

2024

THE SENATE OF THIS STATE, AS IT IS PRESENTLY CONSTITUTED UNDER THE LAWS AND CONSTITUTION OF THE STATE, IS NOT A CONTINUOUS BODY—§§109.13, 101.01, RC.—§7, ARTICLE II, OHIO CONSTITUTION.

SYLLABUS:

The Senate of this state, as it is presently constituted under the laws and Constitution of the state, is not a continuous body.

Columbus, Ohio, February 28, 1961

The Ohio Senate, State House  
Columbus, Ohio

To the Senate:

Senate Resolution No. 22, requesting my opinion, reads as follows:

“Requesting the Attorney General for a written opinion relative to whether or not the Senate of this state is a continuous body.

“WHEREAS, Under section 109.13 of the Revised Code of Ohio the Attorney General when requested by resolution is required to furnish his written opinion on questions of law to either house of the General Assembly; and

“WHEREAS, Under Section 2 of Article II of the Constitution of Ohio, as amended on November 6, 1956, it is provided, among other things, that only approximately one-half of the members of the state Senate shall be replaced at a single election; and

“WHEREAS, Pursuant to the provisions of Section 2 of Article II of the Constitution of Ohio approximately one-half of the total number of Senators were elected for a term of four years commencing on the first day of January 1959, and the remainder were elected for a term of two years commencing likewise on the same day ; and

“WHEREAS, The terms of all of the Senators elected for terms commencing on the first day of January 1961 and for Senators to be elected thereafter are four years under the Constitution, except that the term of an additional Senator provided for in Section 6a of Article XI of the Constitution of Ohio is two years ; and

“WHEREAS, As a result of the aforementioned amendment to the Constitution there remains in the Senate at the commencement of each new session approximately a constant one-half of the members whose qualifications have been passed upon and who have taken the oath of office ; and

“WHEREAS, As the law in this state presently exists a Senator elected for a term of four years having once taken the oath of office becomes a fortiori entitled to sit as a member of the Senate during all sessions of the General Assembly during his term of office ; and

“WHEREAS, The existence of this situation has raised a doubt in the minds of some of the members of the Senate as to whether this body as now constituted and as it will continue to be constituted in future sessions is a continuous body by reason of the election procedures in force as a result of the November 2, 1956 amendment of Section 2, Article II of the Constitution of Ohio ; therefore be it

“RESOLVED, That we the members of the Senate of the 104th General Assembly of Ohio do hereby adopt this Resolution for the purposes of resolving this doubt that exists among us and to hereby under the provision of section 109.13 of the Revised Code request your written opinion as it bears on the following proposition :

“Is the Senate of this state as it is presently constituted under the laws and Constitution of this state a continuous body? be it further

“RESOLVED, That the Clerk of the Senate of the 104th General Assembly of Ohio forthwith transmit a properly authenticated copy of this Resolution to the Attorney General, Hon. Mark McElroy.”

Regular sessions of the General Assembly are held every two years starting on the first Monday of January (Section 25 of Article II, Ohio

Constitution). Special sessions may be called by the Governor pursuant to Section 8 of Article III, Ohio Constitution. Since the Senate may transact business only during a session of the General Assembly, it is obviously not a body which may act at any time, and, therefore, not a "continuing body" in that regard. The question as I see it, therefore, pertains to the internal affairs of the Senate such as adoption of rules, oaths of office, and other related matters arising at the commencement of a regular session of the General Assembly.

Section 7 of Article II, Ohio Constitution, provides that the mode of organizing the House of Representatives at the commencement of each regular session shall be prescribed by law, but there is no corresponding constitutional provision applying to the Senate. Section 101.01, *et seq.*, Revised Code, however, provides a procedure for organizing both the House and the Senate.

Section 101.01, *supra*, provides for the regular session to commence on the first Monday of January following the election of its members, and provides that the "senators-elect" shall be called to order to take the oath of office. Section 101.02, Revised Code, provides that the Senate shall elect a president pro tempore and other officials. Under the existing statutes, therefore, there is a definite implication that the Senate is not a continuing body. On the other hand, however, these statutes were enacted before the 1956 amendment of Section 2 of Article II, Ohio Constitution, referred to in Senate Resolution No. 22, *supra*, and were geared to a Senate in which the members were elected for two-year terms.

I have been unable to find any Ohio authority, and little authority, in general, as to what is or is not a continuing body. There is authority to the effect that the Senate of the United States is a continuing body (*McGrain v. Daugherty*, 273 U. S. 135; Hughes, *American Parliamentary Guide*, page 642; Cushing, *Law and Practice of Legislative Assemblies*, page 993; Riddick, *U. S. Congress Organization and Procedure*, page 329). Unlike the Ohio Senate, however, only about one-third of the members of the Senate of the United States are replaced at a single election. On reading the authorities which hold the U. S. Senate to be a continuing body, I find that the main basis for such position is that the U. S. Senate, itself has considered itself to be a continuing body. This viewpoint can be seen in the language found at page 329 of Riddick, *supra*, and reading :

“Thus the manner and extent of organizing each new Senate have not been established under the influence of definite breaks between each Congress as has been the experience of the House, nor have the parliamentary rules of the Senate been equally subjected to alterations. The Representatives re-adopt their old rules of procedure at the inception of each Congress, sometimes with slight modification, while the Senators have not given a general reaffirmation to their rules since 1789. The identical rules adopted by the Senate in the first Congresses have remained in force continuously with the exceptions of particular additions or abolishments from time to time.”

I note that the attitude of the U. S. Senate as to its being a continuing body has not been followed in the Ohio Senate. In the first place, Sections 101.01 and 101.02, *supra*, discussed earlier, appear to imply otherwise. In the second place, the present Senate has adopted rules of procedure for the Senate of the 104th General Assembly (Senate Journal for January 25, 1961) notwithstanding the fact that approximately one-half of the present members will continue in office through the 105th General Assembly. Also, I note that *all* of the Senators present took the oath of office on January 2, 1961, whether they were Senators-elect or Senators who had served in the 103rd General Assembly.

Of further interest in the question at hand is the history of the Ohio Senate from 1802 to 1852. Under the Ohio Constitution of 1802, the General Assembly met annually (Section 25 of Article I). Members of the House of Representatives were elected each year for one-year terms (Section 23 of Article I). Senators were elected for two-year terms, approximately one-half of them being elected each year (Section 5 of Article I). Thus, until the adoption of the Ohio Constitution of 1851, an elected Senator served in two regular sessions of the General Assembly, just as the present Senators elected for four-year terms will serve in two such regular sessions.

I have been unable to find any authority that the Senate was considered a continuing body during the years 1802 to 1852, and it appears that the Senate did not consider itself as such during those years. This can be seen from the fact that the Senate in each session, from the first in 1802, to the 49th in 1851, either reaffirmed its old rules or adopted new rules. The practice of reaffirming the old rules or adopting new ones would seem to be inconsistent with the theory that the Senate as then constituted was a continuous body (Riddick, *supra*).

Also to consider in the question at hand is the fact that there is a new Legislature every two years. While only about half of the Senators will be starting in a new term, *all* of the Representatives will be starting new terms. Thus, there is a definite break between each Legislature, and the Senate being a part of the Legislature, there is a break between Senates in that regard.

In summary, therefore, while there do not appear to be any definite rules to follow in determining whether the present Senate should be considered a continuing body, the actual practice followed by the Senate should be given great weight in arriving at a conclusion (Riddick, *supra*). Thus, the fact that the present Senate has proceeded as if it were not a continuing body, plus the provisions of Sections 101.01 and 101.02, *supra*, as to organization of the Senate, plus the procedure followed by the Senate in the years 1802 to 1852 under somewhat similar circumstances, lead me to the conclusion that the Senate should not now be considered a continuing body.

I might note in passing that since the present Senate is the first in which members who were elected for four-year terms are serving in two regular sessions of the General Assembly, and since the precedents as to *all* members taking the oath of office, and of adoption of new rules, have been established, it might be advisable for the present General Assembly to review the provisions of Section 101.01, et seq., Revised Code, with a view towards a revision in light of the amendment to Section 2 of Article II, *supra*, and of the precedents established.

In conclusion, and answering the specific question of Senate Resolution No. 22, it is my opinion that the Senate of this state, as it is presently constituted under the laws and Constitution of the state, is not a continuous body.

Respectfully,  
MARK MCELROY  
Attorney General