

Oregon State Capitol Workplace Harassment Work Group
Discussion Draft – Constitutional Subgroup – October 18, 2018

The subgroup considered a number of open constitutional questions before the full work group. It largely focused on the ability of the Legislative Assembly to impose interim safety measures and discipline on respondent-legislators. The conversation focused largely on two provisions of the Oregon Constitution: Article IV, section 11, and Article IV, section 15. They provide, in pertinent part:

“Each house when assembled, shall...determine its own rules of proceeding....”

[Article IV, §11.](#)

“Either house may punish its members for disorderly behavior, and may with the concurrence of two thirds, expel a member; but not a second time for the same cause.” [Article IV, §15](#)

Consensus: Oregon’s appellate courts have not yet had the opportunity to construe either of the clauses in a meaningful way. But the clauses are substantially similar to clauses in the United States Constitution and the constitutions of most other states, and there is case law in some of those jurisdictions. Based on a review of cases in these other jurisdictions, and an understanding of the methodology Oregon’s appellate courts use to interpret the Oregon constitution, the subgroup reached consensus on the likely scope of the Oregon provisions. While this document represents the subgroup’s considered opinion on likely outcomes, the actual outcome is far from certain. The only way to guarantee that a particular policy choice would survive constitutional scrutiny is to amend the Oregon Constitution.

Article IV, section 11

Consensus: The ‘rules of proceeding clause’ gives each house broad authority to conduct legislative business in the manner it sees fit. Absent exceptional circumstances, it is unlikely that an Oregon court would review legislative action that falls squarely within the clause, including the failure of a house to follow either its own rules or a state statute. In some instances, federal courts have considered suits based on the federal constitutional rights of individual legislators, such as the right to free speech or due process. A properly structured rule for discipline or interim measures should be able to avoid such challenges.

Consensus: The subgroup recommends that discipline of legislators occur pursuant to rule or constitutional amendment. Given the body’s broad constitutional authority to govern itself “when assembled,” it is uncertain whether a statute enacted by a previously assembled body would have the authority to govern a later-assembled body. A rule plainly would govern, though its staying power is uncertain from session to session. The only way to ensure the longevity of a rule is via constitutional amendment.

Consensus: Article IV, section 11, is quite broad; it likely authorizes the imposition of interim safety measures, including prohibitions on contact with specific individuals or classes of individuals, restrictions on unaccompanied movement in the State Capitol or requirements to participate remotely in the legislative process. Such safety measures should be narrowly tailored to avoiding the safety risk; punitive measures could be considered “punishment” that would fall under Article IV, section 15, rather than the rules of proceeding clause.

Interim safety measures are most defensible in those situations where:

- Interim safety measures do not limit a legislator’s ability to engage in core legislative functions (e.g. voting).
- Interim safety measures are otherwise narrowly tailored to address immediate safety concerns that are based on credible allegations.
- The affected legislator is provided with notice and an opportunity to be heard on the proposed interim safety measures, in advance when possible.

Consensus: It is likely that the rules of proceeding clause would allow each house to adopt rules delegating the authority to impose interim safety measures to a subgroup of the full body (e.g. to a committee or Presiding Officer).

Article IV, section 15

Consensus: Either house may punish its members for “disorderly behavior.” There is a strong argument the Legislative Assembly is constitutionally empowered to determine for itself whether certain conduct constitutes “disorderly behavior,” and that its determination is not reviewable by a court. And harassing behavior, even if not strictly unlawful, has already been considered “disorderly behavior” by the U.S. Congress. But even if a court reviewed such a determination, it is likely that it would determine that harassing or retaliatory behavior is “disorderly behavior.”

Consensus: It is likely that the ‘punishment clause’ authorizes a broad array of sanctions, including censure, reprimand, the imposition of fines or training requirements and the loss of committee assignments. Restrictions on core legislative functions, however, may be impermissible because they have the potential to interfere with the constitutional rights of a legislator’s constituents to representation.

Consensus: The clause requires “punishment” to be for “disorderly behavior” and not for suspected disorderly behavior. Thus, a legislator likely may not be punished until the body has determined that disorderly behavior occurred. This means that a legislature may not require “punishment” as an interim measure. Interim measures must not go beyond what is necessary for safety, or they may be considered impermissible punishment.

Consensus: The punishment clause requires a two-thirds vote for expulsion but does not specify the required vote margin for other punishments. It is likely that the punishment clause authorizes either house to punish its members based on a majority vote. It is likely that the punishment clause would allow a house to delegate this disciplinary authority by rule to a smaller group of legislators (e.g., to a committee or Presiding Officer).

Recommendations and Outstanding Issues

Consensus: To avoid unnecessary partisanship, the Conduct Committees should continue to include the same number of members from the majority and minority parties.

Consensus: The use of technology to allow legislators to remotely participate in the legislative process should be considered, as it may provide an effective balance between the constitutional rights of the voters and the need to provide a safe state Capitol.

Consensus: While it may be legally permissible for either house to delegate the authority to impose punishment (except for expulsion), this mechanism may prove more effective in the context of interim safety measures where a more nimble response may be required.

Outstanding Issues: Consider the authority of each house to take action (interim safety measures or punishment) during the legislative interim. Would a special session be required? Should a constitutional amendment create a standing committee?