



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE

FOR THE MEETING HELD
THURSDAY, NOVEMBER 12, 2015

Call to Order:

Chair Fred Mills called the meeting of the Legislative Branch and Executive Branch Committee to order at 2:31 p.m.

Members Present:

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

Approval of Minutes:

The minutes of the October 8, 2015 meeting of the committee were approved.

Presentations:

Update on Issue 1 Election Results – Legislative Redistricting

Steven C. Hollon
Executive Director

Chair Mills first recognized Executive Director Steven C. Hollon, who gave an update on the November 3, 2015 election results for State Issue 1 (“Issue 1”), involving legislative redistricting. Director Hollon briefly described the features of House Joint Resolution 12, adopted in the 130th General Assembly and submitted to voters as Issue 1 on the ballot. Director Hollon indicated that the issue passed, with a vote of 71.64 percent in favor and 28.54 percent against.

Article II, Section 15 (D) – One Subject Rule

John J. Kulewicz

Partner

Vorys, Sater, Seymour & Pease

Chair Mills then recognized Attorney John Kulewicz, of the law firm of Vorys, Sater, Seymour & Pease, who presented to the committee on the topic of the one-subject rule contained in Article II, Section 15(D).

Mr. Kulewicz said the rule raises a multitude of issues for consideration. He said Ohio courts originally took a hands-off approach and the legislature enforced the rule itself, adding that, recently, Ohio courts have shown a significant interest in the rule, and it has gained traction outside the legislature. He said courts now invalidate legislation that goes against the rule, and this is a new era for the one-subject rule.

Describing the history of the rule, he said there was little substantive debate about the purpose of it at the 1851 Constitutional Convention. He said the intent of the framers, as discussed by the Ohio Supreme Court in *Pim v. Nicholson* [6 Ohio St. 176 (1856)], is that its purpose is to prevent logrolling. He said the Court in *Pim* held it to be a directory provision only, and that the rule should be enforced by the General Assembly rather than the courts. Mr. Kulewicz described how, in the 1980s, that approach changed, noting that in *State ex rel. Dix v. Celeste* [11 Ohio St.3d 141, 464 N.E.2d 153 (1984)], the Court took the opportunity to analyze whether there was a relationship between the subjects in the legislation. The following year, in *Hoover v. Franklin Cty. Bd. of Commrs.* [19 Ohio St. 3d 1, 482 N.E.2d 575 (1985)], the Court sent the case back to common pleas court for a determination of whether there was more than one subject and, if so, whether the content of the legislation defied rationality.

Mr. Kulewicz described how, in *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections* [62 Ohio St.3d 145, 580 N.E.2d 767 (1991)], the Ohio Supreme Court imposed a remedy, a development that was significant because, in so doing, the Court severed the offending portion of the act. He said former Ohio Supreme Court Justice Andrew Douglas’s dissent in that case laid out issues that have been of great significance since then. The Court continued to apply the remedy of severing a portion of the act that it declared invalid in *State ex rel. Ohio AFL-CIO v. Voinovich* [69 Ohio St.3d 225, 631 N.E.2d 582 (1994)], as well as in *Simmons-Harris v. Goff* [86 Ohio St.3d 1, 1999-Ohio-77, 711 N.E.2d 203 (1999)].

Mr. Kulewicz described *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* [86 Ohio St.3d 451, 715 N.E.2d 1062 (1999)] as “a bombshell of a case.” He said in *Sheward*, the Ohio Supreme Court decided that the tort reform bill at issue dealt with so many different topics that the entire bill had to be rejected. He identified the Court’s rationale as being that any attempt to identify a primary subject would constitute a legislative exercise. Suggesting the case of *In re Nowak* [104 Ohio St.3d 466, 2004-Ohio-6777] was the Court’s “tipping point,” Mr. Kulewicz said *Nowak* rejected *Pim*’s declaration that the one-subject rule was directory only, instead concluding the rule is mandatory. He said that decision redefined the interpretation of the one-subject rule, creating a new generation of litigation.

Mr. Kulewicz then mentioned the pending Ohio Supreme Court case of *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State* [2013-Ohio-4505, 2 N.E.3d 304 (10th Dist.), Supreme Court Case Number 2014-0319], in which the Court will decide whether the Tenth District Court of Appeals properly remanded the case to common pleas court for an evidentiary hearing to determine whether the one-subject rule had been violated.

Mr. Kulewicz concluded that the one-subject rule, a long-dormant provision, is now suddenly an active provision. He added that governors have independent authority to enforce the constitution, and there is now constitutional support for a governor using his veto power on that basis.

Mr. Kulewicz identified the various tests courts apply when legislation is challenged as contradicting the one-subject rule, including: (i) whether there is disunity but not a plurality of subject matter; (ii) whether there is a common purpose to the legislation; and (iii) whether the combination of subjects in the challenged bill has a rationality to it. He said the result is that the General Assembly now must consider the breadth of the legislation it is passing.

He also identified that an expressed rationale for the rule is that it is intended to impede logrolling. But, he said, the type of logrolling the rule prevents is more than one subject in a bill. He said the rule doesn't prevent multiple bills that address one problem. He asked whether logrolling is necessarily something to be condemned.

Reviewing national trends regarding one-subject rules, Mr. Kulewicz said Ohio is one of 43 states that have such a rule, but that there are categorical differences. He said Ohio is one of a few states that regarded the rule as directory. He said 14 states, including Ohio, exempt appropriations bills from application of the one-subject rule, while six states confine appropriations bills to appropriations. He said in two states the rule is limited only to the appropriations bill, while 13 states exempt codification and revision bills from application of the rule.

He said the rule, as set out in the provision, has two parts, requiring that no bill shall contain more than one subject, and that the bill's purpose should be expressed in its title. He said 12 state constitutions allow the rule to void legislation only as to subjects not included in the title.

Having concluded his remarks, Mr. Kulewicz then invited questions from the committee.

Representative Michael Curtin asked whether there would be any merit for the General Assembly, through legislation, to attempt to incorporate recent case law into a statute that would provide a road map of what should and should not be done. Mr. Kulewicz answered that idea may have merit, but the risk is that the constitutional provision would still prevail over the statutory provision. He added it also might be hard to avoid a risk that, as in *Sheward*, a court would be concerned that the legislature would be trying to tell the court how to rule.

Rep. Curtin followed up, noting that state constitutions do not contain definitions, and asking how constitutional change might bring more specificity to the rule. Mr. Kulewicz answered that one could embed in the constitution one or the other of these one-subject rule tests, a requirement

of a common purpose or rational relationship, for example. He said that would not end litigation, but would be a step closer to defining what “one subject” is.

Vice-chair Paula Brooks agreed, saying she thinks that clarification would help both the General Assembly and legal practitioners. Mr. Kulewicz said former Ohio Supreme Court Justice Evelyn Stratton, and others, have expressed frustration that it is hard to define what the rule means. He said the rule made sense in 1851. Today, with technology, he said “we have searchable documents and can look right away to see if a different topic is in a bill.” He wondered whether it is worth the time to struggle with this one-subject issue.

Ms. Brooks asked Mr. Kulewicz whether he has a favorite model of interpretation as to the rule. Mr. Kulewicz said no, but that he does like the rational relationship test. He said, however, this does not prevent litigation, as litigation can occur on the issue of whether there is a rational relationship.

Committee member Herb Asher asked, in states that have the rule but do not apply it to appropriations bills, whether there is evidence that appropriations bills have been used to “load up” on subjects in order to get legislation considered. Mr. Asher noted that legislators often have ideas and are looking for a vehicle to attach legislation to, wondering if part of the problem is that the practice of the legislature is such that members themselves are looking for some opportunity or some vehicle. Mr. Kulewicz said he has no evidence that those states are different.

Governor Taft asked whether Mr. Kulewicz thinks the legislature has clear guidance based on the case law, wondering about the impact of *Sheward*. Mr. Kulewicz noted that the majority in *Sheward* said if the one-subject rule was interpreted so broadly as to allow what the General Assembly tried to do with tort reform, one could redo the entirety of state law in two bills. Mr. Kulewicz said the General Assembly has more guidance now than 15 years ago; then there were no consequences for the failure to observe the one-subject rule. He said now the General Assembly knows the courts have rejected rationales that are unsustainable or meaningless as being too broad. So there is some risk involved in enacting legislation that goes too far.

Senator Charleta Tavares asked whether there are any states that have provisions that automatically void legislation that violates the one-subject rule, or whether the determination always requires a court challenge. Mr. Kulewicz answered that there are several states whose constitutions say it shall be void, but that it still is not self-executing, and would require someone to challenge the legislation.

Sen. Tavares followed up, asking whether any states are contemplating revising their constitutional provisions requiring legislation to have only one subject. Mr. Kulewicz said the United States Constitution does not limit Congress in what is included in bills, but there are several efforts underway to attempt to add a one-subject rule.

Committee member Kathleen Trafford offered that one thing the General Assembly could do is to write a very short statute of limitations.

There being no further questions, Chair Mills thanked Mr. Kulewicz for his presentation.

Congressional Redistricting

Steven C. Hollon
Executive Director

Chair Mills then recognized Director Hollon, who presented to the committee a draft of a report and recommendation on the subject of Congressional redistricting. Director Hollon indicated that the report and recommendation provides a history of how Congressional districts have been drawn in Ohio, describes two joint resolutions pending in the General Assembly proposing to change the procedure by having a commission undertake drawing district lines, and outlines various presentations that have been made to the committee on the subject of redistricting. Director Hollon indicated that the report and recommendation does not describe the committee's recommendation with regard to whether and how to reform the Congressional redistricting procedure because the committee has not yet given staff guidance on what it would like to do.

There were no questions for Director Hollon on the report and recommendation.

Committee Discussion

Congressional Redistricting

Chair Mills then indicated that the committee had just received a draft of a new joint resolution drafted by the Legislative Service Commission, identified as "LR 131 0157." He said this draft had been requested by Representatives Kathleen Clyde and Mike Curtin, and was an attempt to reconcile the differences between H.J.R. 2, the House version of a Congressional redistricting resolution, and S.J.R. 2, the Senate version. Chair Mills then invited Rep. Clyde and Rep. Curtin to lead the committee through the differences in the two introduced resolutions and how they have been resolved in the new draft.

Rep. Clyde began by saying "we had a big victory as a Commission and as a state with the success of Issue 1" on the November 2015 ballot. She said the message was clear that voters want to choose their lawmakers, not be chosen by them. She said "We have a mandate from the voters," noting that three-fourths of seats in Congress belong to one party when only half the votes went to that party. She said that makes Ohio one of the most unfair jurisdictions in the world.

She then identified changes in the new draft resolution from the original H.J.R. 2 that she and Rep. Curtin introduced. She said, in the new version, they combined the Congressional redistricting provisions with the legislative provisions, since the same commission will be drawing district lines by using virtually the same rules. She also noted that the result in the U.S. Supreme Court's decision in *Arizona State Legislature v. Arizona Indep. Redistricting Comm.*, 576 U.S. ___, 135 S.Ct. 2652 (2015), means that a commission such as is created by the proposed amendment is constitutionally valid. She said H.J.R. 2 was drafted before the *Arizona State Legislature* decision, and so it has a conditional provision that would have accounted for a

different outcome in the case. She added, now that the case is decided, the new version took those parts out. Rep. Clyde added that the new draft also added a feature of S.J.R. 2 that prevents a sitting member of Congress from being on the commission. In addition, she said the draft removes a provision allowing a county to be split under certain circumstances. She said Congressional districts are larger than state districts, and so that feature is not needed for Congressional redistricting. She added they were concerned about giving the map drawers too much authority to draft alternative rules, and so the new draft is more restrictive in that regard.

Rep. Clyde indicated that the provisions in H.J.R. 2 and S.J.R. 2 are virtually the same regarding the population, but that they chose the language in S.J.R. 2 because they liked it a little better. She said they adopted the S.J.R. 2 provision regarding the court's ability to redraw the lines. In conclusion, Rep. Clyde said they took the best from both the House and Senate versions.

Rep. Curtin thanked the committee for its "yeoman's work" on the issue of redistricting, saying that because Issue 1 was a success at the polls "something good and historic was done." He said this is the moment to act on Congressional redistricting, because "once we get into the 2018 election cycle, and we have a sense of how the winds are blowing, we are going to be immobilized in dealing with this issue. So we have a window; after that we don't have that window for a very long time." He noted an Akron *Beacon Journal* editorial describing that if it isn't done now, it will be 17 years before there is another chance. He said if there is no reform in time for the 2020 Census, there will not be reform until the 2030 Census. He said he would hope the momentum will continue in this committee, and that he wants to keep the bipartisan spirit going for the rest of this year. He said he and Rep. Clyde aren't married to the details in the document, so the real project is not to "make the perfect the enemy of the good."

Chair Mills then opened up the floor for questions.

Gov. Taft asked whether the new draft changes anything approved by voters in state Issue 1. Rep. Clyde and Rep. Curtin said that nothing is changed. Gov. Taft asked whether it included a restriction on a member of Congress being on the proposed commission, recommending that if this is not in the draft it should be added. Rep. Curtin agreed with the point, saying they would be sure it is included.

Sen. Tavares agreed with Rep. Curtin that it is important to keep the bipartisan spirit, saying she would agree a sitting member of the General Assembly should not be on the proposed redistricting commission.

Ms. Trafford asked whether it would be possible for the committee to make a recommendation that left the details to be decided by the General Assembly. Chair Mills said the committee has that option, but that he would prefer the committee to come up with the best language to submit to the General Assembly. He said he would like to see a very thorough, thoughtful product come out of this committee. "We did all the heavy lifting in S.J.R. 1 (introduced in the 130th General Assembly), I would like to get a draft as perfect as we can, knowing the General Assembly would change things."

Rep. Curtin said the legislature has sessions in December, and that if the committee is in agreement, the committee could have the Legislative Service Commission provide a draft.

Ms. Brooks asked about the procedure for approving a report and recommendation. She wondered if the committee would need another special meeting to comply with rules of submitting to the full Commission by the end of the year. Chair Mills said the committee can't do it in that time frame, noting that the General Assembly has until August 2016 to act in time to put it on the ballot. He said he is not sure the committee needs to rush to finish the process by the end of this calendar year, and that he does not intend to call a special meeting in December. But, he said, by the next meeting, the committee should be prepared to discuss these issues. He said they could use the meeting as a drafting session in order to have a thoughtful work product.

Ms. Brooks asked whether the committee could call a special session for the purpose of concluding its work on Congressional redistricting.

Chair Mills said the committee has met as much or more than any other committee, and that he is not in favor of bringing people back to decide something that doesn't need to be decided until August.

Mr. Asher said the committee's goal is to get something finished as early in the new year as possible. He said, if it is January or February, it gives the legislature ample time to work on this.

Chair Mills said that is a fair statement.

Rep. Curtin reiterated with a "personal plea," saying it is important not to wait 17 years to get reform passed.

Sen. Tavares said, in light of the conversation about the time frame, she would agree with Mr. Asher, and that a recommendation should be made sooner rather than later. She said she would rather put it to task as immediately as possible, January or February at the latest. She said otherwise it does not give the General Assembly much time to consider the issue. She said "the longer we wait, the more difficult it becomes, because some members of Congress on both sides of the aisle will be weighing in and will want to do nothing." She said, "If we believe in the voters and what we did with Issue 1, we should be hasty; do it right, but get it on the ballot next year."

Chair Mills agreed that next year is appropriate, but it should be correct. He said "hasty implies sloppy, so let us do it carefully."

Rep. Clyde said she echoes that one way to move quickly is that the committee has a good model in Issue 1, saying she is heartened that "we can come together as a Commission."

Chair Mills then recognized Catherine Turcer, policy analyst for Common Cause Ohio, who addressed the committee on the subject of Congressional redistricting.

Ms. Turcer said, with regard to Issue 1, that “voters changed the quality of democracy,” and that she was encouraged by this result and hopes that the election results will help spur Congressional redistricting reform.

Chair Mills also recognized Richard Gunther, professor emeritus of Political Science with The Ohio State University. Professor Gunther urged the committee to move forward with the proposals by Rep. Clyde and Rep. Curtin. He said he has compared S.J.R. 2 and H.J.R. 2, and that “they are well rooted in Issue 1.” He said he is very concerned that the committee move forward quickly, noting that the negotiations that created Issue 1 were extremely difficult. He emphasized that “it is even more urgent to move forward for Congress than for the state legislature,” noting that the problems with Congressional districts are worse and that the electoral disproportionality is twice as bad as it is for the General Assembly districts. He added that the lack of term limits for Congress means members have a term for life. He concluded that he is “very concerned” about a time line that has an August deadline, because the alternative is a citizen’s initiative. He said if, by January, there is no indication that the legislature will act, there will be a citizen’s initiative that will move forward, so if the committee wants to maintain control over the process, it should keep the process moving forward at a reasonable pace.

Chair Mills clarified his earlier remark, saying he did not mean the committee should wait until August to act, rather, this is the General Assembly’s timeline for placing an issue on the ballot.

Sen. Tavares thanked Professor Gunther, as well as the League of Women Voters and Common Cause for their work on redistricting.

Adjournment:

There being no further business to come before the committee, the meeting was adjourned at 4:05 p.m.

Approval:

The minutes of the November 12, 2015 meeting of the Legislative Branch and Executive Branch Committee were approved at the January 14, 2016 meeting of the committee.

/s/ Frederick E. Mills

Frederick E. Mills, Chair

/s/ Paula Brooks

Paula Brooks, Vice-chair