OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE

FOR THE MEETING HELD
THURSDAY, NOVEMBER 10, 2016

Call to Order:

Chair Fred Mills called the meeting of the Legislative Branch and Executive Branch Committee to order at 2:17 p.m.

Members Present:

A quorum was not present with Chair Mills and committee members Curtin, Davidson, and Taft in attendance.

Approval of Minutes:

There being no quorum, the minutes of the October 13, 2016 meeting of the committee were not approved.

Presentation:

"Legislative Privilege in State Legislatures"
Steven F. Huefner, Assistant Professor of Law
Moritz College of Law
The Ohio State University

In relation to the committee's review of Article II, Section 12 (Privilege of Members from Arrest, and of Speech), Chair Mills recognized Professor Steven F. Huefner of the Moritz College of Law to present on the topic of legislative privilege in state legislatures. Prof. Huefner said he comes to the question of legislative privilege from having spent five years assisting the United States Senate in efforts to protect and enforce its privileges, including those provided by Article I, Section 6, Clause 1 of the United States Constitution.

He indicated that, after coming to Ohio in 2000, he wrote an article about state legislative privilege provisions based on his observations of how those provisions were being interpreted in different ways than he was familiar with in the U.S. Senate.[1]

Prof. Huefner said, particularly with regard to the *DeRolph* litigation,[2] there were multiple occasions in which staffers in the General Assembly were asked and in some cases required to provide testimony regarding how the legislature dealt with the school funding issue. He said the existence of the legislative privilege is about protecting the separation of powers, a concept that goes back to when the British Parliament was subservient to the Crown. He said, in the 17th century, drama ensued when King Charles I entered Parliament seeking offenders he wanted to punish for treasonous behavior. Prof. Huefner said Parliament was able to resist that intrusion, but the incident resulted in the English Bill of Rights including the predecessor of the speech or debate clause.

He said the clause is intended to protect members of a legislative body from retaliation by the executive branch for how they perform their official duties. The provision derives from the concept that, while all public representatives are subject to political retaliation, they should not be subject to retaliation by the executive or judicial branch, which could use their power to make the legislative branch subservient.

Prof. Huefner said provisions protecting legislators from retaliation for speech or debate remain, even though the clashes in England have not been part of the American experience.

Noting there are justifications for continuing the privilege, Prof. Huefner nonetheless commented that the countervailing pressure is for legislative activities to be open and public. The need for transparency sometimes includes pressure to force legislatures and their staffs to be even more forthcoming and provide information. He described *City of Dublin v. State*, 138 Ohio App.3d 743, 742 N.E.2d 232 (2000), a case that challenged the scope of the open meetings law, but, in the course of addressing that question the trial court received testimony from a member of the Legislative Service Commission (LSC) staff about what was happening in a legislative committee meeting. At the same time, the court honored motions to quash a subpoena that would have required the legislators themselves to talk. Thus, Prof. Huefner noted, the trial court required testimony from a staffer while protecting the legislators themselves. He said the privilege should apply to staff as well as to legislators, but it is not always interpreted that way in the states.

Article II, Section 12 extends a privilege against arrest as well as the speech or debate privilege. Prof. Huefner said he had occasion to help the U.S. Senate understand the federal counterpart. He described an incident in the late 1990s when West Virginia Senator Robert Byrd was stopped on his way back to his Washington, D.C. suburban home and, when asked for identification, he produced his U.S. Senate identification card. The traffic officer decided not to cite him, but the

---

[1] Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221 (2003), http://scholarship.law.wm.edu/wmlr/vol45/iss1/4 (last visited Nov. 14, 2016).

[2] *See 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).*

story that became public was that the officer said he could not cite Sen. Byrd because, as a member of Congress, he was privileged against arrest. Prof. Huefner said that is not true; rather, it is a privilege against a citizen's civil arrest, which was occasionally used to detain members of a legislative body to prevent them performing their legislative duty. The privilege only excuses members of the legislature from being arrested in all cases except treason, felony, and breach of the peace.

Addressing the prohibition against legislators being questioned elsewhere for any speech or debate, Prof. Huefner described what conduct and types of questioning is covered. He said by its terms the provision protects members of the legislature, but he thinks for that protection to be fully effective, legislative staff members ought to be within the scope of that privilege if the legislative member desires the privilege to cover the staffer. He said it is the member's privilege to encompass the staff that is serving the member in connection with the work they are doing. Prof. Huefner said the privilege should cover broadly all the essential legislative activities, a privilege that may go beyond the official duties of the legislators. He noted there are duties performed that may not be expressly legislative.

He said the remaining question is whether the privilege should be construed to protect the legislators only against liability or whether it also protects them against having to testify. The provision itself states they shall not be questioned elsewhere. He remarked that, if that statement is only taken at face value it is easy to argue legislators cannot be subpoenaed about what they have done, even if they are not defendants. But, he said, although this is how federal courts construe the rule, this is not always how state courts have construed it. He said the privilege against questioning includes being required to produce documents.

He said the privilege raises questions about freedom of information laws, commenting that an argument could be made that an individual legislator could extend his or her privilege to the entire legislative body. He said, at the same time, the privilege only provides that members should be free from questioning elsewhere, meaning outside the legislature, so that the legislature is always accountable to the public for what they do in legislative session, including ethics investigations, deciding what parts of the process to conduct in public session, and by videotaping floor and committee sessions. He said the legislature can choose to create paper documents as a way of making its activities more readily available to the public. Despite this, he said, it is his view that legislators need to be able to a degree to insulate themselves against the possibility that disgruntled constituents or other branches of government might be able to get information to harass them.

Prof. Huefner having concluded his remarks, Chair Mills asked committee members for questions or comments.

Representative Mike Curtin asked if Prof. Huefner could summarize where Ohio may be deficient in defining the privilege.

Prof. Huefner said his worry is that Ohio courts, which have not addressed the topic as frequently as federal courts, have been too willing to see the privilege as not extending to staff. He said he also is concerned that the courts may see the privilege as involving liability and evidentiary use of documents, but not as privileging testimonial inquiry about legislative activity. He said that is what happened in the *City of Dublin* case.

He said the deeper question is whether this is a deficiency in Ohio jurisprudence that should be remedied through judicial construction or through textual change in the provision. He said he is not arguing for a textual change in the provision. He said he will give it more extensive thought. He said he is not aware of much in the way of change to the language of these analogous provisions in other states that trace back to the founding constitutions. Even when rewritten, the provisions do not demonstrate a substantive change. He said there could be reason to scrap that relatively brief textual language and have something more detailed. But, he cautioned, "once you start putting in detail you have to worry about what you have left out."

Rep. Curtin followed up, asking whether there are cases to indicate that the privilege would extend not just to sitting legislators but to former legislators if litigation is brought after their service is over.

Prof. Huefner said he is sure at the federal level, at least in dicta, there are cases that make it clear that the privilege is ongoing, and does not just protect during the term of service. He said that sometimes raises interesting questions when the legislator has the privilege but has died, causing the question to become who asserts the privilege when someone seeks information in the legislator's file.

Committee member Bob Taft asked whether the privilege against arrest language is obsolete. Prof. Huefner said he is not aware that the civil arrest power has been used recently, thus, in theory the power is still there, just not used. He said he can see a stronger argument for a revision for that language rather than revising the speech or debate clause, to clarify what is being excluded. He said a revision could say "privileged from civil arrest but not criminal arrest." He said he needs to think more about whether a change is justifiable.

Committee member Jo Ann Davidson asked about a situation where, if the legislature determines it needs a quorum, law enforcement can be instructed to bring in members. She wondered if that situation relates to this provision.

Prof. Huefner said it is appropriate for the institution to have that power, but he hopes it is rarely used. He said, historically, it is possible to have the sergeant-of-arms drag people to the floor, but that is different from civil arrest.

Rep. Curtin asked, regarding the *DeRolph* case, whether legislators were compelled to testify or whether their participation was voluntary. Prof. Huefner said wherever the privilege applies it can be waived, and it is not a barrier that prevents giving the testimony if the testimony is voluntarily offered. He said the legislators who testified in *DeRolph* either knowingly waived or were not aware of the privilege, he is not sure which.

Ms. Davidson, recalling her participation as a witness in that litigation, said legislators did testify at the request of the defense, which was the state, so their participation was voluntary.

Chair Mills asked whether there was a subpoena issued in the case involving the LSC staffer. Prof. Huefner said he does not know if they asserted the privilege, but they were subpoenaed. He said there was a successful motion to have those subpoenas quashed.

Ms. Davidson asked whether there is a statutory provision relating to LSC as far as records are concerned, restraining records from being distributed as a protection to the legislator.

Prof. Huefner said on a couple of occasions the General Assembly has desired to pass some statutory provisions that would provide the same type of protection. But, he said, there is a strong argument that even without that provision the documents that LSC produces are for members of the General Assembly related to legislation, and so should be covered by the speech or debate clause. So, he said, the statute does not require interpreting what the constitutional provision means. He said Gov. Taft vetoed one piece of legislation because it provided more protection than the speech or debate would have provided, and the provision itself said it was intended to be redundant, but there was concern about how the court would interpret it. The General Assembly has wanted to use statutory means to be sure its members were protected, but in his view the speech or debate clause would provide that protection.

Chair Mills remarked that the committee has been reviewing Articles II and III, to see what may need to be modernized. He said, in preparation for discussion of Article II, Section12, he would like to follow up with Prof. Huefner to see if there are some things that maybe could be made clearer.

Prof. Huefner said the Kansas Constitution has one more word in it that may be relevant: it protects against legislators being questioned about speech and debate "or written document." Prof. Huefner suggested that might be a change to consider.

Adjournment:

There being no further business to come before the committee, the meeting was adjourned at 3:02 p.m.

Approval:

The minutes of the November 10, 2016 meeting of the Legislative Branch and Executive Branch Committee were approved at the December 15, 2016 meeting of the committee.

/s/ Frederick E. Mills
Frederick E. Mills, Chair

/s/ Paula Brooks
Paula Brooks, Vice-chair