



**OHIO CONSTITUTIONAL MODERNIZATION COMMISSION**

---

**MINUTES OF THE  
BILL OF RIGHTS AND VOTING COMMITTEE**

**FOR THE MEETING HELD  
THURSDAY, DECEMBER 11, 2014**

**Call to Order:**

Chair Sapphire called the meeting of the Bill of Rights and Voting Committee to order at 10:13 a.m.

**Members Present:**

Committee members Sapphire, Jacobson, Amstutz, Bell, Clyde, Cole, Fischer, Gilbert, and Peterson were in attendance.

**Approval of Minutes:**

The committee approved the minutes of the October 9, 2014 meeting.

**Topics Discussed:**

*Article V, Section 6 (Idiots and Insane Persons)*

Michael Kirkman, Executive Director of Disability Rights Ohio, presented to the committee on the topic of voting rights for the disabled.

Mr. Kirkman began by describing how society's perception of people with disabilities has changed since 1851. At that time neglect, isolation, and segregation were typical responses to mental illness. After the Civil War, surgeons from the war started to consider mental illness and their views began to evolve. He noted that many advances were made in this area, accompanied by some setbacks. He mentioned Dorothea Dix, a social reformer during the 1800s, who had a philosophy that putting the mentally ill on farms and giving them work would help them. She was correct and this model is still used in Europe today. However, as the populations of these institutions grew, they became horrific places. Then, Mr. Kirkman noted that in the 1960s, the civil rights movement helped to improve the institutions, making them humane places. Sometimes this meant de-institutionalization, which had its own problems.

Mr. Kirkman noted that his organization has filed law suits on behalf of the mentally ill to get help for them and has obtained consent decrees to improve their conditions.

He added that, as medical and psychiatric knowledge expanded, the mentally ill were still living in horrible conditions and were sometimes sterilized against their will. At times, people were treated as if they were mentally deficient when they were merely poor. There was a convergence of disability, gender, and race, with a label of insanity or imbecility as a way to deal with people who were different.

He also observed that in the 1960s and 1970s professionals changed how they viewed mental illness, and awareness grew that people should be treated as individuals, with an expectation that people with disabilities should be treated as full citizens. This new approach emphasized nondiscrimination, integration, and full inclusion, rather than stereotypes.

In reviewing Ohio law, Mr. Kirkman said the current system is disjointed. While Article V, Section 1 gives broad basic eligibility requirements for being an Ohio voter, Article V, Section 6 constitutes the only categorical exception in that it disenfranchises people with mental disabilities. Under Article V, Section 4, felons are treated better than people with mental disabilities, since their rights are automatically restored after they are no longer incarcerated.

Regarding statutory law, Mr. Kirkman is still researching the provisions and procedures, but has found that a voter's registration is cancelled under mental health laws if the voter is found incompetent to vote. However, there is no case law on this because people don't bring law suits. If people seem to have the ability to vote, poll workers do not question them. Despite anecdotal stories, there is no evidence of large numbers of mentally incompetent nursing home residents being brought to the polls.

Chair Sapphire asked whether the rule is that as long as they can register, they can vote. Mr. Kirkman responded in the affirmative, indicating that if someone clearly is in a coma, a poll worker would challenge, but those people are not brought to the polls.

Committee member Bell stated that the information given to poll workers is not to look out for people who seem mentally incompetent. Theoretically, there is an opportunity to disqualify under the adjudication procedure, but in reality that doesn't occur.

Mr. Kirkman responded that probate courts do not send a list of incompetents to the county board of elections, and said relying on probate courts to handle the problem is not a solution.

Chair Sapphire commented "we have a constitutional provision that excludes a class of persons, we can't tell from language of the constitution what effect the provision has in the real world, no coherent statutory scheme, and few consistent rules, so does that mean we have a provision that is only on paper, no effect on real world?" Michael Kirkman said broadly speaking this is correct.

Chair Sapphire, observing that Mr. Kirkman's recommendation is to repeal Article V, Section 6, asked why repeal is necessary if the provision is not being used; maybe it would be enough simply to change the objectionable language. Mr. Kirkman pointed out that, in its current form,

the constitutional provision is unconstitutional under the U.S. Constitution. He also indicated that if the constitution should reflect the values of our society, and to be a leader in what the values should be, there shouldn't be discriminatory language in our constitution. He pointed out that using guardianship as a surrogate for disqualification doesn't work. He noted that some of this is aspirational, because respecting where we are with federal law and as a society, this language must come out.

Committee member Cole indicated that he views the debate as being between two potential paradigms, one that advocates that there is a group that should not be able to vote but is difficult to define, and the other being that the group should be permitted access to the ballot no matter how defined.

Mr. Kirkman said it is not clear what it means to say "not mentally incompetent to vote," since even mental health professionals have difficulty defining that. Mr. Kirkman indicated he would go further and have a policy that if someone shows up at the polls and can demonstrate to the poll worker who he is; he should be able to vote. Canada handles the same issue in this manner. He also said there should be a presumption of legal capacity.

Chair Sapphire asked if Mr. Kirkman was aware of any instances in Ohio where someone showed up at the poll but was not able to say who he was and so couldn't vote. Mr. Kirkman said no, this has not occurred, but that his organization does get calls on Election Day. He said the Secretary of State has been diligent in making sure that people have access.

Chair Sapphire asked whether, if the provision is repealed, there would be no damage, since it is never used. Mr. Kirkman agreed, saying this is his view, and that it would not affect statutory law.

Ms. Bell, who has served as a poll observer, said she is distressed by that conclusion after seeing a person brought to the polls who was under restraints, drooling, unable to talk, and that this person's mother was there and essentially voted for that person. Mr. Kirkman answered that if someone thinks there is voter fraud that is another matter, but that we do not really know anything about the disabled person the committee member observed. The person could have had normal intelligence but was severely disabled. Mr. Kirkman said the point is that disqualifying that person without individualized inquiry does not happen under the current provision and wouldn't happen under anything that has been proposed.

~~Ms. Bell observed there should be more education so people will come forward to prevent people who lack the mental capacity from voting. The fact that there are no documented cases doesn't mean people aren't voting when they shouldn't. Mr. Kirkman said these cases do happen, but people worried about voter fraud may be overstating the problem.~~

Committee member Gilbert noted that he believes it is "a slippery slope" to challenge a person based on appearance or behavior. Having served as a poll worker, he once saw a man who talked to himself all the time arrive to vote and state he wanted an "Obama ballot." He said it is of great concern that poll workers do not have the medical background to challenge people. If every questionable case has to be adjudicated, probate courts would be overwhelmed. He said it would be interesting to learn what other states, which have such a provision, are doing. African-

Americans in the South have been disenfranchised because someone said they looked crazy. Not aware of any language that would be effective in clarifying when disenfranchisement would be appropriate, he is in favor of repeal without replacement of the provision.

Mr. Kirkman stated that, since 2005 when there was an ADA symposium on voting and dementia, researchers have started the process of trying to determine and define "the capacity to vote." Even these academics who are experts in their field say they don't have enough information to figure out who has capacity to vote, and can't accurately test that. The standard adopted by the American Bar Association, as well as other researchers, says that if someone shows up, this means they recognize the right to vote, and they should be allowed to vote.

Rep. Amstutz asked if this section is repealed, how would the state avoid a future court decision that would strike down statutes regarding disenfranchising mental incompetents. Mr. Kirkman answered that currently there are statutory methods that can be refined to create a more cohesive system. He doesn't think a constitutional provision is required in order for this to be in place. When asked if he was saying that the only proper way to address voter fraud is to focus on restricting someone from voting on behalf of another person, Mr. Kirkman replied this is already in place in the statute. Rep. Amstutz emphasized his belief that those statutes will fail without the constitution.

Mr. Gilbert noted that there are plenty of people who can't see or write to fill out a ballot and they get help at the polls. The mere fact that someone needs help to vote doesn't mean they lack the mental capacity to do so.

Mr. Kirkman said he understands why some think this should be in the constitution, but in reality, people who lack mental capacity at that severe of a level usually don't go to the polls and never have the opportunity. It was noted that the discussion to this point had focused on incompetent people presenting at the polls, but absentee voting changes the scenario, and there could be fraud occurring outside the polling place.

Judge Fischer wondered, as a practical matter, how judges and others will be able to draw the lines on competence. He said he views the role of the Bill of Rights in the Constitution as protecting the rights of individuals and the minority. If Article V, Section 1, is kept, as a presumption voting eligibility, with no other provision, there could be a problem. He further indicated that he is aware of cases involving people who really do not know where they are or temporarily do not know what they are doing. ~~To let the legislature determine what constitutes a competent voter, without limitation, would not protect and help the people who need it.~~ The Bill of Rights should be a limitation on the State, and protect those who should be able to vote. Agreeing the current language of Article V, Section 6, needs to be changed, there is a necessity of drawing a line in order to protect people's right to vote, he said.

Chair Sapphire asked Mr. Kirkman if he could suggest a backup proposal that would alleviate this concern, and Mr. Kirkman directed him to the written materials he provided to the committee.

Ms. Bell pointed out that current statutory law only protects the right to vote for those who are mentally ill and hospitalized. If this section isn't replaced, those people will have no statutory or constitutional protection.

Mr. Kirkman said under the guardian system mandatory appointment of counsel does not exist, and added this should also be looked at.

In summary, Mr. Kirkman said that repealing Article V, Section 6, would create a conclusive presumption of the right to vote for mentally incompetent persons because Article V, Section 1 would govern. As there is a tendency to blame the victim, the goal of his organization is to refocus the law on those who would perpetrate voter fraud rather than to punish the disabled. He emphasized the importance of this issue to people with disabilities, and cited Canadian law on this topic as a good approach to the problem. Chair Sapphire thanked Mr. Kirkman for his presentation.

### *Reports and Recommendations*

Executive Director Hollon described three reports and recommendations being presented to the committee for its consideration: Article I, Section 2, relating to the Right to Alter, Reform, or Abolish Government, and Repeal Special Privileges; Article I, Section 3, relating to the Right to Assemble; and Article I, Section 4, relating to Bearing Arms, Standing Armies, and Military Power. The committee had voted in a prior meeting to retain all three of these provisions; however, Commission rules require that reports and recommendations be considered in two meetings, with a formal vote by the committee being taken to approve a report and recommendation at the second meeting before passing the issue along to the Commission. The committee had no comments or questions related to these Reports and Recommendations.

### *Committee Discussion*

Chair Sapphire stated he would like to conclude review of Article V in 2015. The committee had a presentation at the last meeting regarding Article V, Section 4. The chair would like the committee to finish review of this section in the near future.

Chair Sapphire indicated it was thought Article V, Section 6, would have been an easier question than it has turned out to be. The committee now has enough memoranda, as well as the information provided by Mr. Kirkman, to allow the committee to work through specific questions. Chair Sapphire noted he hopes the committee will go through the process of figuring out what to do at its February meeting. If the committee decides to recommend repeal then there is no need to consider alternative wording; if not, members need to come up with alternatives.

Chair Sapphire asked the members of the committee to select no more than five of the proposed revisions and to let him know their choices in preparation for further discussion of this topic at the next committee meeting.

It was suggested the committee should review the proposed revisions one at a time as the committee might be able to reach a majority consensus on a particular course of action.

Chair Sapphire said he will correspond with the committee to come up with a reasonable proposal, and asked committee members to let him know if they have ideas for ways to handle this.

Rep. Amstutz asked if the judicial process should be inserted in this, and commented that the committee should be able to come up with language that replaces other words. Should the committee consider further clarification that no person shall vote for another person unless that desire has been communicated?

Chair Saphire concluded that this is a difficult question. It was noted that the present law is so fractured there is no way to set a hearing on competence and no procedural way to address it.

**Adjournment:**

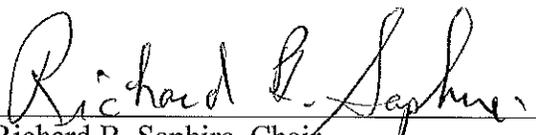
With no further business, the committee adjourned at 11:45 a.m.

**Attachments:**

- Notice
- Agenda
- Roll call sheet
- Kirkman remarks
- Kirkman materials

**Approval:**

These minutes of the December 11, 2014 meeting of the Bill of Rights and Voting Committee were approved at the February 12, 2015 meeting of the committee.

  
Richard B. Saphire, Chair

  
Jeff Jacobson, Vice Chair