

*Co-Chair*  
*Charleta B. Tavares*  
*Assistant Minority Leader*  
*15<sup>th</sup> Senate District*



*Co-Chair*  
*Jonathan Dever*  
*28<sup>th</sup> House District*

## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### MINUTES FOR THE MEETING HELD THURSDAY, APRIL 13, 2017

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

Co-chair Charleta Tavares called the meeting of the Ohio Constitutional Modernization Commission ("Commission") to order at 1:36 p.m.

#### **Members Present:**

A quorum was present with Commission Co-chairs Tavares and Dever, and Commission members Abaray, Asher, Beckett, Clyde, Cole, Coley, Craig, Cupp, Davidson, Fischer, Gilbert, Jacobson, Jordan, Kurfess, McColley, Mills, Mulvihill, Peterson, Sapphire, Skindell, Taft, Talley and Trafford in attendance.

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

The minutes of the March 9, 2017 meeting were approved.

#### **Standing Committee Reports:**

##### *Coordinating Committee*

Kathleen Trafford, chair of the Coordinating Committee, reported that the committee approved a report and recommendation from the Judicial Branch and Administration of Justice Committee regarding Article I, Section 8, writ of habeas corpus. She said the committee then took up a report the committee is working on to address the need for gender neutral language in the current constitution. She said the committee also discussed the need to be sure the Commission has an accurate record of its activities, seeking to supplement the record prepared before staff was hired. She said staff has made nonsubstantive corrections, so the Commission will be able to leave a more complete record. She said the documents will be submitted to the individual committees for their review before they become final.

## **Subject Matter Committee Reports:**

### *Constitutional Revision and Updating Committee*

Dennis Mulvihill, chair of the Constitutional Revision and Updating Committee, said the committee heard a first reading of a report and recommendation concerning the rewrite of the initiative and referendum sections in Article II. He said there is no more confusing part of the constitution, and that the committee has undertaken to rewrite and streamline the process. He said the goal is to make it user-friendly, to modernize it, and to facilitate the initiative process. He said some of the changes are to the statutory initiative, eliminating the supplementary petition, and making it a single petition with a five percent signature requirement, making it easier for people to use the statutory initiative route.

Mr. Mulvihill continued that, since the initiative and referendum process was first adopted in 1912 there has been a significant overuse of the constitutional process and an under use of the statutory initiative process. He said the result is there are many things in the constitution that should not be there. He said the committee's effort was directed toward promoting the use of the statutory initiative, and strengthening the use of the constitutional initiative. On the constitutional side, he said the committee will recommend that constitutional initiatives only get on the ballots in even-numbered years. He said the reason for this is there is a significant drop off in odd-numbered years; thus, it was a policy decision to have more people decide the constitutional amendments. He said the committee also is proposing raising the threshold for passing a constitutional initiative from 50 to 55 percent. He added, since 1912, the statutory initiative has been used 12 times, but only has passed three times. He said there have been 69 constitutional initiatives, with 18 passing. Mr. Mulvihill noted more uptick since then, so that "what we are seeing an overuse of the constitution for things which are not constitutional; it is clogging up the constitution." He said the committee is also recommending gender neutral language, and allowing General Assembly to modernize the signature gathering process to accommodate emerging technology, if it chooses to do so. He said, in aggregate, the proposed changes will provide a much easier process for petitioners, with less litigation as a result. He said the committee also is recommending front-end loading the work of the ballot board, explaining that currently the ballot board does not write the language until the back end after proponents' money and time is spent. He said the committee will recommend language requiring the ballot board to write the language and title before the signatures are gathered so as not to waste time and money.

Regarding the statutory initiative, Mr. Mulvihill said the committee is proposing a safe harbor provision, by which the General Assembly cannot alter an initiated statute for five years absent a super majority in each house. He cited comments by Justice Judith French in an Ohio Supreme Court concurrence in which she asked that the process be modernized.<sup>1</sup> He said the committee

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<sup>1</sup> *Ohio Mfrs. Assn. v. Ohioans for Drug Price Relief Act*, 2016-Ohio-5377, J. French, concurring, at ¶ 50 ("This case highlights the unworkable timeline that Article II, Sections 1b and 1g impose and the need to amend it. Considering the complexity of the initiative-and-referendum process for enacting laws and the large number of signatures that must be collected and verified, getting an initiative on the first general-election ballot following its submission to the secretary of state becomes nearly impossible when the process spawns litigation, as it so often does. \* \* \* The system is broken and calls for modern amendments to fix it. I respectfully ask the Ohio Constitutional Modernization Commission and the General Assembly to address these issues and prevent another situation like this from arising.")

will have a second presentation on the report and recommendation next month, and asked Commission members to contact members of the committee if they have questions.

Commission member Herb Asher commented that, when the committee first started talking about the initiative and referendum, the concern was not so much that the process was unwieldy but that the constitution was being abused to pursue economic interests that should be in statute. He said there was a feeling that the constitution should deal with correct principles, and to encourage proponents to take the statutory route.

Mr. Mulvihill agreed, saying the committee has stuck to that principle, and also lent a hand in promoting the antimonopoly issue that was on the ballot in November 2015.

Asking about the one amendment requirement, Commission member Jeff Jacobson asked whether the recommendations regarding the statutory initiative and the constitutional initiative should be separated for ballot purposes. Mr. Mulvihill answered the committee will propose a single subject amendment because it has redrafted the entire process and there is no way to tease out the two different methods. He said the belief is that recommending it as one ballot will be compliant with the single subject rule because it is a rewrite of the whole initiative process. Mr. Jacobson agreed, saying he is much less alarmed at presenting the recommendation as a single item.

Senator Mike Skindell thanked committee for its work. He said he wants to examine how to place the initiative process in a position that would allow it to be utilized more. He said he is concerned that changes being proposed will only allow those with vast wealth to change the constitution.

Mr. Mulvihill said the committee was cognizant of that concern, and that the changes being recommended are the opposite of that. He said, regarding the statutory initiative, the changes will remove some of opportunity for potential shenanigans in the ballot board review and will save the petitioners money by allowing them to bring a challenge in the Supreme Court immediately if they need to. He said, if petitioners choose the constitutional route, the only change is requiring the proposal to be on the ballot only in even-numbered years and obtaining a 55 percent approval. He said the proposal keeps the same number of signatures, and there is no change to the ballot board process or the secretary of state and attorney general review. He said the committee is constitutionalizing a couple of requirements that are currently in the Revised Code, but regarding constitutional amendments there are no changes that would make the process more expensive.

#### *Education, Public Institutions, and Local Government Committee*

Education, Public Institutions, and Local Government Committee Vice-chair Edward Gilbert reported that the committee had a first presentation of a report and recommendation for repeal of Article VII, Sections 2 and 3. He said the committee would have a second presentation and vote at its next meeting, and bring that report and recommendation to the Commission at first opportunity. Mr. Gilbert said the committee also had a first presentation on Article VII, Section 1, regarding state support for persons with certain disabilities, and has reached a consensus on new language to recommend for that provision. He said the committee also has divided up its remaining sections for review, and will be taking up Article XVIII in May regarding municipal

corporations, and will hear from experts on home rule. He said in June the committee will review Article II, Section 20, dealing with county commissioners, and expects to discuss sections relating to their salaries, with a focus on the idea of having staggered appointments or elections so as to avoid some county commissioners receiving a higher compensation based on when they were elected. He said in July the committee plans to take up Article XV, Section 6, dealing with casinos, and that Senator Bill Coley has some suggestions about that issue.

#### *Judicial Branch and Administration of Justice Committee*

Janet Abaray, chair of the Judicial Branch and Administration of Justice Committee, said the committee has had two presentations of a report and recommendation regarding grand juries. She said there are two aspects to the proposal; one is to have a constitutional right for the accused to be provided with a transcript of testimony of any witness who is called in the actual trial. She said the second proposal is for a grand jury legal advisor, an idea from the Hawaii Constitution that provides the grand jury with an independent advisor separate from the prosecutor to help with legal issues and observe proceedings. She said the committee had a separate vote on the two concepts, and both passed 7 to 1. She said the committee has continued discussion, has heard additional presentations, and has been looking at the issue for 20 months, with speakers that include multiple prosecutors, law school professors, the state public defender, and a grand jury legal advisor from Hawaii. She said the committee voted to postpone the discussion to the next meeting and so has not had a final vote. Ms. Abaray continued that the committee also heard a proposal regarding the Modern Courts Amendment that would have changed some responsibilities or powers from the judiciary to the legislative branch, but that proposal was withdrawn by the sponsor and no one on the committee wanted to pursue it.

#### *Finance, Taxation, and Economic Development Committee*

Doug Cole, chair of the Finance, Taxation, and Economic Development Committee, reported that the committee would meet immediately after the full Commission meeting to consider whether it would like to propose constitutionalizing the debt-reporting role of the treasurer of state.

### **Reports and Recommendations:**

#### *Article I, Section 8 (Writ of Habeas Corpus)*

Co-chair Tavares recognized Ms. Abaray for the purpose of providing a presentation of a report and recommendation for no change to Article I, Section 8, relating to the writ of habeas corpus.

Ms. Abaray indicated the Judicial Branch and Administration of Justice Committee is recommending no change to Article I, Section 8, which reads as follows:

The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

She said the report and recommendation describes that the Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

The report indicates that habeas corpus is Latin for “that you may have the body.” It is a legal concept originating in early English common law, and was a key aspect of the Magna Carta. The report describes that the principle was embodied in a provision for a formal writ, also called “The Great Writ,” by which a person wrongfully imprisoned could petition the government for release. As currently understood in American criminal law, the writ commands a person detaining someone to produce the prisoner or detainee.

Ms. Abaray continued that the report notes the writ of habeas corpus is preserved in various parliamentary enactments, in the Northwest Ordinance of 1787, in the United States Constitution, and in the first Ohio Constitution in 1802, before being incorporated in the 1851 constitution in its present form. She said the report describes the statutory procedure governing application for a writ of habeas corpus, as well as indicating that the constitution identifies which courts have original jurisdiction over petitions for the writ.

Discussing proceedings of the Constitutional Revision Commission in the 1970s, Ms. Abaray said the report indicates that the 1970s Commission’s review did not “disclose any significant differences between federal and state interpretations or any reasons to recommend changes in the language,” and so recommended no changes. The report also briefly describes Ohio Supreme Court jurisprudence relating to the section, indicating that courts generally determine petitioners for the writ of habeas corpus have an adequate remedy in the form of an appeal, and thus do not qualify for the writ.

Ms. Abaray said the report outlines the committee’s conclusion that the long history of the writ of habeas corpus, as well as the similarities between Ohio’s provision and its counterpart in the U.S. Constitution and other states, indicates that no change should be recommended.

There being no public comment or discussion relating to the report and recommendation, Co-chair Tavares asked for a motion. Mr. Jacobson moved to adopt the report and recommendation, with Representative Robert McColley seconding the motion. Co-chair Tavares asked for a roll call vote, which was as follows:

Co-chair Tavares – yea  
Co-chair Dever – yea  
Abaray – yea  
Asher – yea  
Beckett – yea  
Clyde – yea  
Cole – yea  
Coley – yea  
Craig – yea  
Cupp – yea  
Davidson – yea  
Fischer – yea  
Gilbert – yea  
Jacobson – yea  
Jordan – yea  
Kurfess – yea  
McColley – yea

Mills – yea  
Mulvihill – yea  
Peterson – yea  
Saphire – yea  
Skindell – yea  
Taft – yea  
Talley – yea  
Trafford – yea

The motion passed unanimously, by a vote of 25 in favor, with none opposed, and five absent.

Co-chair Tavares announced that, at the Commission's March meeting, a first presentation was provided on several reports and recommendations for no change. She said, according to the Commission's Rules of Procedure and Conduct, because the recommendation was for no change, a second presentation on these reports and recommendations is not required prior to holding a vote on whether to adopt the reports. She said she would briefly reference these reports and recommendations before asking for a motion to approve them.

*Article II, Sections 3, 4, 5, and 11(Member Qualifications and Vacancies in the General Assembly)*

Commission member Fred Mills moved to adopt the report and recommendation, with Commission member Bob Taft seconding the motion. Co-chair Tavares asked for a roll call vote, which was as follows:

Co-chair Tavares – yea  
Co-chair Dever – yea  
Abaray – yea  
Asher – yea  
Beckett – yea  
Clyde – yea  
Cole – yea  
Coley – yea  
Craig – yea  
Cupp – yea  
Davidson – yea  
Fischer – yea  
Gilbert – yea  
Jacobson – yea  
Jordan – yea  
Kurfess – yea  
McColley – yea  
Mills – yea  
Mulvihill – yea  
Peterson – yea  
Saphire – yea  
Skindell – yea  
Taft – yea

Talley – yea  
Trafford – yea

The motion passed unanimously, by a vote of 25 in favor, with none opposed, and five absent.

*Article II, Sections 6, 7, 8, 9, 13, and 14 (Conducting Business of the General Assembly)*

Mr. Mills moved to adopt the report and recommendation, with Senator Bill Coley seconding the motion. Co-chair Tavares asked for a roll call vote, which was as follows:

Co-chair Tavares – yea  
Co-chair Dever – yea  
Abaray – yea  
Asher – yea  
Beckett – yea  
Clyde – yea  
Cole – yea  
Coley – yea  
Craig – yea  
Cupp – yea  
Davidson – yea  
Fischer – yea  
Gilbert – yea  
Jacobson – yea  
Jordan – yea  
Kurfess – yea  
McColley – yea  
Mills – yea  
Mulvihill – yea  
Peterson – yea  
Saphire – yea  
Skindell – yea  
Taft – yea  
Talley – yea  
Trafford – yea

The motion passed unanimously, by a vote of 25 in favor, with none opposed, and five absent.

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

Mr. Mills moved to adopt the report and recommendation, with Commission member Jo Ann Davidson seconding the motion. Co-chair Tavares asked for a roll call vote, which was as follows:

Co-chair Tavares – yea  
Co-chair Dever – yea  
Abaray – yea

Asher – yea  
Beckett – yea  
Clyde – yea  
Cole – yea  
Coley – yea  
Craig – yea  
Cupp – yea  
Davidson – yea  
Fischer – yea  
Gilbert – yea  
Jacobson – yea  
Jordan – yea  
Kurfess – yea  
McColley – yea  
Mills – yea  
Mulvihill – yea  
Peterson – yea  
Saphire – yea  
Skindell – yea  
Taft – yea  
Talley – yea  
Trafford – yea

The motion passed unanimously, by a vote of 25 in favor, with none opposed, and five absent.

*Article V, Section 2a (Names on the Ballot)*

Commission member Richard Saphire moved to adopt the report and recommendation, with Commission member Kathleen Trafford seconding the motion. Co-chair Tavares asked for a roll call vote, which was as follows:

Co-chair Tavares – yea  
Co-chair Dever – yea  
Abaray – yea  
Asher – yea  
Beckett – yea  
Clyde – yea  
Cole – yea  
Coley – yea  
Craig – yea  
Cupp – yea  
Davidson – yea  
Fischer – yea  
Gilbert – yea  
Jacobson – yea  
Jordan – yea  
Kurfess – yea



McColley – yea  
Mills – yea  
Mulvihill – yea  
Peterson – yea  
Saphire – yea  
Skindell – yea  
Taft – yea  
Talley – yea  
Trafford – yea

The motion passed unanimously, by a vote of 25 in favor, with none opposed, and five absent.

*Executive Director Report*

Co-chair Tavares recognized Shari L. O’Neill, interim executive director and counsel, for the purpose of providing an executive director’s report. Ms. O’Neill indicated that the Commission’s new legislative members have been officially appointed to committees and may now participate as voting members. She said Senator Vernon Sykes will join the Education, Public Institutions, and Local Government Committee; Constitutional Revision and Updating Committee; and Public Information and Liaisons with Public Offices Committee. Ms. O’Neill continued that Representative Glenn Holmes will join the Constitutional Revision and Updating Committee; Judicial Branch and Administration of Justice Committee; Public Information and Liaisons with Public Offices Committee. Ms. O’Neill said Representative Hearcel Craig will join the Legislative Branch and Executive Branch Committee; Education, Public Institutions, and Local Government Committee; and Coordinating Committee. Finally, Ms. O’Neill described that the Commission’s Co-chair, Representative Jonathan Dever, will join the Bill of Rights and Voting Committee; the Finance, Taxation, and Economic Development Committee; and the Public Information and Liaisons with Public Offices Committee.

**Adjournment:**

There being no further business to come before the Commission, the meeting adjourned at 2:12 p.m.

**Approval:**

The minutes of the April 13, 2017 meeting of the Ohio Constitutional Modernization Commission were approved at the May 11, 2017 meeting of the Commission.

/s/ Charleta B. Tavares  
Co-chair  
Senator Charleta B. Tavares  
Assistant Minority Leader

/s/ Jonathan Dever  
Co-chair  
Representative Jonathan Dever