OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Bill of Rights and Voting Committee

Prof. Richard Saphire, Chair
Jeff Jacobson, Vice-chair

September 10, 2015

South Meeting Room B & C, 31st Floor
Riffe Center for Government and the Arts

OCMC Bill of Rights and Voting Committee

Chair	Prof. Richard Saphire
Vice-chair	Mr. Jeff Jacobson
	Rep. Ron Amstutz
	Ms. Karla Bell
	Rep. Kathleen Clyde
	Mr. Douglas Cole
	Hon. Patrick Fischer
	Mr. Edward Gilbert
	Sen. Bob Peterson
	Sen. Michael Skindell

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

BILL OF RIGHTS AND VOTING COMMITTEE

THURSDAY, SEPTEMBER 10, 2015
9:30 A.M.
SOUTH MEETING ROOMS B & C, 31ST FLOOR
RIFFE CENTER FOR GOVERNMENT AND THE ARTS
AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of June 11, 2015

  [Draft Minutes – attached]

IV. Reports and Recommendations

- Article V, Section 6 (Idiots or Insane Persons)
  - First Presentation
  - Public Comment
  - Discussion

  [Report and Recommendation – attached]

  [Recommendation of the Ohio Constitutional Revision Commission, dated March 15, 1975, regarding Article V, Section 6 (Idiots and Insane Persons) – attached]

V. Presentations

- None scheduled

VI. Committee Discussion

- Article V, Section 4 (Felon Disenfranchisement)

  The chair will lead continuing discussion regarding excluding from voting those convicted of a felony.

  [Memorandum by Hailey C. Akah, Legal Intern, titled "Summary of Written Material and Previous Presentations on Article V, Section 4 (Felon Disenfranchisement)" dated March 26, 2015 – attached]

- Article V, Section 1 (Who May Vote)

  The chair will lead discussion regarding the interest of the committee in amending Article V, Section 1 and what research or additional information committee members may wish to have provided to assist in making this determination.

VII. Next steps

- Committee discussion regarding the next steps it wishes to take in preparation for upcoming meetings.

  [Planning Worksheet – attached]

VIII. Old Business

IX. New Business

X. Public Comment

XI. Adjourn

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, JUNE 11, 2015

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order at 9:40 a.m.

Members Present:

A quorum was present with Chair Saphire, Vice-chair Jacobson, and committee members Amstutz, Bell, Clyde, Fischer, and Gilbert in attendance.

Approval of Minutes:

The committee approved the minutes of the April 9, 2015 meeting. Chair Saphire complimented the staff for the comprehensive, detailed minutes, as did committee member Karla Bell.

Reports and Recommendations

The committee heard a second reading of the reports and recommendations for Article I, Section 13 (Quartering of Troops) and Article I, Section 17 (No Hereditary Privileges).

Article I, Section 13 (Quartering of Troops)

Executive Director Steven C. Hollon outlined the background of Article I, Section 13, describing its history as a provision that prohibited the military from using private homes and businesses to house and provide for standing armies. Mr. Hollon said that the committee had concluded that there should be no change to Section 13, and so recommended that the section be retained in its present form. At the conclusion of the reading, Chair Saphire invited public comment. There being none, Vice-chair Jeff Jacobson moved to adopt the report and recommendation, which was seconded by Judge Patrick Fischer. The committee then voted unanimously to approve the report and recommendation for Article I, Section 13, which Mr. Hollon said would be forwarded to the Coordinating Committee for its approval.

Article I, Section 17 (No Hereditary Privileges)

Mr. Hollon then held a second reading of Article I, Section 17, which prohibits the awarding of hereditary privileges. He explained that, in the early days of the United States, founders were concerned about foreign influence and wanted to avoid the hierarchical systems of privilege and title that had been prevalent in Europe. Mr. Hollon indicated that the United States Constitution, as well as many state constitutions, includes similar prohibitions on hereditary emoluments. After explaining this background, Mr. Hollon indicated that the committee had concluded this section should be retained in its present form, and that this conclusion is reflected in this report and recommendation. At the conclusion of the reading, Chair Saphire invited public comment. There being none, Mr. Jacobson moved to adopt the report and recommendation, which was seconded by Judge Fischer. The committee then voted unanimously to approve the report and recommendation for Article I, Section 17, which Mr. Hollon said would be forwarded to the Coordinating Committee for its approval.

Committee Discussion:

Article V, Section 6 (Idiots and Insane Persons)

Chair Saphire then directed the committee's attention to the next item on the agenda, which was further discussion of possible recommended changes to Article V, Section 6, disenfranchisement of "idiots and insane persons."

Referencing a memorandum by Mr. Hollon, Chair Saphire indicated that this was the fifth or sixth meeting in which the committee has devoted significant attention to this issue, and that the committee had held various discussions about how to change the provision. He added the committee has had the benefit of at least three comprehensive memos by staff on this issue, in which were offered proposals and counter-proposals for change.

Mr. Hollon then reviewed his memorandum with the committee, indicating that the memo was staff's attempt to distill the conversation that occurred during the committee's last meeting, by diagramming options for phrases to replace the current "idiots and insane persons" language. Mr. Hollon said these choices boiled down to whether the committee wants an adjudication requirement, how a lack of mental ability should be described, whether to indicate such a person "lacks the capacity to vote" or, alternately, "lacks the capacity to understand the act of voting," and whether a proposed provision would limit such a person from voting, or from being entitled to the privileges of an elector, during the time of their incapacity. Chair Saphire added that the committee also might consider whether the act of voting ought to be described as a privilege or a right, a question that Mr. Hollon indicated also had been mentioned in the memorandum.

Chair Saphire directed the committee to the first question, which was about adjudication, giving a brief summary of members' comments about that issue at the previous meeting. He identified committee member Doug Cole as opining that an express mention of adjudication is not required. Chair Saphire said committee member Sen. Mike Skindell had expressed his opinion that adjudication should be required before denying the right to vote, which Chair Saphire said was his position as well. He said Mr. Jacobson was against including an express requirement of

adjudication, with committee member Judge Fischer advocating for the approach taken by South Carolina, which doesn't specify adjudication. Chair Saphire said he was not sure of the view of committee member Representative Ron Amstutz, who then commented that his position was that he had been trying to bridge the gap between differing opinions on the question of adjudication. Chair Saphire said that the committee needs to determine whether adjudication is required. Ms. Bell then asked if the committee could take a straw vote to see if there is support for requiring an express reference to adjudication.

Ms. Bell said she wants to be sure there is a procedure in place that includes constitutional safeguards, and that this would include adjudication in some form.

Mr. Jacobson said he has several concerns about expressly mentioning adjudication. He said he agrees there is difficulty in the prospect of the state taking away a right, but that there is a long, complicated history with the activities of poll workers and their need to be able to make determinations about the capacity of an individual to cast a vote. He said including an adjudication requirement is impractical, and, if due process is required, then that is what courts are for. He said if the committee's recommended provision is silent on that issue, it does not affect a requirement that there be due process. He said, "just because we don't say it doesn't mean it won't be done."

Ms. Bell disagreed with this position. Mr. Jacobson continued that he doesn't think there has been a general feeling that people have been unfairly deprived.

Chair Saphire said this issue is surreal because this issue just doesn't come up. He said he agrees with Mr. Jacobson that the constitutional issue is kicked down the road, and that courts will have to decide if that person was given due process. Chair Saphire said he doesn't think the absence of reference makes it unconstitutional but it does make a difference because it allocates the presumption of who has the responsibility to do what. He said the burden then goes on the individual rather than the person who wants to prevent their voting. Chair Saphire said the burden should be on the state before the person is disenfranchised, adding that, at least symbolically, if the right to vote is important then a person should not be deprived until the state meets that burden.

Mr. Jacobson said he thinks this would be unwieldy in practice. He said he doesn't discount the principle behind it, but that it is a solution in search of a problem. He said if this is a problem, which he doesn't think it is, the committee would be advocating a process that would add to the burden of the court system. He said such a provision would require asking boards of elections or poll workers to scour voting lists in advance of an election in order to come up with a list of incompetent people. Chair Saphire said he disagrees that would be a burden.

Committee member Edward Gilbert said "voting is a right, period." He said the committee should take the offensive language out of Section 6, and that his preference would be for there to be no express restriction on the right to vote for those having a mental incapacity. But, he added, if there is to be a restriction, then the provision must say something about due process or it is not fair to the citizen. Mr. Gilbert said if the committee doesn't repeal the entire section, then there must be a reference to adjudication.

Rep. Amstutz said common sense suggests there will be a range of situations that are not difficult where two poll workers are in a position to make a decision together without court involvement. But, he added, there will be hard cases where there will be different opinions between poll workers, or some other situation producing a conflict, in which case there needs to be a reasonable adjudication process.

Ms. Bell said the idea that poll workers are empowered to decide who looks like they should vote is terrifying to her. She said there is nothing in the Revised Code right now that allows someone to bring an action to determine whether someone is competent to vote. She said, although there is a procedure, the hearing they hold doesn't meet due process requirements. She said the system is a mess, and there is no coherent law. She speculated that may be why there is a lack of case law on that issue. She said she is not sure it is persuasive that there is no apparent evidence of a problem.

Judge Fischer commented that requiring a prior adjudication would create a severe problem. He said it is never clear who will show up at the polls or ask for a ballot. He said it would be necessary to scour the voting rolls and decide who is competent ahead of time. He said that the legislature has not provided a procedure to bring these actions, so someone must bring a mandamus action, but then there is no right of direct appeal. He said if the committee wants to prevent voting because of a lack of capacity, then there needs to be a procedure, but that it is the legislature's job to provide specific procedures. Judge Fischer said the idea of requiring a prior adjudication would create a problem in the courts. He said the boards of elections do clean up the rolls every other year which is when this would show up.

Mr. Gilbert asked: "doesn't that cause a real problem?" He added that, with medication, some people would be able to vote. He said this is not a set system where they could even adjudicate it because mental capacity could be a changing condition.

Judge Fischer said he agrees there is a problem with the provision, but, regardless, it should be a self-executing provision, without expressing a need for an adjudication.

Ms. Bell commented regarding the report of the Constitutional Revision Commission in the 1970s, indicating that the best course of action would be to delegate to the legislature to determine the appropriate procedure because the details are too cumbersome. Judge Fischer agreed, saying the committee should express a standard and let the General Assembly sort it out.

Representative Kathleen Clyde said she agrees with requiring adjudication, saying she has been a poll worker and hasn't seen a problem, but this is an important right that should not be removed lightly. There needs to be a procedure for reviewing the evidence and making a sound decision about whether a person can vote. She added that the voter makes the decision about his or her vote, not the poll workers. She said she likes the idea of including an adjudication clause.

Mr. Jacobson said he would draw a distinction between adjudication and due process, noting that sometimes an administrative action can be enough. He said there are non-judicial procedures that can be followed if there is a problem. He said requiring adjudication could also be a

problem for absentee ballots where there isn't face-to-face contact. The requirement would be "a disaster" if it meant the state had to bring an action against a whole class of people.

Chair Saphire said he doesn't think Mr. Jacobson's described scenario is accurate. Mr. Jacobson said a provisional ballot would handle it, and that nobody needs to adjudicate it on election day.

Chair Saphire then polled the committee on whether it would vote to include an adjudication requirement in the proposed provision. He said, for purposes of the minutes, a straw vote on the question of adjudication was four to three to include an adjudication requirement prior to disenfranchisement. However, it was noted that some members of the committee were absent and so unable to register their positions on the question.

Chair Saphire then directed the committee to the issue of whether a proposed provision should refer to individuals as "lacking mental capacity" or "being mentally incompetent."

Ms. Bell said there is a statutory definition of "competent" and "mentally incompetent," as being, in part, any person who is so mentally impaired that he is incapable of taking proper care of self or property. Chair Saphire said his sense from Michael Kirkman, executive director of Disability Rights Ohio, is that the reference should be to a lack of mental capacity. Mr. Jacobson said there may be consensus on that question but he is reluctant to agree until he sees the proposed provision in its entirety.

Chair Saphire then directed the committee to the question of whether the proposed provision should refer simply to voting or to "understand the act of voting." He said if the purpose is to disenfranchise as a result of a lack of mental capacity, then the incapacity has to be tailored to voting. Mr. Jacobson said he is worried that using the phrase "understand the act of voting" signals that the committee would be creating an intentional difference. He said, if that is the recommendation, judges might "read more than we intend into it or more than they need to. If we just say 'vote', it allows jurisprudence to develop better. There are implications we don't necessarily mean to get at."

Mr. Gilbert said he would agree with that opinion, and Chair Saphire and Ms. Bell also said they agreed. Chair Saphire added that a court will ultimately determine whether the person has the capacity. Judge Fischer said he would go with using the plain reference to "voting," saying it would result in less litigation. Chair Saphire summarized the consensus of committee members as being that the phrase ought to be "mental incapacity to vote."

Chair Saphire then directed the committee to the question of whether the phrase should read "act of voting" or "privileges of an elector." Mr. Jacobson noted there are two issues in this because "voting" and "privileges of an elector" are not the same thing. He continued, saying there is also a discussion to be had about the concept of "right" versus "privilege." He said it is a mistake to limit this provision to a right to cast a vote because it invites other questions, and because the concept of "privileges of an elector" is a wider concept than just voting.

Chair Saphire noted that Article V, Section 4 says "exclude from the privilege of voting." Mr. Jacobson said the committee should harmonize both concepts, and that the language used ought to extend to all opportunities a voter has to participate in the democratic process.

Ms. Bell suggested an alternative that might satisfy both sides, such as using the phrase "right to vote and privileges of an elector." Mr. Jacobson said he would want reinforcement from a legal authority on that, but that using that phrase would relieve the concern about whether the committee is signaling whether something is a right or a privilege. Rep. Amstutz said he might be able to go along with that, and suggested another approach might be to use the word "functions" instead of "right" or "privilege."

Mr. Gilbert asked whether anyone thinks voting is a privilege and not a right, emphasizing his view that voting is a right. Mr. Jacobson said there is a history of a dispute regarding rights and privileges, with some people trying to classify things as rights when they are not. He said "we don't want to wade into that controversy."

Rep. Clyde said the option of stating both "right to vote" and "privileges of an elector" does not respond to the concerns she has. She also has issues about vagueness if the phrase reads "or." She said there is no gray area about voting being a right. Ms. Bell said her proposal was that the phrase use the word "and" rather than "either/or." Rep. Clyde said that is still a gray area, and she remains uncomfortable with using both phrases in the provision. Mr. Jacobson said Rep. Clyde's position means the committee would be unable to reach a consensus on that issue.

Chair Saphire suggested the committee take a straw vote about whether to include language that describes it as "right to vote and privileges of an elector." Mr. Gilbert said "it is a right, period." Mr. Jacobson said adding "privileges of an elector" doesn't change that.

Chair Saphire asked whether the concern is alleviated by going back to Article V, Section 1, which uses the word "entitled." He said "entitled" is the language of "right" not "privilege." Mr. Jacobson said the word "privilege of an elector" has not been interpreted that way, and that focusing on the word "entitled" could make a problem where none exists. He suggested the word "prerogative" could be substituted for "entitlement."

Judge Fischer said Section 1 makes a distinction about the right to vote which is inherent. He said it describes it as the "qualifications of an elector" and that the person is entitled to vote at all elections. He said saying a right to vote doesn't encompass privileges of elector; it is the other way around, meaning that "privileges of an elector" encompasses other activities. Chair Saphire pointed out that there was a difference in the 1960s between a privilege and a right. Mr. Jacobson said the committee should mention both. Judge Fischer said there is a difference and that the committee should understand the difference.

Ms. Bell asked whether her suggestion of saying "right to vote, and privileges of an elector" could satisfy committee members' concerns. Mr. Gilbert said he likes that option. Ms. Bell then shared relevant portions of the record of the activities of the 1970s Constitutional Revision Commission with the committee so that it could compare that commission's recommended

language. She asked that staff send a copy of portions of those proceedings to the committee for its consideration prior to the next meeting.

The committee then turned to new business. Judge Fischer suggested that an idea he had proposed about a constitutional provision that would create a right to internet privacy might be given more immediate attention. He said he envisions an amendment that would balance the need for public safety and the right to privacy. Chair Saphire agreed that the privacy suggestion deals with an important subject, and originally was contemplated as being on the committee's agenda at some point in the future because it was perceived as being potentially complicated and controversial. Chair Saphire said the committee would be discussing the agenda for future meetings at its next meeting and could determine when to address Judge Fischer's suggestion at that time. Ms. Bell complimented staff and noted that the committee is now making good progress because of the leadership provided by Mr. Hollon.

Adjournment:

With no further business, the committee adjourned.

Approval:

These minutes of the June 11, 2015 meeting of the Bill of Rights and Voting Committee were approved at the September 10, 2015 meeting of the committee.

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Richard B. Saphire, Chair

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Jeff Jacobson, Vice-chair

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE
BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION
ARTICLE V, SECTION 6

IDIOTS OR INSANE PERSONS

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article V, Section 6 of the Ohio Constitution concerning the disenfranchisement of mentally incapacitated persons. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

Based on the following and for the reasons stated herein, the committee recommends that Article V, Section 6 in its current form be repealed, and that a new section be adopted as follows:

> *No person who [has been adjudicated to lack] [lacks] the mental capacity to vote shall have the right to vote and the privileges of an elector during the time of incapacity.*

Background

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 6 reads as follows:

> No idiot, or insane person, shall be entitled to the privileges of an elector.

The clear purpose of the provision is to disqualify from voting persons who are mentally incapacitated. 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.[1]

When this provision was adopted as part of the 1851 Ohio Constitution, words such as "idiot," "lunatic," and "feebleminded," were commonly used to describe persons of diminished mental capacity. In modern times, however, the descriptors "idiot" and "insane person" have taken on a pejorative meaning and are not favored. Throughout the 1800s, an "idiot" was simply a person with diminished mental capacity, what later was termed "mental retardation," and what is now referred to as being "developmentally disabled." Further, the word "idiot" conveyed that it was a permanent state of mental incapacity, possibly congenital, as opposed to "mania" "dementia," or "insanity," which signified potentially transient or temporary conditions.[2] Today, the word "idiot" has become an insult, suggesting someone who is willfully foolish or uninformed.[3]

The use of both the word "idiot" and the phrase "insane person" in Article V, Section 6 suggests that the privileges of an elector were to be denied both to persons with permanently diminished mental capacity, as well as to persons whose condition is or could be temporary.

In one of the few cases discussing the meaning and origin of the words "idiot" and "insane persons" in this provision, the Marion County Common Pleas Court in 1968 observed:

> From my review of legal literature going back to 1800 it seems apparent that the common definition of the word "idiot," as understood in 1851 when our present Constitution was in the main adopted, meant that it refers to a person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. I am unable to find anything indicating any real change in this definition to this date. * * *
>
> The words "insane person," however, most commonly then as well as now, refer to a person who has suffered such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life. It seems quite apparent that some persons who once had normal reason and sense faculties become permanently insane. Others lose their normal perception and reason for relatively short periods of time such as day, a week, or a month or two, and then regain their normal condition for either their entire life or for some lesser indeterminate period. During these lucid intervals such persons commonly exercise every characteristic of normality associated with all those persons who have never, even for a short period, been deprived of their normal reasoning faculties.

Baker v. Keller, 15 Ohio Misc. 215, 229, 237 N.E.2d 629, 638 (Marion CP Ct. 1968).

Amendments, Proposed Amendments, and Other Review

Article V, Section 6 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Elections and Suffrage Committee ("E&S Committee") of the Ohio Constitutional Revision Commission ("1970s Commission") discussed whether to amend the

provision in order to remove the "idiot" and "insane person" references. The E&S Committee's discussion centered both on the words themselves, which were recognized as outdated and potentially offensive, as well as the provision's vagueness:

> The present provision concerning mental illness and voting is unsatisfactory for several reasons. First, the constitutional language is simply a direct prohibition. The General Assembly is not expressly given the power to determine which mental conditions are such that a person should not vote, nor to establish procedures for determining who does or who does not fall into the categories. Statutory authority for the courts to deny the vote to involuntarily committed patients is nevertheless provided in [Ohio Revised Code] section 5122.15, dealing with legal incompetency. But this provision carries out neither the letter nor the spirit of the constitutional prohibition. The law now tolerates the voting of some persons who may in fact be mentally incompetent. A voluntary patient who does not request a hearing before the probate court retains his civil rights, among them the right to vote. The loss of the right to vote is based upon the idea that a person in need of indeterminate hospitalization is also legally incompetent. But there are other persons whose right to vote may be challenged on the basis of insanity, either at the polls or in the case of contested election results. In these instances, there are no provisions resolving how hearings must be conducted, by whom, or even the crucial question of whether medical evidence shall be required. The lack of procedure for determining who is "insane" or an "idiot" could allow persons whose opinions are unpopular or whose lifestyles are disapproved to be challenged at the polls, and they may lose their right to vote without the presentation of any medical evidence whatsoever.[4]

The E&S Committee acknowledged that "large scale and possibly arbitrary exclusion from voting are a greater danger to the democratic process than including some who may be mentally incompetent to vote." The E&S Committee concluded that "a person should not be denied the right to vote because he is 'incompetent,' but only if he is incompetent for the purpose of voting," ultimately recommending a revision that would exclude from the franchise persons who are "mentally incompetent for the purpose of voting."[5] The 1970s Commission voted to submit this recommendation to the General Assembly, specifically proposing repeal of the section and replacing it with a new Section 5 that would read:

> The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency.[6]

For reasons that are not clear, the General Assembly did not present this issue to the voters.

Litigation Involving the Provision

Only two Ohio Supreme Court cases refer to this provision. An early case, *Sinks v. Reese,* 19 Ohio St. 306 (1869), cited it to support a holding that some votes by mentally-impaired residents of an asylum could be disqualified; however, the court counted a vote by a resident who was "greatly enfeebled by age," because "the reverence which is due to 'the hoary head' ought to have left his vote uncontested." The court also mentioned the provision in *State ex rel. Melvin v. Sweeney, Secy. of State,* 154 Ohio St. 223, 94 N.E.2d 785 (1950), in which the court held constitutional a statutory provision that required county boards of elections to provide ballot assistance to physically disabled voters, but prohibited them from providing similar assistance to illiterate voters.

The provision also was cited in the context of an election in which a person of diminished mental capacity was alleged to have been improperly allowed to vote. *In re South Charleston Election Contest,* 1905 Ohio Misc. LEXIS 191, 3 Ohio N.P. (n.s.) 373 (Clark County Probate Court, 1905), involved a contested election relating to the sale of liquor in which one voter was deemed by the court to be mentally incompetent for the purpose of voting, with the result that the election was so close as to be declared null and void.

Baker v. Keller, supra, a common pleas case, cited Article V, Section 6 in relation to its conclusion that a litigant could not base a motion for new trial on the allegation that a mentally ill juror should have been disqualified where there had been no adjudication of incompetence.

More recently, a Maine federal court decision has been relied on in other jurisdictions for its holding that imposition of a guardianship for mental health reasons does not equate with mental incapacity for purposes of voting. *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001), concluded that federal equal protection and due process guarantees require a specific finding that an individual is mentally incompetent for the purpose of voting before disqualification can occur. *Doe v. Rowe* was cited in *Bell v. Marinko,* 235 F. Supp.2d 772 (N.D. Ohio 2002), for the proposition that, because voting is a fundamental right, disenfranchisement based on residency requirements must be predicated on notice and an opportunity to be heard.

Presentations and Resources Considered

Michael Kirkman, Disability Rights Ohio

On December 11, 2014, Michael Kirkman, executive director of Disability Rights Ohio, a legal advocacy and rights protection organization, presented to the committee on the topic of voting rights for the disabled. Mr. Kirkman attended the committee meeting again on February 12, 2015, to provide additional assistance as the committee discussed potential changes to Article V, Section 6.

According to Mr. Kirkman, society's perception of mental disability has changed since 1851, when neglect, isolation, and segregation were typical responses. Social reform after the Civil War helped create institutions for housing and treating the mentally ill, but there was little

improvement in societal views of mental illness. Mr. Kirkman noted that, even as medical and psychiatric knowledge expanded, the mentally ill were still living in deplorable conditions and were sometimes sterilized against their will. By the 1950s, there was a growing awareness that the disabled should be afforded greater rights, with the recognition that due process requirements must be met before their personal liberties and fundamental rights could be constrained. Mr. Kirkman observed that Article V, Section 1 gives broad basic eligibility requirements for being an Ohio voter, but Article V, Section 6 constitutes the only categorical exception in that it automatically disenfranchises people with mental disabilities. Mr. Kirkman further noted the difficulty in defining "mental incapacity for the purpose of voting," commenting that mental capacity is not fixed in time or static in relation to every situation, and that even mental health experts have difficulty defining the concept. According to Mr. Kirkman, the better practice is to make an individualized determination of decisional capacity in the specific context in which it is challenged.

Mr. Kirkman emphasized the view of the disability community that full participation in the political process is essential, and for this reason he advocated removal of Article V, Section 6, without replacement. Alternately, if Article V, Section 6 cannot be entirely eliminated, Mr. Kirkman recommended the provision should be phrased as an affirmative statement of non-discrimination, such as "No person otherwise qualified to be an elector shall be denied any of the rights or privileges of an elector because of a disability." He also stated that the self-enabling aspect of the current provision should be changed to reflect that the General Assembly has the authority to enact laws providing due process protection for persons whose capacity to vote is subject to challenge.

In his second appearance before the committee on February 12, 2015, Mr. Kirkman commented that the phrase "mentally incompetent to vote" is not currently favored when drafting legislative enactments. Instead, he said the mental health community favors expressing the concept as a lack of mental "capacity," or as being "mentally incapacitated." Mr. Kirkman noted that the word "incompetent" is a purely legal term used in guardianship and criminal codes, while "mental incapacity" more specifically describes the mental state that would affect whether a person could vote.

Research Materials

The committee benefited from several memoranda that described relevant research, as well as posed questions for consideration and suggested possible changes to the section.

Staff research presented to the committee indicates that voting is a fundamental right that the United States Supreme Court calls the "essence of a democratic society." *Reynolds v. Sims*, 377 U.S. 553, 555 (1964). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). In addition, disenfranchisement is considered to be a denial of a fundamental liberty, subject to basic due process protections that ensure fundamental fairness. *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 24 (1981). In reviewing provisions affecting the

exercise of the elective franchise, courts apply the balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), by which the individual's interest in participating in the democratic process is weighed against the state's interest in ensuring that those who vote understand the act of voting. *Dunn v. Blumstein*, 405 U.S. 330 (1972). Because voting is a fundamental right, the high court has held a state's interest in limiting its exercise must be compelling, and the limitations themselves must be narrowly tailored to meet that compelling interest. *See, e.g., Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008).[7]

The committee also reviewed other state constitutions that address disenfranchisement of the mentally impaired. Although nine states have no constitutional provision relating to a voter's mental status, the remainder contain a limitation on voting rights for persons experiencing mental impairment, with three of those states having a provision that grants discretion to the state legislature to determine whether to disenfranchise. Significantly, only four states, Ohio, Kentucky, Mississippi, and New Mexico, retain the descriptors "idiots" and "insane persons," with other states referring to such persons as being mentally incompetent, mentally incapacitated, or as having a mental disability.

Additional Resources

Research that assisted the Committee's consideration of this issue included Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 McGeorge L.Rev. 931 (2007); James T. McHugh, *Idiots and Insane Persons: Electoral Exclusion and Democratic Values Within the Ohio Constitution*, 76 Albany L.Rev. 2189 (2013); Kay Schriner, *The Competence Line in American Suffrage Law: A Political Analysis*, Disability Studies Quarterly, Vol. 22, No. 2, page 61; Kay Schriner & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 Ohio St. L.J. 481 (2001).

Discussion and Consideration

In reviewing possible changes to Article V, Section 6, the committee first considered whether to simply replace the offensive references with more appropriate language, leaving the rest of the section intact. However, some members emphasized the importance of additionally stating that any disenfranchisement due to lack of mental capacity must only last during the period of incapacity.

The committee also discussed whether to retain the section's "self-executing" status, or whether to include language that would specifically authorize or require the General Assembly to create laws governing the disenfranchisement of mentally incapacitated persons. On this question, some members asserted that expressly requiring or empowering the General Assembly to act was unnecessary because this legislative authority is inherent. It was the consensus of the committee that expressly requiring or enabling action by the General Assembly is unnecessary, and so the committee concluded that the section need not include such language.

The committee also addressed what would be the appropriate descriptor for persons whose mental disability would disqualify them from voting. On this question, the committee found persuasive Michael Kirkman's assertion that the preferred modern reference is to an individual's "incapacity," rather than to his or her "incompetence." Members of the committee agreed that "mental incapacity" would be an acceptable phrase to substitute for "idiots" and "insane persons." Combined with the committee's consensus that disenfranchisement should occur only during the time of the individual's incapacity, allowing voting to be restored to persons who recover their mental capacity, the committee concluded that the appropriate phrase should be "mental incapacity to vote."

The committee also considered the significance of the use of the phrase "privileges of an elector" in the section, as opposed to using the phrase "privileges of a voter" or "rights of a voter." One committee member noted that "privileges of an elector" would not indicate merely voting, but would include activities such as running for public office or signing a petition. Further discussion centered on the symbolic or other differences between using the word "privilege" and using the word "right," as well as the inclusion of the word "entitled" in the section. Some committee members expressed a strong preference for having the new section refer to voting as a "right," a word choice they believed would signify the importance of the act of voting, and emphasize the constitution's protection of the individual's voting prerogative. Other committee members were reluctant to change the reference to "privileges of an elector," because of the possibility that the original meaning and application of that phrase would be lost. Several members acknowledged that the "privilege versus right" controversy was larger than could be thoroughly addressed or satisfactorily resolved by the committee, and that, in any case, its resolution was not necessary to revising the section.

As a compromise, the committee agreed to recommend that the phrase read "right to vote *and* privileges of an elector," so as to embrace both the concept of voting as a right and the concept, articulated in the original language of the section, of an "elector" having privileges beyond those of simply voting.

Debate arose over whether to include an explicit reference to judicial review, due process, or adjudication, as a prerequisite to disenfranchisement. Some committee members said they were inclined to exclude the reference based on their view that due process must be satisfied regardless of whether the provision expressly mentions the need for it. These committee members indicated that a constitutional provision that expressly requires adjudication could complicate or interfere with current procedures for ascertaining whether an individual is capable of voting. Other committee members said requiring adjudication would emphasize that the burden is on the state to prove that an individual's mental state disqualifies him or her from voting, rather than the burden being on the individual to prove sufficient mental capacity to vote. Some members sought to include language that would emphasize that voting is a right that should not be removed absent adjudication. Those members expressed the view that a constitutional provision that doesn't express this concept is not fair to the citizen.

On taking a straw poll, committee members realized they were evenly divided between those who wanted to include a reference to adjudication, and those who did not. Acknowledging

persuasive arguments on either side of the issue, and not wishing to delay the process of modifying the section by further discussion of a question on which the committee was unlikely to reach a consensus, the committee concluded that its recommendation could focus on substituting the references to "idiots" and "insane persons" with the adjective phrase "lacks the mental capacity to vote." The committee further concluded that the provision could recognize both the "right to vote" and the "privileges of an elector," and that the disenfranchisement would only be during the period of incapacity.

Because the committee failed to reach a consensus about adjudication, it concluded that the decision of whether to expressly require an adjudication could be left to the full Commission. Alternately, the Commission could forward the committee's recommendation to the General Assembly without resolving the question, allowing the issue to be worked out in the legislative process.

The Bill of Rights and Voting Committee concluded that the considerations and interests supporting the change proposed by the 1970s Commission remain relevant today. Specifically, current knowledge regarding mental illness and cognitive impairment, as well as modern distaste for adjectives like "idiot," continue to provide justification for amending this provision.[8]

Additionally, the current provision does not require that the subject individual be mentally incapacitated for the purposes of voting. The committee concluded that, without this specific element, the current provision lacks proper protection for persons asserted to be incapable of voting due to mental disability.

In addition to these considerations, the committee acknowledged the view that voting is a right, and that an individual possesses the "privileges of an elector," which may include the ability to sign petitions or run for public office. Thus, the committee desired the new provision to signify that it is both of these potentially separate rights or interests that are infringed when a person is determined to lack mental capacity for the purpose of voting.

Conclusion

Based on these considerations, the Bill of Rights and Voting Committee recommends that Article V, Section 6 be repealed and replaced with the following new provision:

> *No person who [has been adjudicated to lack] [lacks] the mental capacity to vote shall have the right to vote and the privileges of an elector during the time of incapacity.*

The recommended amendment serves the goal of:

- Removing all outdated or pejorative references to mentally incapacitated persons;
- Specifying that the disenfranchisement only applies to the period of incapacity; and
- Requiring that only mental incapacity *for the purposes of voting* would result in disenfranchisement.

Date Adopted

After considering this report and recommendation on September 10, 2015, and _____, the Bill of Rights and Voting Committee voted to adopt this report and recommendation on _____.

Endnotes

[1] Article V, Section 1 provides:

> Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.

[2] Although the discipline of psychology was in its infancy in the 1800s, the Ohio Supreme Court's description of insanity in 1843 reflects a surprisingly modern view:

> *** [I]t should be remembered that "insanity is a disease of the mind, which assumes as many and various forms as there are shades of difference in the human character. It exists in all imaginable varieties, and in such a manner as to render futile any attempt to give a classification of its numerous grades and degrees that would be of much service, or, under any circumstances, safe to be relied upon in judicial investigations. It is an undoubted fact, that, in determining a question of lunacy, the common sense of mankind must ultimately be relied on, and, in the decision, much assistance cannot be derived from metaphysical speculations, although a general knowledge of the faculties of the human mind, and their mode of operations, will be of great service in leading to correct conclusions." *Clark v. State*, 12 Ohio 483 (Ohio 1843), quoting Shelford on Lunacy, 38.

A full citation to "Shelford on Lunacy" is Shelford, Leonard, *A Practical Treatise on The Law Concerning Lunatics, Idiots, and Persons of Unsound Mind, with an Appendix of The Statutes of England, Ireland, and Scotland, Relating to Such Persons and Precedents and Bills of Costs,"* London: Wm. McDowall. 1833. Print.

[3] *See* Merriam Webster Dictionary, http://www.merriam-webster.com/dictionary/idiot (1. *usually offensive:* a person affected with extreme mental retardation; 2. a foolish or stupid person). For further discussion of nineteenth century scientific and political views on the subject of disenfranchisement of the mentally incompetent, see Schriner, Kay, *The Competence Line in American Suffrage Law: A Political Analysis*, Disability Studies Quarterly, Vol. 22, No. 2, page 61; and Schriner, Kay & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 Ohio St. L.J. 481 (2001).

[4] Ohio Constitutional Revision Commission (1970-77), Proceedings Research, Volume 5, Elections and Suffrage Committee Recommendations, p. 2515. Print. Available at http://www.lsc.ohio.gov/ocrc/v5%20pgs%202195-2601%20elections-suffrage%202602-2743%20local%20govt.pdf, accessed July 6, 2015.

[5] *Id.* at 2516.

[6] Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Constitution, Part 7, Elections and Suffrage, pp. 23-25. Print. 15 March 1975. Available at: http://www.lsc.ohio.gov/ocrc/recommendations%20pt7%20elections%20and%20suffrage.pdf, accessed July 6, 2015.

[7] A discussion of Due Process and Equal Protection jurisprudence related to state constitutional provisions that disenfranchise the mentally impaired may be found in Bindel, Jennifer A., *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 N.Y.U. Ann. Surv. Am. L. 87 (2009).

[8] Since the 1970s, the General Assembly has undertaken efforts to purge the Ohio Revised Code of outdated or pejorative references to persons having diminished mental capacity, and to protect the civil rights of persons subject to guardianships. Thus, Am. Sub. H.B. 53, introduced and passed by the 127th General Assembly, removed all statutory references to "lunatic," "idiot," "imbecile," "drunkard," "deaf and dumb," and "insane," in 29 sections of the Revised Code, replacing them, where necessary, with more modern references.

STATE OF OHIO

OHIO CONSTITUTIONAL REVISION COMMISSION

Recommendations for Amendments to the Ohio Constitution

PART 7

ELECTIONS AND SUFFRAGE

March 15, 1975

Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

whelmed by the collective vote of military personnel, and to protect the franchise from infiltration by transients. The Court rejected this reasoning saying that "Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." The United States Supreme Court, in *Evans v. Cornman*, 389 U.S. 49, 90 S. Ct. 1752 (1970), held that such restrictions violated the Fourteenth Amendment equal protection clause. In 1973, a United States District Court declared Section 5 of Article V of the Ohio Constitution unconstitutional insofar as it denies a person the right to register because he lives on the grounds of a federal enclave (*Stencel v. Brown*, U.S.D.C., Southern District of Ohio, #72-331).

Rationale for Change

The Commission believes this language should be removed from the Constitution because it is unconstitutional and because the Commission agrees with the principle of an expanded franchise.

ARTICLE V

Section 6

Present Constitution

Section 6. No idiot, or insane person, shall be entitled to the privileges of an elector.

Commission Recommendation

Repeal and enact new section 5:
Section 5. The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency.

Commission Recommendation

The Commission recommends the repeal of Section 6, and enactment of a new section 5 as follows:

Section 5. THE GENERAL ASSEMBLY SHALL HAVE POWER TO DENY THE PRIVILEGES OF AN ELECTOR TO ANY PERSON ADJUDICATED MENTALLY INCOMPETENT FOR THE PURPOSE OF VOTING ONLY DURING THE PERIOD OF SUCH INCOMPETENCY.

History and Background of Section

The Ohio Constitution of 1851 contained a provision disfranchising idiots and insane persons, who were not denied the vote in the 1802 Constitution. The language of section 6, "No idiot, or insane person, shall be entitled to the privileges of an elector", is self-executing, requiring no action by the General Assembly to implement the prohibition. The terms "idiot" and "insane" are not defined in the Constitution, and their application arises from legislation and judicial determination. Although most state constitutions at one time used the words "idiot" and "insane", these have become archaic and devoid of standard meaning. Newer state constitutional provisions regarding competence to vote use terms such as "mentally incompetent."[1] Scientific progress has revealed that the myriad of mental impairments do not fall into just two groups, and even the currently acceptable terms "mentally retarded" and "mentally ill" are thought to blur the distinctions among many types and extremes of mental disabilities.

The body of legislation which has been created regarding mental illness and mental retardation has several consequences for the constitutional prohibition against idiots and insane persons voting. The Ohio Revised Code contains provisions regarding mentally ill patients in Chapters 5122., 5123., and 5125. An earlier movement to promote treatment for mental illness advocated voluntary as well as involuntary admittance procedures to encourage persons to seek help, and the 1952 Draft Act, proposed by the National Association of Mental Health, recommended the retention of all civil rights by patients, unless adjudicated incompetent and not re-

[1]E.g. Constitution of Virginia, Article II, Section 1.

stored to capacity. The Ohio statutes reflect these recommendations. Voluntary patients do not appear before the probate court for a determination of the need for hospitalization and therefore retain their civil rights. A person who is involuntarily committed appears before the court and, after a finding of the need for indeterminate hospitalization, the person is declared legally incompetent and loses such civil rights as the right to vote. As a consequence, a voluntary patient who may be severely disabled is, theoretically, able to vote. This result contravenes the intent of the constitutional prohibition of idiots and insane persons voting.

The General Assembly is not expressly given the power to determine which mental conditions are such that a person should not vote nor to establish procedures for determining who does or does not fall into the categories. A voter could be challenged at the polls on the grounds that he is an idiot or insane person. In the absence of standards to be used in making the determination, a person could be denied his right to vote without benefit of any medical testimony on his mental fitness, with the determination heavily dependent on the judge's personal opinion of what an idiot is.

Effect of Change

The Commission recognizes that the present constitutional language is antiquated and probably too broad to pass the Fourteenth Amendment equal protection and due process requirements for depriving a person of a fundamental right.[2] Therefore, the Commission recommends language that will give the General Assembly authority to create some useful standards to determine incompetency for the purpose of voting. Testimony presented to the Commission included cogent reasons why a person incompetent to serve on a jury or to drive may be competely competent to vote.

Rationale for Change

The Commission believes that the present constitutional provision is unacceptable for several reasons. The Elections and Suffrage Committee suggested, in its report to the Commission, that large scale and possibly arbitrary exclusion from voting is a greater danger to the democratic process than including in the franchise some who may be mentally incompetent. Repeal of present Section 6 and omission from the Constitution of any provision excluding persons from voting on the basis of mental incompetence was considered but rejected on the grounds that the Constitution should contain a recognition of the problem, leaving a specific solution to the General Assembly. The Commission's approach is to rewrite the provision so it will exclude only those persons who should not participate in the electoral process, and specifically to give the legislature the right to regulate the procedures for determining that one is mentally incompetent for the purpose of voting. An important factor in the Commission's decision to repeal the prohibition against idiots and insane persons voting was the testimony received from Professor Michael Kindred, a professor of law at The Ohio State University and an expert on the legal rights of mentally ill and mentally retarded persons. Professor Kindred suggested that Section 6 of Article V was probably unconstitutional under the equal protection clause of the Fourteenth Amendment to the United States Constitution and possibly unconstitutional under the due process clause of the Fourteenth Amendment. "It seems to me very clear at the present time that the provision is unacceptable. It's unacceptable because it is ambiguous, it's unacceptable because if it has any substance to it it's too broad, and it's unacceptable because the terms that it uses are basically insulting, stigmatizing terms."[3] The United States Supreme Court has begun to recognize the right to vote as a fundamental right, and restrictions on the right to vote must bear a necessary and rational relation to a compell-

[2]*Kramer v. Union Free School District No. 15*, 359 U.S. 621 (1969).

ing state interest.[4] Because the terms "idiot" and "insane" are ambiguous, it would be difficult to show how they meet the test for exclusion. In addition, it was suggested that the mentally retarded might qualify as a "suspect class", having certain relevant characteristics from birth, so that the due process clause of the Fourteenth Amendment might present another constitutional barrier to excluding them from exercising a fundamental right.

The Commission desires to preclude any wholesale exclusion from the electoral process on the basis of mental incompetence. The proposed language requires an adjudication of mental incompetence. The Commission also believes that the restoration to competency should restore the right to vote, and this restoration should be guaranteed by the Constitution. Hence, disfranchisement is limited by the words "only during the period of such incompetency."

Intent of the Commission

The Commission recommends the repeal of present Section 6 and enactment of a new Section 5 to fill the section vacated by the repeal of present Section 5 proposed earlier. The language disfranchising persons "adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency", is deemed a sufficient safeguard of the electoral process with less likelihood of excluding persons who should vote than the present prohibition of Section 6 appears to permit. The Commission believes that by placing these procedures under the auspices of the General Assembly, new attitudes regarding mental illness can be implemented and more uniform standards for determination and review will be possible than are provided under the present language.

[3]Minutes of the Ohio Constitutional Revision Commission, June 17, 1974. p. 11.
[4]*Kramer v. Union Free School District No. 15*, supra.

ARTICLE V

Section 7

Present Constitution

Section 7. All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors. Each candidate for such delegate shall state his first and second choices for the presidency, which preferences shall be printed upon the primary ballot below the name of such candidate, but the name of no candidate for the presidency shall be so used without his written authority.

Commission Recommendation

No recommendation.

Commission Recommendation

The Commission has no recommendation with regard to Section 7 at the present time.

History and Background of Section

A provision regarding the selection of delegates to political party conventions first appeared in the Ohio Constitution in 1912. At the 1912 Constitutional Convention, the evils of the convention method of nominating candidates were discussed. Delegates expressed their preference for direct primaries and Theodore Roosevelt, addressing the convention, advocated direct preferential primaries for the election of delegates to national nominating conventions. He referred to the use of the convention

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO:	**Chairman Richard Saphire, Vice Chair Jeff Jacobson and Members of the Bill of Rights and Voting Committee**
CC:	**Steven C. Hollon, Executive Director and Shari L. O'Neill, Counsel to the Commission**
FROM:	**Hailey C. Akah, Legal Intern**
DATE:	**March 26, 2015**
RE:	**Summary of Written Material and Previous Presentations on Article V, Section 4 (Felon Disenfranchisement)**

The committee has asked staff to provide a summary of the information it has received on Article V, Section 4 and the topic of felony disenfranchisement.

On October 9, 2014, Douglas A. Berman, Robert J. Watkins/Procter & Gamble Professor of Law at the Moritz College of Law, Ohio State University, presented to the committee his remarks and written materials relating to felony disenfranchisement. These materials included a policy brief from the Sentencing Project, a review of felony disenfranchisement laws from the American Civil Liberties Union ("ACLU") and affiliate organizations, and a memorandum from the staff on the history of Article V, Section 4. The meeting minutes from October 9, outlining Professor Berman's talk and committee questions, also were utilized in the creation of this summary. This summary includes:

- A brief history of Article V, Section 4;
- An overview of felony disenfranchisement nationally;
- Several arguments offered against felony disenfranchisement;
- A note about public opinion and the changing goals of the criminal justice system;
- A suggestion offered to the Committee.

A Brief History of Article V, Section 4

Article V, Section 4 of the Ohio Constitution provides:

> 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.

The word "felony" is not original to the 1851 Ohio Constitution. Before it was revised in the 1970s, Article V, Section 4 stated:

> The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime.

The Ohio Constitutional Revision Commission ("1970s Commission") analyzed this provision in 1974. At that time, the phrase "infamous crime" was seen as vague and out-of-date. The word "felony" was more specific, contemporary, and brought the Constitution in line with the terminology of the Ohio Criminal Code. Therefore, the 1970s Commission's recommendations substituted the word "felony" for "bribery, perjury, or other infamous crime." The 1970s Commission desired to "preserve the flexibility now available to the General Assembly to expand or restrict the franchise in relation to felons in accordance with social and related trends." These recommendations were accepted by the General Assembly, and the current version of Article V, Section 4 was approved by the voters. It became effective on June 8, 1976.

Felony Disenfranchisement Nationally

Ohio is one of 14 states that restores voting rights to felons as soon as they are released from prison.[1] A majority of states continue felony disenfranchisement through an individual's term on parole (4 states),[2] on probation (19 states),[3] and even post-sentence (12 states).[4] In most of the states that continue felony disenfranchisement post-sentence, individuals convicted of a felony will never regain their right to vote. In contrast, two states, Maine and Vermont, do not restrict voting at any point in an individual's conviction and punishment process.

Felony disenfranchisement laws are widespread; however, over the past 15 years there has been a general trend towards increasing voting rights for felons.[5] Although some states have imposed more stringent felony disenfranchisement laws in that time,[6] there still has been an overall increase in states allowing individuals to regain the right to vote.

Arguments against Felony Disenfranchisement

Restoring Full Citizenship

This committee has been presented with several arguments against felony disenfranchisement. First, advocates of expansive voting rights state that felony disenfranchisement alienates felons

from society. This is problematic, proponents argue, because the criminal justice system is simultaneously attempting to reintegrate those individuals into society. In this way, felony disenfranchisement stands in opposition to the modern goals of the criminal justice system: rehabilitation and reintegration of former prisoners into society.

In his presentation, Professor Berman advocated for re-enfranchisement of felons statewide. He testified that if felons are re-enfranchised, they are less likely to commit additional crimes because voting allows felons to invest in the laws of the state. Not only that, but voting is a strong symbol of re-entry into society, according to Professor Berman. In order to regain full citizenship after serving time in prison, Professor Berman said he believes that it is important for felons to regain their right to vote.

Disparate Impact of Disenfranchisement

Second, advocates of re-enfranchisement assert that state disenfranchisement laws disproportionately impact racial minorities. African Americans of voting age are four times more likely to lose their voting rights than the rest of the adult population. One in 13 black adults is disenfranchised nationally, and 2.2 million black citizens are banned from voting in total.[7] Additionally, proponents of expanded voting rights argue that there are political consequences to the disparate impact of disenfranchisement law. For example, one study found that disenfranchisement policies have likely affected the result of seven United States Senate races from 1970 to 1998, as well as the Bush-Gore Presidential election.[8]

Proponents also assert that, because of increased incarceration rates around the country, the disenfranchised population is growing. After the Civil Rights era, the United States saw a significant drop in disenfranchisement. However, since that time, disenfranchisement rates have increased in conjunction with the growing U.S. prison population.

Legal Challenges to Disenfranchisement

Although felony disenfranchisement has been challenged under the Equal Protection Clause, it has been upheld by the U.S. Supreme Court. In *Richardson v. Ramirez*, individuals with felony convictions argued that California's felony disenfranchisement law was unconstitutional because it was not narrowly tailored to meet a compelling state interest. 418 U.S. 24, 33 (1974). However, the Supreme Court upheld California's disenfranchisement law because the Fourteenth Amendment guarantees the right to vote "except for participation in rebellion, or other crime." *Id.* at 54. The Court therefore found an "affirmative sanction" for felony disenfranchisement laws in the Fourteenth Amendment. *Id.*

Public Opinion and Goals of Disenfranchisement

The review of disenfranchisement from the ACLU emphasized that, over the course of the twentieth century, attitudes about criminality have shifted. The goals of the criminal justice system now include rehabilitation and reintegration of former prisoners into society upon their

release. However, ACLU and its affiliate organizations argue that many felony disenfranchisement laws have not been realigned to these modern goals. Additionally, these groups state that disenfranchisement has not been shown to deter future crime.

Public opinion surveys report that eight in ten U.S. residents support voting rights for citizens who have completed their sentence, and nearly two-thirds support voting rights for those on probation or parole.[9] Proponents of re-enfranchisement report that, in response to public opinion, states have begun to modify their felony disenfranchisement provisions to expand voter eligibility. From 1997 to 2010, an estimated 800,000 citizens regained the right to vote.

Suggestion Offered to the Committee

Professor Berman offered a suggestion to the committee. Rather than altering the current language of Article V, Section 4, he suggested including an express provision that gives the Governor the power to re-enfranchise felons during their incarceration, if the Governor receives a petition seeking the right to vote. This provision would state that those disenfranchised by the laws of the General Assembly have the right to petition the Governor for re-enfranchisement.

Endnotes:

[1] Ohio is joined by DC, HI, IL, IN, MA, MI, MT, NH, ND, OR, PA, RI, and UT. *Felony Disenfranchisement: A Primer*, The Sentencing Project (April 2014) 1.

[2] CA, CO, CT, and NY. *Id.*

[3] AL, AR, GA, ID, KS, LA, MD, MN, MO, NJ, NM, NC, OK, SC, SD, TX, WA, WV, and WI. *Id.*

[4] AL, AZ, DE, FL, IA, KY, MS, NE, NV, TN, VA, and WY. *Id.*

[5] For example, Virginia, which has traditionally been one of the most restrictive states, began automatically restoring the voting rights of any person convicted of a non-violent felony (after state supervision, pending felony charges, and free of court debt) in 2013. This is a gubernatorial policy that may be revoked or revised by future governors. *Id.* at 2.

[6] Iowa eliminated lifetime disenfranchisement in 2005 and reinstated it in 2011. *Id.*

[7] *Id.*

[8] *Id.* at 5.

[9] *Id.* at 4.

Bill of Rights and Voting Committee

Planning Worksheet
(September 2015)

Article I – Bill of Rights (Select Provisions)	
Sec. 1	Inalienable Rights (1851)
Notes:	
Sec. 2	Right to alter, reform, or abolish government, and repeal special privileges (1851)
Notes:	**Report and recommendation approved by committee (02.12.2015)**
Sec. 3	Right to assemble (1851)
Notes:	**Report and recommendation approved by committee (02.12.2015)**
Sec. 4	Bearing arms; standing armies; military powers (1851)
Notes:	**Report and recommendation approved by committee (02.12.2015)**
Sec. 6	Slavery and involuntary servitude (1851)
Notes:	**Draft started**
Sec. 7	Rights of conscience; education; the necessity of religion and knowledge (1851)
Notes:	
Sec. 11	Freedom of speech; of the press; of libels (1851)
Notes:	
Sec. 13	Quartering troops (1851)
Notes:	**Report and recommendation approved by committee (06.11.2015)**
Sec. 17	No hereditary privileges (1851)
Notes:	**Report and recommendation approved by committee (06.11.2015)**
Sec. 18	Suspension of laws (1851)
Notes:	
Sec. 19	Eminent domain (1851)
Notes:	
Sec. 19b	Protect private property rights in ground water, lakes, and other watercourses (2008)
Notes:	
Sec. 20	Powers reserved to the people (1851)
Notes:	**Draft started**
Sec. 21	Preservation of the freedom to choose health care and health care coverage (2011)
Notes:	

Bill of Rights and Voting Committee

Planning Worksheet
(September 2015)

Article V – Elective Franchise	
Sec. 1	Who may vote (1851, am. 1923, 1957, 1970, 1976, 1977)
Notes:	
Sec. 2	By ballot (1851)
Notes:	
Sec. 2a	Names of candidates on ballot (1949, am. 1975, 1976)
Notes:	
Sec. 3	Referred to the privilege from arrest of voters during elections (1851)
Notes:	**Repealed (1976)**
Sec. 4	Exclusion from franchise (1851, am. 1976)
Notes:	**Draft started**
Sec. 5	Referred to those persons not considered residents of the state (1851)
Notes:	**Repealed (1976)**
Sec. 6	Idiots or insane persons (1851)
Notes:	**Report and recommendation first presentation (09.10.2015)**
Sec. 7	Primary elections (1912, am. 1975)
Notes:	
Sec. 8	Term limits for U.S. senators and representatives(1992)
Notes:	
Sec. 9	Eligibility of officeholders (1992)
Notes:	

Article XVII – Elections	
Sec. 1	Time for holding elections; terms of office (1905, am. 1954, 1976)
Notes:	
Sec. 2	Filling vacancies in certain elective offices (1905, am. 1947, 1954, 1970, 1976)
Notes:	
Sec. 3	Referred to present incumbents (1905)
Notes:	**Repealed (1953)**

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Remaining 2015 Meeting Dates

October 8
November 12
December 10

2016 Meeting Dates (Tentative)

January 14
February 11
March 10
April 14
May 12
June 9
July 14
August 11
September 8
October 13
November 10
December 8