



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE FOR THE MEETING HELD THURSDAY, FEBRUARY 9, 2017

Call to Order:

Vice-Chair Paula Brooks called the meeting of the Legislative Branch and Executive Branch Committee to order at 2:30 p.m.

Members Present:

A quorum was not present, with Vice-chair Brooks and committee members Davidson and Taft in attendance.

Approval of Minutes:

There being no quorum, the minutes of the January 12, 2017 meeting of the committee were not approved.

Presentations and Discussion:

Shari L. O'Neill

Interim Executive Director and Counsel

"Constitutional and Statutory Provisions Related to the Speech or Debate Privilege"

Vice-chair Brooks recognized Shari L. O'Neill, interim executive director and counsel, for the purpose of presenting on legislative privilege as applied to legislative staff. Based on a fifty-state survey, Ms. O'Neill said nearly all states provide some type of protection to legislators when performing their legislative duties, with most providing both a speech or debate privilege that protects legislators from having to testify or answer in any other place for statements made in the course of their legislative activity, and a legislative immunity that protects legislators against civil or criminal arrest or process during session, during a period before and/or after session, and while traveling to and from session. She noted only Florida and North Carolina lack a constitutional provision relating to legislative privilege or immunity, although a North Carolina

statute protects legislative speech and the Florida Supreme Court has recognized a legislative privilege as being available under the separation of powers doctrine.

Addressing whether any states mention or protect legislative staff in their constitutional provisions relating to legislative privileges and immunities, Ms. O'Neill indicated no state constitutions provide this protection, although statutory protections are available in at least some states.

Reviewing state statutory provisions, Ms. O'Neill noted that several states expressly protect communications between legislators and their staff, particularly in the context of discovery requests in a litigation setting. She explained that, although Ohio's statute, R.C. 101.30, requires legislative staff to maintain a confidential relationship with General Assembly members and General Assembly staff, it does not expressly provide a privilege to legislative staff. She said R.C. 101.30 also does not indicate that legislative documents would not be discoverable, and does not address whether legislative staff could be required to testify in court about their work on legislation. She added that the statute does not discuss oral communications between legislators and staff or expressly address communications that may occur between interested parties and legislative staff on behalf of legislators.

Vice-chair Brooks thanked Ms. O'Neill for her presentation.

*Sarah Pierce and Bridget Coontz, Assistant Attorneys General
Constitutional Offices of the Ohio Attorney General
"Legislative Privilege in a Litigation Setting"*

Vice-chair Brooks introduced Sarah Pierce and Bridget Coontz, two assistant attorneys general from the Constitutional Offices of the Office of the Ohio Attorney General, to present on the topic of legislative privilege in a litigation context. Ms. Pierce indicated that she and Ms. Coontz provide representation to General Assembly members in legal matters that arise in the course of legislators' official duties. She said there are few Ohio cases discussing legislative privilege, and Ohio courts often analyze the speech or debate clause as being co-extensive of the federal clause.

Ms. Pierce said the first case to discuss the topic at any length is *City of Dublin v. State*, 138 Ohio App.3d 753, 742 N.E.2d 232 (10th Dist. 2000), a case involving a challenge to a budget bill. In that case, the plaintiff served a discovery request that included noticing a sitting senator for deposition and submitting interrogatories to General Assembly members and their staffs. She said the trial court quashed all of the discovery requests on the ground of privilege. Ms. Pierce indicated that when the case was appealed to the Tenth District Court of Appeals, the appellate court decision included an extensive analysis of legislative privilege, extending the privilege to all meetings and discussion. She said, however, the court did allow interrogatories to go to the lobbyists who had meetings with legislators.

Ms. Pierce described a second case relating to legislative privilege, *Vercellotti v. Husted*, 174 Ohio App.3d 609, 2008-Ohio-149, 883 N.E.2d 1112, in which the plaintiffs noticed depositions of sitting General Assembly members, as well as one legislative aide and one member of the Legislative Service Commission. The trial court granted a protective order preventing legislative members from having to appear for deposition. A Legislative Service Commission employee testified at a hearing about the committee meeting itself, but the state successfully asserted that conversations with legislators were privileged.

Ms. Pierce described that her office has raised legislative privilege in a number of cases. She identified several cases in which motions to quash subpoenas were granted, or where subpoenas were withdrawn, but said these issues were resolved without a court decision or analysis. She said when her office responds to discovery requests, it relies on R.C. 101.30 to assert a confidential relationship between the General Assembly and legislative staff.

Committee member Jo Ann Davidson asked whether “legislative staff” is considered to be the Legislative Service Commission staff or the General Assembly staff. She said, if one were to ask a legislator, he or she would think it means the legislator’s own staff. Ms. Pierce said that distinction has not caused a problem, and that the terms are defined in R.C. 101.30 for the specific purposes of that statute.

Vice-chair Brooks asked whether the presenters see a need for a change to Article II, Section 12. Ms. Pierce said she can only speak to what has happened in litigation and how the parties and the courts have addressed the issue. She said the issue does come up, and that there is “a deep body of case law on the federal level that the federal courts draw from.”

Vice-chair Brooks asked whether legislators voluntarily comply with discovery requests. Ms. Coontz said some are willing to testify about their communications. She added that the courts generally follow the wishes of the legislative member. She said, in the typical case, members are non-parties, and courts are reluctant to pull in members and staff for testimony.

Vice-chair Brooks asked whether the presenters have looked at how other states handle the issue. Ms. Coontz said they had not.

Vice-chair Brooks thanked Ms. Pierce and Ms. Coontz for their comments.

Moving forward to upcoming topics, Vice-chair Brooks asked for an update on sections the committee still needs to review.

Ms. Davidson suggested that the committee begin considering some issues from the executive branch sections in Article III. Vice-chair Brooks stated that she would confer with Chair Fred Mills regarding the best way to move forward, and that the committee could make further plans at its meeting in March.

Adjournment:

There being no further business to come before the committee, the meeting was adjourned at 3:03 p.m.

Approval:

The minutes of the February 9, 2017 meeting of the Legislative Branch and Executive Branch Committee were approved at the March 9, 2017 meeting of the committee.

/s/ Frederick E. Mills

Frederick E. Mills, Chair

/s/ Paula Brooks

Paula Brooks, Vice-chair