



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE FOR THE MEETING HELD THURSDAY, JANUARY 12, 2017

Call to Order:

Chair Fred Mills called the meeting of the Legislative Branch and Executive Branch Committee to order at 11:13 a.m.

Members Present:

A quorum was present with Chair Mills, Vice-chair Brooks, and committee members Asher, Coley, Curtin, Davidson, McColley, Taft, Tavares, and Trafford in attendance.

Approval of Minutes:

The minutes of the December 15, 2016 meeting of the committee were approved.

Presentations and Discussion:

Steven C. Hollon
Executive Director

Chair Mills recognized Steven C. Hollon, executive director, for the purpose of presenting the draft of a proposed report and recommendation relating to Article II, Sections 10 and 12.

Mr. Hollon described that the report and recommendation covers two sections of the legislative article relating to the rights and privileges of members of the General Assembly. Mr. Hollon said Section 10 provides a right to protest to members who are in the minority in opposing legislation, allowing them to publicize their dissent in the legislative journal. Mr. Hollon said the report and recommendation outlines the history of the right of protest, which originated with the British Parliament. Mr. Hollon then described Article II, Section 12, which provides legislators a privilege from arrest under certain circumstances while traveling to and from legislative session. He said the section also provides a privilege for legislators' speech or debate, preventing them from being questioned in another setting for communications made in the course of their

legislative duties. Mr. Hollon said the report also describes discussions on these topics by the Ohio Constitutional Revision Commission in the 1970s, as well as litigation in which the sections were at issue. Mr. Hollon continued that the report outlines a presentation on the privilege of speech or debate that was provided to the committee by Professor Steven F. Huefner, of the Ohio State University Moritz College of Law. Mr. Hollon concluded that the report does not indicate the committee's discussion or recommendation on these sections but will do so once the committee has had a full opportunity to conduct its review.

Chair Mills thanked Mr. Hollon for his presentation and sought comment from the committee. He suggested the committee consider whether the speech or debate privilege should include a prohibition against testimony in a litigation setting, and whether the privilege should be extended to legislative staff.

Senator Bill Coley said the discussion in legislative caucus sessions centers on the best way to move forward on legislation that benefits citizens of the state. He said legislative members officially speak through their vote and their comments during session, not through other types of communications. He said he supports maintaining the privilege.

Sen. Charleta Tavares disagreed, saying if legislators are acting on behalf of the citizens, they should not be fearful of what they say or do on citizens' behalf. She said she would like to study this topic a little more, but would hope legislators do not say anything in any setting they would not want their constituents to know.

Sen. Coley clarified that his point was the privilege prevents another branch of government being able to call to task the legislative branch. He noted that conferences on cases conducted by justices of the Supreme Court of Ohio are privileged, as are some executive branch activities, and that members of the legislative branch deserve the same protection in order to effectively do their work. He said, "We are all elected; you cannot have different branches of government infringing on each other."

Committee member Herb Asher said the committee could benefit from more research regarding whether the provision could be modified to expressly extend the privilege to legislative staff. He said it would be useful to see how the privilege works, specifically, under what circumstances a legislator is performing his or her official duties.

Committee member Jo Ann Davidson said the privilege between legislators and employees of the Legislative Service Commission (LSC) still exists, and that the General Assembly has always protected that information. She said if legislators are to effectively perform their role the privilege is necessary. She gave an example from her experience as speaker of the Ohio House, indicating a change in party control can result in employee changes because it is recognized that the relationship between legislator and staff is confidential. She said it is important to keep in mind that there is precedent for protecting confidentiality of the legislator-staff relationship.

Chair Mills agreed, saying the committee could benefit from additional research on the privilege as it relates to legislative staff. Regarding the right of members to record their protest in the journal, he said this right has been exercised over the years, and he is not aware of complaints about legislators' having the ability to register their dissent.

Commenting regarding a report prepared by the committee of the 1970s Commission that reviewed Section 10, Sen. Tavares said she disagrees with the suggestion that because legislators can publicize their protest in the media they do not need a constitutional protection for their ability to dissent. She said the media is not something legislators can control directly, and publication may be fragmented and not reach everyone. She said, considering the recent rise in the use of social media, she would like the committee to consider some modern thinking on this question.

Chair Mills provided the committee with information about how, as a practical matter, a legislator may place a protest in the journal. He said this occurs when an individual member or when a party, usually the minority, does not like the way something came about on the floor of the chamber. He said, for example, there was a procedural ruling against them, or a procedure that was not followed, and the protest would be handed to the clerk and then included in the journal of that day's business. He said this allows a permanent record of that protest.

Sen. Tavares added some instances of the use of the protest have arisen because audio and video recordings are not permitted in committee. She said legislative minutes "are pretty vague, so we don't really capture any protest that takes place in committee hearings, who testified, or who attended." She added legislative intent is not expressed in the legislation, and no explanation is given why a legislator sponsored a bill. She said the committee record is void of any protest information, other than what is in that person's written testimony. She added that proceedings on the floor are livestreamed, so that information is available to the public.

Committee member Mike Curtin noted that, prior to the mid-1990s, a bill request from a legislative member to LSC was a public record. Describing an incident in which communications between a legislator, an interest group, and LSC came under public scrutiny, he said legislation was introduced at that time to make communications between members and LSC privileged. He said it would be helpful to know how other states address communications between legislators and legislative service agencies, and whether those states provide a privilege by statute or by constitutional provision.

Chair Mills said his sense is that the provision granting a right of protest should be maintained, but the committee may wish to revise it. Sen. Coley expressed that there could be a situation in which a legislator may vote with the majority but may agree with the minority that the procedure for enacting the legislation was improper. He said in that case the legislator cannot speak through his or her vote, so it is important to maintain the right to protest.

Chair Mills thanked Mr. Hollon for his presentation, indicating the committee would be hearing more on Sections 10 and 12 at a future meeting.

William K. Weisenberg
Attorney
Article II, Section 8 and "Lame Duck" Sessions

Chair Mills then recognized Attorney William K. Weisenberg, who said he was appearing in his personal capacity to provide comments relating to the portion of the legislative session occurring between the November election and the conclusion of the General Assembly, also known as "lame duck."

Mr. Weisenberg briefly described his prior experience as a lobbyist, indicating that, for many years, he was active in promoting legislation and was present in the statehouse during numerous lame duck sessions.

He said, in his view, lame duck bills create uncertainty. He said Article II, Section 8, relating to sessions of the General Assembly, is well-drafted, providing for a year-round legislature. He said Ohio is one of the few states whose legislature is full time. He said Section 8 also provides for a special session to be called by proclamation. Mr. Weisenberg suggested that Section 8 be amended to provide that, in a post-general-election period of time, the General Assembly may be reconvened only by a proclamation from the governor or a proclamation from the leadership of the General Assembly to address a singular specific issue that could not be subject to unrelated or extraneous issues being added on. He said the lame duck session is not in the best interest of the public or the General Assembly.

Mr. Weisenberg continued that the lame duck session results in legislation that violates the one-subject rule in Article II, Section 15(D). For this reason, he said if Section 8 is amended to allow post-election session only by proclamation, the section also should be amended to prevent extraneous issues being tacked on to a bill being considered at that time.

Mr. Asher said he shares some of Mr. Weisenberg's concerns, but asked if there are some ways the legislature could adopt rules and procedures that would resolve the problems.

Mr. Weisenberg said the General Assembly has the authority to establish its own rules, which it does every session. He said the legislature needs that ability to be sure the way it conducts itself stays within Article II.

Mr. Asher said if an issue is under consideration prior to the election, and further hearings and a vote occur in the lame duck, that is not the same as a situation in which the issue suddenly springs up during the lame duck session. He wondered if the rule could be that no items would be addressed unless there was a previous public discussion or hearing.

Mr. Weisenberg said there can be more than one right answer, and that different proposals could be examined. He said there are issues that the General Assembly will consider over the entire biennium, for example the recodification of criminal statutes.

Mr. Asher said he has respect for the General Assembly, but becomes distressed when he sees the General Assembly subject to substantial criticism by significant parties, such as editorial boards and good government groups. He said this issue is something the General Assembly might address to acknowledge this does not seem to be the way a legislature ought to operate. He expressed hope that Mr. Weisenberg's comments would encourage that discussion.

Mr. Weisenberg said "Our society has become cynical about our public institutions; there is an erosion of public trust and confidence in government," noting that his proposal could be a way help restore public confidence in the system. He said what has troubled him personally is a sense that the public does not know or understand what government does, and his proposed change may be a way to take a positive step in Ohio.

Chair Mills thanked Mr. Weisenberg for his comments.

Turning to the issue of Congressional redistricting, Chair Mills said there was nothing new to report, and there have been no meetings on that topic in the last month. He noted a story in the Columbus *Dispatch* indicating the governor wants to deal with Congressional redistricting in the upcoming state budget.

Looking ahead, Chair Mills indicated his intention is for the committee to meet in February, and that the committee would continue discussion of the reports and recommendations as it works through Article II.

Adjournment:

There being no further business to come before the committee, the meeting was adjourned at 12:01 p.m.

Approval:

The minutes of the January 12, 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