



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, NOVEMBER 12, 2015

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order at 9:38 a.m.

Members Present:

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

Approval of Minutes:

The minutes of the September 10, 2015 meeting of the committee were approved.

Reports and Recommendations

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

Chair Saphire recognized Shari L. O'Neill, counsel to the Commission, who provided the first presentation of the report and recommendation for Article I, Section 20 (Powers Reserved to the People). Ms. O'Neill indicated that Article I, Section 20, stating that the powers retained by the people will not be impaired or denied by the enumeration of other rights in the constitution, was adopted as part of the 1851 Ohio Constitution. She described that the section mirrors language from both the Ninth and Tenth Amendments to the United States Constitution, and expresses the view that the powers of the government are derived from the people. She indicated the report and recommendation describes the history of the limited litigation involving the provision, with courts generally citing Article I, Section 20 only in conjunction with other sections of the Bill of Rights. Ms. O'Neill said the report and recommendation concludes that the committee recommends that Article I, Section 20 be retained in its current form.

Senator Michael Skindell moved to recommend no change to Article I, Section 20. This motion was seconded by Judge Patrick Fischer, and a roll call vote was held. By unanimous vote of all present at the time of the vote, the committee voted to issue the report and recommendation for Article I, Section 20.

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

Ms. O'Neill then provided the first presentation of the report and recommendation for and Article V, Section 4 (Exclusion from Franchise for Felony Conviction). Ms. O'Neill indicated that this section relates to the power of the General Assembly to exclude from the privilege of voting or being eligible to office any person convicted of a felony. She said the provision was adopted as part of the 1851 Ohio Constitution, and was amended in 1976, after a recommendation by the Ohio Constitutional Revision Commission to substitute the word "felony" for the phrase "bribery, perjury, or other infamous crime." Ms. O'Neill described that the section empowers the General Assembly to enact laws that exclude felons from voting or holding office, rather than directly disenfranchising, and that the General Assembly enacted laws on this topic in Ohio Revised Code Chapter 2961. Referring to litigation involving the subject of felon disenfranchisement, Ms. O'Neill noted the report and recommendation discusses case law upholding the disenfranchisement of felons on the basis that the Fourteenth Amendment to the United States Constitution guarantees the right to vote "except for participation in rebellion, or other crime," thus finding an "affirmative sanction" for felony disenfranchisement, and that the section has been cited in Ohio in relation to its restriction on eligibility for public office of persons convicted of a felony. Ms. O'Neill stated the report and recommendation describes the committee's discussion of the issue, documenting its consensus that Ohio's disenfranchisement of felons only during the period of their incarceration is a reasonable approach that appropriately balances the goals and interests of the criminal justice system with those of incarcerated felons.

She said the report and recommendation sets forth the committee's conclusion that the provision should be retained in its current form.

Upon motion by Judge Fischer, with second by Vice-chair Jeff Jacobson, the committee voted unanimously to recommend no change to Article V, Section 4.

As a point of order, Chair Sapphire then asked the committee whether it would be in favor of issuing the two reports and recommendations after only one presentation, as is now permitted by the Rules of Procedure and Conduct in circumstances in which the committee is recommending no change. There being no objection, Mr. Jacobson then moved that the initial vote recommending no change to Article I, Section 20 be vacated, which was seconded by Judge Fischer. Without objection, the motion was agreed to. Sen. Skindell then moved to issue the report and recommendation recommending no change to Article I, Section 20, and that it be retained in its current form. This motion was seconded by Judge Fischer, and a roll call vote was held. By unanimous vote of all present at the time of the vote, the committee voted to issue the report and recommendation for Article I, Section 20.

There being no objections to having only one presentation of the report and recommendation for Article V, Section 4 before forwarding it to the Commission, Judge Fischer then moved to issue the report and recommendation for no change to Article V, Section 4, and that it be retained in its current form. This motion was seconded by Mr. Jacobson, and a roll call vote was held. By unanimous vote of all present at the time of the vote, the committee voted to issue the report and recommendation for Article V, Section 4.

Committee Discussion:

Article V, Section 6 (Mental Capacity to Vote)

Chair Sapphire then turned the committee's attention to its review of Article V, Section 6, relating to the mental capacity to vote. Noting that he had not attended the committee's previous meeting on September 10, 2015, Chair Sapphire said that his review of the meeting minutes caused him to understand that the vote taken at the last meeting was a straw poll rather than a final vote, so that no first presentation of a formal report and recommendation had occurred.

Mr. Jacobson objected to this characterization, saying it was clear in the previous meeting that the presentation of the report and recommendation was the first reading. He cautioned that, if each time the wording of the recommendation is changed another "first presentation" is required, there could be no progress in the work of the Commission. He said the committee took a straw poll because it was trying to finalize the text of its recommendation.

Committee members then expressed different views regarding the effect of the discussion and vote taken at the last meeting. Chair Sapphire asked the committee for a motion that would allow the committee to reach a formal conclusion about whether the presentation at the current meeting constitutes a second hearing.

Mr. Jacobson moved that the presentation on November 12, 2015 constitutes a second hearing. Committee member Doug Cole seconded the motion, and discussion on the motion was held.

Committee member Karla Bell expressed that the vote changes at each meeting because a different majority is present.

Mr. Jacobson clarified that the committee is not voting on the recommendation, but is voting about whether this is the second presentation. He said the problem is not that the committee hasn't given it enough consideration, but that it is focusing on side issues, and missing the opportunity to remove language that doesn't belong in the constitution. He said if the committee can't compromise here, it hurts the whole process.

Chair Sapphire said he disagrees that these are side political issues, but agreed the committee should vote on whether this is a second hearing.

Mr. Cole said he agrees with the underlying sentiment that these issues have been fully vetted, and he believes the committee is in a position to vote. He said this is not a situation where there is a lack of information.

Representative Kathleen Clyde said she agrees that the committee did take a formal procedural vote at its last meeting. She said there are substantive differences that may delay the committee, but she said she agrees that a first action was taken.

The committee then took a roll call vote of the committee members present. The following committee members were in favor of declaring that the presentation on November 12, 2015 constituted a second hearing:

Richard Saphire
Jeff Jacobson
Rep. Amstutz
Rep. Clyde
Doug Cole
Judge Fischer
Sen. Skindell

The following committee member was opposed to declaring that the presentation on November 12, 2015 is a second hearing:

Karla Bell

Chair Saphire then recognized Wilson R. Huhn, professor emeritus at the University of Akron School of Law, who spoke on behalf of the American Civil Liberties Union of Ohio (“ACLU”) regarding the committee’s consideration of Article V, Section 6 (Mental Capacity to Vote).

After describing the constitutional due process requirements relating to the right to vote, Professor Huhn advocated for removing Article V, Section 6, saying the General Assembly would still retain the ability to establish procedures for denying the right to vote to persons who are incapable of voting.

Chair Saphire said the presumption is that if someone satisfies the qualifications listed in Article V, Section 1, and no other constitutional provision limits the person’s voting rights, the person constitutionally is entitled to vote. He asked, if that is so, where does the General Assembly get its authority to step in and limit the right to vote? Prof. Huhn answered that these provisions speak to the constitutional rights of the individual, rather than being a limitation on the powers of the government. He said the government always retains the ability to limit constitutional rights so long as there is a compelling governmental interest. He said the right to vote similarly could be limited to protect the integrity of the electoral process.

Seeking further clarification, Chair Saphire asked whether the General Assembly has the inherent authority to step in. Prof. Huhn said the government retains its police powers, and that

limiting the right to vote would be necessary to prevent some people from voting who have extreme mental incapacity.

Mr. Jacobson noted that legislative actions can be interpreted in ways that may not have been intended by their drafters, wondering if the same thing could happen when a provision in the constitution is enacted. He asked, if Article V, Section 6 is removed, could a court decide that meant the people of Ohio no longer wish their legislature to exercise that authority?

Prof. Huhn agreed that is a possible interpretation. He said a court could say to enact one is to exclude the other, or could conclude voting is a right and there is no intent to limit the legislature.

Ms. Bell said she agrees removal is the best, but doesn't think that option will win. She noted Prof. Huhn's comment that if Article V, Section 6 can't be abolished, the committee could track the language proposed by the 1970s Constitutional Revision Commission, which stated that the General Assembly has the power to deny the right to vote. She asked why Prof. Huhn would recommend that.

Prof. Huhn said that is his backup, or alternate, phrasing for the section. He said he would recommend requiring an adjudication because every person has a fundamental right to self-govern, noting only a small percent of persons fall into the category of severely impaired. He said, on a theoretical level, he sees all of those people as equals, but because there is a compelling governmental interest they could be adjudicated unable to vote.

Mr. Cole noted that Prof. Huhn seems to believe it would be appropriate to prevent some mentally impaired people from voting, asking what Prof. Huhn finds inappropriate about the language the committee is considering that would accomplish that result.

Prof. Huhn answered that the right to due process is fundamental; it is a due process concern that makes him want to include the word "adjudication" in the provision.

Mr. Cole said the federal constitution imposes restrictions on limitations on the franchise as well as providing substantive and procedural due process. He wondered whether the proposed constitutional language could be interpreted as being consistent with federal restrictions.

Prof. Huhn said the integrity of the electoral process is important, but so is the dignity of the persons involved. He said the notion that a person could be challenged and prevented from voting without a prior adjudication is very troubling to him.

Mr. Cole asked whether there is anything in the proposed language that would prevent the use of an adjudicative process. Prof. Huhn answered there is nothing to prevent it but also nothing to require it.

Judge Fischer noted the procedure whereby someone contesting the ability of another to vote must file a protest with the board of elections 20 days before the election and, if someone doesn't

like the result, a writ of mandamus must be sought. Prof. Huhn said that procedure does not constitute an adjudication by an appropriate body, and that an administrative agency lacks the expertise to determine mental capacity.

Judge Fischer continued, saying that is what the legislature has put into effect; he doesn't like it, it is an unusual process, but it is a process. Prof. Huhn said he does not know much about that procedure, but he doubts it satisfies due process. He said the board of elections is not appropriate for conducting an adjudication in this context, giving an analogy that a person is not determined to be a felon (and so unable to vote) by a board of elections but by a criminal proceeding in a court.

Sen. Skindell remarked that the difference, in part, between the existing provision of the constitution and the provision under consideration is that the version under consideration just has "mental capacity to vote," while the existing provision says "no idiot or insane person." He asked, "is there a difference between 'mental capacity' and 'idiot or insane'?"

Prof. Huhn said he doesn't know what was meant by idiot in 1851, but by 1910 it was someone with an IQ of less than 25. He said "if you take it literally and use the medical definition of the time, that phrase substantively was okay." He said "mental capacity" means far more than that. He said experts use methods to evaluate performance that are far more than a simple IQ test, adding that people have abilities based on living skills, communication skills, and common sense.

Following up, Sen. Skindell said, hypothetically, or practically, using the term "mental capacity" is a lot broader, and would exclude a larger group. Prof. Huhn agreed with this statement.

Prof. Huhn noted that the use of the word "privilege" would be adequate to cover the right to vote. He said "privilege" is an archaic term used to determine this kind of constitutional right. He said, to modern ears, the word privilege sounds like something that can be taken away, and that it would be better to call it the "right to vote."

Mr. Jacobson followed up on this statement by asking whether Prof. Huhn was implying that activities referred to as "privileges" are something other than a right. Prof. Huhn said historically privileges were government-sponsored activities that all male adult citizens had the ability to participate in, for example running for office or serving on a jury. He said "immunities," (as in the "privileges and immunities clause") were freedoms.

Mr. Jacobson said he concedes there must be some kind of procedure before someone goes to the poll and asks for a ballot, but his concern is that the use of the word "adjudicated" implies some sort of process in front of a judge, involving counsel and other formal procedures. He asked whether Prof. Huhn would find it acceptable to require a prior determination, possibly a process set up by the General Assembly.

Prof. Huhn said a constitution will be interpreted according to the intent of the people who wrote it. He said before someone is committed to an institution, there must be notice and a hearing.

He said, for example, in a guardianship setting, the burden of proof is on those seeking to impose the guardianship. He said the constitution places the burden of proof on the government and that it is very important for the constitution to say there should be an adjudication.

Ms. Bell noted that there is a guarantee of the civil rights of patients contained in a Revised Code section relating to persons who are admitted to a hospital or taken into custody. She said in that instance, the General Assembly requires a separate adjudication prior to depriving someone of a right to vote.

Prof. Huhn then concluded his remarks, and Chair Sapphire thanked him for his presentation.

Ms. Bell then asked if Michael Kirkman, executive director of Disability Rights Ohio, who was present in the audience, could answer some questions. Chair Sapphire then recognized Mr. Kirkman.

Ms. Bell asked Mr. Kirkman about the board of elections procedure for preventing persons from voting. Mr. Kirkman said there is a process for this, but he is not sure what the standard is for disqualifying someone. Ms. Bell asked what kind of notice is given when someone is taken off the voting rolls, and whether notice by publication is sufficient. Mr. Kirkman said notice by publication is sufficient as a last resort, but that notice procedure has to do with disqualifying someone because of a change in residency, which is not this situation.

Chair Sapphire inquired about Mr. Kirkman's statement, in his November 10, 2015 letter to the committee, that he sees adjudication as a side issue. Mr. Kirkman answered that, prior to disenfranchisement, some kind of hearing process is going to happen anyway because it is required under federal law. Chair Sapphire said he is more concerned with the burden of proof than with the actual process afforded the individual, because the burden on the individual can be severe if voting rights are removed prior to an adjudication and the individual has to initiate litigation to get his rights back.

Mr. Kirkman said there is dispute about what "capacity to vote" is. He said he continues to be bothered that felons have more rights in the constitution than people with disabilities, and that the burden of proof is on the person least likely to be able to challenge the disenfranchisement. He said Article V, Section 4 is a good template because it acknowledges the role of the General Assembly in deciding exactly what circumstances should affect voting rights in this context.

Mr. Jacobson suggested to the committee a revision of the language under consideration, as follows:

The General Assembly shall have the power to exclude from the rights and privileges of an elector during the time of incapacity any elector who is determined to lack the mental capacity to vote.

Chair Sapphire said the language would be improved if it said "determined according to procedures determined by the General Assembly."

Mr. Cole said he appreciates Mr. Jacobson's efforts, but his concern is that on this issue the committee is having difficulty differentiating a statutory process from a constitutional process. He said the fewer words the better, adding "it doesn't serve us to ensconce in the constitution too much nuance and statutory construct. The fundamental notion we are trying to express is that those who lack the capacity to vote shouldn't vote. If we try and create too much statutory construct around that it is hard to understand. Also what we are trying to put there is part of due process protections there already."

Ms. Bell said she agreed with a statement made by Executive Director Steven C. Hollon in a previous memorandum to the committee that the use of the term "adjudication" suggests a decision made by a judicial body and that due process has been met, and also that it puts the burden on the state, rather than on the voter. She said adjudication shifts the burden to the state to be sure it has proven its case.

Chair Sapphire suggested the committee adjourn until next time because it was the scheduled time for the meeting to conclude. Mr. Jacobson objected, indicating that the committee should continue to discuss the issue in order to bring the topic to a conclusion. He then made a formal proposal for new language:

The General Assembly shall have the power to exclude from the rights and privileges of an elector during the time of incapacity any elector who is determined under law to lack the capacity to vote.

Judge Fischer commented that it is important that the committee change the offensive language in Article V, Section 6. He said, "this committee has spent months on this issue; there are a lot of issues important to this committee, and it is time to move on one way or another."

Mr. Cole said he has a procedural concern, indicating if the committee is completely rewriting the language, he would struggle with calling this a second reading. He asked whether the committee could vote on whether to adopt the language that came out of the previous meeting and see if there is a majority in favor of it.

Mr. Cole then moved to adopt the language approved at the last meeting, which was seconded by Judge Fischer. The committee then held a discussion on the motion.*

Mr. Jacobson said he thinks there is majority support for language from the last meeting. He said it could be helpful to clarify that there should be some prior determination, but that his concern about adjudication is that it requires a formal court process. Adding that requirement of a prior determination would help reach a broader consensus, he agreed that the committee has considered this a long time. He said the committee could save seeking a broader consensus for the Commission as a whole, if people would prefer.

* That language states: "No person who lacks the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity."

Ms. Bell said the committee has been deadlocked on this issue; it is evenly split depending on who shows up. She said she is concerned the committee would be in a position of sending to the Commission a recommendation that is disapproved by a significant portion of the committee. She said she could support Mr. Jacobson's proposal.

Chair Sapphire said he agrees with Fischer, Cole, and Ms. Bell. He said, if he had to vote on the current proposal he would move against it, but that he could support Mr. Jacobson's proposed language.

Mr. Jacobson said he wishes the committee could wrap this up today. Mr. Cole said he doesn't believe the committee can rewrite the proposal and call it a second reading.

Chair Sapphire reminded the committee there is a motion on the floor. Ms. Bell moved to amend the motion and instead adopt the language suggested by Mr. Jacobson. Chair Sapphire then asked for a second, but none was provided at that time.

Rep. Amstutz then suggested another wording of the language that would include the phrase "the General Assembly shall exclude...." Thus, it would read:

The general assembly shall exclude from the rights and privileges of an elector during the time of incapacity an elector who is determined under law to lack the mental capacity to vote during the period of this incapacity.

Mr. Jacobson said the problem with that phrasing is that it uses the word "elector" twice. Judge Fischer suggested using the language originally proposed, but add at the beginning that "the General Assembly shall provide under law that...."

Mr. Jacobson agreed to this change, and offered the following:

The General Assembly shall provide that no person who has been determined under law to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

Chair Sapphire asked whether this would constitute a second reading, adding whether or not it is a second reading, there is nothing to preclude a third reading.

Mr. Jacobson then made a substitute motion that the motion regarding his former proposal be stricken. This motion was seconded by Ms. Bell.

Ms. Bell then withdrew her motion to amend.

Mr. Jacobson then moved to amend the original motion, and that the following language be adopted by the committee:

The General Assembly shall provide that no person who has been determined under law to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

A roll call vote of the committee members present was taken on the motion to amend. The following committee members were in favor of amending the motion:

Richard Saphire
Jeff Jacobson
Rep. Amstutz
Karla Bell
Doug Cole
Judge Fischer
Sen. Peterson

The following committee members opposed to amending the motion:

Rep. Clyde
Sen. Skindell

Sen. Skindell asked for clarification as to whether the report and recommendation was subject to a final vote to be referred to the Commission, to which Chair Saphire answered no.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:15 a.m.

Approval:

These minutes of the November 12, 2015 meeting of the Bill of Rights and Voting Committee were approved at the March 10, 2016 meeting of the committee.

/s/ Richard B. Saphire

Richard B. Saphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair