

## Special Edition:

# The Construction Conversation

## Ohio's Legislative, Administrative, and Judicial **Two-Way Newsletter**

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## How DOES a Bill Become Law?

**Overview.** "Laws are like sausages, it is better not to see them being made," claimed Otto von Bismarck (1815-1898), first imperial Chancellor of the German Empire.<sup>[i]</sup> Yet, the right to advocate to our American government is a two-century right found in the First

Amendment of the United States and Ohio Constitutions,<sup>[ii]</sup> no matter how messy.

Athens, Greece is recognized as the first historic democracy, where every citizen might exercise a direct vote on everything. Talk about chaos! Plato in his book the "Republic"<sup>[iii]</sup> disdained democracy, where voters choose only in their self-interest. When that fails, citizens vote to destroy (so as to get a second chance.) We see this dynamic every day in current voting at the polls and in the legislatures. Plato preferred an oligarchy of disinterested "scientists" (philosophers) to choose what is best for the people, a dictatorship in essence. No politics in that, right?

Today, the United States is a "representative democracy" with full discretion vested in elected officials only during their term of office, limited by separation of powers among the legislature, courts, and executive agencies. But, because of the historic beginning of slavery economics, the individual states remain the primary unit of government. The federal government only operates within the constraints of Constitutional authority expressly granted by the states, all other authority reserved locally to the people.

Former U.S. House Speaker Tip O'Neill (D, Massachusetts) maintained that, "All politics is local,"<sup>[iv]</sup> reflecting the power of local statehouse governance, and the variety of legal solutions across our nation.

Success in legislating involves building "consensus" among all affected participants. This differs from "compromise". The discussion process is critically important. Legislation enacted by cutting corners or slipping a provision into a lengthy bill seldom survives the passage of time. Those laws of longevity are interpreted by

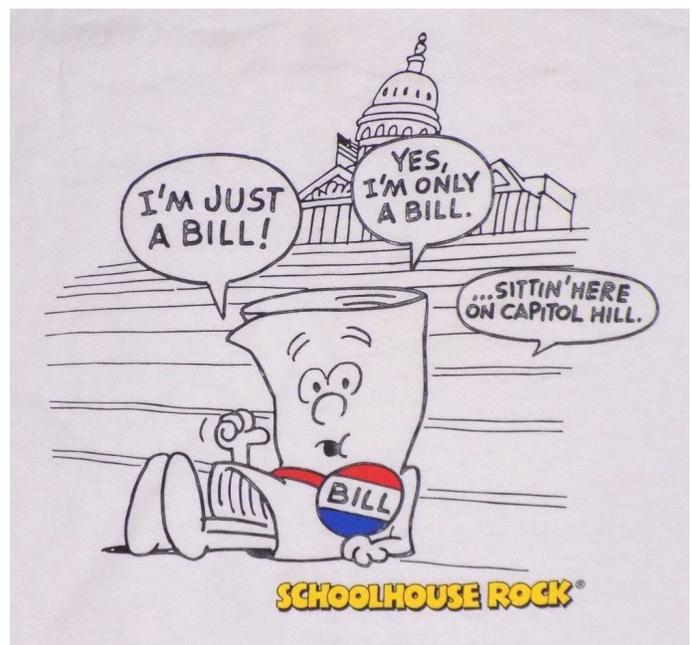
courts, amended by future legislators, and built upon by administrative action through executive agencies. In this manner, proper legislation is a slow and deliberate process, of many persons' ideas, and requiring patient work.

**Drafting a Proposed Law.** Imagine cooking a great dinner, but without choosing any ingredients. Imagine suing in court, but without writing anything for the judge to consider. Imagine wanting to turn your idea into a new statute, without drafting the provisions you want.

To argue in court for anyone other than oneself, the person requires a license as a lawyer, becoming an "officer of the court." There is no requirement or restriction for any person to draft a proposal for a new law.

The Legislative Service Commission is an agency of the Ohio General Assembly, charged with drafting a bill in the specific form necessary for introduction. Any legislator can request LSC to draft any idea into bill form. LSC drafting rules are as unique as the Civil Rules of Procedure in Ohio courts. And anyone can follow that recipe in the first instance, allowing LSC to finalize the bill for introduction.

Each sentence of a new law draws on two-hundred years of American legal precedent, including



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related laws and court case interpretations. Often a lawmaker might want to amend current law to reverse the result of a court's legal determination. To accomplish that, the wording requires precision as to the court's interpretation.

Words coupled together create a myriad of interpretations. Should the approach be in the nature of a prohibition or an affirmative authorization? Is the idea to create a general, philosophical standard, or to list discreet conditions for a public program funding?

Sometimes simple is the best solution. Look at the Constitution, and notice how succinctly the provisions provide for the entire concept and law.

A bill cannot contain more than one subject, to prevent "log-rolling" where a legislator has to vote for a bad law to avoid being perceived as voting against a necessary law. [v]

As a practical matter, here is how anyone might draft a bill. First, download a current bill into a new document. Then, cut-and-paste a current statute of the subject-matter at issue. Add additional sentences with an underline; strike undesired language with a strike-through (not deletion.) LSC will do the rest. Truly, to draft your idea into a bill does not require paying a professional.

Personal drafting of the bill controls the likely outcome from its birth through passage. The drafter becomes a necessary party for choices in amending the bill to meet other goals or concerns, just like the kitchen cook decides to add salt or pepper.

**Interested Parties.** Meeting with everyone concerned before pursuing legislation is the most important part of this process. Compromise is not the first concern; transparency is the immediate necessity, involving all as they wish to be involved. Sometimes they just want to say their peace, never to be heard from again. That's building consensus.

Inconsistently, often a proponent will introduce a bill without letting any affected party know. Instead, the proponent expects that interested party conversations will arise only after the bill is public. This turns the conversation into an adversarial contest, instead of a cooperative effort toward a mutual solution. No one likes surprises, creating instant opposition instead of inviting participation of an ally.

Consider all persons who might be positively or negatively affected by the new law, including the administrative agency designated to implement the law. Inviting other's ideas gains diversity of solutions, while uncovering support for passage. While this process takes time, it is the healthiest nature of democratic government.

**Legislator Sponsorship.** "My idea for this bill is so grand, that the entire General Assembly will unanimously pass it without delay!" Now for a reality break. Ohio elects 99 State Representatives and 33 Senators by Political Party Primary. Ohio legislators serve part-time; this is not a full-time job. Therefore, one is a firefighter, one is a design engineer, few are lawyers. Sixty percent are Republicans in the Ohio General Assembly today. Diversity of opinion on any bill is a certainty.

## "Personal drafting of the bill controls the likely outcome from its birth through passage."

Similarly, Ohio Supreme Court Justices are elected through partisan Party Primaries. Some represented injured parties who sue businesses; others defended those businesses. All read newspapers. The Justices' job is not to listen to witness testimony, but to confirm statewide policy based on existing law applied to each case scenario. Without doubt, this is the very essence of a political process (notwithstanding that judges wear black robes to present an appearance of neutrality.)

When advocating an idea, presenting a 15-minute argument to the Supreme Court, or talking for 2-minutes to a State Senator, the message must fit to that individual's background.

Therefore, choosing a sponsor is critical. If your idea requires funding, financial appropriations Constitutionally must begin in the House. During budget hearings, the Senate is not as busy. Is there such an urgency that both a Senator and a Representative separately might introduce two versions simultaneously? Which Political Party is in the majority (and holds the leadership) in each chamber? What Committee likely will hear the subject-matter, such that a Committee Member as sponsor might shepherd the new bill through that Committee? Is your idea local to one part of the State, such that it might appeal to regional legislators?

For all of what might seem confusing or hopeless, the political process in the legislature is remarkably predictable. Typically, less than 10% of bills introduced are passed and sent to the Governor for signature. So, an insider's trick is to find a recent bill similar to your new idea that passed. Profile the sponsors of that successful bill, review the committees and testimony, understand the timeline. Now, follow that path.

**Committee Hearings.** The legislature's real work is done in the Committee. After introduction, the Rules and Reference Committee consisting of each chamber's leadership assigns the bill to a Committee, typically reflecting the subject-matter of the bill.

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The idea of working through a Committee truly is an American invention. Prior to American independence, an advocate for legal change would go to “court”, visiting the king’s castle court yard, where the king and his ministers discussed policy. If the king rejected the idea, one could ask the church, which rendered decisions on canonical law based on equitable considerations notwithstanding the king’s law. Old coins of Europe reflect this duality with the king’s likeness on the obverse, and a Christian cross on the reverse. Obviously, the decisionmakers were limited to society’s elite. Today, every court in the United States applies both statutory law (the king’s law) and canonical equity (the church law.)

With American independence, no elites existed. So, local American leaders came together as equals “in congress” to resolve policy issues. To “congress” is to come together for action. This manner of decisional government is unique to our nation’s founding. Committee processes intentionally are slow and deliberate, based on our historic opposition to dictatorial mandates.

In 1775, our new country referred to themselves as the “United States of North America”. [vi] Quebec was part of North America, so its citizens called themselves “Americans” too. In 1775, Benedict Arnold led an unsuccessful attack on the City of Quebec. The plaque on the site of the battle downtown refers to the attack of the “Congressionalists” against the victorious Quebecois “Americans”.

## **"There are no rules of procedure limiting how one works with the Committee members to advocate the idea of a new law."**

There are no rules of procedure limiting how one works with the Committee members to advocate the idea of a new law. Advocacy tools typically include letter-writing, personal contact, and formal testimony. Never overlook those Committee members of the non-majority political party or who lack seniority. Regardless of background, each legislator has equal rights to question, comment, and vote.

The Senate and House write procedural rules each session, creating Standing Committees by subject-matter, and requiring that a new bill be considered at least three times before vote: Sponsor Testimony, Proponent Testimony, and Opponent Testimony. There is no limit on the number of additional hearings, on the number of witnesses, or on the duration of testimony by any witness.

As a practical matter, a witness should prepare an outline on letterhead of talking points, only. Since the Committee members can read the bill, and can read the testimony, a witness’ verbal comments should be short, not duplicate but highlight the main positions. Nor should interested parties bring too many witnesses who only repeat the same point. The Committee will accept written testimony without a verbal presentation.

Committee members then ask questions. A witness who reads or talks too long may not receive questions because there are other witnesses and bills to be heard, and Committee members do not want to prolong their own attendance at each meeting.

Constant follow-up to Committee members is helpful, particularly by local constituents in favor of the new legislation. This can be through correspondence or personal contact. Repeated involvement with local representatives builds a network of resources, which can pay off in many other ways for other ideas and projects.

**Bill Amendments.** To achieve consensus, the Committee will consider amendments to the bill as originally introduced. Legislators run for election to the legislature because they want to be of service to the community. They hope to pass legislation as a productive result. When opposition to a bill appears, it is natural for policymakers to work issues out.

With the immense volume of work, proponents of new legislation should meet separately with opponents, and work out a solution. The sponsoring legislator must approve any amendment, and so are appreciative when the parties resolve their differences. The Committee Chair decides whether to hold another hearing, and typically will await word from the sponsor that all differences are gone. A Committee Chair typically does not call for a vote of a bill only to vote it down. The Chair schedules a final hearing, the Committee considers and passes amendments, and the Committee votes the bill out of Committee for floor consideration.

Even without resolution, of opposition issues, the originating Committee and chamber may pass the bill out with a simple majority, and send it to the other chamber for three more Committee hearings. Here exposes a tactical flaw: the sponsor is not a member of the second chamber. Therefore, opponents enjoy an easier time of opposing controversial legislation in the second chamber, and routinely are working that second step long before the bill shows up. The proponents find themselves at an immediate disadvantage in the second phase, having failed to resolve the differences early.

**Passage.** Once a bill is favorably reported out of a

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Committee, the Rules and Reference Committee sets the bill for floor vote. All legislators can debate the bill on the floor, and offer amendments. However, typically the House Speaker and Senate President only bring the bill up for a floor vote with agreed-to amendments, if any.

The bill then moves to the second chamber, requiring three more hearings in an assigned Committee, and floor passage. Often the second chamber amends the bill, so that it is not the same as the bill passed by the first chamber. The amended bill then returns to the sponsoring chamber for another floor vote, which either accepts the amendments, or rejects the amendments and sends it to a Conference Committee.

The Conference Committee membership is bipartisan, appointed by respective leadership. Only those subjects in either version voted out are at issue. Once resolved, the bill returns to both chambers to adopt a final, amended bill.

**Governor's Signature or Veto.** After the General Assembly passes a bill, the Governor has ten days to sign or veto the bill. If the Governor takes no action, the bill becomes law without the Governor's signature.<sup>[vii]</sup>

Because this time is so short, the administration interprets the ten-day rule only to begin when the Governor requests the Ohio Secretary of State to transmit the bill to the Governor, often long after ten days.

If the Governor vetoes a bill, the legislature may override the veto with a three-fifths vote.

At the end of a two-year session, all legislation expires. If the ten-days runs past the expiration deadline without the Governor's signature, then effectively it is not enacted without the Governor's signature. This is known as a "pocket veto."

For appropriation legislation (budgets), the Ohio Governor enjoys a line-item veto, purportedly to balance the budget and to prevent "pork" projects from inclusion just to the benefit of a narrow constituency. However, the line-item veto is not limited to funding. The Governor often deletes substantive program language tied to the funding. The United State President does not enjoy a line-item veto over federal funding passed by Congress.

A bill becomes effective after 90-days, unless the General Assembly passes an emergency clause by a two-thirds vote (or an appropriation bill).<sup>[viii]</sup> This 90-day period allows for a citizens' referendum.

**Administrative Rulemaking.** Every executive agency affected by new legislation enjoys the power of administrative rulemaking, to clarify and to implement the provisions of the new statute. An

administrative rule is just as effective as the enabling statute, provided that the administrative rule cannot exceed the scope of authority in the statute.

An executive agency that establishes an operating procedure is not effective unless formally enacted in an administrative rule.<sup>[ix]</sup>

Therefore, a proponent of a new law must follow through with the administrative agency to write applicable rules for implementation of the new law. This is a critical step.

The process for rulemaking is administered by the Joint Committee on Agency Rule Review (JCARR). The process involves publication and hearings on the draft rule before final acceptance.

**Lobbyists.** It is fundamental to American democracy that no person need hire an expert to advocate for change in government. You do not need a lobbyist to propose legislation or to advocate for changes to law.

The basic service of a lobbyist is to offer experience of the governmental processes. A good lobbyist begins as a coach, to maximize the proponent's resources toward ultimate success.

Typically, a lobbyist will offer a network of relationships which can build upon the proponent's own network. This must be a cooperative relationship, not expecting the lobbyist to go it alone.

Because passage of new legislation takes time, hiring a lobbyist is a long-term process. It is unrealistic to hire a lobbyist for a short time, or only to dictate what the proponent expects as a result. A lobbyist needs to understand the proponent's background, history, issues, and goals, which takes time before ever beginning a legislative initiative.

It is entirely inappropriate to hire a lobbyist to sneak legislation through based on some hypothetical perception of an "inside track".

Most lobbyists charge a monthly retainer for a minimum period, given so many unknowns in the process. Significant time is required just working with the proponent before ever approaching the legislature. Success fees or contingency arrangements are not legal.<sup>[x]</sup>

**To PAC or Not PAC.** One often reads about political finance as a necessity since the beginning of organized governments in human history. Today, an organization active in legislative advocacy may create a Political Action Committee (PAC), to raise and to give funds for the political campaigns of legislators viewed as favorable to the organization's interests. A PAC then reports all activity for the public to review.

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PAC contributions are not “bribery”, but rather the exercise of First Amendment free speech.<sup>[xi]</sup> No amount given by a proponent is going to insure the passage of any legislation.

Rather, PAC contributions serve as a way to build on the proponent’s network of relationships. Legislators hold fundraisers, and a single-attendee contribution allows face-to-face (zoom?) communication. A nominal PAC contribution also expresses the proponent’s appreciation for the hard work a legislator does in helping the proponent’s community.

Under no circumstance is a PAC contribution a substitute for the detailed work necessary to draft new legislation and to advocate for passage. A PAC contribution properly managed only is incidental to a broader effort.

**Conclusion.** The good news is that legislative advocacy in American government works just as intended and explained to students in high school. Like any business effort, legislative advocacy takes time and effort. Participation in one’s government is very rewarding, essential to the American experience.

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**REFERENCES**

[i] See Wikipedia, Otto von Bismarck.

[ii] “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. Constitution.

“All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.” Ohio Constitution.

[iii] Authored circa 375 B.C., see Wikipedia “Republic”.

[iv] See “Man of the House, Life and Political Memoirs” by Tip O’Neill, 1987.

[v] Single Subject Rule, Ohio Constitution, Article II, Section 15(D).

[vi] See Continental Currency.

[vii] Ohio Constitution, Article II, Section 16.

[viii] Ohio Constitution, Article II, Paragraph 1d.

[ix] Pokornowski v Ohio State Racing Comm., 10thDist. Franklin, 2019-Ohio-4264; Farina v Ohio State Racing Comm., 10thDist. Franklin, Case No. 18AP-45, 2019-Ohio-3903; DelBianco v. Ohio State Racing Comm., 10thDist. Franklin, Case no. 01AP-395 (Oct. 16, 2001).

[x] See Ohio Lobbying Handbook, Joint Legislative Ethics Committee, Office of the Inspector General.

[xi] See Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), Wikipedia.