

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



Co-Chair
Jonathan Dever
28th House District

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES FOR THE MEETING HELD THURSDAY, MAY 11, 2017

Call to Order:

Co-chair Jonathan Dever called the meeting of the Ohio Constitutional Modernization Commission (“Commission”) to order at 1:03 p.m.

Members Present:

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

Approval of Minutes:

The minutes of the April 13, 2017 meeting were approved.

Reports and Recommendations:

Co-chair Dever began the meeting by announcing that Ed Gilbert, who has served as the vice-chair of the Education, Public Institutions, and Local Government Committee, has now been appointed to chair of that committee due to the departure of Chad Readler.

Co-chair Dever then announced the Commission would be receiving presentations on several reports and recommendations, recognizing Richard Sapphire, chair of the Bill of Rights and Voting Committee, for a first presentation on a report and recommendation from that committee.

Article V, Section 2 (Election by Ballot)

Mr. Sapphire summarized the report and recommendation as providing an explanation of the general background of the section, which requires elections to be by ballot. He indicated that the committee had discussed adding the word “secret” to the requirement in order to embed in the constitution the concept of a secret ballot – a concept that is well-established in Ohio case law.

He said the committee ultimately concluded it was not necessary and could create confusion to add the word “secret,” and so the committee’s report recommends retaining the section in its current form.

There being no comment or discussion on the recommendation, Co-chair Dever noted that, because the recommendation is for no change, a vote may be taken after a first presentation. He called for a motion to adopt the report and recommendation. Representative Hearcel Craig so moved, with Commission member Jo Ann Davidson seconding the motion.

A roll call vote was taken with the following votes recorded:

Co-chair Dever – yea
Abaray – yea
Beckett – yea
Bell – yea
Brooks – yea
Clyde – yea
Cole – yea
Craig – yea
Cupp – yea
Davidson – yea
Fischer – yea
Gilbert – abstain
Holmes – yea
Jacobson – yea
Kurfess – yea
Mills – yea
Mulvihill – yea
Saphire – yea
Skindell – yea
Taft – yea
Talley – yea
Trafford – yea

The motion passed by a vote of 21 in favor, with one abstention, and eight absent.

Article VII, Section 1 (Support for Persons with Certain Disabilities)

Co-chair Dever then recognized Ed Gilbert, Chair of the Education, Public Institutions, and Local Government Committee, for the purpose of providing a first presentation of a report and recommendation for Article VII, Section 1, relating to support for persons with disabilities.

Mr. Gilbert asked Christopher Gawronski, legal intern, to summarize the report and recommendation. Mr. Gawronski described that the report recommends that Section 1 be changed to read:

Facilities for and services to persons who, by reason of disability, require care or treatment shall be fostered and supported by the state, as may be prescribed by the General Assembly.

He continued that the report describes the background of the section, and outlines the committee's discussion of the topic, including reference to the testimony heard by the committee from experts in the field of mental health and disabilities. He said report concludes that the section should be modernized by removing objectionable language and clarifying the state's responsibility with regard to people who are in need of assistance.

Co-chair Dever invited comments or discussion regarding the report. There being none, Co-chair Dever announced that the report and recommendation would be subject to a second presentation and possible vote at the Commission's next meeting. He asked that anyone who would like to hear from speakers on the topic to notify the committee chair or the co-chairs.

Article VII, Sections 2 and 3 (Directors of Public Institutions)

Co-chair Dever continued to recognize Mr. Gilbert for the purpose of providing a first presentation of a report and recommendation for Article VII, Sections 2 and 3, relating to directors of public institutions. Mr. Gilbert again asked Mr. Gawronski to assist.

Mr. Gawronski summarized the report and recommendation as concluding that Sections 2 and 3 should be repealed because they no longer have a function in how directors of state institutions are selected. He said the report describes the committee's discussion relating to the sections, and the basis for its conclusion that the sections are obsolete and appropriately would be repealed.

Co-chair Dever invited comments or discussion regarding the report. There being none, Co-chair Dever announced that the report and recommendation would be subject to a second presentation and possible vote at the Commission's next meeting. He asked that anyone who would like to hear from speakers on the topic to notify the committee chair or the co-chairs.

Recommendation for Gender Neutral Language

Co-chair Dever then recognized Kathleen Trafford, chair of the Coordinating Committee, for the purpose of providing a first presentation on a report and recommendation relating to the removal of gender-specific language from the Ohio Constitution.

Ms. Trafford summarized the report as indicating the committee's view that gender-specific pronouns and other references in the constitution should be identified and replaced with gender neutral language. She said the report describes that the Constitutional Revision Commission in the 1970s briefly considered the topic but concluded there was no demonstrated need to make a change. She said the committee received presentations from Senior Policy Advisor Steven H. Steinglass, as well as staff, on the topic, and learned that at least ten other states have taken measures to remove such language from their constitutions. She said the report describes the different approaches for modernizing constitutions in this way before concluding that the identification and removal of gender-specific references in the constitution is a task that the Legislative Service Commission could accomplish.

Co-chair Dever invited comments or discussion regarding the report. There being none, Co-chair Dever announced that the report and recommendation would be subject to a second presentation and possible vote at the Commission's next meeting. He asked that anyone who would like to hear from speakers on the topic to notify the committee chair or the co-chairs.

Article II, Sections 1 through 1i, 15 and 17 (Constitutional Initiative, Statutory Initiative, and the Referendum)

Co-chair Dever then recognized Dennis Mulvihill, chair of the Constitutional Revision and Updating Committee, to present for the first time a report and recommendation related to that committee's review of the initiative and referendum process.

Mr. Mulvihill began by thanking Shari L. O'Neill, interim executive director and counsel, and Steven H. Steinglass, senior policy advisor, for their work assisting the committee. He also thanked committee members, particularly noting the success of the committee in leaving partisan politics out of the meetings. He said the committee has made policy judgments, but that they were made in the spirit of preserving the people's right to use ballot initiatives, and did require some give and take among the members. He said, in aggregate, the committee's work reflects the collective wisdom of those judgments and those compromises.

Describing the existing sections of Article II, Mr. Mulvihill said the initiative and referendum provisions contain some of the most confusing and difficult-to-understand language in the constitution. He said the committee's work has been to modernize, streamline, and clear out the density contained in those current provisions.

He continued that the committee has reorganized and rewritten the sections to accomplish its goals. He said the recommendation is the result of four-and-a-half years, during which the committee heard dozens of presentations, received much public comment and input, and had strong bipartisan support for the changes. He said the recommendations were approved by the committee in a unanimous vote.

He said, from the outset, the committee was committed to protecting the strong history of provisions that allow Ohioans the right to initiate laws and constitutional amendments. At the same time, he said, "we have 105 years of history to see what has worked and what has not."

Summarizing the committee's work, Mr. Mulvihill said the committee had a sense the constitutional initiative has been abused over the years, while the statutory initiative has been underutilized. He observed that, since 1913, there have been 69 citizen-initiated constitutional amendments submitted to the voters, with 14 in the last 16 years. He said, of the 69, 18 were approved by the voters, or 26 percent of the time, with the General Assembly having 154 submitted to voters, with 106 approved, for a total of 68.8 percent. He noted that Ohio currently has the tenth longest state constitution in the country, in terms of the number of words.

Since 1913, he said there have only been 12 statutory initiatives submitted to the voters, with only three passing, and only one since 1949. He explained that this means that when the initiative process is used, 85 percent of the time the petitioners use the constitutional route. He said this has resulted in many concepts being implanted, or attempted to be implanted, in the constitution that would be better served being in the Ohio Revised Code.

Mr. Mulvihill said the committee concluded that the most obvious reason for the discrepancy between the over-used constitutional initiative and the under-used statutory initiative is the existence of the supplementary petitions and the lack of protection to initiated laws against interference by the General Assembly.

He said the committee's philosophy was that the state constitution exists to establish the basic framework of government; that there are three branches of government and their relationship to one another; the relationship between state and local governments; and the relationship between citizens and government, primarily through the Bill of Rights.

He continued that what have emerged lately are initiated amendments to the constitution that are inconsistent with the purpose of the constitution. He said, without commenting on the merits of any of these items, but only their placement or attempted placement in the constitution, there has been a trend of placing in the constitution topics such as casino gaming, including the specific land plots for that purpose, age limits for judicial office, smoking bans, minimum wage, treatment in lieu of incarceration for drug offenders, and marijuana legalization, including reference to specific land plots.

He said irrespective of whether someone would support or oppose any of these issues, the committee felt these kinds of initiatives do not really belong in the constitution but rather in the Revised Code. So, he said, the committee's work, in addition to modernizing and making the provisions readable and understandable, was designed to encourage petitioners to take the statutory, rather than the constitutional, route when undertaking the initiative process.

He said the committee also had a goal of reducing the influence of politics and political gamesmanship that occasionally impair the abilities of citizens to get their petitions to the ballot.

He summarized the recommendations as follows:

- Making the sections largely self-executing, consistent with explicit wishes of the 1912 commission;
- Making the statutory initiative more user-friendly by eliminating the supplementary petition and by creating a safe-harbor provision protecting those initiated statutes from amendment or repeal from the General Assembly for five years, absent a 2/3 super majority vote in each house of General Assembly;
- Decreasing the number of signatures required to initiate a statute from six percent (assuming the supplementary petition was needed) to five percent;
- Creating constitutional authority for the initial 1,000 signature petition, submitted to the attorney general, a requirement presently in the Revised Code;
- Creating constitutional authority for the determination by the attorney general that the summary of the initiative or referendum is fair and truthful;
- Requiring initiatives to use gender-neutral language, where appropriate;
- Providing that the one amendment rule applies to both initiated constitutional amendments and legislatively initiated amendments;
- Increasing the passing percentage for constitutional amendments from 50 to 55 percent;
- Permitting initiated constitutional amendments to be on the ballot in even years only, when more people actually vote;

- Providing clarity by specifying dates when proposed statutory and constitutional initiatives can be submitted, and when the attorney general, secretary of state, and ballot board must complete their work;
- Permitting the General Assembly to modernize the signature-gathering process by using electronic signatures;
- Front end loading the work on the ballot board by requiring it to draft the ballot language and title after the petitioners submit the 1,000 signatures to the attorney general, but before the petitioners gather the hundreds of thousands of signatures that are required;
- Allowing the petitioners to suggest ballot language and the title to the ballot board;
- Allowing the petitioners to appeal to the Supreme Court at any time during the process if they are dissatisfied with a ruling from the attorney general, secretary of state, or ballot board; and,
- Retaining the historic role of the attorney general, the secretary of state, and the ballot board in managing the initiative process.

Mr. Mulvihill said the committee recognizes that not all Commission members will like each of the proposed changes. However, he said, the committee strongly believes that, on balance, the suggested changes create a far superior, fairer, and more transparent process for statutory and constitutional initiatives; protect the rights of petitioners to bring their ideas to the voters and reduce the potential for political interference with that right; allow constitutional amendments to be considered by more voters, knowing the significant drop-off between even and odd year elections; and encourage petitioners to use the statutory process, rather than placing in the constitution issues that belong in statutory law.

Mr. Mulvihill said the committee considers the proposals to be in compliance with the single subject requirement because the subject would be “reforming the initiative process.” He noted that the committee approved last-minute amendments to the re-write of the initiative and referendum sections from committee member Senator Vernon Sykes, and the amendments were unanimously approved. However, he said, those amendments were not to the report and recommendation and they do not substantively change the recommendations described by Mr. Mulvihill.

Co-chair Dever invited comments or discussion regarding the report. There being none, Co-chair Dever announced that the report and recommendation would be subject to a second presentation and possible vote at the Commission’s next meeting. He asked that anyone who would like to hear from speakers on the topic to notify the committee chair or the co-chairs.

Article I, Section 10 (The Grand Jury)

Co-chair Dever recognized Janet Abaray, chair of the Judicial Branch and Administration of Justice Committee, to provide a first presentation of a report and recommendation related to the grand jury portion of Article I, Section 10.

Ms. Abaray said the committee is recommending two changes to the grand jury procedure in Ohio. She said the first change is for language indicating that whenever a grand jury is empaneled, there would be an independent counsel appointed by the court to advise the grand jury on matters before it, with independent counsel being selected from among persons admitted to the practice of law in Ohio.

Ms. Abaray said the other change would require the preparation of a record of all grand jury proceedings, and would afford the accused a right to the record of testimony of any witness who is called to testify at trial. She said the recommended language also states that provision may be made by law regulating the form of the record and the process of releasing any part of the record.

She said the changes were the result of deliberations in her committee over the course of the past two years, noting the decision to address the grand jury process originated with a letter from Senator Sandra Williams in which she raised concerns about the prosecution of cases involving officer-involved shootings. She said that letter was referred to the committee by Supreme Court Chief Justice Maureen O'Connor, upon which the committee began an investigation of the grand jury process. She said the committee considered a wide spectrum of proposals, ranging from making no changes to eliminating the grand jury entirely and going with a preliminary hearing process that is used in some other states.

She said one question they discussed was the importance of secrecy in the grand jury process, and whether there is a way to improve the process so as to increase public confidence while also protecting any benefits that are obtained by maintaining secrecy. She said committee members expressed that it was important for the accused, particularly for those wrongly accused, to retain secrecy so that their reputations would remain intact if there was no reason to prosecute. She said, at the same time, they recognized that the public has had distrust in the grand jury in some high-profile situations, and they also found there is a lot of variability in what happens during grand jury proceedings. She noted the disconnect between the secrecy of the grand jury proceeding and the requirements of transparency and accountability in a democratic system.

Describing the presentations to the committee, Ms. Abaray said the committee heard from prosecutors, public defenders, and professors on this topic. She said in the course of the committee's review, it learned about the system in Hawaii in which they have a grand jury legal advisor as mandated by their constitution. She added that one important aspect of the grand jury is that it is both a jury and an investigative body that is utilized by the prosecution in conducting an investigation. She said this hybrid nature of the grand jury requires a balance of all of the powers and rights involved. She said the committee discussed incidents in which prosecutors have abused the investigatory function of the grand jury. She said a majority of the committee concluded that it would be useful to have a grand jury legal advisor, which would be a person appointed by the court to be present during the grand jury's review of the evidence. She described that person as an arm of the court who would be present to give information on legal issues, answer questions from the jurors, and be a neutral resource. She said the committee's review focused on ways to protect the grand jury's independent function so that jurors are not overly persuaded by the prosecutor to the point that they lose their objectivity. She said they heard from a grand jury legal advisor in Hawaii who reported that it is a smooth process there that has been in place over 40 years.

Ms. Abaray commented on one proposal that suggested approaching cases involving law enforcement or public officials differently from other criminal investigations by having the attorney general prosecute those cases, for example. She said that proposal was seen as problematic because it could raise some equal protection or due process issues. Thus, she said, the conclusion was that the grand jury legal advisor idea was a more comprehensive and less intrusive approach.

As to the transcript recommendation, she said there was much discussion about the value of the transcript to the accused. She said they learned that there is no requirement that grand jury testimony be transcribed, so there is often no transcript created. As a result, she said, the accused at trial does not have the ability to see if there are inconsistencies that might be of value to the defense. The committee heard presentations suggesting that the availability of transcripts would have a chilling effect on the willingness of witnesses to come forward. She said the committee was sensitive to that issue, and therefore the committee's recommendation has limited the proposal to witnesses who also will testify at trial.

She said committee members felt the recommendations were pinpointed and precise, and represented a compromise when compared with a proposal to eliminate the grand jury altogether. She said the committee voted seven to one to recommend the changes set out in the report and recommendation.

Co-chair Dever having left the meeting, Co-chair Tavares invited comments or discussion regarding the report.

Mr. Gilbert asked whether the legal advisor would be an employee of the court. Ms. Abaray answered that the legal advisor would not be affiliated with the prosecutor but would be appointed by the court, and paid by the state as an employee or consultant.

Commission member Doug Cole asked how many grand juries are seated in an average year. Ms. Abaray answered that in the major cities grand juries sit frequently, but in the smaller counties they may only sit once a month. She said the major cities probably would have a full-time need for a grand jury legal advisor, but that other locations would not.

Co-chair Tavares announced that the report and recommendation would be subject to a second presentation and possible vote at the Commission's next meeting. She asked that anyone who would like to hear from speakers on the topic to notify the committee chair or the co-chairs.

Standing Committee Reports:

Coordinating Committee

Kathleen Trafford, chair of the Coordinating Committee, reported that the committee met earlier and had approved all of the reports being presented to the Commission.

Subject Matter Committee Reports:

Constitutional Revision and Updating Committee

Dennis Mulvihill, chair of the Constitutional Revision and Updating Committee, indicated he had nothing further to report to the Commission.

Education, Public Institutions, and Local Government Committee

Education, Public Institutions, and Local Government Committee Chair Edward Gilbert reported that he had nothing further to report to the Commission.

Judicial Branch and Administration of Justice Committee

Janet Abaray, chair of the Judicial Branch and Administration of Justice Committee, said the committee plans to discuss the topic of civil asset forfeiture at its next meeting.

Finance, Taxation, and Economic Development Committee

Doug Cole, chair of the Finance, Taxation, and Economic Development Committee, reported that the committee discussed making a recommendation about constitutionalizing the treasurer's debt reporting function. He acknowledged that no final recommendation will be possible, but a report documenting a sense of the committee will be forthcoming.

Bill of Rights and Voting Committee

Richard Sapphire, chair of the Bill of Rights and Voting Committee, reported that the committee will be providing a summary report on what has been discussed but not recommended by the committee.

Legislative Branch and Executive Branch Committee

Fred Mills, chair of the Legislative Branch and Executive Branch Committee, reported that reapportionment and redistricting was discussed again, but that the committee will not be making a recommendation on that issue.

Executive Director Report:

Co-chair Tavares recognized Ms. O'Neill for the purpose of providing an executive director's report. She indicated staff has prepared revised meeting minutes for 2013 through mid-2014, the period before staff came on board. She said the revisions are intended to standardize the format and make needed additions and corrections, and will supplement the record from that period. Ms. O'Neill said the minutes are available for signing by committee chairs and vice-chairs, and also would be available at the next meeting of the Commission.

Ms. O'Neill acknowledged the invaluable assistance of Mr. Gawronski in providing research and writing, as well as staffing committee meetings. She thanked Mr. Gawronski as well as all of the interns who have helped the Commission for their work, indicating it has been a privilege to get to know and work with them.

Finally, Ms. O'Neill announced that two staff members, communications director Shaunte Russell, and administrative assistant Jennie Long, have accepted job offers and will be departing at the end of the month. Ms. O'Neill thanked them for all they have done to make Commission meetings a success, particularly noting Ms. Long's assistance in setting up all of the meetings every month and Ms. Russell's design and maintenance work on the Commission's website. Ms.

O'Neill asked that the Commission join her in wishing them well in their next endeavors, and Commission members offered applause in appreciation for their work.

Old Business:

Co-chair Tavares commented on the departure of two staff members while noting that additional work is still needed before the Commission shuts down. She said the co-chairs will again discuss increasing Ms. O'Neill's pay to account for her new position as executive director and covering two jobs. Co-chair Tavares also mentioned the need to obtain assistance for Ms. O'Neill to make up for the loss of staff members.

Remarking on the overall organization of the Commission, Co-chair Tavares noted the difficulties resulting from having the Commission co-chaired by legislators, who often have time conflicts arising from their legislative duties. She said it would have been her recommendation to have the Commission co-chaired by public members.

Adding to Co-chair Tavares' remarks, Senator Mike Skindell recommended making Ms. O'Neill's pay raise retroactive to the time she took on the executive director role and not just going forward. Co-chair Tavares agreed and said they will consider that recommendation.

Co-chair Tavares recognized Mr. Sapphire, who announced his intention to raise the issue of Article V, Section 6 (Mental Capacity to Vote) at the June Commission meeting for additional consideration. In response, Mr. Gilbert expressed concern about how, procedurally, a report previously voted on could be brought back. He said he felt the entire issue had been fully discussed and the matter was closed. Mr. Sapphire said he recognized a potential procedural issue, and asked for the co-chairs to examine that question at the next meeting.

Co-chair Tavares called for public comment and asked if there were new business to come before the Commission and there was none.

Adjournment:

There being no further business to come before the Commission, the meeting adjourned at 1:53 p.m.

Approval:

The minutes of the May 11, 2017 meeting of the Ohio Constitutional Modernization Commission were approved at the June 8, 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