Author's Comment

As pointed out in the *Comparative Analysis,* the Texas Legislature is one of only four subject to the two-thirds quorum requirement. One scholar suggests the two-thirds requirement reflects distrust of the legislature, a distrust not arising from the Reconstruction experience as one might assume, but traceable to the Republic and its constitution. (See 1 *Interpretive Commentary,* pp. 571-72.) One may only speculate about the abuses real or imagined in the minds of the 1836 delegates that led them to reject their well-worn model, the United States Constitution, and require a two-thirds quorum. Whatever their reasons, however, our longstanding acceptance of and commitment to majority rule suggest that a majority is also adequate for a quorum.

Sec. 11. RULES OF PROCEDURE; EXPULSION OF MEMBER. Each House may determine the rules of its own proceedings, punish members for disorderly conduct, and, with the consent of two-thirds, expel a member, but not a second time for the same offence.

History

The present section resembles that in the Constitution of the Republic, except that the latter prohibited disorderly "behavior" instead of "conduct."

The 1845 Constitution changed "behavior" to "conduct," while the Constitution of 1869 restored the earlier wording, except for the phrase "but not a second time for the same offence." The Constitution of 1876 reincorporated this phrase, so that the wording is as it reads today.

Explanation

Legislative Rules. Every deliberative body needs rules of procedure to ensure the orderly conduct of its business. Each house of the Texas Legislature has had such rules from the beginning, and they have recently become available in loose-leaf form periodically updated by the Texas Legislative Council. (Legislative rules should be distinguished from the various constitutional procedural rules, such as those specifying the enacting clause of bills and requiring their reading on three separate days (see the Annotations of Secs. 29 and 32 of this article), and from a more recent phenomenon, standing committee rules (see the *Explanation* of Sec. 37)). Legislative rules of the two houses deal with everything from order of business and the traditional parliamentary maneuvers to decorum and housekeeping to selection of honorary mascots. There are also joint rules, governing relations between the two houses such as the creation and operation of conference committees. When the rules are silent on a point, or when their application is unclear, resort is had to the rules of congress, interpretations of those rules collected in *Hinds' Precedents of the House of Representatives* and *Cannon's Procedure in the House of Representatives,* and to interpretative commentary such as Paul Mason, *Mason's Manual of Legislative Procedure* (New York: McGraw-Hill Book Co., 1953).

Traditionally in Texas each house has adopted its rules by simple resolution each biennium at the beginning of the regular session. (Joint rules are adopted by concurrent resolution.) The house rules may be amended by majority vote but amendment of the senate rules requires a two-thirds vote; suspension of the rules in either house requires a two-thirds vote. (See Tex. H. Rules 23, 31 (1973); Tex. S. Rule 32 (1973).) Each house employs a parliamentarian to help interpret the rules, but parliamentary rulings by the presiding officer are appealable to the members who may vote to overrule him.

Discipline of Members. Mr. Mason asserts that a legislative assembly's power to discipline its members is both inherent and, subject to the customary two-thirds vote requirement for expulsion, absolute. (Paul Mason, *Mason's Manual of Legislative Procedure* (New York: McGraw-Hill Book Co., 1953), Secs. 561-63.) Section 11 of course confers this power expressly, and from time to time both houses of the Texas Legislature have exercised it in a variety of forms such as arrest and restraint (to compel attendance), denial of privileges, and verbal or written censure.

Expulsion of a member, the ultimate sanction, should be distinguished from exclusion. Section 8 vests each house with power to judge the qualifications and elections of its members, and in exercise of this power a house by majority vote may refuse to seat (exclude) a member. Expulsion, on the other hand, requires a two-thirds vote of the entire membership—100 representatives or 21 senators—or so the senate rules have interpreted the phrase "with the consent of two-thirds." (See Tex. S. Rule 31(a) (5) (1973). For a recent case in which the distinction between expulsion and exclusion proved vital, see *Powell v. McCormack,* 395 U.S. 486 (1969).)

Expulsion may not be imposed a second time for the same conduct. This safeguard, which superficially resembles the double jeopardy prohibition applicable to criminal prosecutions, derives from the belief that an expelled member's reelection expiates his misconduct.

Comparative Analysis

Legislative Rules. The constitutions of all states except Georgia and North Carolina authorize each house to determine its own rules, and the United States Constitution and the *Model State Constitution* contain this customary provision.

According to the Council of State Governments, legislative rules underwent widespread revision during 1971 and 1972 as many states sought to streamline their legislative process. Widely utilized as an aid was *Key Points in Legislative Procedure,* a publication of the Rules Committee of the National Legislative Conference. Both houses of the Minnesota Legislature, for example, replaced *Jefferson's Manual* with the more modern *Mason's Manual* for parliamentary guidance. Florida made extensive changes in the rules for introduction and consideration of bills. In addition to its new procedure for prefiling bills, Kentucky required 24-hour prefiling and distribution to each member of floor amendments offered on third reading and reference of all bills with fiscal impact to the appropriations committee for review and approval. Pennsylvania added to this the requirement that a fiscal note be provided before first reading, and, in the case of amendments to fiscal legislation, that no vote be taken until the day following distribution of the appropriately modified fiscal note. Wisconsin initiated the practice of specifying by joint resolution the complete session schedule. Finally, rules studies were commenced by the Senate Rules Committee in Georgia, with special emphasis on the standing committee system, and by the Joint Committee on Legislative Process in Indiana.

Discipline of Members. Authorization to discipline and expel a member is found in 26 state constitutions, the United States Constitution, and the *Model State Constitution.* Variations exist, however, in the wording of this authorization. Seventeen states, including Texas, and the United States Constitution appear to require for expulsion the concurrence of two-thirds of the members *present* of the house concerned. (Tex. S. Rule 61 (1973) interprets this language to require two-thirds of the total membership, *i.e.*, 21 senators.) Six of the 26 states and the *Model*

State Constitution express the vote requirement as concurrence of two-thirds of the total *membership* of the house. Mississippi has an exception to the general rule: a member may be expelled a second time for the same offense if it was for theft, bribery, or corruption. The United States Constitution does not bar a second expulsion for the same offense. In Michigan the reasons for expulsion must be entered in the journal with the names of the members voting and their vote.

Author's Comment

Undoubtedly each house would have power to prescribe its procedural rules without this section, and to discipline its members as well. The section's limitations on exercise of the disciplinary power are desirable, however, and preserving the section intact may be justified because it is traditional. (If preserved, the rules statement ought to be separated from the discipline statement and relocated with sections like 8 and 9 of this article dealing with organization and procedure of the legislature.)

The rules of each house and the joint rules could be accorded more permanence by a statutory (*not* constitutional) statement that they continue in effect from legislature to legislature unless repealed or amended. Such permanence would have avoided the consequences for the 62nd Legislature of the failure of the two houses to agree on joint rules. The Legislative Reorganization Act of 1961 accorded this kind of status to the standing committees of each house and could be amended to do the same for the rules. (See Tex. Rev. Civ. Stat. Ann. art. 5429f, secs. 2, 5.)

Mr. Mason to the contrary, it is unlikely that the legislature's power to discipline its members is unreviewable by the judiciary. Clearly Texas courts would enforce the two limitations in Section 11, and if recent decisions by the United States Supreme Court are any guide, they would also measure an expulsion proceeding against the requirements of procedural due process. (*Cf. Groppi v. Leslie,* 404 U.S. 496 (1972); *Bond v. Floyd,* 385 U.S. 116 (1966).)

Sec. 12. JOURNALS OF PROCEEDINGS; ENTERING YEAS AND NAYS. Each House shall keep a journal of its proceedings, and publish the same; and the yeas and nays of the members of either House on any question shall, at the desire of any three members present, be entered on the journals.

History

This section originated in the Constitution of the Republic and has remained unchanged except for a clause, which derived from the United States Constitution, permitting each house to withhold publication of "such parts [of its journal] as in its judgment require secrecy." The 1845 Constitution deleted this clause as well as a sentence in another section guaranteeing members the right to record in the journal their protest against "any act or resolution."

It was suggested in the Constitutional Convention of 1875 that nine members instead of three be required to demand recording the yeas and nays. In opposition one delegate said that "the rule would be an arbitrary one, enforced to throttle the minority of Republicans on the floor. . . ." He thought that "if members were afraid of the yeas and nays they must be afraid to have their records go before the people." The sponsor of the proposal retorted that "He had only desired to prevent the encumbrance of the records by two or three of the opposition." (*Debates,* pp. 98-99.) The resolution failed as did an amendment to it requiring six members to demand the yeas and nays. (*Debates,* p. 151.)

Explanation

The journal of each house is its official record of proceedings. Roll calls, motions, the text of bills, committee reports, votes, recesses, and adjournments are all recorded in the journals. (See Tex. S. Rule 46 (1973) for a description of journal content.) The journals do not record debate, either in committee or on the floor, so they are not as comprehensive as the *Congressional Record.* Journals are published daily, approved by each house (with corrections if necessary), and distributed to the members; the daily editions are permanently bound following each session and bound copies automatically are furnished the members, the governor, the State Library, and heads of state agencies. (See Tex. Rev. Civ. Stat. Ann. arts. 5429d, 5442.)

Because they do not record debate, the journals are not very helpful as legislative history of a statute. Sometimes they supply clues to legislative intent, however, and when relevant, courts will judicially notice the journals for this purpose. (See, for example, *Red River Nat'l Bank v. Ferguson,* 192 S.W. 1088 (Tex. Civ. App.—Texarkana), *aff'd,* 109 Tex. 287, 206 S.W. 923 (1917).) And of course they are always the best evidence of what the legislature did—subject to the enrolled bill doctrine discussed below—or did not do. (*Denison v. State,* 61 S.W.2d 1017 (Tex. Civ. App.—Austin, *writ ref'd per curium,* 122 Tex. 459, 61 S.W.2d 1022 (1933) (senate confirmation vote).)

The journals may not be used to contradict an enrolled bill, which the courts have defined as an act regular on its face, signed by the presiding officers of each house, authenticated by their respective clerks, and either signed by the governor or allowed to become law without his signature. (*Williams v. Taylor,* 83 Tex. 667, 19 S.W. 156 (1892).) The enrolled bill is also the exclusive source of the text of a statute, and in case of conflict between it and the printed text, the enrolled version prevails. (*A., T. & S.F. Ry. v. Hix,* 291 S.W. 281 (Tex. Civ. App.–El Paso 1927, *no writ*); *Central Ry. Co. v. Hearne,* 32 Tex. 547 (1870) (dictum).) Technically, the doctrine should be called "the enrolled *act* doctrine" because it is an act and not a bill after it becomes law. In parliamentary procedure a bill is engrossed for third and final consideration by one house and enrolled after final passage by that house for transmittal to the other; a bill is also enrolled after final passage by both houses for transmittal to the governor. The doctrine has traditionally been called "the enrolled bill doctrine," however. This doctrine (which is a variety of the best evidence rule) has been the settled law of Texas since 1892, at least in civil cases, and it is the majority rule in this country.

In the landmark case settling on the doctrine, *Williams v. Taylor,* the supreme court pointed out that the separation of powers principle should make courts reluctant to review compliance by a coequal branch of government with constitutional requirements of a procedural nature and that the journals were no more reliable evidence of what happened than the enrolled bill itself. The most persuasive justification for the doctrine, according to the court, was the need for finality and certainty in our statute law. Modern policy is to declare law by statute, with maximum publicity, and "to stamp upon each statute evidence of unquestioned authority. That evidence at common law was the enrolled bill, and behind it the courts were not permitted to go. . . ." (83 Tex. at 672, 19 S.W. at 157). Thus the court in *Williams* refused to invalidate a statute on the ground that the journals showed that the bill had not been reported out of committee within three days of final adjournment, in violation of Article III, Section 32, holding that the bill was conclusively presumed to have been enacted in accordance with the constitution.

Since *Williams,* Texas courts have applied the enrolled bill doctrine to reject challenges, for example, that a bill was not within the governor's special session

call (*City of Houston v. Allred,* 123 Tex. 334, 71 S.W.2d 251 (1934) (Art. III, Sec. 40)), that a bill was not signed by the speaker in the house's presence (*James v. Gulf Ins. Co.,* 179 S.W.2d 397 (Tex. Civ. App.—Austin 1944), *rev'd on other grounds,* 143 Tex. 424, 185 S.W.2d 966 (1945) (Art. III, Sec. 38)), that a bill was not read on three separate days (*El Paso & S.W. Ry. Co. v. Foth,* 100 S.W. 171 (Tex. Civ. App.), *rev'd on other grounds,* 101 Tex. 133, 105 S.W. 322 (1907) (Art. III, Sec. 32)), and that the senate had not in fact passed a bill (*Ellison v. Texas Liquor Control Bd.,* 154 S.W.2d 322 (Tex. Civ. App.—Austin 1941, *writ ref'd*).) The enrolled bill doctrine does not mask the journals in every instance in which a statute is questioned, however. For example, the supreme court resorted to the senate journal in *Ewing v. Duncan* (81 Tex. 230, 16 S.W. 1000 (1891)) to ascertain the effective date of an act (*i.e.,* whether it received the two-thirds vote necessary under Art. III, Sec. 39, to take effect immediately) because the senate secretary's certificate on the enrolled bill recited the vote as 24 to 24. (See also *Holman v. Pabst,* 27 S.W.2d 340 (Tex. Civ. App.—Galveston 1930, *writ ref'd*) (absence from enrolled bill of speaker's signature fatal); *Nueces County v. King,* 350 S.W.2d 385 (Tex. Civ. App.—San Antonio 1961, *writ ref'd*); and the *Explanation* of Sec. 35 of this article.) The point is that the journals may not be used to contradict an enrolled bill.

A number of states apply the "journal entry rule" to test legislative compliance with constitutional procedural rules. If the constitution mandates a particular procedure, this rule provides, there must be an entry in the journal reflecting its performance or the noncomplying statute is void. The Texas Court of Criminal Appeals followed this rule for many years. (*E.g., Hunt v. State,* 22 Tex. Ct. App. 396, 3 S.W. 233 (1866); *Parshall v. State,* 62 Tex. Crim. 177, 138 S.W. 759 (1911).) Not until 1971 did that court partly disavow it, by overruling cases like *Hunt* that permitted going behind the enrolled bill to ascertain if a statute enacted at a special session was within the governor's call, while leaving undecided whether true journal-entry rule cases like *Parshall* are still the law. (*Maldonado v. State,* 473 S.W.2d 26 (Tex. Crim. App. 1971).) For discussion of the enrolled bill doctrine and its competitors, see C. Dallas Sands, *Sutherland Statutory Construction,* 4th ed. (Chicago: Callaghan, 1972), vol. 1, ch. 15.)

As noted, other sections of this article require recording various information in the journals, and Section 12 itself requires a record vote on a question if any three members demand it. What *may* be recorded in the journals, as distinguished from what must be, is determined by legislative rule. (See Tex. H. Rules 12, secs. 1, 5, 7; 26, sec. 7 (1973); Tex. S. Rules 22, 46 (1973).) Interestingly, the protest guarantee of the 1836 Constitution, mentioned in the *History,* has been preserved in the rules by permitting any member to record in the journal his reasons for a vote and personal privilege statements. (See, *e.g.,* Tex. S. Rule 22 (1973); Tex. H. Rule 10 (1973).)

Comparative Analysis

All states except Massachusetts appear to require that a journal be kept and almost all require that it be published. A good many states have a secrecy exception. The United States Constitution requires that a journal be kept and that it be published from time to time, except such parts as may require secrecy. The *Model State Constitution* calls for a journal which shall be published "from day to day."

Thirty-one states require the entry of the yeas and nays upon final passage, and 13 of these specifically require that the name of each member and his vote be entered. In all except four states a demand can be made for the yeas and nays on any question. Three of those four exceptions are among the thirty-one states that

require entry upon final passage, so it either is mandated or possible, with a demand by the requisite number of members, to record a yea and nay vote on final passage in the journal in 49 states.

The United States Constitution provides for recording any vote upon demand of one-fifth of those present and requires the entry, with the names of those voting, of any vote to override a veto. The *Model State Constitution* has no provision for yeas and nays upon final passage but does provide for a record vote on any question if demanded by one-fifth of the members present.

Author's Comment

As state legislatures become more professional, the proponents of recording committee hearings and debate can be expected to intensify their efforts. There is much to be said in their favor—the courts in particular would welcome this type of legislative history—but there is nothing to be said in favor of including the recording requirement in the constitution. Legislative rule making is a much more flexible method of handling the requirement, and in fact the 1973 Rules of the house provided for recording both committee hearings and debate and those of the senate for recording committee hearings. (Tex. H. Rule 8, secs. 11, 14 (1973); Tex. S. Rule 104 (1973). Curiously, both house rules deny public access to the recordings, a denial inconsistent with the recently-enacted freedom of information act (Tex. Rev. Civ. Stat. Ann. art. 6252-17a). The senate rule provides that its recordings "shall be a matter of public record.")

Although the enrolled bill doctrine has not escaped criticism (see *Sutherland*, vol. 1, pp. 410-12), its prevention of spurious challenges to legislation (*i.e.*, challenges to the merits disguised as challenges to procedural irregularity) makes the doctrine superior to any of its competitors.

Sec. 13. VACANCIES; WRITS OF ELECTION. When vacancies occur in either House, the Governor, or the person exercising the power of the Governor, shall issue writs of election to fill such vacancies; and should the Governor fail to issue a writ of election to fill any such vacancy within twenty days after it occurs, the returning officer of the district in which such vacancy may have happened, shall be authorized to order an election for that purpose.

History

The Constitutions of 1845 and 1861 contained the first clause of the present section; the Constitution of 1866 added the second. No further change occurred until the Constitution of 1876, which substituted "the returning officer of the district in which such vacancy may have happened" for the earlier language "the returning officer for the district or county." Also added was a time period within which the governor was required to fill vacancies. One delegate to the Convention of 1875 suggested that the governor issue writs of election to fill vacancies within two days after their occurrence, but the 20-day period won out. (*Debates*, p. 48.)

Explanation

This section was designed to ensure that no legislative district went long unrepresented because of vacancy in legislative office. The attorney general has ruled, however, that neither the governor nor the county judge (whom Election Code art. 4.12, subd. 2, designates as the "returning officer") may be compelled to issue a writ of election (*i.e.*, order an election) within the 20-day period specified.

(Tex. Att'y Gen. Op. No. WW-728 (1959).) Both must do so within a "reasonable time" after the vacancy occurs, according to the same attorney general, but that standard is difficult to apply.

Once a special election is ordered to fill a legislative vacancy, the Election Code supplies precise dates and times for conducting it. If the legislature is in session with more than 25 days remaining before adjournment, or if the vacancy occurs within 60 days of convening a session, the special election must be held within 21 days after the date of the order (art. 4.12, subd. 4). In all other situations, the election must be held within 20 to 90 days after the order date (art. 4.09, sec. 1).

Who determines the existence of a vacancy? Deaths and resignations are easy, for the Election Code provides that the county judge certifies the former (art. 1.04) and the governor accepts the latter (art. 4.09, sec. 7). What about physical or mental disability, nonresidency, dual officeholding, and other, less clearcut circumstances that produce vacancies? The law is silent on this aspect of the question, but the governor as a practical matter must determine the existence of a vacancy in order to call an election to fill it.

Comparative Analysis

Almost half the states provide for a special election to fill legislative vacancies. In most of these the governor has the power to choose the time of election. In several states the manner of filling vacancies is to be fixed by law. In a few states the vacancy is filled by appointment, usually by the governor. In many of the appointment provisions the appointing power is required to preserve existing party alignment either by the terms of the provision or by accepting the recommendation of an appropriate party committee.

The United States Constitution requires special elections to fill vacancies but in the case of senators permits a "temporary" appointment by the governor pending an election. The *Model State Constitution* simply says that vacancies "shall be filled as provided by law." (Sec. 4.06.)

Author's Comment

Conceding that Section 13 is imperfectly worded, its *History* nevertheless makes clear that the governor is required to order a special election within 20 days after a legislative vacancy occurs, and this is so whether or not the district's election officer has a backup duty and deadline. The 1875 Convention apparently believed the governor could not be compelled by legal process to order a special election. (It is clear today, since the 1891 amendment of Article V, Section 3, that he cannot; see Tex. Rev. Civ. Stat. Ann. art. 1735.) One delegate, it will be recalled, wanted the governor to act within two days after the vacancy; 20 days was finally chosen as a more reasonable period, but the very fact that a deadline was added to Section 13 makes clear the convention's intent to treat the governor's 20-day deadline as mandatory.

There is evidence in the attorney general's opinion cited in the *Explanation* that its author was overinfluenced by the unavailability of compulsory legal process against the governor. Since the governor cannot be mandamused to order the election within 20 days, the opinion writer appeared to reason, the deadline in Section 13 must be meaningless. Putting aside comment on the theory of constitutional interpretation this reasoning seems to represent, surely it is unreasonable to premise a conclusion on the assumption that the state's chief executive officer will violate the constitution. And surely the opinion writer knew, as a reality of partisan politics, that Texas governors in the past have timed special legislative

vacancy elections not to reduce the period of unrepresentation to a minimum but to secure partisan advantage.

Following the lead of the *Model State Constitution,* all details regarding special legislative elections should be relocated in the Election Code, with the counterpart of present Section 13 merely providing that such vacancies are filled by election. The counterpart should also be combined with Section 27 of this article (if the latter section is retained) so that all legislative election provisions will be in a single place.

The Election Code (but *not* a new constitution) should also specify how and by whom vacancies in elective office (for executive and judicial branch officers as well as legislative) are determined. The existence of a vacancy is sometimes hotly disputed, especially when alleged to result from disability or dual officeholding, for example, and comprehensive standards ought to be legislated to ensure a prompt and fair determination.

Sec. 14. PRIVILEGED FROM ARREST. Senators and Representatives shall, except in cases of treason, felony, or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same, allowing one day for every twenty miles such member may reside from the place at which the Legislature is convened.

History

This section substantially resembles a comparable provision in the Constitution of the Republic. The Constitution of 1845 made the only change in this section to date when it added the phrase "allowing one day for every twenty miles such member may reside from the place at which the Legislature is convened."

Explanation

Congressman Williamson was convicted of conspiracy to suborn perjury. At his presentencing hearing he argued that the model for this section in the United States Constitution forbade his imprisonment during the session of congress he was attending. The trial court sentenced him anyway, to 10 months in jail, and he appealed directly to the United States Supreme Court. That court reversed his conviction, for error in the charge to the jury, but unanimously rejected his privilege argument.

The court first noted that the clause appeared in the Articles of Confederation and was carried over intact and without debate into the constitution. This meant that the clause had a fixed and well-understood meaning, a meaning derived from English parliamentary law and practice. Under that law and practice it was clear that members of Parliament were privileged only from *civil* arrest, the court citing an example from the 18th century of the arrest of an MP at his bench in the Commons following his escape from prison. "Breach of the peace" in the exception to the privilege thus covered all crimes, whether felony or misdemeanor, as they were all considered breaches of the king's peace by the common-law courts, and Congressman Williamson was not shielded from arrest or incarceration for his offense. (*Williamson v. United States,* 207 U.S. 425 (1908).)

No Texas case applying the Section 14 privilege was discovered, but an early decision of our supreme court noted that the practice of civil arrest, which grew out of the "common law manner of commencing civil actions by an arrest of the body of the defendant," had been abolished in Texas. The court went on to hold

legislators subject to service of process in civil suits, contrary to the claim that Section 14 shielded them. (*Gentry v. Griffith,* 27 Tex. 461 (1864); accord, *Long v. Ansell,* 293 U.S. 76 (1934).)

Comparative Analysis

Some 40 states besides Texas provide legislators some protection against arrest. Some 13 states grant immunity from civil process and four states grant only this immunity. The new Michigan Constitution has a unique provision protecting against "civil arrest and civil process." This presumably was done to conform to In re *Wilkowski* (270 Mich. 687, 259 N.W. 658 (1935)), which construed "treason, felony or breach of the peace" to except arrest for any offense from the privilege, just as the United States Supreme Court had done in the *Williamson* case.

The United States Constitution provides the same type of privilege as Section 14, but the *Model State Constitution* has nothing comparable.

Author's Comment

Unless one assumes the Texas courts will construe the privilege more expansively than have the courts in other jurisdictions, Section 14 is meaningless. Nor should it be amended to expand the privilege. Sanctuary from legal process and the consequences of criminal conduct is foreign to our concept of government under law.

Sec. 15. DISRESPECTFUL OR DISORDERLY CONDUCT; OBSTRUCTION OF PROCEEDINGS. Each House may punish, by imprisonment, during its sessions, any person not a member, for disrespectful or disorderly conduct in its presence, or for obstructing any of its proceedings; provided, such imprisonment shall not, at any one time, exceed forty-eight hours.

History

Professor C.S. Potts surveyed the origins and history of the legislative contempt power and concluded: (1) The English House of Commons first asserted the power in the 16th century and it was well-established by the end of the 17th. (2) American colonial assemblies, modeled after the Commons, asserted the same power. (3) The Continental Congress and revolutionary state legislatures claimed it. (4) The delegates to the Constitutional Convention of 1787 assumed the power was inherent in legislative assemblies and thus did not bother to express it in the federal constitution. ("Power of Legislative Bodies to Punish for Contempt," 74 *U. Pa. L. Rev.* 691 (1926).) Nevertheless, the Constitution of the Texas Republic provided that "Each House may punish, by imprisonment, during the session, any person not a member, who shall be guilty of any disrespect to the House, by any disorderly conduct in their presence."

The 1845 Statehood Constitution preserved the power and added a limitation: "such imprisonment shall not, at any one time, exceed forty-eight hours." No further change in substance or wording has occurred since then.

Explanation

Although the United States Supreme Court early held the legislative contempt power inherent in congress (*Anderson v. Dunn,* 19 U.S. (6 Wheat.) 204 (1821)), the Texas Court of Criminal Appeals has experienced great difficulty with the Texas Legislature's exercise of the power.

The first two reported cases reviewing legislative contempt proceedings involved witnesses before house and senate special committees investigating

alleged voting frauds in the 1911 statewide prohibition election. (For a description of this and the other wet v. dry battles, see the *History* of Art. XVI, Sec. 20.) The witnesses, who were leaders of the antiprohibitionist forces, refused to answer various questions about their campaign activities and were imprisoned in the county jail for contempt. Both applied for release by writ of habeas corpus directly to the court of criminal appeals whose three members proceeded to write a total of eight opinions before granting the writs. Two of the judges agreed that (1) the contempt power is not inherent so that the language of Section 15, vesting it in each *house,* together with the separation of powers doctrine, prohibited delegating the power to a committee; and (2) the legislature during a special session could not create committees to investigate election irregularities because that subject was not included in the governor's call (Ex parte *Wolters,* 64 Tex. Crim. 238, 114 S.W. 531 (1912)). The two judges voting to grant the writ were considerably influenced by the United States Supreme Court's decision in *Kilbourn v. Thompson* (103 U.S. 168 (1880)), which had frustrated early congressional attempts to exercise the contempt power. The second rationale for their decision, however—the special session limitation—has never again been relied on and, as pointed out in the *Explanation* of Section 40, the legislature is free to do anything except enact unsubmitted legislation during a special session.

Twelve years later the court reviewed another contempt proceeding in Ex parte *Youngblood* (94 Tex. Crim. 330, 251 S.W. 509 (1923)). Youngblood was also a witness before an investigating committee, this one a joint body created during a regular session. Youngblood refused to answer questions and was jailed for 20 days under a statute specifying penalties for legislative contempt. Youngblood was also released, all three judges reasoning that the separation of powers doctrine prohibited delegation of the contempt power to a committee; one judge also reasoned that the 48-hour limitation of Section 15 made the statute, which authorized longer imprisonment, unconstitutional, but his colleague argued that imprisonment for consecutive 48-hour periods was permissible under Section 15 if necessary to purge contempt. The opinion for the court distinguished In re *Chapman* (166 U.S. 661 (1897)), in which the Supreme Court upheld against the nondelegation argument a statute making contempt of congress a crime. Judge Morrow argued that *Chapman* did not involve the power of a congressional committee, which was true, but he did not meet head-on the Supreme Court's response to the nondelegation argument, which was that that statute aided but did not supplant congress's contempt power.

All of which doctrinal exegesis sets the scene for *Ferrantello v. State* (158 Tex. Crim. 471, 256 S.W.2d 587 (1952)), the last reported Texas case on the legislative contempt power. Ferrantello was prosecuted and convicted in district court under a 1937 statute making legislative contempt a misdemeanor; he was sentenced to a year in jail and a $1,000 fine for refusing to answer questions asked by members of the House Crime Investigating Committee of the 52nd Legislature. (The statute, Tex. Rev. Civ. Stat. Ann. art. 5429a, was copied verbatim from the federal act, now 2 U.S.C. 192, upheld in the *Chapman* case.) His conviction was affirmed by a unanimous court of criminal appeals. As for the *Youngblood* decision, the court said:

> The fundamental distinction between the Youngblood case and the case at bar lies in the identity of the tribunal assessing the punishment. In the Youngblood case, the Legislature sought to impose the punishment, while in the case at bar the court set the punishment upon a verdict of the jury following a trial for the substantive offense of refusing to answer questions propounded by a legislative committee. (158 Tex. Crim. at 475, 256 S.W.2d at 590).

The *Ferrantello* court did not discuss the *Youngblood* court's unanimous holding that the contempt power could not be delegated, nor did it cite In re *Chapman* or any other authority on legislative contempt.

Article 5429a was incorporated in the Legislative Reorganization Act of 1961 without change. (See Tex. Rev. Civ. Stat. Ann. art. 5429f, secs. 13-15.) Legislative contempt thus remains a statutory crime, defined as failure to appear or produce tangible evidence in response to a legislative subpoena or refusal to answer questions of a legislative committee and punishable by imprisonment up to a year and/or a fine up to $1,000. Under the statute an alleged contempt is described in writing and the statement forwarded to the speaker or president who certifies it to the district attorney of Travis County (Austin). The district attorney then takes it before a grand jury, which must indict the alleged contemner before he may be prosecuted in district court. A contempt indictment is then tried like any other.

Most legislative contempts have involved a witness's refusal to answer committee questions or produce tangible evidence in response to a subpoena. Courts reviewing contempt convictions in recent years, especially those resulting from congressional investigations, have closely examined both the committee's jurisdiction of the subject matter under inquiry and the pertinence to that subject of the question asked or of the tangible evidence subpoenaed. Thus in *Ferrantello* the appellant argued that the questions about bookmaking that he refused to answer were not pertinent to the committee's investigation, but the court without difficulty dismissed this argument, pointing out that the resolution which created the committee authorized a "sweeping investigation" into alleged organized crime in the state. In addition, the court concluded that the statute's immunity grant (now Tex. Rev. Civ. Stat. Ann. art. 5429f, sec. 13), which barred prosecution for any criminal conduct revealed in answering the committee's questions, was adequate to protect Ferrantello's privilege against self-incrimination.

Federal courts have been somewhat less expansive in reviewing congressional contempt convictions, no doubt in reaction to the excesses of the McCarthy Era investigations, but the *power* of legislative assemblies to punish for contempt of their proceedings is no longer challenged. (The federal cases are surveyed in Annots., 3 L.Ed.2d 1647 (1959). 10 L.Ed.2d 1329 (1964).)

Comparative Analysis

Almost every state has a provision prohibiting disorderly conduct in the legislature. Punishment generally includes imprisonment but the maximum length varies. Some states limit the duration of imprisonment to 24 hours, others to 10 days, some to 30 days, and some to a period not extending beyond the session. A few states provide for a fine or imprisonment or both.

Neither the United States Constitution nor the *Model State Constitution* has a comparable provision.

Author's Comment

Section 15 today serves only to limit the legislature's power to punish contempt itself. Legislative assemblies probably have inherent power to punish for contempt, but in any event a state legislature may punish contempt by statute without constitutional authorization. The Texas Legislature has done so, by delegating the enforcement power to the executive and judiciary, leaving Section 15 solely as a vehicle to impose summary punishment for direct contempt. The section is not necessary for this purpose, however, because the new Penal Code comprehensively proscribes contemptuous conduct (see secs. 42.01-42.05), nor is it adequate in light of the United States Supreme Court's recent decision

imposing some of the requirements of procedural due process applicable to criminal trials generally on the exercise of the legislative contempt power, thereby making summary contempt a lot less summary. (*Groppi v. Leslie,* 404 U.S. 496 (1972) (alleged contemner must be given notice of charge and opportunity to respond before punishment assessed).) Existing statute law is adequate to protect the Texas Legislature, therefore, and its use is a good deal safer as well.

Sec. 16. OPEN SESSIONS. The sessions of each House shall be open, except the Senate when in Executive session.

History

Earlier constitutions provided that "The doors of each House shall be kept open." The Constitution of 1869 retained the earlier wording but added "except upon a call of either House, and when there is an executive session of the Senate." The present section resembles that of 1869, except that it substituted "sessions" for "doors" and deleted "upon a call of either House."

Explanation

Plenary sessions of the Texas House and Senate have always been open to the public. Each chamber has a gallery for visitors, and the public is free to come and go as it pleases. Admission to the floor of each chamber is restricted, on the other hand, to prevent disruption of proceedings; the rules of each house specify who may be admitted, with admission generally limited to members and former members, their staff members who have business there, and representatives of the news media who traditionally have been assigned a press table in each chamber. (See Tex. H. Rule 29 (1973); Tex. S. Rule 64 (1973).)

The traditional exception for executive sessions of the senate is designed to permit nonpublic consideration—thus encouraging frank discussion of qualifications—of gubernatorial nominees for executive office who are subject to senate confirmation. The exception is not mandatory, with the senate rules permitting public consideration on two-thirds vote and requiring that voting on nominees be public and that each senator's vote be recorded in the journal. (Tex. S. Rule 41 (1973).)

Both houses by rule require their committees and subcommittees to meet publicly on a regularly scheduled basis pursuant to advance notice of meeting time and place. (Tex. H. Rule 8, sec. 13 (1973); Tex. S. Rule 105 (1973).) This requirement was reinforced in 1973 by amendments to the state's Open Meeting Act that included legislative committees in the definition of governmental bodies subject to the act and declared that the legislature was exercising its rule-making power in the act "to prohibit secret meetings of the Legislature, its committees, or any other bodies associated with the Legislature, except as otherwise specifically permitted by the Constitution." (Tex. Rev. Civ. Stat. Ann. art. 6252—17, secs. 1(c), 2(b).)

Comparative Analysis

Approximately three-fourths of the states call for open sessions of the legislature, but almost all of them also contain an appropriate exception for secrecy. Neither the United States Constitution nor the *Model State Constitution* specifies public sessions.

Author's Comment

Despite the current push for open consideration and decision making by government, and at the risk of being accused of favoring secret government, a good case can be made for permitting nonpublic working meetings of legislative committees. The late Congressman Robert Luce, an authority on legislative procedure, states the case succinctly:

> . . . [T]he ignorance of the public about [what occurs in nonpublic meetings] is one of the causes of its usefulness. Behind closed doors nobody can talk to the galleries or the newspaper reporters. . . . Another reason is that publicity would lessen the chances for concessions, the compromises, without which wise legislation cannot in practice be secured. (Robert Luce, *Congress—An Explanation* (Cambridge: Harvard University Press, 1926), pp. 12-13.)

Closed meetings should be permitted solely for committee *work* sessions—not to hear witnesses or vote—the distinction being that committee members ought to be able to let their hair down in private at some point during the consideration of legislation but that each bill and resolution ought to have a public committee hearing and vote. Of course the proponents of open government will argue that secret work sessions will produce ritual hearings and predetermined votes: after making up their minds, and making their deals, committee members will nod through a parade of witnesses and then cast their agreed votes. Certainly this risk is present, but it is offset not only by the greater benefit resulting from closed committee work sessions but also by the fact that legislators are sworn to abide by the law and are answerable to the people who elected them if they refuse to do so.

A neat compromise, currently used by the federal house, creates a presumption of open committee meetings. A committee may meet in closed session, but it must first convene in open session and its members vote on the record to exclude the public. (See Eckhardt, "The Presumption of Committee Openness Under House Rules," 11 *Harv. J. Legis.* 279 (1974).)

If secret sessions are considered desirable, they should not be authorized in the constitution; a statute or rule is sufficient (if Section 16 is reworded to permit closed sessions when authorized by law or rule) and will permit much more flexible treatment of the subject in addition to requiring a positive act of the legislature for its members' constituents to evaluate.

Along with tradition, a variation on the justification for secret committee work sessions can be advanced for preserving the executive session exception for senate confirmation hearings and debate. Senators might be unwilling to attack a nominee in public, and the nominee unwilling to submit his reputation to public attack, but to many this rationale argues more cogently for *requiring* public debate on nominations on the theory that nominees with nothing to hide are the only kind fit for government service.

The push for public decision making by government at all levels may be irresistible, and if so Section 16 should be broadened to require all proceedings of the legislature, its committees and other organizations, to be public.

Sec. 17. ADJOURNMENTS. Neither House shall, without the consent of the other, adjourn for more than three days, nor to any other place than that where the Legislature may be sitting.

History

The present wording resembles that of earlier constitutions, except that the

1875 Convention substituted "where the Legislature may be sitting" for "in which they may be sitting," a change without apparent significance.

Explanation

"Adjourn" is used in two different senses, both in the constitution and the legislative rules, and it would be simpler if it were confined to its terminal sense, as in "adjourn sine die," which means terminate the legislative session (literally, adjourn "without a day" for reconvening). It also means recess, however, as in Section 10's authorization for a smaller number than a quorum to "adjourn from day to day, and compel the attendance of absent members," and this meaning has important parliamentary consequences. Mason explains the difference as follows:

> The basic distinction between adjournment and a recess is that an adjournment terminates a meeting, while a recess is only an interruption or break in a meeting. After an adjournment a meeting begins with the procedure of opening a new meeting. After a recess the business or procedure of a meeting takes up at the point it was interrupted.
>
> Breaks in the meetings of a day, as for meals, are usually recesses, but termination of meetings until a later day are adjournments. (Paul Mason, *Mason's Manual of Legislative Procedure* (New York: McGraw-Hill Book Co., 1953), p. 173.)

Despite the confusion in terminology, the reason for Section 17 is clear: to prevent one house from frustrating the other's business by packing up and going home before the session ends.

The attorney general has ruled that the three-day adjournment (actually recess) limitation is calculated by excluding the first day of "adjournment" and including the last unless it is Sunday; thus the customary recess from Thursday noon until Monday morning does not violate this section. The attorney general also ruled in the same opinion that advance, blanket consent to more than three-day recesses would be unconstitutional. (Tex. Att'y Gen. Op. No. V-207 (1947).)

May the legislature meet elsewhere than in Austin, assuming both houses agree? Section 58 of this article, together with Article IV, Section 8, make clear that it may not unless the governor convenes it elsewhere in special session because Austin is occupied by the public enemy or infested with disease. Section 17, on the other hand, implies that the legislature may meet elsewhere on its own initiative, but if such was the 1875 Convention's intent it was contradicted by the two sections mentioned above. (See the *Author's Comment* on Art. IV, Sec. 8.)

Comparative Analysis

Of the 49 states with bicameral legislatures, all except two limit the power of one house to adjourn without the consent of the other. Most of these states also limit unilateral recesses to three days. About 40 states also require consent to conduct sessions at another place. The United States Constitution contains both of these limitations, but the *Model State Constitution* has nothing comparable. The latter omission is of course consistent with the *Model's* unicameral recommendation, but the limitation's omission from its bicameral alternative may have been an oversight.

Author's Comment

With modest rewriting Section 17 could end the confusion between "adjourn" and "recess": "Neither house without the other's consent may adjourn or recess for more than three days."

Art. III, § 18

Sec. 18. INELIGIBILITY FOR CERTAIN OTHER OFFICES; INTEREST IN CONTRACTS. No Senator or Representative shall, during the term for which he was elected, be eligible to (1) any civil office of profit under this State which shall have been created, or the emoluments of which may have been increased, during such term, or (2) any office or place, the appointment to which may be made, in whole or in part, by either branch of the Legislature; provided, however, the fact that the term of office of Senators and Representatives does not end precisely on the last day of December but extends a few days into January of the succeeding year shall be considered as de minimis, and the ineligibility herein created shall terminate on the last day in December of the last full calendar year of the term for which he was elected. No member of either House shall vote for any other member for any office whatever, which may be filled by a vote of the Legislature, except in such cases as are in this Constitution provided, nor shall any member of the Legislature be interested, either directly or indirectly, in any contract with the State, or any county thereof, authorized by any law passed during the term for which he was elected.

History

This section was amended in 1968 to add the proviso to the first sentence: "the fact that the term of office of Senators and Representatives does not end precisely on the last day of December but extends a few days into January of the succeeding year shall be considered as de minimis, and the ineligibility herein created shall terminate on the last day of December of the last full calendar year of the term for which he was elected."

Prior to amendment the section resembled its counterpart in the Constitution of 1845, except that the latter did not prohibit interests in state or county contracts.

While retaining the wording of the 1845 Constitution, the Constitution of 1866 added several clarifications: resignation did not restore eligibility for another office, but members could vote for a speaker and president pro tempore. The Constitution of 1869 omitted these clarifications, as did the present constitution, which as noted added the contractual interest prohibition.

Explanation

Section 18 attempts to eliminate three opportunities for conflict of interest facing legislators. All three prohibitions are designed to prevent a legislator from benefiting privately from performance of his lawmaking duties.

The first clause of the first sentence makes him ineligible for any "civil office of profit," whether elective or appointive, created or for which the "emolument" has been increased by the legislature of which he is a member. The second clause extends the ineligibility to an office or "place" the appointment to which is made "in whole or in part" by either house of the legislature. And both clauses make the duration of ineligibility the legislator's term of office.

The term "civil office of profit" is used in the sections prohibiting dual officeholding and probably has the same meaning here as in those sections. (See the *Explanation* of Sec. 19 of this article for the definition of "office"; see also the *Explanations* of Art. XVI, secs. 33 and 40.) "Emolument" was recently defined for purposes of this Section 18 to include salary (*Hall v. Baum,* 452 S.W.2d 699 (Tex.), *appeal dismissed,* 397 U.S. 93 (1970)); it probably includes any pecuniary gain or advantage as well (see the *Explanation* of Art. XVI, secs. 33 and 40). "Place" is a term peculiar to Section 18 but probably means the same as "position" in the dual officeholding sections.

The Supreme Court in the *Hall* case suggested that insignificant salary increases voted by the legislature would not invoke the ban of Section 18; the court held, however, that a $15,000 a year increase in the governor's salary was not

insignificant as a matter of law. Moreover, a former legislator's serving as a hearing examiner for the Railroad Commission did not invalidate his denial of a motor carrier permit, although he served in the legislature that appropriated funds to the Commission allowing creation of his job (*Keel v. Railroad Commission*, 107 S.W.2d 439 (Tex. Civ. App.—Austin 1937, *writ ref'd*)).

The second clause of the eligibility ban applies to offices filled by appointment subject to senate confirmation, and the attorney general has ruled legislators ineligible for appointment to a state judgeship during their legislative term. (Tex. Att'y Gen. Op. Nos. 0-1092 (1939); WW-305 (1957).)

The first sentence of Section 18 was amended in 1968 to contract the duration of ineligibility by ending legislative terms on December 31 instead of the following January on the date the new legislature convenes. The amendment was necessitated (in the legislature's opinion) by a 1966 amendment to Sections 3 and 4, extending the terms of representatives and senators until the new legislature convened, and its history is discussed in the annotation of Section 3.

The first clause of the second sentence of Section 18 forbids legislators from voting for one of their number for any office (except as authorized elsewhere by the constitution) filled by the legislature, and the second clause forbids their private interest in a state or county contract authorized by statute enacted while they were members.

Before adoption of the Seventeenth Amendment to the federal constitution in 1913, United States Senators were chosen by state legislatures and the first clause prevented election of a legislator to that office. The clause does not prevent election of a representative as speaker or of a senator as president pro tempore, because the election of both is provided for in Section 9 of this article. Today, of course, senators are popularly elected, and there is no other office filled by legislative election. (The secretary of the senate and many of its employees are elected by that body but are not officers within the constitutional sense of that term.)

The second clause was intended "to absolutely prohibit any person from entering into a contract with the state or county authorized by a statute passed by a legislature of which such person was a member. . . ." (*Lillard v. Freestone County*, 57 S.W. 338, 340 (Tex. Civ. App. 1900, *no writ*).) Thus former Representative Lillard was denied payment for printing the county's tax delinquency list because he served in the legislature that authorized the printing contracts. The attorney general has forbidden the secretary of state to contract with a newspaper, owned by a legislator or by a corporation in which a legislator owns stock, to publish constitutional amendment proposals approved by the legislature in which he served. A later opinion somewhat ameliorated this ruling, by noting that ownership of only a few shares of corporate stock might present no real conflict of interest, but the same opinion ruled out contracting with a legislator's partners. (Tex. Att'y Gen. Op. Nos. 0-6582 (1945); M-625 (1970).)

Comparative Analysis

About 38 states forbid legislators from holding another office under state government. The United States Constitution provides in Article I, Section 6:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time. . . .

The *Model State Constitution* is silent on the subject.

With respect to the interest in contracts prohibition, seven states have a comparable restriction, but neither the United States Constitution nor the *Model State Constitution* does.

Author's Comment

As argued in the *Author's Comment* on Section 22 of this article, conflict of interest is best prevented by statute and the legislature in 1973 took a giant first step toward providing meaningful and enforceable standards of conduct for public servants. Section 18, on the other hand, is both too sweeping in application and too difficult to enforce. It is too sweeping because it bars a legislator from running for elective office, even though he resigns from the legislature before getting on the ballot, if the office was created or its salary increased during his term. (See *Spears v. Davis,* 398 S.W.2d 921 (Tex. 1966).) It is difficult to enforce because there is no mechanism for disclosing the contracts of legislators or their business associates.

Barring legislators from accepting any *appointive* state government office during their terms probably is a desirable restriction to remove the temptation of vote trading with the executive. The Constitution of the Republic contained this restriction, copied from the United States Constitution, and each succeeding Texas constitution has preserved it. Legislators should not be barred from seeking any elective office, however, because their opponents and the voters may be depended upon to ferret out any conflict of interest regarding the particular office.

Contracting with government by public servants and their business associates should be regulated by statute with heavy reliance on financial disclosure to reveal potential conflicts of interest. As noted, a 1973 law accomplishes this regulation for legislators and other policymaking officers, and, although imperfect, the statute is vastly more workable than Section 18. (See Tex. Rev. Civ. Stat. Ann. art. 6252—9b.)

The first clause of the second sentence of Section 18 should be deleted because since 1913 there has been no *office* (other than that of speaker and president pro tempore) to which the legislature could elect one of its members.

Sec. 19. INELIGIBILITY OF PERSONS HOLDING OTHER OFFICES. No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.

History

Former Congressman Luce finds the ancestor of this section in a 1348 petition from the English House of Commons to the king "That no person summoned to Parliament should be either a Taxer, Collector, or Receiver of the Fifteenth then granted." A few American colonial charters contained similar dual officeholding bars, but Luce attributes them to "some development of corporation practice in England," not to Montesquieu's doctrine of separation of powers, which had not then been published. Montesquieu's doctrine definitely influenced the emerging states to include such bars in their organic laws following the Revolution, however, and, as noted in the *Comparative Analysis,* the federal constitution contains such a bar. (Robert Luce, *Legislative Assemblies* (Boston: Houghton Mifflin, 1924), pp. 265-70.)

Section 23 of the 1836 Texas Constitution's first article barred from membership in the Republic's Congress a "person holding an office of profit under the

government." The present language derives from the statehood constitution, however, and has remained basically unchanged until the present section added the significant phrase "during the term for which he is elected or appointed" to define the period of ineligibility.

Explanation

This is one of two sections defining disqualifications for legislative office in terms of dual officeholding; the other is Article XVI, Section 12. (Sec. 20 of this article defines a related disqualification, but in terms of conduct in a prior office; see the *Explanation* of that section.) It is notable that neither this Section 19 nor Section 12 of Article XVI contains the traditional exceptions for military officers, certain local government officers, etc. Their absence from Section 12 did not prevent the attorney general from reading in the military exception to permit a retired Air Force colonel to hold a local government office. (Tex. Att'y Gen. Op. No. LA-73 (1973).)

The term "office" of course appears in all the dual officeholding provisions and the following characteristics of an office (as distinguished from a position or employment) may be extracted from the case law: it is usually elective; it is vested with some portion of the sovereign power that its incumbent exercises for the public good largely independently of others; it is created by law rather than contract; it is permanent and continues despite changes in incumbents; and its incumbent must usually qualify by taking the constitutional oath of office and posting a bond. (See, *e.g., Aldine I.S.D. v. Standley,* 154 Tex. 547, 280 S.W.2d 578 (1955); *Kimbrough v. Barnett,* 93 Tex. 301, 55 S.W. 120 (1900); *Dunbar v. Brazoria County,* 224 S.W.2d 738 (Tex. Civ. App.—Galveston 1949, *writ ref'd*). In a recent series of letter advisory opinions, the attorney general has begun to distinguish among a "public office," "civil office," and (position) of "public employment." (See Tex. Att'y Gen. Op. No. LA-63 (1973); see also the *Explanations* of Art. XVI, secs. 12, 33, and 40.)

An office is "lucrative," within the meaning of Section 19, if it yields profit or gain, revenue or salary, and the adequacy of the compensation is immaterial. (Compare *Willis v. Potts,* 377 S.W.2d 622 (Tex. 1964) (city councilman paid $520 a year plus expenses held lucrative office) with *Whitehead v. Julian,* 476 S.W.2d 844 (Tex. 1972) (mayor receiving $50 a month expense allowance but no salary did not hold lucrative office).)

Finally, the courts have held that an office is under this state (or, presumably, the United States or a foreign government) if it is created by a political entity subordinate to and/or a creature of this state (or the United States or a foreign government). (*E.g., Willis v. Potts* (councilman of home-rule city holds office under state).)

The harshest application of Section 19 results from the period of ineligibility it prescribes: "during the term for which he is elected or appointed." Like its counterpart in Section 18 of this article, it has trapped the unwary who believed (not unreasonably) that by resigning their present office they would be eligible to run for the legislature. (Because Sec. 18 is aimed at a different evil, conflict of interest, it must be evaluated differently, for which see the *Author's Comment* on Sec. 18.) One such unwary was a Bexar County Commissioner who resigned his office on the commissioners court, effective February 1, 1964, so he could enter the primary in May of that year to run for the house. The party officials would not put his name on the ballot, however, on the ground he was ineligible under Section 19; the supreme court agreed, because his term as county commissioner did not expire until December 31, 1964, thus overlapping by nearly two months commencement

of the house term, which before the 1966 amendment to Section 4 of this article began when election returns were canvassed in November. (*Lee v. Daniels,* 377 S.W.2d 618 (Tex. 1964).) The 1966 amendment to both Sections 3 and 4, providing for senatorial and representative terms to begin when the legislature convenes, has somewhat mitigated the harshness of Section 19, at least for those elective officers whose terms end in even-numbered years.

Comparative Analysis

The variations in dual officeholding restrictions on eligibility for the legislature in the state constitutions are almost infinite. For example, Tennessee prohibits a "register" from serving in the general assembly, while Virginia bans a "sergeant" and "collector of taxes." Massachusetts illustrates the variety of offices whose incumbents are made ineligible for the legislature by many state constitutions: attorney general, solicitor general, treasurer or receiver general, judge of probate, sheriff, clerk of the house of representatives, register of probate, register of deeds, officer of the customs, and clerk of the supreme judicial court.

The last portion of Article I, Section 6, Clause 2, of the United States Constitution prevents any person holding office under the United States from being a member of either house of congress, but only while actually holding the first office.

The *Model State Constitution* is silent on the subject of dual officeholding.

Author's Comment

It makes good sense to require a candidate for the legislature (or any other elective public office) to tell the voters which office he intends to hold. This is accomplished, of course, by resigning any other office the candidate holds before he gets on the ballot for the legislature. But alas, such candor will avail him naught if the term of his present office happens to extend past the date when the legislature convenes.

Justice Steakley, dissenting in *Lee v. Daniels* (377 S.W.2d 618 (Tex. 1964)), could not believe the 1875 Convention intended this result when it tacked on the period-of-ineligibility phrase at the end of Section 19. The majority thought otherwise, feeling duty-bound to assign meaning to every phrase in the section, and probably the majority was right. The next constitutional convention will not be right, however, if it retains the phrase, or any other that extends ineligibility beyond the date of a resignation effective before applications of candidates to get on the ballot are required.

As mentioned in the *Explanation*, this section differs little from Article XVI, Section 12 (the differences are noted in the *Explanation* of that section). Both sections should thus be consolidated, if retained in a new constitution, and the consolidated section located with Sections 6 and 7 of this article, which prescribe general qualifications for election to the legislature.

Sec. 20. COLLECTORS OF TAXES; PERSONS ENTRUSTED WITH PUBLIC MONEY; INELIGIBILITY. No person who at any time may have been a collector of taxes, or who may have been otherwise entrusted with public money, shall be eligible to the Legislature, or to any office of profit or trust under the State government, until he shall have obtained a discharge for the amount of such collections, or for all public moneys with which he may have been entrusted.

Art. III, § 20

History

The present provision has remained unchanged since the Constitution of 1845. Its language resembles that in the Constitution of 1836, except that the latter only prohibited election to the legislature. The 1845 Constitution added ineligibility for "any office of profit or trust under the State government."

McKay's summarized *Debates* of the 1875 Convention reveal little about the history of this section. Some discussion did take place, however, on whether the offices of tax assessor and collector should exist separately. Some delegates favored separate offices as this tended to prevent abuse. They preferred, however, that the sheriff remained the collector of taxes, because "it took a *man* to be a sheriff" and "if they withheld the work of collection from him, they could not get the office adequately filled." Other delegates favored a combined assessor and collector as an economy measure. They pointed out, too, that from 1845 to 1869 the offices were combined. The convention voted, however, in favor of separate offices. (*Debates,* pp. 309-10. See also the *History* of Art. VIII, secs. 16 and 16a.)

Explanation

This is one of a number of provisions disqualifying certain individuals from holding office under the state. (For the others, see the annotations of Sec. 19 of this article and Sec. 12 of Art. XVI, spelling out ineligibility for the legislature, and Sec. 40 of Art. XVI, prohibiting dual officeholding generally.) Unlike the other sections, however, Section 20 focuses not on the other office but on its holder's conduct while holding it.

Although the section has not been extensively litigated, the courts seem to favor a broad interpretation, one case, for example, applying it to a sheriff entrusted with federal money who argued his voluntary discharge in bankruptcy constituted a discharge within the meaning of Section 20. The court disagreed. (*Orndorff v. State,* 108 S.W.2d 206 (Tex. Civ. App.—El Paso 1937, *writ ref'd*).)

A court of civil appeals expressed concern that a nonjudicial determination of ineligibility under Section 20 (by a party executive committee, for example, in keeping a candidate's name off the ballot) would deny due process of law under the federal constitution. (*Garcia v. Tobin,* 307 S.W.2d 836 (Tex. Civ. App.—San Antonio 1957).) In affirming the court's judgment, however, on a ground different from the due process issue, the supreme court pointed out that a candidate or officer-elect could establish his eligibility in a lawsuit to get on the ballot or take possession of his office. (*Garcia v. Tobin,* 159 Tex. 58, 316 S.W.2d 396 (1958).) In the same opinion the court defined "entrustment," as used in Section 20, to mean: " 'To confer a trust upon; . . .to transfer or deliver property to another to hold as trustee.' "

Comparative Analysis

About a third of the states have comparable provisions. Most of them cover all public offices, but a few are limited to eligibility to serve in the legislature. Neither the United States Constitution nor the *Model State Constitution* contains anything comparable.

Author's Comment

Keeping Section 20 in a new constitution probably won't hurt anything—provided that the ineligibility phrase for officeholding generally is relocated in the general provisions article. The section probably is not necessary, however, in light of the universal requirement that a public officer be a qualified voter, which by virtue of Article VI, Section 1, excludes convicted felons from running for any public office.