

Co-Chair
Charleta B. Tavares
Assistant Minority Leader
15th Senate District



Co-Chair
Ron Amstutz
Speaker Pro Tempore
1st House District

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES FOR THE MEETING HELD THURSDAY, DECEMBER 10, 2015

Call to Order:

Co-chair Ron Amstutz called the meeting of the Ohio Constitutional Modernization Commission ("Commission") to order at 1:40 p.m.

Members Present:

A quorum was present with Commission Co-chairs Tavares and Amstutz, and Commission members Abaray, Asher, Brooks, Clyde, Cole, Coley, Curtin, Gilbert, Jacobson, Kurfess, Mills, Mulvihill, Obhof, Peterson, Readler, Sapphire, Skindell, Taft, Talley, Trafford, and Wagoner in attendance.

Approval of Minutes:

The minutes of the November 12, 2015 meeting of the Commission were reviewed and approved.

Standing Committee Reports:

Coordinating Committee

Mr. Mulvihill said, at its meeting that morning, the committee approved a report and recommendation for Article I, Section 20 (Powers Reserved to the People), and Article V, Section 4 (Exclusion from Franchise for Felony Conviction), both issued by the Bill of Rights and Voting Committee. Mr. Mulvihill continued that the committee heard from the Legislative Branch and Executive Branch Committee regarding a report and recommendation on Article II, Section 2 (Election and Term of State Legislators). He said the report and recommendation provides two options for extending term limits, one option extending the limits only for newly-elected legislators, and one extending the limits for all legislators. Mr. Mulvihill said the committee did not approve the report and recommendation, but agreed to hold over its decision until next month in order to consider the process by which a recommendation with separate options could be addressed.

Mr. Mulvihill said the committee continued its review of activities in each of the subject matter committees by hearing status reports from Doug Cole, as chair of the Finance, Taxation, and Economic Development Committee, and Richard Sapphire, as chair of the Bill of Rights and Voting Committee.

Mr. Mulvihill described a question that arose in the Coordinating Committee meeting about how to address gender-specific language in the Ohio Constitution. Mr. Mulvihill said the Coordinating Committee had expressed interest in looking at this question if the Commission has not already decided it.

Subject Matter Committee Reports:

Education, Public Institutions, and Local Government Committee

Chad Readler, chair of the Education, Public Institutions, and Local Government Committee, reported on the activities of his committee. Mr. Readler said the committee would meet in January to continue its review of the education sections of the constitution. He said that later in the meeting he would be making a second presentation to the Commission of a report and recommendation on Article VI, Section 1 (Funds for Religious and Educational Purposes), and a second presentation of a report and recommendation on Article VI, Section 2 (School Funds).

Finance, Taxation, and Economic Development Committee

Doug Cole, chair of the Finance, Taxation, and Economic Development Committee, reported that the committee had met earlier in the day, and had an extended conversation around a relatively-concrete proposal regarding Article VIII, and its sections dealing with public debt. He said the committee anticipates having a report and recommendation at its next meeting in February, with a second reading shortly after that.

Judicial Branch and Administration of Justice

Janet Abaray, chair of the Judicial Branch and Administration of Justice Committee, reported that the committee would be meeting later in the afternoon, and would be continuing its discussion of issues surrounding the use of the grand jury in criminal prosecutions. She said the committee would be hearing presentations by two members of the Ohio Prosecuting Attorneys Association.

Bill of Rights and Voting Committee

Richard Saphire, chair of the Bill of Rights and Voting Committee, reported that the committee met in November and was not supposed to meet today, but met briefly in anticipation of completing its work on Article V, Section 6 (Mental Capacity to Vote). Mr. Saphire said the committee did not conclude its consideration of that section, so the committee would be taking up the question at its next meeting.

Constitutional Revision and Updating Committee

Dennis Mulvihill, reporting as chair of the Constitutional Revision and Updating Committee, said the committee met and reported to the Commission last month and had nothing new to report.

Legislative Branch and Executive Branch Committee

Fred Mills, chair of the Legislative Branch and Executive Branch Committee, said the committee intends to meet in January to consider a proposal for Congressional redistricting.

Reports and Recommendations:

Article I, Section 20 (Powers Reserved to the People)

Co-chair Amstutz recognized Mr. Sapphire, who provided a first presentation of a report and recommendation issued by the Bill of Rights and Voting Committee on Article I, Section 20 (Powers Reserved to the People). Mr. Sapphire said that the section was adopted as part of the 1851 constitution and expresses the view that the powers of the government are derived from the people. Article I, Section 20 states: “This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers, not herein delegated, remain with the people.”

Mr. Sapphire indicated that the report and recommendation states that Article I, Section 20 has not been amended since its adoption, with the 1970s Ohio Constitutional Revision Commission not recommending any changes. He further discussed the history of the section in Ohio courts, noting that the section is generally cited in conjunction with other sections of the Bill of Rights. He said the committee heard no presentations on the section. Mr. Sapphire concluded by stating that the Bill of Rights and Voting Committee recommends the provision should be retained in its current form.

Co-chair Amstutz asked for public comment. There being none, he then asked if Commission members wished to discuss the report and recommendation, which they did not. Co-chair Amstutz then said this is a first presentation, and that there is no action indicated at this time. He said a second presentation will be made at the Commission’s next meeting on January 14, 2016.

Article V, Section 4 (Exclusion from Franchise for Felony Conviction)

Co-chair Amstutz then recognized Mr. Sapphire for a presentation of a report and recommendation for Article V, Section 4 (Exclusion from Franchise for Felony Conviction).

Mr. Sapphire explained that Article V, Section 4 relates to the power of the General Assembly to exclude from the privilege of voting or being eligible to office any person convicted of a felony. He stated that Article V, Section 4 reads: “The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony.” Mr. Sapphire said the provision modifies the broad enfranchisement of United States citizens over the age of 18 who otherwise meet the qualifications of an elector, as contained in Article V, Section 1. Adopted as part of the 1851 Ohio Constitution, he said the provision was amended in 1976 to substitute the word “felony” for the phrase “bribery, perjury, or other infamous crime.”

Mr. Sapphire continued that the section empowers the General Assembly to enact laws that exclude felons from voting or holding office, rather than directly disenfranchising. He said, exercising this authority, the General Assembly enacted R.C. Chapter 2961, which provides that a person who pleads or is found guilty of a felony “is incompetent to be an elector or juror or to

hold an office of honor, trust, or profit,” and that when a felon is granted parole or other types of release the felon is competent to be an elector, and to sign a petition or register to vote. Mr. Sapphire also described discussions and actions by the 1970s Ohio Constitutional Revision Commission, which resulted in substitution of the word “felony.”

Mr. Sapphire said the report and recommendation describes litigation involving the subject of felon disenfranchisement, noting that the United States Supreme Court upheld a law disenfranchising felons on the basis that the Fourteenth Amendment guarantees the right to vote “except for participation in rebellion, or other crime,” thus finding an “affirmative sanction” for felony disenfranchisement laws in the Fourteenth Amendment. He indicated the Ohio Supreme Court has cited Article V, Section 4 only a few times, primarily in cases pertaining to eligibility for public office, rather than to the disenfranchisement of felons.

Mr. Sapphire described the report and recommendation’s account of a presentation by Ohio State University, Moritz College of Law Professor Douglas Berman, who noted that Ohio is one of the few states that allow felons to vote once they have been released from incarceration. Mr. Sapphire stated the report and recommendation reflects the committee’s consensus that Ohio’s disenfranchisement of felons only during the period of their incarceration is a reasonable approach that appropriately balances the goals and interests of the criminal justice system with those of incarcerated felons. Thus, he said, the report and recommendation indicates the Bill of Rights and Voting Committee’s conclusion that Article V, Section 4 should be retained in its current form.

Co-chair Amstutz asked for public comment and for discussion by the committee. There being none, he indicated this is a first presentation of the report and recommendation, and that there is no action indicated. He said a second presentation will be made at the Commission’s next meeting on January 14, 2016.

Article VI, Section 1 (Funds for Religious and Educational Purposes)

Co-chair Amstutz then recognized Education, Public Institutions, and Local Governments Committee Chair Chad Readler for a second presentation on the report and recommendation for Article VI, Section 1 (Funds for Religious and Educational Purposes).

Mr. Readler gave a brief summary of the contents of the report and recommendation for Article VI, Section 1, indicating that the section relates to funds for religious and educational purposes. Mr. Readler said Article VI, Section 1 provides that “The principal of all funds arising from the sale or other disposition of lands or other property that is granted or entrusted to the state for educational and religious purposes shall be used or disposed of in such manner as the General Assembly shall prescribe by law.” He said the committee reviewed the provision not intending to make a change but to be sure it still has significance today, as well as to consider whether the state actually holds land that is subject to these requirements. He said the committee learned that there are still some lands that are subject to this provision, and for that reason the committee unanimously agreed that the language should stay intact.

Co-chair Amstutz then asked for public comment and there was none. Chair Readler then moved for adoption of the report and recommendation, and Governor Taft seconded the motion. Offered the opportunity to discuss the motion, Commission members declined.

Co-chair Amstutz asked for a roll call vote, which was as follows:

Co-chair Tavares – yea
Co-chair Amstutz – yea
Abaray – yea
Asher – yea
Beckett – absent
Bell – absent
Brooks – yea
Clyde – yea
Cole – yea
Coley – yea
Cupp – absent
Curtin – yea
Davidson – absent
Fischer – absent
Gilbert – yea
Jacobson – yea
Kurfess – yea
Macon – absent
McColley – absent
Mills – yea
Mulvihill – yea
Obhof – yea
Peterson – yea
Readler – yea
Saphire – yea
Sawyer – absent
Skindell – yea
Sykes – absent
Taft – yea
Talley – yea
Trafford – yea
Wagoner – yea

The motion passed unanimously, by a vote of 23 in favor and none opposed, with nine absent.

Article VI, Section 2 (School Funds)

Mr. Readler then gave a second presentation of the report and recommendation for Article VI, Section 2 (School Funds).

Mr. Readler briefly summarized the contents of the report and recommendation, which indicates that Article VI, Section 2 provides that “The General Assembly shall make such provisions, by taxation or otherwise as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but, no religious or other sect or sects shall ever have any exclusive right to or control of any part of the school funds of this State.”

Mr. Readler said the language dates back to the Ohio Constitution of 1851 and for a long time was not a subject of court treatment and was left alone by the 1970s Commission. He said the section gained renewed interest in the 1990s when the Ohio Supreme Court, in the *DeRolph* cases,¹ considered the meaning of the “thorough and efficient” clause and its impact on the public school system in Ohio. For that reason, he said the committee felt that it was appropriate to spend a fair amount of time addressing the provision. Mr. Readler continued, saying the discussion proved helpful despite there being no consensus as to any specific change to the language as written. He described that the committee did reach a consensus that there were not enough votes to make a concrete change, and so agreed to leave the provision as written. Finally, Mr. Readler noted the report and recommendation includes scholarship by Senator Larry Obhof. Mr. Readler concluded by saying the report and recommendation indicates that Article VI, Section 2 should be retained in its current form.

Co-chair Amstutz then opened the floor for public comment, of which there was none.

Commission member Ed Gilbert, vice-chair of the Education, Public Institutions, and Local Government Committee, moved to adopt the report and recommendation, which motion was seconded by Senator Bill Coley. Co-chair Amstutz then asked the Commission for discussion.

Commission member Charles Kurfess asked whether the Ohio Supreme Court’s *DeRolph* case added anything to the committee’s consideration of alternative language. Mr. Readler answered that the committee reviewed all of the *DeRolph* decisions, noting that the phrase “thorough and efficient” is subject to different meanings. He said it was difficult to find another way to define those terms, and that one proposal would have spelled that out to include other adjectives and requirements, including an “outstanding,” “high-performing,” “excellent,” or “equitable” system. There was one suggestion to remove the words “thorough and efficient” entirely on the thought that the General Assembly is required to provide an educational system open to all students, but the committee concluded that the General Assembly and the boards of education should measure the effectiveness of those systems, not the courts. He said the committee had other views as well, but, like the Ohio Supreme Court, the committee was not able to reach a significant consensus on what change would be most appropriate.

Mr. Gilbert agreed with Mr. Readler, saying the committee had at least eight to 10 speakers on every angle of this section. He said the topic was very well researched and discussed, and the committee spent a great deal of time going through this on all angles. He said the committee could not agree on new language and so left it the same.

Mr. Sapphire commented that the United States Constitution does not use the word “education,” and there are other states that do not explicitly guarantee education in their constitutions. He wondered if the committee considered deleting the language entirely, and whether inclusion of this language made any difference at all. He said, as he reads *DeRolph*, the Supreme Court ultimately left it to the General Assembly, so that he is not sure at the end of the day that the guarantee in the constitution made much of a difference.

¹See *DeRolph v. State*, 78 Ohio St.3d 193, 1997-Ohio-84, 677 N.E.2d 733 (*DeRolph I*); *DeRolph v. State*, 89 Ohio St.3d 1, 2000-Ohio-437, 728 N.E.2d 993 (*DeRolph II*); *DeRolph v. State*, 93 Ohio St.3d 309, 2001-Ohio-1343, 754 N.E.2d 1184 (*DeRolph III*); and *DeRolph v. State*, 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529 (*DeRolph IV*).

Mr. Readler answered that one proposal would have removed the “thorough and efficient” language, the thought being that the question posed is who should decide what the state’s public education system looks like, should it be the legislature, the governor, and the boards of education on the one hand, or should there be a role for the courts to decide. He said *DeRolph* injected the courts into this public policy question. He added, there is a lot of debate about whether that was a good or bad thing but that was a focus of the committee’s discussion. He said he is not equipped to answer questions about the analytical aspects of the provision.

Co-chair Charleta Tavares said she would revert to the constitutional convention of 1850-51, where the delegates were expressing their intent that Ohio should have an educational system for all. So she would object to taking the language having to do with education out of the constitution.

Sen. Obhof commented that he was not on the committee, but he thinks *DeRolph* resulted in significant changes to the school funding system in Ohio and played a major role in how things were done as a policy matter. To the extent that the constitutional provision has been looked at historically, it has actually resulted in significant policy changes over a number of decades. So, he said, answering the question of whether the case mattered, the answer is yes.

Commission member Herb Asher said the original *DeRolph* case became an issue of school facilities, which became another impact of *DeRolph*. He said there have been changes that came about, not necessarily in the area of school performance, but about support for facilities.

Mr. Gilbert said there is no question *DeRolph* made a difference, and education is a right and should be, adding the case made a big difference in funding and how schools are operating today. He said “we should consider education as a right.”

Commission member Jeff Jacobson said the inclusion of provisions about education in state constitutions came about in the mid-1800s because of a desire to not let education be in the hands of religious bodies. Citizens were worried that those who had access to religious educational institutions might not support public schools, so the desire came about in many states to put education in the constitution. He said, judging the *DeRolph* litigation, what was clear in the General Assembly at that time was not that the “thorough and efficient” provision got Ohio into trouble, but that the state did not have a rational basis for what it was doing, and that government actions must at least meet a rational basis test. He added, in Ohio, the system was based on schools getting whatever was left over when everything else was funded. That approach could not be a rational basis, so the legislature developed a rational basis. He said that was the General Assembly’s responsibility under any reading of the constitution. He said the “thorough and efficient” language had no effect other than to invite confusion and/or mischief.

Mr. Cole asked, putting aside whether thorough and efficient played a role, whether the committee considered crafting language clarifying that the determination of what constitutes “thorough and efficient” education should go to the legislative body, rather than to a judicial body.

Mr. Readler answered there were certainly discussions to that end, but he does not know if there was a specific proposal that would have added that. Generally speaking, he said there were members who thought it was appropriate for the courts to be the final arbiter of the provision and

that it was not something to be reserved exclusively to the legislature, governors, and the boards of education.

Mr. Gilbert said the committee had at least three proposals for other language, so that was all considered and debated.

Co-chair Amstutz said he, too, has a history with the provision over the years. He said that 1851 was the time when public education was being promoted across the country and Ohio was at the vanguard of the movement. As it relates to the court decision, he said in the case of facilities the state basically had provided almost no funding, and that has changed to many billions of dollars as a result of the influence of that litigation. He added that, in the case of operating expenditures, not only did the methodology for distribution change, but the volume of expenditure increased about 85 percent over a time when inflation increased 32 percent. He continued that, because that was a main part of the state's budget, it was to the detriment of higher education during that time period. He said the *DeRolph* decision had a tremendous impact even though the outcome is reflected in this report, which is that there continues to be a difference of opinion as to whether the Court decision should continue to press for additional funding. He commented that this is why no one on that side of the discussion is willing to say the courts should no longer have as much influence in interpreting what clearly is a mandate on the legislature. He concluded that there are differences of opinion, so that is why it was hard to find consensus for change.

Co-chair Amstutz asked for a roll call vote, which was as follows:

Co-chair Tavares – yea
Co-chair Amstutz – yea
Abaray – yea
Asher – yea
Beckett – absent
Bell – absent
Brooks – yea
Clyde – yea
Cole – yea
Coley – yea
Cupp – absent
Curtin – yea
Davidson – absent
Fischer – absent
Gilbert – yea
Jacobson – yea
Kurfess – nay
Macon – absent
McColley – absent
Mills – yea
Mulvihill – yea
Obhof – yea
Peterson – yea
Readler – yea
Saphire – yea
Sawyer – absent

Skindell – yea
Sykes – absent
Taft – yea
Talley – yea
Trafford – yea
Wagoner – yea

The motion passed by a vote of 22 in favor and one opposed, with nine absent.

Executive Director’s Report:

Co-chair Amstutz then recognized Executive Director Steven C. Hollon for his report. Mr. Hollon directed Commission members to the draft of the Annual Report. He noted that the Commission is only required to issue a biennial report, but it was determined it would be in the Commission’s interest to issue an annual report. Mr. Hollon pointed out, on page 50 of the booklet regarding the Coordinating Committee, there is incomplete material that will be corrected after today’s meeting. He indicated the report should say there are 11 reports and recommendations for presentation to the full Commission. One item not listed is Article I, Section 13 (Quartering of Troop); that item will be added to the final draft. He further indicated that, on the last page, only two items were considered and approved by the Coordinating Committee; it did not approve the report and recommendation for Article II, Section 2 (Election and Term of State Legislators). The recommendations to the General Assembly on the last page also were not subject to adoption today and so they will not be included in the Annual Report. He said, other than these noted changes, this is the report that he would like to provide to the General Assembly leadership, and would need the full approval of the Commission today to do so.

Motion to approve the report by Pierrette Talley, seconded by Mr. Mills. There was no discussion by members of the Commission.

Co-chair Amstutz took a voice vote, on which the motion passed unanimously, and the report was adopted.

Adjournment:

There being no further business to come before the Commission, the meeting adjourned at 2:30 p.m.

Approval:

The minutes of the December 10, 2015 meeting of the Commission were approved at the January 14, 2016 meeting of the Commission.

/s/ Charleta B. Tavares

Co-chair
Senator Charleta B. Tavares
Assistant Minority Leader

/s/ Ron Amstutz

Co-chair
Representative Ron Amstutz
Speaker Pro Tempore