OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Ohio Constitutional Modernization Commission

Co-Chair
Sen. Charleta B. Tavares
Assistant Minority Leader

Co-Chair
Rep. Ron Amstutz
Speaker Pro Tempore

April 14, 2016
Ohio Statehouse
Room 313

Ohio Constitutional Modernization Commission

Co-chair Sen. Charleta Tavares
Co-chair Rep. Ron Amstutz
Ms. Janet Abaray
Mr. Herb Asher
Mr. Roger Beckett
Ms. Karla Bell
Ms. Paula Brooks
Rep. Kathleen Clyde
Mr. Douglas Cole
Sen. Bill Coley
Rep. Robert Cupp
Rep. Mike Curtin
Ms. Jo Ann Davidson
Judge Patrick Fischer
Mr. Edward Gilbert
Mr. Jeff Jacobson
Sen. Kris Jordan
Mr. Charles Kurfess
Mr. Larry Macon
Rep. Robert McColley
Mr. Fred Mills
Mr. Dennis Mulvihill
Sen. Bob Peterson
Mr. Chad Readler
Mr. Richard Saphire
Sen. Tom Sawyer
Sen. Michael Skindell
Rep. Emilia Sykes
Governor Bob Taft
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Ms. Kathleen Trafford
Mr. Mark Wagoner

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

COMMISSION MEETING

THURSDAY, APRIL 14, 2016
1:30 P.M.
OHIO STATEHOUSE ROOM 313

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of March 10, 2016

[Draft Minutes – attached]

IV. Standing Committee Reports

- Coordinating Committee (Trafford)

V. Subject Matter Committee Reports

- Education, Public Institutions, and Local Government Committee (Readler)
- Finance, Taxation, and Economic Development Committee (Cole)
- Judicial Branch and the Administration of Justice Committee (Abaray)
- Bill of Rights and Voting Committee (Saphire)
- Constitutional Revision and Updating Committee (Mulvihill)
- Legislative Branch and Executive Branch Committee (Mills)

VI. Reports and Recommendations

First Presentation

- Article V, Section 6 (Mental Capacity to Vote)
  - Review of Report and Recommendation
  - Public Comment
  - Discussion

VII. Executive Director's Report (Hollon)

VIII. Old Business

IX. New Business

X. Public Comment

X. Adjourn

Co-Chair
Charleta B. Tavares
Assistant Minority Leader
15th Senate District

Co-Chair
Ron Amstutz
Speaker Pro Tempore
1st House District

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES
FOR THE MEETING HELD
THURSDAY, MARCH 10, 2016

Call to Order:

Co-chair Ron Amstutz called the meeting of the Ohio Constitutional Modernization Commission ("Commission") to order at 1:34 p.m.

Members Present:

A quorum was present with Commission Co-chairs Tavares and Amstutz, and Commission members Asher, Bell, Clyde, Cole, Coley, Cupp, Curtin, Davidson, Fischer, Gilbert, Jacobson, Jordan, Kurfess, McColley, Mulvihill, Peterson, Saphire, Skindell, Sykes, Taft, Talley, and Wagoner in attendance.

Approval of Minutes:

The minutes of the January 14, 2016 meeting of the Commission were reviewed and approved.

Subject Matter Committee Reports:

Education, Public Institutions, and Local Government Committee

Ed Gilbert, vice-chair of the Education, Public Institutions, and Local Government Committee, reported the committee postponed a second reading of a report and recommendation for Article VI, Section 3, relating to local school boards. He said the committee has been considering Article VI, Section 4, dealing with the state board of education and the state superintendent of public instruction. Mr. Gilbert said the committee has heard from William Phillis, who advocated for a return to an all-elected state board of education membership, as well as from Tom Gunlock, current president of the state board, who expressed his belief that the current system is not working. Mr. Gilbert said the committee heard from eight presenters on the topic at its February meeting. He said the committee will continue its discussion next month in order to reach a decision on what to recommend regarding the provision.

Finance, Taxation, and Economic Development Committee

Doug Cole, chair of the Finance, Taxation, and Economic Development Committee, reported that the committee was scheduled to meet in February, but there was a request to postpone the meeting for a month to allow testimony by the treasurer's office. Mr. Cole said the committee is scheduled to meet later in the afternoon, at which time he expects the committee to have a first presentation of a report and recommendation on obsolete provisions in Article VIII related to general obligation bonds. He said he hopes to bring the report and recommendation forward at the next meeting of the full Commission.

Judicial Branch and Administration of Justice Committee

Patrick Fischer, vice-chair of the Judicial Branch and Administration of Justice Committee, reported that the committee has been examining the role of the grand jury system. In that regard the committee has heard two presentations by Sen. Sandra Williams, and presentations by Professor Gregory M. Gilchrist, State Public Defender Tim Young, and two county prosecutors. He said the committee has engaged in discussion about possible changes to the system. Judge Fischer said some of the changes being considered could be done nonconstitutionally, but the committee has been examining other state systems, including New York and Hawaii.

Bill of Rights and Voting Committee

Richard Saphire, chair of the Bill of Rights and Voting Committee, said earlier in the day the committee took up the issue of Article I, Section 6, which prohibits slavery and involuntary servitude. He said the committee will continue to discuss the issue at its next meeting. He said the committee also voted to issue a report and recommendation for Article V, Section 6, relating to mental capacity to vote. Mr. Saphire said the committee expects to begin a review of Article V, Section 1 (Qualifications of an Elector) at its next meeting, as well as considering the issue of electronic privacy.

Constitutional Revision and Updating Committee

Dennis Mulvhill, reporting as chair of the Constitutional Revision and Updating Committee, said the committee is looking at the statutory initiative, the constitutional initiative, and the referendum process. He said the current focus is on the statutory initiative, and thanked staff for providing research and guidance on this topic. Mr. Mulvihill said the committee is reviewing potential redrafts of Article II, Sections 1b and 1g, and is discussing removing the supplementary petition requirement, raising initial signature requirement from three percent to five percent, and providing a three-year "safe harbor" provision to provide temporary protection to initiated statutes. Mr. Mulvihill said he anticipates the committee will next address the constitutional initiative process.

Legislative Branch and Executive Branch Committee

Reporting on behalf of the Legislative Branch and Executive Branch Committee, Executive Director Steven C. Hollon said last Fall the committee considered the single subject rule, but

after passage of Issue 1 (legislative redistricting) in November, the focus turned to the issue of Congressional redistricting. He said, at its January 14, 2016 meeting, the committee heard and discussed a first presentation of a report and recommendation on the issue. The committee then held a special meeting on February 4, 2016, at which it considered approving the report and recommendation as proposed. However, before the vote, the committee created a four-person subcommittee to look further into the details of the proposed amendment. The subcommittee, consisting of Fred Mills, Paula Brooks, Senator Charleta Tavares, and Representative Robert McColley, met on March 9, 2016. At the meeting, Commission member Jeff Jacobson and Bethany Sanders, legal counsel for the Ohio Senate Democratic Caucus, updated the subcommittee on discussions that had taken place on the issue and what progress had been made. Mr. Hollon said the subcommittee will continue its work and will bring a full report back to the Legislative Branch and Executive Branch Committee meeting on April 14, 2016, noting that, at this stage the subcommittee seemed positive and hopeful that a consensus could be reached on the issue of Congressional redistricting.

Executive Director's Report:

Co-chair Amstutz then recognized Mr. Hollon for his report. Mr. Hollon noted that the committees have been very busy in the past month, and that staff appreciates the guidance that chairs provide in the planning process. Mr. Hollon introduced Nick Adair and Lee Matheson, both law students at the Moritz College of Law at The Ohio State University, who are assisting the Commission this semester as legislative clinic interns.

New Business:

Co-chair Amstutz noted the Commission has been discussing whether to hold a meeting in other places in the state, and invited suggestions by committee chairs in this regard.

Mr. Saphire expressed compliments to staff for all the hard work, memoranda, and discussions that have been provided to assist his committee. Co-chair Amstutz added that staff support is exceptional, and thanked staff for making the Commission's work more productive and on target.

Adjournment:

There being no further business to come before the Commission, the meeting adjourned at 1:57 p.m.

Approval:

The minutes of the March 10, 2016 meeting of the Commission were approved at the April 14, 2016 meeting of the Commission.

_____	_____
Co-chair Senator Charleta B. Tavares Assistant Minority Leader	Co-chair Representative Ron Amstutz Speaker Pro Tempore

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE V, SECTION 6

MENTAL CAPACITY TO VOTE

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:

> *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.*

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.

Mr. Kirkman again appeared before the committee on November 12, 2015 to answer questions from committee members about proposed changes to the provision. Reiterating that experts dispute what is meant by "capacity to vote," Mr. Kirkman said one way to address that question would be to include language giving the General Assembly an express role in deciding what circumstances should affect voting rights.

Huhn Presentation

On November 12, 2015, the committee heard a presentation by 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"). 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. Prof. Huhn said mental health experts use methods to evaluate performance that are far more than a simple IQ test, and that people have abilities based on living skills, communication skills, and common sense.

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 last only 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. Ultimately, it was the consensus of the committee that expressly requiring or enabling action by the General Assembly is necessary in order to acknowledge an evolving understanding of the concept of "mental capacity for the purpose of voting," and so the committee concluded that the section should 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 "rights 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.

The committee was divided between those who wanted to include a reference to adjudication, and those who did not. As a way of addressing the issue of adjudication, the committee decided the amendment should require the General Assembly to enact laws governing the legal determination of whether a person lacks the mental capacity to vote. The committee also agreed its recommendation should 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 "rights" and "privileges" of an elector, and that the disenfranchisement would only be during the period of incapacity.

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:

> *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.*

The recommended amendment serves the goal of:

- Requiring the General Assembly to enact laws relating to the disenfranchisement of persons lacking the mental capacity to vote;
- 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 Issued

After considering this report and recommendation on September 10, 2015, November 12, 2015, and March 10, 2016, the Bill of Rights and Voting Committee voted to issue this report and recommendation on March 10, 2016.

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 Leonard Shelford, *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).

[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 19th century scientific and political views on the subject of disenfranchisement of the mentally incompetent, see Kay Schriner, *The Competence Line in American Suffrage Law: A Political Analysis*, 22 Disability Stud. Q., no. 2, 2002, at 61; and Kay Schriner and 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 Report, 2502, 2515 (Apr. 22, 1974), http://www.lsc.ohio.gov/ocrc/v5%20pgs%202195-2601%20elections-suffrage%202602-2743%20local%20govt.pdf (last visited Oct. 28, 2015).

[5] *Id.* at 2516.

[6] Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Constitution, Part 7, Elections and Suffrage, 23-25 (Mar. 15, 1975) http://www.lsc.ohio.gov/ocrc/recommendations%20pt7%20elections%20and%20suffrage.pdf (last visited Oct. 28, 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 Jennifer A. Bindel, *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.

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2016 Meeting Dates

May 12

June 9

July 14

August 11

September 8

October 13

November 10

December 8