



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

---

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

#### **Call to Order:**

Committee member Robert Taft, acting on behalf of Chair Fred Mills, called the meeting of the Legislative Branch and Executive Branch Committee to order at 9:40 a.m.

#### **Members Present:**

A quorum was present, with Gov. Taft and committee members Asher, Coley, Davidson, McColley, and Tavares in attendance. At the invitation of the chair, Representative Glenn Holmes participated as an ex officio non-voting member of the committee.

#### **Approval of Minutes:**

The minutes of the January 12, 2017 and February 9, 2017 meetings of the committee were approved.

The committee also approved corrected minutes from November 2015 and November 2016. In introducing the corrections, Shari L. O'Neill, interim executive director and counsel, described that both sets of minutes required correction in order to more accurately reflect statements by two guest speakers: Attorney John Kulewicz, who spoke in November 2015 on the topic of the one-subject rule in Article II, Section 15(D); and Professor Steven F. Huefner, who spoke in November 2016 on the topic of the legislative privilege. She said, in the case of Mr. Kulewicz, the minutes had incorrectly recorded that Ohio exempts appropriations bills from application of the one-subject rule, when, in fact, Ohio does not exempt appropriations bills from the rule. She described that, in the case of the comments of Prof. Huefner, the minutes had inaccurately described the relevance of *City of Dublin v. State*, 138 Ohio App.3d 753, 742 N.E.2d 232 (10<sup>th</sup> Dist. 2000), and so the revised minutes removed that reference.

## **Reports and Recommendations:**

### *Article II, Sections 10 and 12 (Rights and Privileges of Members of the General Assembly)*

Gov. Taft recognized Ms. O'Neill for the purpose of providing a first presentation on a report and recommendation for no change to Article II, Sections 10 and 12, which govern the rights and privileges of members of the General Assembly.

Ms. O'Neill said the report describes that Section 10 provides a right of legislative members to protest, and to have their objections recorded in the journal. Discussing the history of Section 10, the report indicates the right of protest 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, and that recording the dissent in the house journal was the minority's recognized method of registering political objection. Ms. O'Neill continued that the report indicates there is no similar provision in the United States Constitution, although dissents in Congress are preserved by the publication of debates in the Congressional Record.

Discussing Section 12, Ms. O'Neill said the report and recommendation indicates that 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 17<sup>th</sup> century England when the Crown and Parliament clashed over their competing roles. The report describes that the "freedom of speech and debates" for parliamentary members in England subsequently was included in the English Bill of Rights of 1689, and was accepted as a necessary democratic protection by the time the U.S. Constitution was drafted to include a speech or debate provision in Article I, Section 6, Clause 1. The report indicates nearly all states adopted constitutional provisions that protect legislative speech or debate.

Ms. O'Neill said the report describes the review of the 1970s Commission, indicating a committee of that group had 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, nevertheless, that view was not adopted by the full Commission, and so the right of protest remains. She said the report documents that the 1970s Commission did not address Section 12, thus, it also remains in its 1851 form.

Ms. O'Neill said the report and recommendation describes litigation involving the provisions, as well as presentations by former Executive Director Steven C. Hollon, Commission Counsel Shari O'Neill, Ohio State University Moritz College of Law Professor Steve Huefner, and Assistant Attorneys General Sarah Pierce and Bridget Coontz.

She said the report and recommendation indicates the 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. The report documents the committee's view that the right of protest should be retained because the section still has relevance despite the proliferation of multiple media and internet news outlets. She said the report states the committee's determination 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.

Ms. O'Neill said the report describes the committee's conclusion that Section 12 should be retained because legislative privilege helps to maintain the separation of powers, and 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. Addressing the confidentiality of communications between legislators and legislative staff, she said the report indicates that the privilege allows legislators to effectively perform their role.

Thus, 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 present form.

Gov. Taft asked if there were comments from the audience. There being none, he asked if the committee wished to discuss the report and recommendation. Senator Bill Coley said it is his preference to leave the sections in their present form, as they seem to be working well. Senator Charleta Tavares said she agrees with that conclusion. Gov. Taft added that the privilege has been upheld by the courts, and there does not appear to be a problem with the current provisions. He then asked for a motion to issue the report and recommendation.

Sen. Tavares moved to issue the report and recommendation for Article II, Sections 10 and 12, and committee member Jo Ann Davidson seconded the motion. A roll call vote was taken, and the motion passed unanimously.

### **Presentations and Discussion:**

Gov. Taft continued to recognize Ms. O'Neill for the purpose of providing an introduction to a draft report and recommendation for Article II, Sections 15, 16, 26, and 28, relating to the manner in which the General Assembly enacts laws.

Ms. O'Neill said the report and recommendation indicates these sections provide the requirement for the governor's signature, how laws are to be applied, and restrictions for their enactment. She said the sections were subject to several proposals for change since 1851, but only a few amendments have been approved by the electorate.

She continued that the report indicates that Section 15, adopted in 1973, details how bills shall be passed in the General Assembly, including requirements relating to the style of the laws, the one subject rule, and signing by the presiding officer. She noted the report's discussion of Section 16, adopted in 1851 and amended in 1903, 1912, and 1973, which details the requirements for the governor's signature on bills, the veto of bills, veto overrides by the General Assembly, and bills becoming law without the governor's signature.

Ms. O'Neill said the report and recommendation also discusses Section 26, unchanged since 1851, which states that laws of a general nature will have uniform operation throughout the state, and prohibits laws from taking effect on approval of an authority other than the General Assembly, except as provided in the constitution.

She added the report covers Section 28, which is unchanged since 1851, and states that the General Assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts.

Ms. O'Neill said the report outlines the activities of the Constitutional Revision Commission in the 1970s in relation to these sections, indicating that Section 15 of the 1851 constitution was repealed and replaced in the 1970s to consolidate multiple sections of Article II. She said the report continues that Sections 16, 26, and 28 all date to the 1851 constitution, with Section 16 being amended in the early 1900s before undergoing revision in the 1970s as part of the effort to consolidate sections of Article II.

She said the report extensively details the recommendations and changes in the 1970s before describing the limited case law relating to Sections 16, 26, and 28, and the plethora of case law dealing with Section 15, specifically 15(D), the one-subject rule. Ms. O'Neill said the report will be completed once the committee determines what, if any, changes it would like to recommend.

Gov. Taft asked the committee if it had any comments regarding the report, and whether the committee felt that more testimony or research on any of the topics, particularly the one-subject rule, would be useful.

Ms. Davidson said she would be interested in a report on challenges to the one subject rule, specifically on topics that were the source of a challenge.

Regarding Section 26, Sen. Coley commented that litigation dealing with home rule issues, specifically the use of "red light" cameras, involves Section 26, and that he would like to see a presentation on that topic.

With regard to Section 16, which provides for a line-item veto, Gov. Taft commented that, in some states, governors have the authority not only to strike items from the budget, but to reduce some items in the budget. He said he is not proposing that change, but it was discussed in the 1970s.

Gov. Taft asked whether Section 28, relating to retroactive laws, has been subject to litigation or controversy. Sen. Coley said to his knowledge there were two occasions when that issue arose, the first involving a bill related to priest abuse, and the other was relating to the Joint Committee on Agency Rule Review (JCARR) process, in which the administration was trying to impose a rule that was seen to have a retroactive effect.

Gov. Taft wondered about the portion of Section 28 that allows the legislature to adopt laws to authorize courts to cure defects and errors in instruments that do not comply with the laws of the state. He said he would like to know if there actually have been laws passed by the General Assembly that authorize courts to cure omissions and errors. Ms. O'Neill said research could be provided on that question.

Sen. Coley commented that the issue sometimes arises under the Uniform Commercial Code, where the law fills in areas where a contract is silent.

There being no further comments, Gov. Taft indicated the committee would hear testimony and have additional research available at the next meeting.

Turning to the question of the next topics for review, Gov. Taft drew attention to a document grouping the sections of Article III, related to the executive branch. He said the three sections

relate to the office of the governor and offices of the executive branch, the privileges and duties of the office of the governor, and eligibility for office and filling vacancies.

Mr. Asher noted a concern about whether the constitution requires gubernatorial appointments to be electors of the state, wondering if the committee could address that question. Sen. Coley suggested that Section 21, allowing the requirement that appointments be subject to the advice and consent of the Senate to be altered or repealed by law, might relate to Mr. Asher's question. Mr. Asher requested that research be provided on this topic.

Gov. Taft suggested that the committee might hear a first presentation on a report and recommendation for "Group I" of the executive branch sections, specifically Article III, Sections 1, 1a, 1b, 2, 3, 18, 19, 20, and 21 (The Office of the Governor and Officers of the Executive Branch).

Ms. O'Neill noted other issues for the committee to consider, including Article V, Section 9 (Eligibility of Officeholders), and Section 8 (Term Limits for U.S. Senators and Representatives). She said the question with regard to Section 8 is whether it should be repealed because a United States Supreme Court decision had declared it unenforceable.

Ms. O'Neill indicated the committee also was assigned Article IX, relating to the militia, and Article XI, relating to apportionment and redistricting.

Ms. O'Neill asked whether the committee would be amenable to meeting in tandem with the Bill of Rights and Voting Committee to consider the issue of prison labor as it may be affected by Article I, Section 6 (Slavery and Involuntary Servitude), and Article II, Section 41 (Prison Labor). The committee agreed that meeting jointly would allow the two committees to hear the same testimony and to address the issue in a cooperative manner. Ms. O'Neill said staff would try to set up a joint meeting.

Ms. O'Neill indicated the committee received a handout consisting of a new Congressional redistricting joint resolution introduced by Senator Frank LaRose. She said because this is a topic the committee has been addressing, staff wished to provide a copy of the legislation in order to keep the committee up-to-date on that issue.

Gov. Taft announced that the committee approved reports and recommendations for several sections of Article II, and that these reports will be a topic at the full Commission meeting later in the day. Specifically, he said, the committee voted to issue a report and recommendation for no change to Article II, Sections 3, 4, 5, and 11 (Member Qualifications and Vacancies in the General Assembly), and for no change to Article II, Sections 6, 7, 8, 9, 13, and 14 (Conducting Business of the General Assembly). He said, because the committee just voted to issue the report and recommendation for Article II, Sections 10 and 12 (Rights and Privileges of Members of the General Assembly), that report also would be presented to the full Commission.

### **Adjournment:**

There being no further business to come before the committee, the meeting was adjourned at 10:20 a.m.

**Approval:**

The minutes of the March 9, 2017 meeting of the Legislative Branch and Executive Branch Committee were approved at the May 11, 2017 meeting of the committee.

*/s/ Frederick E. Mills*

\_\_\_\_\_  
Frederick E. Mills, Chair

*/s/ Paula Brooks*

\_\_\_\_\_  
Paula Brooks, Vice-chair