



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### 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 minutes of the April 9, 2015 meeting of the committee were approved. 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 Sapphire 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 Sapphire 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 Sapphire 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 Sapphire 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 Sapphire 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 Sapphire said committee member Sen. Mike Skindell had expressed his opinion

that adjudication should be required before denying the right to vote, which Chair Sapphire 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 Sapphire 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 Sapphire 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 Sapphire 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 Sapphire 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 Sapphire 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 Sapphire 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 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 Sapphire 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 Sapphire 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 Sapphire 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 Sapphire 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.

*Excused*

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Richard B. Saphire, Chair

*/s/ Jeff Jacobson*

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Jeff Jacobson, Vice-chair