

ARTICLE XII

PRIVATE CORPORATIONS

Sec. 1. CREATION BY GENERAL LAWS. No private corporation shall be created except by general laws.

History

Prior to 1874 all corporations in Texas were created by special act of the legislature. Private business corporations were greatly distrusted in the early 19th century although churches and charities were freely permitted to incorporate. According to Supreme Court Justice Brandeis, dissenting in *Louis K. Liggett Co. v. Lee* (288 U.S. 517 (1933)), Americans feared corporations because they were monopolistic, because they subjugated labor to capital, because they were believed to encroach upon individual liberties and opportunities, and because their large aggregations of capital seemed inherently menacing.

The 1845, 1861, and 1866 Constitutions reflected this distrust by providing that corporations could be created only by a two-thirds vote of the legislature. This system led, however, to corruption of legislators by corporation directors seeking special favors and powers for their corporations. The widespread abuses during the mid-19th century of this method of corporate regulation resulted in the view that everyone should have an equal opportunity to form corporations for lawful purposes. The enactment of general incorporation statutes was the method adopted to provide this opportunity and also to control abuses.

General laws also appeared to the public to be the best method for responding to the intense pressures for enormous business expansion brought about by the Industrial Revolution. The public had become resigned to the need for many corporations but only on the condition that they all be treated alike.

New York's 1846 Constitution was the first to require incorporation by general law; other states followed in fairly rapid succession. By 1900, 35 states had similar provisions, Texas included. The Texas legislature enacted a general incorporation statute in 1874 to compensate for the 1869 Constitution's complete silence on corporations. The statute was ineffective because of technical defects, and the 1875 Convention made certain the new doctrine received constitutional stature. The records of the convention reveal no debate on this provision although there was some discussion of other sections of Article XII, since repealed.

Explanation

The section has rarely been construed. In order to determine which corporations are covered, the courts have distinguished between public corporations, which are not covered, and private corporations, which are. "Public corporations" have been defined as those "connected with the administration of the government, and the interests and franchises of which are the exclusive property and domain of the government itself," and private corporations as all others. (*Miller v. Davis*, 136 Tex. 299, 307, 150 S.W.2d 973, 978 (1941).) The attorney general has ruled, for example, that the Bank Deposit Insurance Corporation was not covered by the section because it was an instrumentality of government. (Tex. Att'y Gen. Op. No. 2971 (1935).)

Comparative Analysis

Nearly three-quarters of the states provide for the creation of corporations by general law, and approximately that many also prohibit their creation by special law. A number of states permit exceptions for certain types of corporations; the most common (permitted by about ten states) allows creation of corporations by

special act for “charitable, educational, penal or reformatory purposes.” The *Model State Constitution* makes no mention of corporations but prohibits a special act when a general one can be made applicable.

Author’s Comment

Article III, Section 56, which prohibits local or special laws on a laundry list of subjects “and in all other cases where a general law can be made applicable,” duplicates this section, which thus could be omitted.

Sec. 2. GENERAL LAWS TO BE ENACTED; PROTECTION OF PUBLIC AND STOCKHOLDERS. General laws shall be enacted providing for the creation of private corporations, and shall therein provide fully for the adequate protection of the public and of the individual stockholders.

History

See the *History* of Article XII, Section 1.

Explanation

As with Section 1 the courts have seldom construed this section. Applying the public-private distinction, *City of Tyler v. Texas Employers’ Insurance Ass’n* (288 S.W. 409 (Tex. Comm’n App. 1926, *holding approved*)) held that the Texas Employers’ Insurance Association was not a private corporation for purposes of this section although it had many of the elements of a private corporation; it was held instead to be a public corporation created for the proper administration of the Workmen’s Compensation Law. The mandate to the legislature to provide for the protection of the public was held to be sufficient authorization for a statute providing for damages to survivors for the death of a relative caused by the negligence of a corporation’s agents or employees despite the fact that its constitutionality was questionable when applied to the negligence of natural persons. (*Sid Westheimer Co. v. Piner*, 263 S.W. 578 (Tex. Comm’n App. 1924, *judgmt adopted*.)

The legislature long ago provided comprehensive regulation of corporations: the current statutes are the Business Corporation Act of 1955, Non-Profit Corporation Act of 1959 (Tex. Rev. Civ. Stat. Ann. art. 1396), and Miscellaneous Corporation Laws Act of 1961 (Tex. Rev. Civ. Stat. Ann. art. 1302).

Comparative Analysis

Nearly two-thirds of the states have provisions that are substantially the same. The *Model State Constitution* makes no mention of corporations.

Author’s Comment

This section is not needed to confer power on the legislature to enact corporation laws since it already has that power. In any event, the section’s command has long since been obeyed and the section could be omitted.

Sec. 6. CONSIDERATION FOR STOCK OR BONDS; FICTITIOUS INCREASE. No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void.

History

During the 1875 Convention this section was added to Article XII by floor

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amendment on second reading, apparently without debate. No prior Texas constitution contained a similar provision. The Texas Legislative Council recommended its deletion (1 *Constitutional Revision*, pp. 97-99), but for some reason the section was not included in the 1969 "deadwood" amendment.

Explanation

The *Interpretive Commentary* to this section states that this provision was inserted as a response to a contemporary scandal involving the issuance of watered stock in a company set up to construct portions of the Union Pacific Railroad. Stock watering—issuing stock for less than full payment—defrauds stockholders who pay full value for their shares and creditors who rely on the stated capital of a corporation in extending credit. (2 *Interpretive Commentary*, pp. 712-13.) In 1872 a congressional investigation of this scandal revealed that stock watering was a common business practice among all large corporations, but by 1875 congress had not legislated to regulate this abuse.

Since the 1875 Convention, however, this problem has been thoroughly treated by statute. The Business Corporation Act, Insurance Code, and Banking Code all contain detailed rules on stock issuance. (See, e.g., Tex. Bus. Corp. Act. Ann. art. 2.16; Tex. Rev. Civ. Stat. Ann. art. 342-303; Tex. Ins. Code Ann. art. 2.08.) Numerous cases have interpreted and applied these statutes, making reference to the constitutional section, but since the statutes have always tracked the section, none of the decisions is constitutionally significant.

Comparative Analysis

Fourteen other states have similar constitutional provisions. One state refers only to the requirement that stock be issued for labor done or money or property received, and four states refer only to fictitious increases of stock or indebtedness. The *Model State Constitution* is silent on the subject.

Author's Comment

The abuse prohibited by this section is now thoroughly treated by statute and case law. The section has no constitutional significance and could safely be deleted.

ARTICLE XIII**SPANISH AND MEXICAN LAND TITLES**

(Repealed, August 5, 1969.)

ARTICLE XIV

PUBLIC LANDS AND LAND OFFICE

Sec. 1. GENERAL LAND OFFICE. There shall be one General Land Office in the State, which shall be at the seat of government, where all land titles which have emanated or may hereafter emanate from the State shall be registered, except those titles the registration of which may be prohibited by this Constitution. It shall be the duty of the Legislature at the earliest practicable time to make the Land Office self sustaining, and from time to time the Legislature may establish such subordinate offices as may be deemed necessary.

History

While Texas was part of Mexico, records of land titles were maintained in separate land offices established in each colony, and no system of recordation existed. The chaos and fraud that resulted under that system and the need for a central agency to administer the 216 million acres of land still belonging to the Republic led the framers of the Constitution of the Republic to direct the Congress of the Republic to establish a general land office, in which all land titles of the Republic were to be registered, "with a view to the simplification of the land system, and the protection of the people and the government from litigation and fraud." (Constitution of the Republic of Texas, General Provisions, Sec. 10. See T. Miller, *The Public Lands of Texas, 1915-1970* (Norman, Okla.: University of Oklahoma Press, 1972), p. 213.) Although the office was not fully operational until 1844 (see *Dobbin v. Bryan*, 5 Tex. 276 (1849)), it was created by the first congress. (Tex. Laws 1836, An Act To Establish a General Land Office, 1 *Gammel's Laws*, p. 1276.)

When Texas entered the Union it was permitted to retain its public lands. The Constitution of 1845 also required that a general land office be maintained in the capital, and the provision has been included in every succeeding constitution. The only change since 1845 was made in the present constitution, which added the provisions relating to the registration of titles prohibited by the constitution and to making the office self-sustaining.

Explanation

The section's exception of prohibited titles referred to the remaining sections of this article. They were repealed in 1969 as obsolete. Otherwise, the section is self-explanatory. It has caused no problems.

Comparative Analysis

No other state constitution creates a repository for records of land titles emanating from the state. A few create a constitutional officer with some responsibilities relating to public land. (See the *Comparative Analysis* of Art. IV, Sec. 23.)

Author's Comment

This is the only remaining section of Article XIV, the others having been repealed as obsolete in 1969.

This section is also obsolete or at least unnecessary. The authorization of subordinate offices adds nothing to the legislature's plenary power to create them. The admonition to make the land office self-sustaining is unenforceable and states a goal that probably never has been achieved but that legislators ordinarily pursue even without constitutional mandate. The language about prohibited titles was redundant when adopted and clearly is obsolete now since it relates to sections repealed in 1969. As long as the commissioner of the general land office exists as a

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constitutional officer, the existence of the General Land Office as an agency administered by him is implicit as is its maintenance in the capital, since the commissioner is required to reside there. (See Art. IV, Sec. 23.)

The only function of this section is to require as one of the duties of the land office the maintenance of records of land titles. (It has been given numerous statutory functions. See, *e.g.*, Tex. Rev. Civ. Stat. Ann. arts. 5306-5337 (administration of public lands set aside for schools and asylums), arts. 5339-5382e (leasing for oil and gas development), art. 5421m (administration of Veteran's Land Program).) It is inconceivable that the legislature would discontinue state maintenance of land records or that it would transfer those duties to another agency while the commissioner and the land office exist. If cause sufficient to induce the legislature to resort to either of those unlikely eventualities develops, however, the constitution should not prevent the legislature from doing so.

ARTICLE XV

IMPEACHMENT

Sec. 1. POWER OF IMPEACHMENT. The power of impeachment shall be vested in the House of Representatives.

History

The institution of impeachment originated in England. Its purpose was to reach highly placed offenders whose power and influence might place them beyond the reach of punishment by ordinary tribunals. After the division of Parliament into two branches, the House of Commons assumed the duties of accusation and preferring charges of impeachment, while the House of Lords acted as a judicial body to try the accusations. This separation of functions came about so that the same body would not act as accuser, prosecutor, and judge, a combination of powers too dangerous to permit in a democracy. (For an interesting discussion of the origins of impeachment and its early development in United States history, see R. Berger, *Impeachment: The Constitutional Problems* (Cambridge: Harvard University Press, 1973).)

Impeachment appeared in a number of colonial constitutions, such as those of Virginia and Massachusetts, and was then embodied in the United States Constitution. The United States House of Representatives has the power of impeachment (Art. I, Sec. 2), with trial by the senate.

The 1836 Texas Constitution of the Republic contained an impeachment provision mirroring that of the United States Constitution. The 1845 Constitution, adopted when Texas entered the Union, contained a separate impeachment article, Section 1 of which stated that "The power of impeachment shall be vested in the House of Representatives." The adoption of a separate impeachment article was probably done in the interests of clarity and was no doubt influenced by other state constitutions with similar articles. This section and Sections 2, 3, 4, 5, and 7 of the impeachment article were continued unchanged in the Constitutions of 1861, 1866, and 1869 and are found in practically identical language in the present constitution.

Present Article XV was reported by committee late in the Convention of 1875 (*Journal*, p. 770), and, after very little debate, adopted on second and third reading the next day. (*Journal*, pp. 793-94.) No proposed amendment to the impeachment article has been submitted to the voters.

Explanation

Impeachment is an extraordinary method for removing from public office and disqualifying from holding public office one who has abused the public trust by serious misconduct. (Technically, "impeachment" is merely an accusation, analogous to a criminal indictment, and must be followed by trial and conviction for removal. The entire procedure is customarily called "impeachment," however.) This power is vested in the legislative branch, although impeachment proceedings are judicial in nature.

Unlike the United States Constitution, the present Texas Constitution has no list of impeachable offenses such as "treason, bribery, or other high crimes and misdemeanors." (As noted, the Constitution of the Republic did identify these offenses.) However, the supreme court has said that the term "impeachment," as used in the Texas Constitution, embraces by reference to American and English parliamentary law both the offenses triable and the procedure for trying them.

While impeachable offenses are not defined in the Constitution, they are very clearly designated or pointed out by the term "impeachment," which at once connotes the offenses to be considered and the procedure for the trial thereof.

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"Impeachment," at the time of the adoption of the Constitution, was an established and well-understood procedure in English and American parliamentary law, and it had been resorted to from time to time in the former country for perhaps 500 years. It was designed, primarily, to reach those in high places guilty of official delinquencies or maladministration. It was settled that the wrongs justifying impeachment need not be statutory offenses or common-law offenses, or even offenses against any positive law. Generally speaking, they were designated as high crimes and misdemeanors, which, in effect meant nothing more than grave official wrongs.

In the nature of things, these offenses cannot be defined, except in the most general way. A definition can, at best, do little more than state the principle upon which the offense rests. Consequently, no attempt was usually made to define impeachable offenses, and the futility as well as the unwisdom of attempting to do so has been commented upon. In the Constitution of the United States impeachable offenses are designated as "treason, bribery, or other high crimes and misdemeanors." Const. U. S. art. 2, para. 4. Substantially the same language is used in many of the state Constitutions. In others "misdemeanors in office," "maladministration," "oppression in office," and the like, are declared to be impeachable offenses.

When the Constitution of Texas was adopted, it was done in the light of, and with a full knowledge and understanding of, the principles of impeachment as theretofore established in English and American parliamentary procedure. The Constitution in this matter of impeachment created nothing new. By it, something existing and well understood was simply adopted. The power granted to the House to "impeach," and the Senate to try "impeachment," carries with it, by inevitable implication, the power to the one to prefer and to the other to try charges for such official delinquencies, wrongs, or malfeasances as justified impeachment according to the principles established by the common law and the practice of the English Parliament and the parliamentary bodies in America. The grant of the general power of "impeachment" properly and sufficiently indicates the causes for its exercise. (*Ferguson v. Maddox*, 114 Tex. 85, 97, 263 S. W. 888, 892 (1924).)

In the English Parliament, the House of Commons initiated impeachment by investigating and bringing formal charges. In Texas the house of representatives performs this function and after voting impeachment, it appoints someone, usually a committee of its members, to serve as prosecutors (called "managers") for the trial in the senate.

A private citizen can not initiate impeachment proceedings. (Tex. Att'y Gen. Op. No. 898 (1939).)

Section 1 does not identify the officers subject to impeachment and Section 2 provides only that the officers it lists must be *tried* by the senate following impeachment. (Sec. 7 authorizes statutory removal procedures for those officers whose removal is not provided by the constitution, so Sec. 2 presumably lists certain officers to guarantee a certain procedure for them. See also Texas Constitution Art. IX, Secs. 1-3 (1845).) The United States Constitution subjects to impeachment all civil officers of the federal government and as noted the Constitution of the Republic copied this provision. Arguably, therefore, the legislature has power to impeach and try any state officer except a member of the legislature (whose removal is provided for separately, in Art. III, Sec. 11).

Comparative Analysis

Virtually all states have adopted an impeachment plan similar to that set out in Article I, Section 2, of the United States Constitution, with impeachment by the lower house and trial by the upper house. Forty-seven states specify that the house of representatives, house of delegates, or general assembly has the power of impeachment. In 17 state constitutions a majority vote of all members is required to impeach; six states specify a two-thirds vote of all members. Mississippi requires

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only a two-thirds vote of those present and the Rhode Island Constitution states that a two-thirds vote is necessary to impeach the governor. Nebraska, with its unicameral legislature, requires a majority vote of all members for impeachment. The Alaska Constitution, in an unusual reversal of the normal procedure, specifies that impeachment originates in the senate and must be approved by a two-thirds vote of its members; trial is then conducted by the house of representatives.

Oregon is the only state with no provision for impeachment. Its constitution provides that "no public official shall be impeached, but incompetency . . . or delinquency in office may be tried in the same manner as criminal offenses, and judgment may be given of dismissal from office, and such further punishment as may have been prescribed by law." (Oregon Const. Art. VII, Sec. 6.)

The *Model State Constitution* provides for legislative impeachment by a two-thirds vote of all members of each house, with trial to be provided by law. (Sec. 4.18.)

Author's Comment

If a bicameral legislature is retained, this section should be retained, perhaps specifying whether a simple or extraordinary majority is needed to impeach. Since impeachment by the house merely initiates a trial of the accused and does not result in removal from office, the house should retain the power which it now has of determining the procedure and vote required by simple majority.

Protections against political or partisan impeachments are better built into the trial stage. To make impeachment too difficult may subject the people to continuation of the very corruption or tyranny this extraordinary remedy is designed to remove.

Sec. 2. TRIAL OF IMPEACHMENT OF CERTAIN OFFICERS BY SENATE.
Impeachment of the Governor, Lieutenant Governor, Attorney General, Treasurer, Commissioner of the General Land Office, Comptroller and the Judges of the Supreme Court, Court of Appeals and District Court shall be tried by the Senate.

History

See the *History* of Section 1.

Explanation

In the English Parliament persons impeached by the House of Commons were tried by the House of Lords. In the United States the trial function is customarily performed by the upper house of a bicameral legislature. In addition to following this custom, Section 2 lists the state officials whose impeachment is to be tried by the senate. Section 7 of this article provides that the legislature may add to this list, and it has done so, clarifying in the process that judges of the court of criminal appeals and courts of civil appeals, which courts are the successors to the court of appeals abolished in 1891, are subject to impeachment. (See Tex. Rev. Civ. Stat. Ann. art. 5961.)

The power and duty to try and judge one holding high public office may have been vested in the House of Lords originally to guarantee a tribunal powerful enough to sit in judgment on the highest in the land.

. . . [A]s history appears to have taught, human beings are sometimes frail when called upon to judge those in high places; hence, it is sometimes well that the power to judge the powerful be placed in powerful hands. (3 *Constitutional Revision*, p. 207.)

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Comparative Analysis

See the *Comparative Analysis* of Section 1.

Author's Comment

As pointed out in the *Explanation* of Section 1, the legislature probably has power to impeach any state officer and this section merely guarantees that the officers it names will receive a trial by the senate. Whether judges should be subject to impeachment at all, as distinguished from some less cumbersome removal method, is less certain.

Sec. 3. OATH OR AFFIRMATION OF SENATORS; CONCURRENCE OF TWO-THIRDS REQUIRED. When the Senate is sitting as a Court of Impeachment, the Senators shall be on oath, or affirmation impartially to try the party impeached, and no person shall be convicted without the concurrence of two-thirds of the Senators present.

History

See the *History* of Section 1.

Explanation

This provision was copied from the federal constitution. The function of the senate in an impeachment trial is judicial rather than legislative. (See *Ferguson v. Maddox*, 114 Tex. 85, 263 S.W. 888 (1924).) Acting as a court, the senators are sworn impartially to ascertain the facts, the applicable law, and apply the law to the facts. Acting in this capacity the senators should not primarily represent the interests or wishes of their constituents, as they normally would as legislators, but should assume a judicial role.

In the English House of Lords, conviction on impeachment required only a majority vote; however, the Lords inherit their seats and are thus considered insulated from popular clamor. (See 3 *Interpretive Commentary*, p. 48.) In a popularly elected body such as the Texas Senate, on the other hand, two-thirds of the members present must concur to convict and this extraordinary majority helps to protect the accused from a purely partisan trial.

Comparative Analysis

See the *Comparative Analysis* of Section 1.

The *Model State Constitution* requires the chief justice of the state's highest court to preside at the trial of the governor or lieutenant governor.

Author's Comment

The presence and participation of the chief justice would lend dignity to what otherwise could become (or at least be characterized as) a purely partisan attack on the governor or lieutenant governor. It might also be useful for the senate rules to set out at least the major procedural elements of the impeachment trial. This would permit advance familiarization, save time when impeachment is voted, and help ensure procedural regularity in the trial.

Sec. 4. JUDGMENT; INDICTMENT, TRIAL AND PUNISHMENT. Judgment in cases of impeachment shall extend only to removal from office, and disqualification

from holding any office of honor, trust or profit under this State. A party convicted on impeachment shall also be subject to indictment, trial and punishment according to law.

History

See the *History* of Section 1.

Explanation

This limitation on the nature of the judgment following impeachment distinguishes it from the traditional criminal prosecution. The accused may be removed and disqualified from ever again holding government office but cannot otherwise be deprived of life, liberty, or property. Conversely, the judgment does not bar criminal prosecution or civil suit based on the conduct for which impeached. (For a definition of the term "office of honor, trust or profit under this state," see the annotations of Art. XVI, Secs. 12 and 40.)

During the impeachment trial of Governor James Ferguson, he submitted his resignation one day before the senate rendered its judgment of removal and disqualification. Several years later Ferguson filed as a candidate for governor and argued that the judgment of the senate was void for lack of jurisdiction over his person. In *Ferguson v. Maddox* (114 Tex. 85, 99, 263 S.W. 888, 893 (1924)), the supreme court rejected this contention:

If the Senate only had the power to remove from office, it might be said, with some show of reason, that it should not have proceeded further when the Governor, by anticipation performed, as it were, its impending judgment. But under the Constitution the Senate may not only remove the offending official; it may disqualify him from holding further office, and with relation to this latter matter his resignation is wholly immaterial. For their protection the people should have the right to remove from public office an unfaithful official. It is equally necessary for their protection that the offender should be denied an opportunity to sin against them a second time. The purpose of the constitutional provision may not be thwarted by an eleventh hour resignation.

Thus impeachment has been called a quasi-criminal proceeding. Its purpose is not to punish the public official, but to protect the public from him. (Of course the impeached official is punished by the removal and permanent disqualification from officeholding as well as the stigma of a highly-publicized trial, but this is not impeachment's principal objective.)

Also in *Ferguson* the court offered some instructive dicta on the nature of a judgment of impeachment:

This opinion should not be concluded without a statement as to the status under our organic law of the judgment of the Senate, sitting as a court of impeachment. It is unquestionably true that such judgment cannot be called in question in any tribunal whatsoever, except for lack of jurisdiction or excess of constitutional power. For instance, an attempt by the Senate to try an officer who had not been impeached by the House, or to pronounce a judgment other than that authorized by section 3, of article 15, would be without effect and its action void. The Senate must decide both the law and the facts. It must determine whether or not the articles presented by the House set forth impeachable offenses, and it must determine whether or not these charges are sustained by the evidence produced. Its action with reference to these matters is undoubtedly within its constitutional power and jurisdiction. This is as it should be. The power reposed in the Senate in such case is great, but it must be lodged somewhere, and experience shows there is no better place. The courts, in proper cases, may always inquire whether any department of the government has acted outside of and beyond its constitutional authority. The acts of the Senate, sitting as a court of impeachment, are

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not exempt from this judicial power; but so long as the Senate acts within its constitutional jurisdiction, its decisions are final. As to impeachment, it is a court of original, exclusive, and final jurisdiction.

Comparative Analysis

See the *Comparative Analysis* of Section 1.

Author's Comment

Historical English impeachment procedure allowed the House of Lords to impose any punishment upon conviction, including banishment and death. But American constitutional law, with, among others, its basic requirement of specifying criminal conduct in advance to provide notice of what is forbidden before one is punished for doing it, probably would not sanction punishment of such severity, and Section 4's limitation on the nature of the judgment following impeachment is therefore sound.

Sec. 5. SUSPENSION PENDING IMPEACHMENT; PROVISIONAL APPOINTMENTS. All officers against whom articles of impeachment may be preferred shall be suspended from the exercise of the duties of their office, during the pendency of such impeachment. The Governor may make a provisional appointment to fill the vacancy occasioned by the suspension of an officer until the decision on the impeachment.

History

See the *History* of Section 1.

Explanation

This section further distinguishes impeachment from a criminal prosecution because one who is indicted is presumed innocent and probably could not be automatically suspended from office without constitutional authorization. Because one being impeached stands accused of serious misconduct *in office*, however, suspension is desirable to protect the public from continuing misdeeds.

If the governor or lieutenant governor is impeached, Article IV, Sections 16 and 17, provide for the lieutenant governor and president pro tempore of the senate to fill those respective offices during the trial, and since both are next in line, they would automatically succeed to those offices following removal of the governor or lieutenant governor.

Comparative Analysis

Approximately 20 other state constitutions provide for suspension following impeachment and temporary appointment to fill the resulting vacancy. The *Model State Constitution* simply directs that impeachment procedure be provided by law. The United States Constitution is silent on the subject.

Author's Comment

Permitting the lieutenant governor (as president of the senate) to preside over the impeachment trial of the governor whom he will succeed upon removal presents the potential for abuse. (The same potential of course exists when the president pro tempore presides over the lieutenant governor's trial.) One remedy, already mentioned in the *Comparative Analysis* of Section 3, is to require the chief justice of

Art. XV, § 6

the state's highest court to preside over the impeachment trial of both the governor and lieutenant governor.

Sec. 6. JUDGES OF DISTRICT COURT; REMOVAL BY SUPREME COURT.

Any judge of the District Courts of the State who is incompetent to discharge the duties of his office, or who shall be guilty of partiality, or oppression, or other official misconduct, or whose habits and conduct are such as to render him unfit to hold such office, or who shall negligently fail to perform his duties as judge; or who shall fail to execute in a reasonable measure the business in his courts, may be removed by the Supreme Court. The Supreme Court shall have original jurisdiction to hear and determine the causes aforesaid when presented in writing upon the oaths taken before some judge of a court of record of not less than ten lawyers, practicing in the courts held by such judge, and licensed to practice in the Supreme Court; said presentment to be founded either upon the knowledge of the persons making it or upon the written oaths as to the facts of creditable witnesses. The Supreme Court may issue all needful process and prescribe all needful rules to give effect to this section. Causes of this kind shall have precedence and be tried as soon as practicable.

History

See the *History* of Section 1. This section has no counterpart in earlier Texas constitutions.

The committee report of this section allowed a removal proceeding to be instituted by seven citizens, of whom three had to be practicing lawyers. (*Journal*, p. 771.) A minority report was filed opposing this provision, but a motion to strike it failed. However, it was amended to substitute ten lawyers practicing in the court of the accused judge for the four citizens and three lawyers. (See *Journal*, pp. 776, 793.)

Explanation

The only reported case in which this procedure for removal was used is *In re Laughlin* (153 Tex. 183, 265 S.W.2d 805 (1954)). In this case the supreme court appointed a district judge as special master to take testimony and make findings of fact. The accused judge was confronted by the witnesses against him, he testified in his own behalf, and he had an opportunity to contest the findings of fact and argue all legal questions before the supreme court. Both the master and the supreme court applied a standard of proof whereby all allegations against the accused judge had to be proved by clear and convincing evidence. In rendering its judgment of removal, the court refused to disqualify the judge from holding public office because this section, unlike Section 4 for impeachment, does not so provide. In fact, Judge Laughlin was re-elected at the next election following removal.

There is also a wider range of conduct for which removal is authorized under this section than under the impeachment sections. For example, Section 6 may be invoked against a judge who is physically unfit to carry out his duties and the threat of invocation can serve to force early retirement. (See 3 *Interpretive Commentary*, p. 52.)

Comparative Analysis

Indiana and New York have similar provisions. The *Model State Constitution* gives the supreme court power to remove appellate judges and judges of trial courts of general jurisdiction for such cause and in such manner as provided by law.

Art. XV, § 7, 8

Author's Comment

Texas district judges are subject to more removal provisions than any other officeholder. In addition to impeachment and address authorized by this article, Article V, Section 1-a, creates a Judicial Qualifications Commission with authority to remove them. (See the *Author's Comment* on that section.)

Sec. 7. REMOVAL OF OFFICERS WHEN MODE NOT PROVIDED IN CONSTITUTION. The Legislature shall provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution.

History

See the *History* of Section 1.

Explanation

Title 100 of the *Texas Revised Civil Statutes Annotated* includes a variety of provisions relating to removal from office. Article 5961 adds to the constitutional list of officers subject to impeachment under Section 2 of this article.

Articles 5962 and 5963 provide that the house or senate may continue in session beyond the normal adjournment date when considering impeachment or may convene in a special session for this purpose on proclamation of the governor, speaker, lieutenant governor, or president pro tempore of the senate or upon majority vote of either house.

Articles 5970-5997 implement this section and Article V, Section 24, by providing the mechanics for removal of district, county, and municipal officials.

Article 6253 of the civil statutes also provides for removal from office by quo warranto, initiated by the attorney general or county or district attorney, of one who illegally holds office.

In *Bonner v. Belsterling* (104 Tex. 432, 138 S.W. 571 (1911)), the court held that a city charter providing for recall elections to remove city officials did not violate the requirement in Section 7 that *state* officials be removed only after trial.

Comparative Analysis*

Numerous state constitutions contain similar authorization, but both the *Model State Constitution* and United States Constitution are silent on the matter.

Author's Comment

This section is unnecessary because the legislature has this authority anyway.

Sec. 8. REMOVAL OF JUDGES BY GOVERNOR ON ADDRESS OF TWO-THIRDS OF EACH HOUSE OF LEGISLATURE. The Judges of the Supreme Court, Court of Appeals and District Courts, shall be removed by the Governor on the address of two-thirds of each House of the Legislature, for wilful [*sic*] neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient ground for impeachment; provided, however, that the cause or causes for which such removal shall be required, shall be stated at length in such address and entered on the journals of each House; and provided further, that the cause or causes shall be notified to the judge so intended to be removed, and he shall be admitted to a hearing in his own defense before any vote for such address shall pass, and in all such cases, the vote shall be taken by yeas and nays and entered on the journals of each House respectively.

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History

Address originated in England as the form by which parliament or either house of parliament communicated its wishes or requests to the king. (See L.S. Cushing, *Law and Practice of Legislative Assemblies*, 315-16, 357-60, (Boston: Little, Brown & Co., 9th ed. 1907).) Address did not become a removal procedure until 1700, when the English Parliament in the Act of Settlement, restricted the king's power to remove judges from office, requiring cause for their removal. The act authorized, but did not require, the king to remove a judge without cause, however, on address by both houses of parliament requesting removal. (See R. Berger, *Impeachment: The Constitutional Problems*, 125, 150-52, (Cambridge: Harvard University Press, 1973).) Several states incorporated removal of judges by address in their first constitutions.

Removal of judges by address first appeared in Texas in the judiciary article of the 1845 Constitution. The 1845 version listed only "wilful neglect of duty or other reasonable cause which shall not be sufficient cause for impeachment" as grounds for removal by address; otherwise it was substantively identical to this section. The 1861 and 1866 Constitutions retained the 1845 version, as part of the judiciary article, with only minor changes in punctuation.

The 1869 Constitution included two provisions on removal by address. A section in the judiciary article governing removal of judges by address retained the 1845 language but added "incompetency" as an express cause for removal and specified that the vote required was "two-thirds of the members elected to each House." A separate section in the article on general provisions provided: "All civil officers of this State shall be removable by an address of two-thirds of the members elect to each House of the Legislature, except those whose removal is otherwise provided for by this Constitution."

During the 1875 Convention, the committee on the Judicial Department omitted removal of judges by address, and the convention adopted the judicial article without an address provision. Three days later, just moments after the convention adopted an impeachment article without providing for removal of judges or other officers by address, a member proposed that the 1845 Constitution's address section, with the additional causes now in Section 8 added, be included in the judiciary article. The convention adopted the proposal. (*Journal*, pp. 730-32, 793-94, 796.) Just one year earlier, in 1874, the legislature had proposed to address the governor to remove a number of district judges who had gained office under the reconstruction government and had succeeded in removing four. (See, e.g., *Tex. H. Jour.* 14th Leg., 1st Reg. Sess., 588-90, 597-98, 604, 618-19, 659, 686 (1874).) Presumably, the convention concluded that the usefulness of address the year before justified its retention, although it is probable that the convention had included Section 6 of this article as a remedy for the problems that initiated the earlier address proceedings.

The *Journal* of the 1875 Convention contains no record of additional action on the address section, but the final version of the constitution had moved it from the judiciary article to this article. Apparently, the committee on Style and Arrangement decided this article was the more logical location.

In 1891 a constitutional amendment revised the judiciary article, substituting a court of criminal appeals and courts of civil appeals for the court of appeals. The drafters of the amendment forgot to make the substitution in this section and in Section 2 of this article.

Explanation

Impeachment originated as and continues to be a judicial removal procedure.

with the two houses of the legislature performing judicial functions. (*Ferguson v. Maddox*, 114 Tex. 85, 263 S.W. 888 (1924).) Address originated as a legislative removal procedure. It required no cause for removal and no hearing, although the legislature obviously could assert a cause and permit presentation of a defense. In effect, removal by address was a precursor of recall, with the elected representatives acting instead of the electorate. (See R. Berger, *supra*, pp. 150-52.) Whether the addition to address proceedings of traditionally judicial procedures—a complaint or statement of causes, notice, and an opportunity to appear at a hearing—has changed the legislative character of address proceedings is uncertain.

In *Ferguson v. Maddox, supra*, the supreme court intimated that the judicial character of impeachment justified the house and senate convening themselves during an interim between regular sessions, without action by the governor under Article IV, Section 8, for impeachment purposes. A statute prescribes procedures for convening for impeachment purposes, (Tex. Rev. Civ. Stat. Ann. arts. 5962, 5963), and the legislature has done so twice. (See *Tex. H. Jour.*, 42d Leg., 1st Called Sess., 364, 368 *et seq.* (1931); *Tex. Sen. Jour.*, 42d Leg., 281 *et seq.* (1931); *Tex. H. Jour.*, 64th Leg., Impeachment Sess. (1975); *Tex. Sen. Jour.*, 64th Leg., Impeachment Sess. (1975).) No court opinion discusses whether the legislature may convene for address proceedings, no statute prescribes procedures for doing so, and the legislature has never attempted it.

As the *History* of this section notes, the legislature instituted address proceedings against several district judges in 1874 under the 1869 Constitution and removed some of them. Under the current constitution, address proceedings appear to have been instituted only twice—against a district judge in 1887 and an associate justice of the supreme court in 1977. (In the 1887 address, the house voted for removal, but the senate voted against it. In 1977, the justice resigned before presentation of evidence began.) In 1953 the senate considered instituting address proceedings against another district judge but decided against it. (*Tex. Sen. Jour.*, 53d Leg., Reg. Sess., 506-07, 629, 877-78 (1953).) Subsequently, the supreme court removed the judge by the procedure prescribed by Section 6 of this article, (In *re Laughlin*, 153 Tex. 183, 265 S.W.2d 805 (1954)), but he was reelected, then subjected to an unsuccessful disbarment attempt. (See *State v. Laughlin*, 286 S.W.2d 278 (Tex. Civ. App.—San Antonio 1956, writ *ref'd n.r.e.*.)

In 1887, the house and senate conducted the hearing required by this section separately. (*Tex. H. Jour.*, 20th Leg., Reg. Sess., 119-20, 461-66, 498, 501-03, 509 (1887); *Tex. Sen. Jour.*, 20th Leg., Reg. Sess., 363, 652-53, 684 (1887).) In 1874 and 1977, however, the house and senate acted jointly. In 1874 a joint committee of five house members and three senators held the hearing and reported to the two houses. The two houses then heard argument of counsel for the judge and the state in joint session. (See *Tex. H. Jour.*, 14th Leg., 1st Reg. Sess., (1874); *Tex. Sen. Jour.*, 14th Leg., 1st Reg. Sess. (1874).) The procedure in 1977 provided for committees of the whole house and the whole senate to meet jointly to hear evidence and argument. (*Tex. H. Jour.*, 65th Leg., 1st Called Sess., 3, 8-13, App. (1977); *Tex. Sen. Jour.*, 65th Leg., 1st Reg. Sess., 7-12, 15-16, App. (1977).)

The curious wording of the phrase specifying the causes for removal has created problems. Although the constitution does not specify grounds for impeachment, Section 8 appears to provide that a ground for impeachment may not be a cause for removal by address. In the 1874 address proceedings, the issue arose twice. Judge J.B. Williamson excepted to the charges against him because, among other grounds, he claimed he was charged with conduct subject to impeachment and therefore not proper cause for address. (*In the Matter of the Charges Against Honorable J.B. Williamson*, p. xiii (Austin, Texas: 1874), bound with *State Against Hon. S.B. Newcomb*, (Austin, Texas: J.D. Elliott, State Printer, 1874).) The

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legislature, in voting to sustain the address, overruled the objection. (The house, before voting on the address, overruled the objections in a separate vote.) (*Tex. H. Jour.*, 14th Leg., 1st Reg. Sess., 604 (1874); *Tex. Sen. Jour.*, 14th Leg., 1st Reg. Sess., 598m (1874).) During the same session, the house impeached a judge. The senate acquitted him of the charges, and a senator filed address charges against him. The address never came to a vote, but the senate judiciary committee ruled that grounds for impeachment may also be a basis for address, stating that the option "is a privilege extended to the government and if it sees proper to pursue the milder course of address in which no disabilities follow conviction, as in impeachment, that it might do so." (*Tex. Sen. Jour.*, 14th Leg., 1st Reg. Sess., 541-45, 601, 611-14 (1874).)

During the 1887 address proceedings against Judge Willis, the judge argued before a senate committee that this section requires two-thirds of the members *elect*ed to each house. The house vote to sustain the address had been by more than two-thirds of the members present but by less than two-thirds of the total membership. The house, in reporting adoption of the address, obviously disagreed. The senate committee also rejected the contention. (*Tex. H. Jour.*, 20th Leg., Reg. Sess., 509 (1887); *Tex. Sen. Jour.*, 20th Leg., Reg. Sess., 344, App. p. 7 (1887).)

Comparative Analysis

Just 20 years ago removal by a vote of both houses of the legislature or by the governor on address of both houses of the legislature was a common feature of state constitutions. Approximately 30 state constitutions provided for some form of legislative removal in addition to impeachment. In the past 15 years, however, almost one-third of those states in the course of revising a judiciary article or an entire constitution have eliminated legislative removal, usually replacing it with a judicial qualifications commission similar to Section 1-a of Article V.

Most of the states that retain legislative removal make it applicable only to judges. Five states authorize legislative removal of state officers generally or of executive and judicial officers. Three others include the attorney general and all prosecuting attorneys along with judges, and one of those, Arkansas, also includes the secretary of state, the treasurer, and the auditor.

Only two states do not require an extraordinary majority of both houses. One-half of the states providing for legislative removal omit the governor's participation. The other half is evenly divided between requiring the governor to remove on address by the legislature, as Texas does, and merely authorizing the governor to remove.

A few states, like Texas, enumerate several causes that justify legislative removal. Most, however, require good or reasonable cause without more. Two or three do not mention cause for removal. North Carolina specifies mental or physical incapacity, expressly requiring removal for any other cause to be by impeachment. Five other states attempt to treat the relationship between address and impeachment. Only Nevada makes it clear that cause for removal by address "may or may not be" sufficient ground for impeachment. The Michigan, Mississippi, New Hampshire, and South Carolina provisions on the relationship between address and impeachment are almost identical to the Texas provision. Only one-half of the legislative removal provisions require notice and a hearing on the charges, and an additional three require only notice.

Neither the United States Constitution nor the *Model State Constitution* provides for legislative removal by any means other than impeachment.

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Author's Comment

As the *Comparative Analysis* indicates, the trend in modern state constitutions is to substitute a judicial qualifications commission with removal power for address. In fact, address is not an effective mechanism for policing judicial conduct. Part-time legislators who meet regularly only once every two years for 140 days and have more business than they can handle are not going to concern themselves with any but the most serious judicial misconduct.

When the judge's misconduct is major and he resists removal, however, the current procedures for removal by the supreme court on recommendation by the judicial qualifications commission under Article V, Section 1-a, appear to be inadequate. In the three cases in which that removal procedure was fully used, almost a year or more elapsed between the date the proceedings were instituted and the date the issue was determined. (See *Matter of Bates*, 555 S.W.2d 420 (Tex. 1977) (10 days less than a year); *Matter of Carrilo*, 542 S.W.2d 105 (Tex. 1976) (14 months); In re *Brown*, 512 S.W.2d 317 (Tex. 1974) (3 years and 3 months).) Two of the judges involved in those cases had been indicted and convicted of felony offenses—one in state court for receiving a bribe and the other in federal court for violation of federal income tax laws—months before their removal, and the judicial qualifications commission has no power to suspend pending final determination.

Obviously, address can be a speedier procedure in a serious case. Before address is eliminated, judicial qualifications commission procedures should be modified to permit the commission to suspend a judge pending final determination of the case against him. Also, it seems desirable to provide that suspension is automatic on indictment for a felony and that removal is automatic on conviction.