the judge found the statement to be false, he was directed to transmit a copy of his decision and the evidence to the prosecuting attorney of the county in which the statement was filed, and to the Attorney General in the case of statements filed with the Secretary of State, with directions to the prosecuting attorney to present them to the next grand jury in the county or with directions to the Attorney General to prosecute the case on behalf of the State.

The remedy provided by R.C. 3517.13 was repealed by the provisions of Am. Sub. S.B. No. 46, but this legislation enacted R.C. 3517.14, which provides for the creation of the Ohio Elections Commission, and R.C. 3517.15, which reads in part as follows:

> "(B) Upon presentation to the Ohio Elections Commission of an affidavit of any person, made on personal knowledge and subject to the penalties for perjury, setting forth any failure to comply with or any violation of sections 3517.08 to 3517.13 of the Revised Code, the commission shall proceed to an investigation of the charges made in the affidavit.
>
> "If the Commission finds a statement to be filed by section 3517.10 of the Revised Code false or any willful intent to violate or defeat sections 3517.08 to 3517.13 of the Revised Code, it shall forthwith transmit a copy of its findings and the evidence to the appropriate prosecuting authority. * * *"

Clearly, the above language is procedural and remedial in nature. The General Assembly has merely designated a new institution for the investigation of charges stemming from alleged violations of the specified statutes. The assumption of jurisdiction of the matter by the Ohio Elections Commission has no effect upon the substantive rights of the parties and does not create additional legal responsibilities.

Accordingly, under the rule established by the Ohio Supreme Court in the cases discussed previously, the prohibition of Article II, Section 28, is not applicable. Therefore, the answer to your first question is negative.

Your letter refers also to ex post facto laws. Such laws are criminal laws which operate retroactively to make illegal an action which was not illegal when it occurred, or increase the penalty which was applicable when the act occurred. No state may pass an ex post facto law, under Article I, Section 10, United States Constitution. However, as in the case of civil laws, remedial or procedural enactments which do not affect substantive rights are not covered by this prohibition. "One charged with crime must submit to the existing rules of procedure when he is tried." State v. Whitmore, 126 Ohio St. 381, 389 (1933).

I am aware of no other provision of law which could prohibit the application of Am. Sub. S.B. No. 46 to the affidavit in question.

II. Since there is no constitutional bar to the Elections Commission's jurisdiction of a report which was filed before the Commission was established, the question arises as to whether the General Assembly intended the Commission to take jurisdiction in such a case. R.C. 1.48 states that "[a] statute is presumed to be prospective in operation unless expressly made retrospective." However, it must be remembered that R.C. 3517.14 and 3517.15, which establish the Elections

Commission and confer its powers, are procedural or remedial statutes with respect to the report in question. Their application is prospective, so that they apply to all proceedings which occur after their effective date. The date when the report was filed is irrelevant to such application. As the Ohio Supreme Court stated in Kilbreath v. Rudy, supra, at 72, laws of a remedial nature are applicable to any proceedings conducted after the adoption of such laws. The legislative intent to provide to the citizen a more suitable remedy for investigation of a perceived wrong is evident, and it would be frivolous to assume that the General Assembly intended to create a gap in the provision for a remedy by repealing an existing statutory remedy and substituting another which applied only to those infractions which occurred after a certain date.

III. Your third question pertains to R.C. 1.58, which reads as follows:

> "(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:
>
> (1) Affect the prior operation of the statute or any prior action taken thereunder;
>
> (2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;
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> (3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;
>
> (4) Affect any investigation, proceedings, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.
>
> "(B) If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended." (Emphasis added.)

The foregoing language would authorize an investigation and prosecution of a violation of R.C. 3517.10, as it existed prior to July 23, 1974, even if the statute had been repealed rather than amended. In determining whether or not a violation has taken place, as alleged in the affidavit, the Commission must look to the statute as it read on June 19, 1974, but the subsequent amendment of R.C. 3517.10 to modify the filing requirements does not otherwise limit the investigation of the charge by the Commission. As concluded previously in this discussion, those procedures specified in Am. Sub. S.B. No. 46 apply to all proceedings commenced after July 23, 1974.

IV. The reasoning and conclusion in question 3 also apply to question 4. The proper "investigative procedure" is that set forth in the current statutes. Any liability, however, will be based on R.C. 3517.10 as it read prior to July 23, 1974.

V. Your final question concerns the time limitation applicable to investigations by the Elections Commission. Prior to January 1, 1974, R.C. 3599.40 read as follows:

> "Whoever violates any provision of Title XXXV [35] of the Revised Code, unless otherwise provided in such title, shall be fined not less than twenty-five nor more than five hundred dollars or imprisoned not less than ten days nor more than six months, or both. All prosecutions under Title XXXV [35] of the Revised Code must be commenced within one year after the commission of the act complained of." (Emphasis added.)

This statute was amended by Am. Sub. H.B. No. 511, the new criminal code, to read as follows:

> "Whoever violates any provision of Title XXXV [35] of the Revised Code, unless otherwise provided in such title, is guilty of a misdemeanor of the first degree."

Under R.C. 2901.13(A)(2), the limitation for prosecution of a misdemeanor other than a minor misdemeanor is two years, unless otherwise specified. Thus, the limitation was extended from one year to two years on January 1, 1974.

The two-year limitation is clearly applicable to the affidavit in question, which was filed several months after its effective date. However, your question asks for general guidelines.

Prior to January 1, 1974, the one-year limitation was in effect. Nevertheless, the general rule is that a period of limitation may be extended by the legislature, with respect to those claims which were not already extinguished by the previous statute of limitations. See Peters v. McWilliams, 36 Ohio St. 155 (1880), and Baker v. Farish, 1 Ohio Misc. 1 (1964). There is little authority on the application of this rule to criminal cases, but what there is appears to favor such application. See 46 ALR 1101. Since a limitation is not a matter of substantive right, but of remedy (see State, ex rel. Donovan v. Duluth Street R. Co., 150 Minn. 364, 185 N.W. 388 (1921)), it is not violative of due process to extend the statute of limitations for a criminal offense. However, if a criminal prosecution is barred under an old statute due to the running of the time limitation, a vested right arises and a new statute of limitations cannot revive criminal liability as this would be retroactive legislation impairing the vested right. The court in Swamp Land Dist. v. Glide, 112 Cal. 85, 90, 44 Pac. 451, 452-53 (1896) stated:

> "But a man has no vested right in the running of the Statute of Limitations until it has completely run and barred the action. And, when a change in the statute is made during the time of its running, that time is not a credit to the defendant under the new law. The whole period contemplated by the new law must lapse to bar the

> action. Such are the general rules applicable alike to criminal and civil actions, unless the new act itself expresses a contrary intent."

Therefore, I conclude that the General Assembly had constitutional authority to extend the period of limitation with respect to prosecutions not extinguished by the previous limitations. Consequently, any violators of the elections laws which occurred after January 1, 1973, are subject to the two-year limitation, because prosecution was not barred by the one-year limitation at the time the new limitation took effect. Any violations which occurred before January 1, 1973, are now barred from prosecution, and may not be investigated by the Commission.

In specific answer to your questions, it is my opinion and you are so advised that:

1. Neither Article II, Section 28, Ohio Constitution, nor any other constitutional provision prohibits the Elections Commission from taking jurisdiction of an alleged violation of the election laws which occurred prior to the effective date of Am. Sub. S.B. No. 46, which established the Commission.

2. The Elections Commission has statutory authority to investigate a statement of expenditures which was filed on June 19, 1974.

3. The investigative procedure set forth in Am. Sub. S.B. No. 46 is applicable to an investigation, after the effective date of that Act, of an alleged violation which occurred before its effective date, in order to determine whether the election laws as they read on such earlier date were violated.

4. Unless otherwise specified, the two-year limitation of R.C. 3599.40 and 2901.13(A) applies to prosecutions of violations of the elections laws which occurred after January 1, 1973; the one-year limitation of former R.C. 3599.40 applies to those which occurred before that date.