OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

OHIO CONSTITUTION
ARTICLE II
SECTIONS 10 AND 12

RIGHTS AND PRIVILEGES OF MEMBERS OF THE GENERAL ASSEMBLY

The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Sections 10 and 12 of Article II of the Ohio Constitution concerning General Assembly members' rights of protest, and their privileges against arrest and of speech. It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The Commission recommends that no change be made to Article II, Sections 10 and 12 of the Ohio Constitution and that the provisions be retained in their current form.

Background

Article II generally concerns the Legislative Branch, providing the organizational structure and membership requirements of the General Assembly and the method for it conducting its business.

Section 10 (Rights of Members to Protest)

Section 10, unaltered since 1851, provides:

> Any member of either House shall have the right to protest against any act, or resolution thereof; and such protest, and the reasons therefor, shall, without alteration, commitment, or delay, be entered upon the journal.

Section 10 was slightly revised from the version adopted in the 1802 constitution, which reads:

> Any two members of either house shall have liberty to dissent from, and protest against, any act or resolution which they may think injurious to the public or any individual, and have the reasons of their dissent entered on the journals.

The right of legislative members to protest, and to have their objections recorded in the journal, has its origins in the House of Lords of the British Parliament, where the right of written dissent was recognized as a privilege of the upper house.[1] Recording the dissent in the house journal was the minority's recognized method of registering political objection, but the protests would also appear in the press, and for this reason the decision to protest, and the wording of the objection, were carefully considered.[2]

While the right of protest is ancient, its use was uncommon until the 18th century, when it was promoted by the rise of partisan factionalism in Parliament and a growing public interest in politics that encouraged dissenters to air their protests in the court of public opinion.[3] By the close of the century, American state constitutions began to include the right of legislative members to dissent and have their protest journalized, with several of the original 13 colonies adopting the measure in their state constitutions, including New Hampshire, North Carolina, and South Carolina.[4] Tennessee followed suit in its 1796 constitution, with Ohio's provision being included in the 1802 constitution.[5] [6]

Although about a dozen states maintain a similar provision in their constitutions, the United States Constitution contains no equivalent, merely providing at Article I, Section 5, Clause 3, that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may, in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal." Commenting on the absence of a similar provision in the U.S. Constitution, the Ohio Constitutional Revision Commission (1970s Commission) observed that dissents in Congress are preserved by the publication of debates in the Congressional Record.[7]

Section 12 (Privilege of Members from Arrest, and of Speech)

Section 12 has not been altered since its adoption in 1851. It provides:

> Senators and Representatives, during the session of the General Assembly, and in going to, and returning from the same, shall be privileged from arrest, in all cases, except treason, felony, or breach of the peace; and for any speech, or debate, in either House, they shall not be questioned elsewhere.

Section 12 is nearly identical to Article I, Section 13 of the 1802 constitution, which reads:

> Senators and Representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

The idea that legislative representatives must be able to freely engage in debate, consult with staff and constituents, and travel to and from legislative session without hindrance, was challenged in 17th century England when the Crown and Parliament clashed over their competing roles.[8] A particularly dramatic 1641 incident in which King Charles II stormed into Parliament demanding the arrest of members he deemed treasonous cemented the belief that an independent legislative body was essential to a democratic form of government, and the "freedom of speech and debates" for parliamentary members subsequently was included in the English Bill of Rights of 1689.[9]

By the time the U.S. Constitution was drafted, the privilege was accepted as a necessary democratic protection, and it was incorporated in Article I, Section 6, Clause 1, apparently without debate.[10] Various forms of the privilege also made their way into state constitutions, with nearly all states adopting constitutional provisions that protect legislative speech or debate.[11]

Amendments, Proposed Amendments, and Other Review

Section 10 was reviewed by the Committee to Study the Legislature of the 1970s Commission. On October 15, 1971, that committee issued a report in which it indicated the right to protest on the record originated in an era in which legislators had no other ability to communicate their objection to legislation. The committee concluded that because dissenting legislators now have the ability to publicize their views in the news media, the provision is "an anachronism and appropriate for removal."[12] Despite this recommendation, the question was not taken up by the full 1970s Commission, and, thus, the section remains as it was adopted in 1851.

The 1970s Commission did not address Section 12, thus, it also remains in its 1851 form.

Litigation Involving the Provisions

The Supreme Court of Ohio has not had occasion to review Article II, Section 10 since the 1970s, however, the Court has reviewed Article II, Section 12.

In *Costanzo v. Gaul*, 62 Ohio St.2d 106, 403 N.E.2d 979 (1980), the plaintiff sued a city councilman who, in explaining why the plaintiff's rezoning request had not been accepted, allegedly made defamatory statements about plaintiff to the press. In *Constanzo*, the Court considered whether the privilege of speech or debate was limited to the General Assembly, or whether communications by members of a city council also qualified for protection. The Court held the councilman, like a state legislator, was entitled to absolute privilege so long as his published statement concerned a matter reasonably within his legislative duties.

Two Ohio Court of Appeals cases also bear mentioning. In *Kniskern v. Amstutz*, 144 Ohio App.3d 495, 760 N.E.2d 876 (8th Dist. 2001), the Cuyahoga County Court of Appeals addressed whether a civil rights violation case could be maintained against 72 state legislators who voted in favor of tort reform legislation in 1996.[13] In dismissing, the appellate court emphasized that legislators acting in their legislative capacities enjoy immunity from lawsuit, even where, later, the enacted law is held unconstitutional. *Id.*, 144 Ohio App.3d at 497, 760 N.E.2d at 877-78.

In *City of Dublin v. State*, 138 Ohio App.3d 753, 742 N.E.2d 232 (10th Dist. 2000), the Franklin County Court of Appeals considered whether private meetings between legislators and corporate representatives were privileged from discovery in a case alleging portions of the state biennial budget bill unconstitutionally restricted municipalities from regulating public utilities. Noting that state court precedent primarily focused on immunity from suit – an issue not present in the facts of the case – the court sought guidance from federal case law holding that the speech or debate protection also provides evidentiary privilege against the use of statements made in the course of the legislative process. *Id.*, 144 Ohio App.3d at 758, 742 N.E.2d at 236. Following the rationale that the purpose of the speech or debate clause is to protect the legislator from the "harassment of hostile questioning," rather than to encourage secrecy, the court concluded that "requiring legislators to divulge the identity of corporate representatives with whom they have had private, off-the-public-record meetings" does not infringe on an integral part of the legislative process and so does not violate legislative privilege. *Id.*, 144 Ohio App.3d at 760, 742 N.E.2d at 237.

Presentations and Resources Considered

Hollon Presentation

In July 2016, Steven C. Hollon, executive director, described to the Legislative Branch and Executive Branch Committee that Sections 10 and 12 were related in that both deal with the freedoms and privileges of legislators to express their views and to perform their legislative duties without interference. Mr. Hollon suggested that, because these provisions cover related subject matter, they could be reviewed together and addressed in a single report and recommendation.

Huefner Presentation

In November 2016, Steven F. Huefner, assistant professor of law at the Ohio State University Moritz College of Law, presented on legislative privilege as set forth in Article II, Section 12.

Prof. Huefner, whose career included a position assisting the United States Senate's efforts to protect and enforce its privileges, said the existence of the legislative privilege is about protecting the separation of powers, a concept that goes back to when the British Parliament was subservient to the Crown. He said the clause is intended to protect members of a legislative body from retaliation for actions taken in the performance of their official legislative duties. He noted the provision derives from the concept that, while all public representatives are subject to political retaliation, legislators should not be subject to retaliation by the executive or judicial branch, which could use their power to make the legislative branch subservient. Prof. Huefner said provisions protecting legislators from retaliation for speech or debate remain, even though the clashes in England have not been part of the American experience.

Noting there are justifications for continuing the privilege, Prof. Huefner nonetheless commented that the countervailing pressure is for legislative activities to be open and public. He said the

privilege should apply to staff as well as to legislators, but it is not always interpreted that way in the states.

Addressing the section's additional privilege against arrest, Prof. Huefner explained the privilege is against a citizen's civil arrest, which was occasionally used to detain members of a legislative body to prevent them from performing their legislative duty. He said the privilege excuses members of the legislature from being subject to civil arrest in all cases except treason, felony, and breach of the peace.

Regarding the prohibition against legislators being questioned elsewhere for any speech or debate, Prof. Huefner described the conduct and types of questioning covered. He said, by its terms, the provision protects members of the legislature, but for that protection to be fully effective, legislative staff members ought to be within the scope of that privilege if the legislative member desires the privilege to cover the staffer. He said it is the member's privilege to encompass the staff that is serving the member in connection with the work. Prof. Huefner said the privilege should cover broadly all the essential legislative activities, a privilege that may go beyond the official duties of the legislators. He noted there are duties performed that may not be expressly legislative.

Prof. Huefner said the remaining question is whether the privilege protects legislators only against liability or whether it also protects them against having to testify. He remarked that, if the phrase indicating they shall not be questioned "elsewhere" is only taken at face value, it is easy to argue legislators cannot be subpoenaed about what they have done, even if they are not defendants. But, he said, although this is how federal courts construe the rule, this is not always how state courts have construed it. He said the privilege against questioning includes being required to produce documents.

Prof. Huefner added the privilege raises questions about freedom of information laws, commenting that an argument could be made that an individual legislator could extend his or her privilege to the entire legislative body. He said, at the same time, the privilege only provides that members should be free from questioning elsewhere, meaning outside the legislature, so that legislators are always accountable to the public for what they do in legislative session, including ethics investigations, deciding what parts of the process to conduct in public session, and by videotaping floor and committee sessions. He said the legislature can choose to create paper documents as a way of making its activities more readily available to the public. Despite this, he said, it is his view that legislators need the ability to insulate themselves against the possibility that disgruntled constituents or other branches of government might be able to obtain information for harassment purposes.

O'Neill Presentation

On February 9, 2017, Shari L. O'Neill, interim executive director and counsel to the Commission, presented to the committee 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. Ms. O'Neill indicated no state constitutions mention or protect legislative staff in their constitutional provisions relating to legislative privileges and immunities, 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 are not 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.

Pierce and Coontz Presentation

On February 9, 2017, the committee heard a presentation by two assistant attorneys general from the Constitutional Offices of the Office of the Ohio Attorney General, Sarah Pierce and Bridget Coontz. 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*, *supra*, a case involving a challenge to a budget bill. In that case, the plaintiff noticed a sitting senator for deposition, and submitted 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 in which motions to quash subpoenas were granted, or 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.

Ms. Coontz said some legislatures voluntarily comply with discovery requests, adding that 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.

Discussion and Consideration

In discussing Article II, Sections 10 and 12, the Legislative Branch and Executive Branch Committee considered research indicating that most states protect the right to protest as well as providing a legislative privilege against having to answer in court or other places for words undertaken in the furtherance of the legislator's official duties.

Addressing the right to register a protest in the journal, as described in Section 12, the committee noted that the procedure allows General Assembly members who disagree with a procedural ruling against them, or a procedure that was not followed, to hand a written protest to the clerk. The protest is then then included in the journal of that day's business, allowing a permanent record of that protest.

Regarding the committee report from the 1970s Commission recommending repeal of Section 10, committee members expressed that the section still has relevance despite the proliferation of multiple media and internet news outlets because the journal is the official record of the business of the General Assembly, and the member filing the protest can directly control the message being communicated. Committee members also noted that the protest allows legislators to counteract the fact that legislative minutes are vague, that legislative intent is not expressed in the legislation, and that bill sponsors are not required to explain their reasons for sponsoring the bill. Committee members also noted that a legislator may vote with the majority but may agree with the minority that the procedure for enacting the legislation was improper. In that case, because the legislator cannot speak through his or her vote, committee members indicated it is important to maintain the right to protest.

Regarding the issue of legislative privilege as provided in Section 12, some committee members expressed that because legislative members officially speak through their vote and their comments during session, other types of communications are properly viewed as being privileged. Members additionally indicated that legislative privilege helps to maintain the separation of powers, noting that many communications that occur in the executive and judicial branches of government are recognized as privileged. At the same time, committee members recognized that legislators are acting on behalf of citizens and should, as much as possible, maintain transparency as they conduct their duties. Addressing the confidentiality of communications between legislators and legislative staff, committee members observed that the privilege allows legislators to effectively perform their role.

Action by the Legislative Branch and Executive Branch Committee

After formal consideration by the Legislative Branch and Executive Branch Committee, the committee voted on March 9, 2017 to issue a report and recommendation recommending that Article II, Sections 10 and 12 be retained in their present form.

Presentation to the Commission

On March 9, 2017, Shari L. O'Neill, interim executive director and counsel to the Commission, on behalf of the Legislative Branch and Executive Branch Committee, presented a report and recommendation for Article II, Sections 10 and 12. Ms. O'Neill said the report and recommendation describes that Section 10 provides a right of legislative members to protest, and to have their objections recorded in the journal. Discussing Section 12, she said the report and recommendation describes the historic basis for the idea that legislative representatives must be able to freely engage in debate, consult with staff and constituents, and travel to and from legislative session without hindrance. She said the report further describes the work of 1970s Commission, indicating that its Committee to Study the Legislature issued a report in which it concluded that because dissenting legislators now have the ability to publicize their views in the news media, the protest provision is "an anachronism and appropriate for removal." She said the report indicates that, despite this recommendation, the question was not taken up by the full 1970s Commission, and, so remains as it was adopted in 1851. The report indicates the 1970s Commission did not address Section 12, thus, it also remains in its 1851 form.

Ms. O'Neill continued that the report addresses litigation involving the provisions, as well as describing presentations related to the speech or debate clause in Section 12. She said the report and recommendation indicates the committee's discussion and consideration, documenting the committee's conclusion that, because the journal is the official record of the business of the General Assembly, and the member filing the protest can directly control the message being communicated, it is important to retain that right. She said the report also indicates the committee's conclusion that that Section 12 should be retained because legislative privilege helps to maintain the separation of powers, noting that many communications that occur in the executive and judicial branches of government are recognized as privileged. She said the report acknowledges the views of some of the committee that legislators are acting on behalf of citizens and should, as much as possible; maintain transparency as they conduct their duties. In addressing the confidentiality of communications between legislators and legislative staff, she said the report notes committee members' observation that the privilege allows legislators to effectively perform their role.

She said the report and recommendation indicates the Legislative Branch and Executive Branch Committee's conclusion that Article II, Sections 10 and 12 continue to serve the General Assembly and should be retained in their current form.

Action by the Commission

At the Commission meeting held April 13, 2017, Legislative Branch and Executive Branch Committee Chair Fred Mills moved to adopt the report and recommendation for Article II, Sections 3, 4, 5, and 11, a motion that was seconded by Commission member Jo Ann Davidson. After general discussion, a roll call vote was taken, and the motion passed unanimously, by a vote of 25 in favor, with none opposed, and five absent.

Conclusion

The Ohio Constitutional Modernization Commission recommends that Article II, Sections 10 and 12 be retained in their present form.

Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on March 9, 2017 and April 13, 2017, the Commission voted to adopt the report and recommendation on April 13, 2017.

/s/ Charleta B. Tavares
Senator Charleta B. Tavares, Co-chair

/s/ Jonathan Dever
Representative Jonathan Dever, Co-chair

Endnotes

[1] William C. Lowe, *The House of Lords, Party, and Public Opinion: Opposition Use of the Protest, 1760-1782*, 11 Albion 2 (1979) 143, 143-44. Available at: https://www.jstor.org/stable/4048271 (last visited Jan. 10, 2017).

[2] *Id.* at 144.

[3] *Id.* at 143; A Short History of Parliament: England, Great Britain, the United Kingdom, Ireland and Scotland 156 (Clyve Jones, ed. 2009).

[4] North Carolina Const., art. II, § 18 provides: "Any member of either house may dissent from and protest against any act or resolve which he may think injurious to the public or to any individual, and have the reasons of his dissent entered on the journal."

South Carolina Const. art. III, § 22 provides, in part: "Any member of either house shall have liberty to dissent from and protest against any Act or resolution which he may think injurious to the public or to an individual, and have the reasons of his dissent entered on the journal."

New Hampshire Const. Part II, Art. 24 provides, in part: "And any member of the senate, or house of representatives, shall have a right, on motion made at the time for that purpose to have his protest, or dissent, with the reasons, against any vote, resolve, or bill passed, entered on the journal."

[5] A copy of the Tennessee Constitution of 1796 is available at: http://teva.contentdm.oclc.org/cdm/fullbrowser/collection/tfd/id/380/rv/compoundobject/cpd/421/rec/7 accessed 1/9/17 (last visited Jan. 9, 2017).

[6] In fact, Tennessee's constitution is recognized as providing, or at least influencing, most of the text of Ohio's first constitution. Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 22 (2nd prtg. 2011), citing Howard McDonald, A Study in Constitution Making – Ohio: 1802-1874, Ph.D. Dissertation, Univ. of Michigan, 27 (1916).

[7] Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Proceedings Research, Volume 3, 1109, http://www.lsc.ohio.gov/ocrc/v3%20pgs%201098-1369%20legislative-executive%201370-1646%20finance-taxation.pdf (last visited Jan. 9, 2017).

[8] Michael L. Shenkman, *Talking About Speech or Debate: Revisiting Legislative Immunity: Introduction,* 32 Yale L. & Pol'y Rev. 351, 357-58 (2014).

[9] *Id.* at 358-59; Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures,* 45 Wm. & Mary L. Rev. 221, 229-30 (2003).

[10] U.S. Const. art. I, § 6, cl. 1 states that members of both Houses "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses, and in going to and from the same, and for any Speech or Debate in either House, they shall not be questioned in any other place."

For a comprehensive history of the speech or debate clause in the U.S. Constitution and the British Constitution, see Josh Chafetz, Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions (2007).

[11] Huefner, *supra,* at 235-37.

[12] *Ohio Constitutional Revision Commission, supra* note 7, at 1110.

[13] The full cite of this case is *Kniskern v. Amstutz,* 144 Ohio App.3d 495, 760 N.E.2d 876 (8th Dist. 2001), dismissed, 93 Ohio St.3d 1458, 756 N.E.2d 1235 (2001), cert. denied, 535 U.S. 990 (2002).