OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

BILL OF RIGHTS AND VOTING COMMITTEE

THURSDAY, JUNE 11, 2015
9:30 A.M.
OHIO STATEHOUSE ROOM 017
AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of April 9, 2015

IV. Reports and Recommendations

- Article I, Section 13 (Quartering of Troops)
  - Second Presentation
  - Public Comment
  - Discussion
  - **Action Item: Consideration and Adoption**

- Article I, Section 17 (No Hereditary Privileges)
  - Second Presentation
  - Public Comment
  - Discussion
  - **Action Item: Consideration and Adoption**

V. Presentations

- None scheduled

VI. Committee Discussion

- Article V, Section 6 (Idiots and Insane Persons) – Continuing discussion regarding elimination of the phrase "idiot, or insane person" from Article V, Section 6.

- Article V, Section 4 (Felon Disenfranchisement) – Continuing discussion regarding excluding from voting those convicted of a felony.

VII. Next steps

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

VIII. Old Business

IX. New Business

X. Public Comment

XI. Adjourn

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, APRIL 9, 2015

Call to Order:

Chair Saphire called the meeting of the Bill of Rights and Voting Committee to order at 11:17 a.m.

Members Present:

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

Approval of Minutes:

The committee approved the minutes of the February 12, 2015 meeting.

Reports and Recommendations

Chair Saphire reviewed the process of approving reports and recommendations.

Executive Director Steven C. Hollon presented for the first time two separate reports and recommendations on Article I.

Article I, Section 13 (Quartering of Troops)

Executive Director Hollon first presented the report and recommendation on Article I, Section 13, concerning the quartering of troops. This provision is original to the 1851 Ohio Constitution and is almost identical to its predecessor – Article VIII, Section 22 of the 1802 constitution. In addition, this provision is similar to the Third Amendment to the U.S. Constitution. When Ohio adopted this prohibition in 1802, the quartering of troops in private homes had become a symbol of British oppression. The 1851 provision has not been amended since its implementation. The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this provision, and it has not generated any significant litigation. The report and recommendation states that the committee recommends that Article I, Section 13 be retained in its current form.

Chair Saphire asked for member comments. Chair Saphire called attention to footnote 14 of the report and recommendation. The citation contains a volume and section number which are the same. This is not common, so Chair Saphire asked for staff verification that this was not a typographical error. It was later confirmed that the citation is correct.

Article I, Section 17 (No Hereditary Privileges)

Executive Director Hollon presented the report and recommendation on Article I, Section 17, concerning the granting or conferring of hereditary privileges. This provision is original to the 1851 Ohio Constitution and is almost identical to its predecessor, Article VIII, Section 24 of the 1802 constitution. In addition, this provision is similar to Article I, Sections 9 and 10 of the U.S. Constitution. The drafters of the 1802 constitution adopted this prohibition as a rejection of Old World notions of birthright and fixed social status. The drafters also employed this provision to ensure that Ohioans would not be influenced in times of war by foreign nations who might offer them titles of nobility. The 1851 provision has not been amended since its adoption. The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this provision, and it has not generated any significant litigation. The report and recommendation states that the committee recommends that Article I, Section 17 be retained in its current form.

Chair Saphire asked for member comments and none were provided. He then called for public comment on both reports and recommendations and none were provided.

Reports and Recommendations Previously Approved:

Article I, Section 4 (Bearing Arms; Standing Armies; Military Power)

Chair Saphire explained that, at the March Coordinating Committee meeting, committee member Senator Obhof expressed concern regarding a statement previously contained in the report and recommendation for Article I, Section 4. The sentence discussed the impact of the U.S. Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), on the right to bear arms. Chair Saphire stated that the sentence of concern has been removed from the report and recommendation. The change has no substantive effect on the report and recommendation.

Executive Director Hollon informed the committee members that, since the change has no substantive effect on the report and recommendation, the full Commission will still be voting on the report and recommendation this afternoon unless the committee objects.

Representative Amstutz and Senator Skindell both asked whether procedure required committee members to take a vote on this change. Executive Director Hollon stated that whether to take a vote is up to the committee. He assured the committee that the Coordinating Committee does not anticipate recommending these types of changes in the future but that this was an isolated situation.

Senator Skindell made a motion to accept the change. Representative Amstutz seconded the motion. A unanimous voice vote was taken to accept the change.

Committee Discussion:

Article V, Section 6 (Idiots and Insane Persons)

Chair Saphire directed the committee's attention to the work previously conducted by the committee on Article V, Section 6. He reminded members of testimony given by Michael Kirkman, Executive Director of Disability Rights Ohio, and memoranda written by committee member Karla Bell. Chair Saphire stated that there appears to be a consensus that the current language has to change, but the committee still needs to decide whether the provision will be repealed all together or if language will be replaced. He then called the members' attention to a memorandum prepared by staff outlining the current status of the discussion. He expressed appreciation for this memorandum.

Executive Director Hollon gave a brief presentation outlining the contents of a memorandum written by Shari L. O'Neill, Counsel to the Commission, which provides a summary of the status of the committee's work on Article V, Section 6. The memorandum, included in the meeting materials, outlined the three replacement proposals suggested at the February 2015 meeting. First, the memorandum identified a proposal drafted by Commission staff that was based on the expressed goals of the committee up to that point: "The General Assembly shall have the power to exclude an otherwise qualified elector from voting while lacking the mental capacity to vote, as determined by judicial process." Second, the memorandum identified the proposal suggested by committee member Douglas Cole: "No person who lacks the mental capacity to vote shall be entitled to the privileges of an elector during the time of such incapacity." Finally, the memorandum identified a proposal suggested by committee member Karla Bell: "No person who lacks the mental capacity to understand the act of voting shall be entitled to the privileges of an elector during the time of such incapacity." The memorandum then addressed the differences in the three proposals, also addressing which expressed goals of the committee were satisfied by each.

Executive Director Hollon then outlined the legal issues of each proposal as outlined in the memorandum. The memorandum focused on due process and equal protection analyses as deemed important by a frequently-cited case in the area of voting rights for the mentally impaired, *Doe v. Rowe*, 156 F. Supp.2d 35 (D.Maine, 2011). The Maine federal district court in *Doe* held that voting is a fundamental right, that individuals have an interest in maintaining that right, and that, as a result, a due process and equal protection analysis is necessary when assessing voting rights questions. Executive Director Hollon also outlined the burden-of-proof analysis contained in the memorandum, its review of other state constitutional provisions on this topic, and its summary of the arguments for and against the inclusion of various elements in the final proposal. These elements include whether to expressly require the General Assembly to enact laws relating to disenfranchisement, whether the proposal should authorize a judicial determination, whether the proposal should contain a reference to "the privileges of an elector," and whether the proposal should outline what it means to be mentally incapacitated for voting purposes.

Chair Saphire suggested that the first issue to consider is whether the section should be repealed entirely. If that is the case, there is no need for further discussion. However, Mr. Saphire

acknowledged that he is likely the only member with this view and that a repeal likely would not pass in the long-term. Vice-Chair Jacobson expressed that he is not comfortable with a repeal. He would rather see the section replaced.

Chair Saphire suggested, in light of this fact, that the committee discuss the section's replacement. He recalled that the committee seems to have a consensus on three main issues. First, that the incapacity must be with respect to voting. Second, that regardless of the disqualification that arises, the disqualification should only last as long as the incapacity remains. Finally, the phrase "incapacity" should be used to describe the mentally impaired. Chair Saphire stated the next issue to be decided is whether there are other issues where a consensus is needed. He asked for member comments and ideas.

Committee member Cole pointed out that one way that his proposal and the Bell proposal differ from the staff proposal is that the staff proposal is not self-executing. He explained that the staff proposal requires action by the General Assembly. What happens if the General Assembly chooses not to act? Mr. Cole stated he favors a self-executing proposal and asked what other members thought. He suggested that a vote be taken on the issue of self-execution. If the members felt that self-execution is needed, that could narrow the discussion. Vice-Chair Jacobson stated that a self-executing provision would not preclude the General Assembly from acting.

Representative Amstutz offered a sample replacement which built off of the Cole proposal and contained two sentences instead of one. He stated that the goal of this alternative is to address the three potential shortcomings of the Cole proposal, while also addressing the staff proposal's lack of a self-executing nature. He offered, "No person who lacks the mental capacity to vote shall be entitled to vote during the time of such incapacity. The General Assembly shall have the power to enact laws executing this provision, provided that such laws include appropriate judicial process." He added that this is just a suggestion for debate, not a new proposal.

Vice-Chair Jacobson noted that the phrase "privileges of an elector" is not the same as voting, because "privileges" actually means something broader than just casting a vote. It encompasses all of the roles that a person can play, such as running for public office or signing petitions. He said that because of this he wants the replacement section to retain the "privileges" language instead of changing it to "voting." He added that as long as the replacement states, "General Assembly has the right to make laws," there is no need to require appropriate judicial process in the language. The General Assembly can pass any statutes that it likes; there is no requirement that the laws be constitutional. If those laws are not constitutional, the courts can strike them down. With regard to the "privileges" question, Chair Saphire drew attention to Article V, Section 4, relating to felon disenfranchisement, which describes voting as a privilege and is not self-executing. Section 4 expressly gives the General Assembly power to decide who has the power to vote. He added, however, that there is no reason why any replacement provisions need to match other provisions. Representative Amstutz concurred with Vice-Chair Jacobson's suggestions.

Chair Saphire agreed with Mr. Jacobson's statement that the replacement section does not need to be, but should be, written in a way that diminishes constitutional vulnerabilities. In addition, he pointed out that a section can authorize the General Assembly to do whatever and act in a way it deems constitutional. He stated that he believes the replacement needs to be a provision that,

regardless of its self-executing nature, has a procedural safeguard in order to be effectuated. He stated a preference for the staff proposal because it requires adjudication.

Mr. Cole disagreed with the notion that a state constitutional provision is unconstitutional unless it specifies adjudicatory procedures in excruciating detail. He does not see much case law to support that. Instead, he sees the question as whether the individual receives process and whether that process complies with due process. This would require a case-by-case analysis. Mr. Cole stated that the standard for a facial challenge under the Due Process Clause is whether it would be unconstitutional in all of its applications. In his opinion, a provision lacking reference to judicial determination is not unconstitutional in all settings because there could be a statute which covers this.

Chair Saphire stated that whether the committee includes a provision on the basis of its constitutional necessity is a matter of policy. Regardless of what is done by the committee, it is true that the General Assembly's actions are ultimately subject to constitutional challenge. However, if the committee sees an adjudicatory process as a prerequisite, why not state it in the constitutional provision?

Senator Skindell expressed that he is not in support of language requiring General Assembly involvement. One issue in his mind, however, is the practical effect of this provision; it could allow the denial of an individual's rights without adjudication or anything else. He recalled situations that he has been told about where board of elections officials have made a self-determination that a person lacks mental capacity. The official used this section to prevent someone from voting. Because of this potential problem, he said his inclination is to go along with the idea worked into other states' provisions by requiring a judicial determination before denying the right to vote. If the Cole or Bell proposals are re-written to include this element, he said he would tend to favor them a little bit more.

Chair Saphire agreed that he shared this tendency and would be more in favor of the Cole proposal if it included a judicial determination provision. He asked if there is a fundamental problem with adding language requiring judicial process, or is the argument that the language is just not necessary. Mr. Cole responded that his problem lies with the facial challenge motivation for including the language. He stated he has no problem with the language itself and would not be opposed to include the language if the inclusion is based on another reason. He concluded that he had never heard of Senator Skindell's concern of people being denied access in the polling place here in Ohio. Senator Skindell stated his stories are not about polling place denials but about board of elections officials going into nursing homes to assist with the voting process, indicating that the officials use these provisions to make their own independent determination that a person does not have the right to vote. Vice-Chair Jacobson stated that he was on a board of elections, and his experience was that officials have contested someone's vote along partisan lines. He said general disenfranchisement is not occurring. Instead, these officials are trying to not record a vote that they do not want counted. Vice-Chair Jacobson then stated that he is not sure about the solution to this debate; he is just uncomfortable with the thought that the provision must be detailed about what the General Assembly is allowed to do. He stated no objection to making the replacement more constitutional, so if this is the argument for requiring a judicial

determination, it should be included. However, he has not heard of anyone challenging this issue in court.

Chair Saphire stated that there is something surreal about this conversation, noting that, according to Michael Kirkman's testimony at the last meeting, this issue almost never arises. Therefore, he said, this remedy is prophylactic in nature only. However, he said, if something like this did happen, the individual would be forced into court on a very short timeline. Chair Saphire said that a voting challenge puts the burden on the individual being denied the right, rather than the challenger, and there is no requirement of adjudication to take the right away. He said that if the right to vote is so precious, the presumption should be that the individual is qualified. The state should then have the burden of establishing the disqualification. The right should be protected, and the state should have to go to court to take it away.

Judge Fischer suggested an alternative, directing the committee's attention to the constitutional provision in South Carolina. This alternative would read, "The General Assembly shall establish disqualifications for voting by reason of mental incompetence and may provide for the removal of such disqualification." Mr. Cole pointed out that the South Carolina provision is not self-executing. It allows for the General Assembly's action, but the General Assembly can still choose not to act. Judge Fischer stated that he offered the suggestion merely as a way to keep the committee moving forward. He stated that the committee is approaching this conversation in a short-sighted manner. The analysis of competency will change before the next modernization commission meets to consider revisions to the constitution. As a result, there should be some leeway. He said that giving or mandating General Assembly authority would be a good thing.

Vice-Chair Jacobson suggested another replacement proposal. Based on the consensus of the committee that "idiots and insane persons" language should be struck, this replacement would add in "no person lacking mental capacity to vote" and leave the rest intact. By doing so, the committee would not be creating problems for existing procedures and also would not be creating new procedures. He said that this would allow the committee to "cut the Gordian knot." Chair Saphire responded that this alternative could have a danger of doing too little. Mr. Cole said that this is the same as his proposal, except his proposal adds, "during the time of such incapacity." Mr. Jacobson agreed that that Mr. Cole is correct that both proposals are the same. Representative Amstutz expressed a desire to focus less on voting and instead look to the broader capabilities. Senator Skindell stated a concern that "mental capacity" is much broader than "idiots and insane persons" and will likely deny a large number of voters not currently denied. Vice-Chair Jacobson agreed that this would be risky, but said there needs to be something there. Representative Amstutz pointed out that a qualifier already exists, "to exercise the duties of an elector."

Chair Saphire asked if Vice-Chair Jacobson would agree that a provision should be added for, "as long as the incapacity should last?" Mr. Jacobson said yes.

Mr. Saphire asked what would be wrong with Mr. Cole's original provision plus the addition of a reference to judicial adjudication. Senator Skindell expressed that he had the same question. The provision could read, "No person who has been adjudicated to lack the mental capacity to vote shall be entitled to the privileges of an elector during the time of such incapacity." Senator

Skindell stated a preference for the language of the Arizona, Georgia, and Delaware constitutions as included in the meeting materials. Chair Saphire summarized that the provision should be self-executing, should be focused on general incapacity, and should be non-specific, allowing the courts to work out the details. To accomplish this, he said all that would need to be added is a judicial adjudication provision.

Representative Amstutz suggested adding the term "adjudged" like another state had because going to court seems like a large burden. Mr. Jacobson asked who would bring the case. Chair Saphire said that this provision would not preclude the General Assembly from developing a plan. Mr. Jacobson returned to the nursing home example. He stated that this problem is not likely to arise for those individuals who can walk into a polling place. It will be a problem for those who are at the end of their life and cannot speak. Their silence will be taken advantage of by board of elections officials who want to count that individual's vote for their party. Judge Fischer stated that under the current system the board of elections makes the determination and the individual has no direct appeal from that determination. They must file a writ of mandamus. He returned to his earlier concern regarding developments over the coming years. He said, in twenty years you may be able to appeal these determinations online. As a result, he said he sees no problem with being specific, so long as the provision is flexible. Chair Saphire said that Senator Skindell's proposal of just adding in language referencing a judicial adjudication will still allow the General Assembly to change the process later as needed. Vice-Chair Jacobson stated that the term "adjudication" sounds more formal and restrictive. Senator Skindell said that the General Assembly could make it an administrative adjudication. The goal should be to preserve the person's right to due process and the privileges of an elector. The privileges of an elector are broad and allow the individual to pursue a taxpayer action under certain circumstances. These determinations, therefore, will go broader than any statute or local provisions, so due process is necessary.

Chair Saphire asked if Steven Steinglass, Senior Policy Advisor for the Commission would like to comment. Mr. Steinglass stated that "privilege" is only used in five places in the constitution, while "elector" is used in many. He went on to explain that the contrast being made regarding self-execution is too sharp. The General Assembly can still be left a way to act and should be left some sort of role. He suggested that the language be, "No person who lacks the mental capacity to vote may be denied outside of [some provision allowing the General Assembly to act.]" This would also create a self-executing provision through the use of the term "may."

Vice-Chair Jacobson stated that he would like to go back to the Cole provision. He stated that the committee has not given the General Assembly a role but has told them what to do. Some members think a judicial process should be included and some do not. One thing that everyone has agreed upon, however, is not to use the words "idiots and insane persons." He suggested that the proposal be limited to this change and leave out these other contentious issues. Continuing to try to deal with them will leave the committee in knots. He stated that there should also be a provision for re-instatement because all seem to agree on that idea as well. He expressed that he does not see a need to go any further. The more simple the provision, the more likely it is to pass. He said Cole's provision, therefore, provides the best option because its inclusion of "during the time of such incapacity" opens the door for some sort of judicial adjudication. In addition, by being less detailed, the courts and the General Assembly can decide what that will look like.

Then the committee can move on to the next topic. Chair Saphire asked the staff to create one more proposal incorporating Mr. Jacobson's ideas.

Senator Skindell asked whether there is a consensus that a reference to the General Assembly be removed. All members agreed. Senator Skindell made a final suggestion that "to vote" be replaced with something more artful.

Chair Saphire stated that this consensus will take the committee into its next meeting and the main sticking point remaining will be the inclusion of a judicial adjudication process.

Representative Amstutz stated that a court dealing with this provision would have to follow due process.

Chair Saphire stated that this does not get rid of the issue regarding the right to vote being a presumptive right, but this new proposal will give the committee something to vote on, allowing the committee to move forward.

Mr. Cole asked if a poll should be taken on the issue of an adjudicatory process. Senator Skindell stated that he leans toward supporting a phrase about adjudication, but it can be administrative through the board of elections. He said the General Assembly could design the process without changing the Cole proposal. Senator Skindell then returned to his concern that mental capacity is broader than the current phrase. He stated a discomfort with the idea that board of elections workers are making the interpretation on their own. Mr. Cole stated that he shares these concerns but feels that these are legislative concerns rather than constitutional ones. He said that many constitutional provisions leave rulemaking to the General Assembly and the courts. He prefers to let the General Assembly make this determination.

Chair Saphire stated that the committee is out of time. Executive Director Hollon stated that this conversation has been helpful to the staff, and they will draft a proposal for the next meeting which includes some options for phrasing.

Representative Clyde requested that a discussion be had at the next meeting regarding whether or not the language will label voting as a "right" or a "privilege" because people seem to be using different terms. Mr. Cole stated that there can be rights of an elector or a privilege. Vice-Chair Jacobson commented that this issue is currently a large, on-going political fight. He stated that he would prefer not to address this issue because it is too controversial and would get in the way of the committee finishing its task.

Adjournment:

With no further business, the committee adjourned.

Attachments:

- Notice
- Agenda

- Roll Call Sheet
- Reports and Recommendations for Article I, Section 13 (Quartering of Troops) and Section 17 (No Hereditary Privileges)
- Memorandum by Shari L. O'Neill titled "Review of Proposals Regarding Article V, Section 6 (Idiots and Insane Persons)," dated April 2, 2012
- Research materials: *Doe v. Rowe*, 156 F. Supp.2d 35 (D. Maine 2001); *IMO Absentee Ballots v. Trenton Psych. Hospital*, 331 N.J. Super. 31, 750 A.2d 790 (Sup. Ct. N.J. 2000); Ballotpedia article titled "Kansas Voting Disqualification Amendment, Constitutional Amendment Question 2 (2010)
- Memorandum by Hailey C. Akah titled "Summary of Written Material and Previous Presentations on Article V, Section 4 (Felon Disenfranchisement)"

Approval:

These minutes of the April 9, 2015 meeting of the Bill of Rights and Voting Committee were approved at the June 11, 2015 meeting of the committee.

_____
Richard B. Saphire, Chair

_____
Jeff Jacobson, Vice-Chair

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE I, SECTION 13

QUARTERING OF TROOPS

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 13 of the Ohio Constitution concerning the quartering of troops. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that no change be made to Article I, Section 13 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article I, Section 13, reads as follows:

> No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, except in the manner prescribed by law.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution. The Third Amendment to the U.S. Constitution reads: "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

Adopted as part of the 1851 Ohio Constitution, Article I, Section 13 is virtually identical to its predecessor, Article VIII, Section 22 of the 1802 Constitution, which reads:

> That no soldier, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in the manner prescribed by law.

The concept of quartering troops in private homes arose out of English law and custom, and was the byproduct of a military system that had transitioned from reliance upon local citizen militias to standing armies comprised of professional soldiers.[1] Eventually, Parliament's Mutiny Act protected private British citizens in England from being forced to house and feed British soldiers, requiring compensation to innkeepers and others who supplied traveling armies with food and shelter.[2] But the anti-quartering section of the Mutiny Act was not extended across the Atlantic, and the forced quartering of troops during the French and Indian War (1754-1763) angered colonists who felt they were being denied protections they understood to be their birthright as Englishmen.[3] Attempting to defuse colonial anger, Parliament amended the Mutiny Act to include The Quartering Act of 1765, authorizing British troops to shelter in public houses or vacant structures where barracks were unavailable and clarifying that quartering in private homes was to be avoided.[4]

From the Crown's point of view, standing armies were necessary even after the war to protect British supremacy in North America, including the securing of territorial and trading interests.[5] From the colonists' point of view, the end of the French and Indian War should have seen a reduction, rather than an increase, in troop numbers.[6] Eventually, the role of colonial standing armies evolved to that of containing the civil unrest that ensued as the British government imposed unpopular taxes and other restrictions.[7] Throughout this period, colonial governments were unwilling to concede the need for standing armies, the British control they symbolized, and the expense they represented.[8]

As the situation escalated, Parliament enacted a second Quartering Act in 1774 to require the quartering of troops in private homes.[9] Citizen outrage followed, based, in part, on the growing conviction that the real purpose of the military presence was to suppress colonists' resistance to British control.[10]

Thus, the quartering of troops issue became a symbol of British oppression, and helped to provide justification for the independence movement.[11] In fact, "Quartering large bodies of armed troops among us" was one of the rights violations cited in the Declaration of Independence.[12] In the 1800s, some historians characterized the Quartering Acts, along with other parliamentary decrees limiting and controlling economic and personal liberties during colonial times, as "Intolerable Acts," a historiographical term which continues to be used to describe the despotic actions of the British government in the years leading up to the Revolutionary War.[13]

This history inspired several former colonies to include anti-quartering provisions in their state constitutions, and led to adoption of the U.S. Constitution's Third Amendment.[14] It also influenced the drafters of the constitutions of Pennsylvania, Kentucky, and Tennessee, all three of which are recognized as primary sources for much of Ohio's 1802 Constitution.[15] [16]

Amendments, Proposed Amendments, and Other Review

Article I, Section 13 has not been amended since its adoption as part of the 1851 Ohio Constitution.[17] The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this section.[18]

Litigation Involving the Provision

Article I, Section 13 has not been the subject of significant litigation.

The Third Amendment to the United States Constitution has been cited in some litigation, not because it references the quartering of troops *per se*, but for its support of the concept that citizens have a constitutional right to privacy that must be protected from governmental intrusion. *See e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347 (1967).

Presentations and Resources Considered

There were no presentations to the committee on this provision.

Conclusion

The Bill of Rights and Voting Committee concludes that Article I, Section 13 should be retained in its current form.

Date Adopted

After formal consideration by the Bill of Rights and Voting Committee on April 9, 2015 and _____, the committee voted to adopt this report and recommendation on _____.

Endnotes

[1] William S. Fields and David T. Hardy, The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History, 35 Am. J. Legal Hist. 393 (1991).

[2] Alan Rogers, Empire and Liberty: American Resistance to British Authority 1755-1763, Berkeley and Los Angeles: UP of California (1974), p. 76.

[3] *Id.*, p. 83-84.

[4] *Id.*, p. 88.

[5] Fields & Hardy, *supra*, pp. 414-415.

[6] *Id.*, p. 416.

[7] *Id.*

[8] *Id.*, p. 415.

[9] *Id.*

[10] *Id.*, p. 416.

[11]Rogers, *supra*, p. 89.

[12] Fields & Hardy, pp. 417-18.

[13] J.L. Bell, "Intolerable Acts," Journal of the American Revolution, June 25, 2013. http://allthingsliberty.com/2013/06/intolerable-acts/ (accessed April 24, 2015).

[14] Note, Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment's Protection of Houses, 112 Columbia L.Rev. 112, Thomas G. Sprankling, 2012, pp. 126-27.

[15]Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), pp. 21-22.

[16] The 1796 Constitution of Tennessee includes Article 11, Section 27, which reads: "That no Soldier shall in time of peace be quartered in any House without consent of the owner, nor in time of war but in a manner prescribed by Law." http://www.tn.gov/tsla/founding_docs/33633_Transcript.pdf (accessed April 24, 2015).

Article IX, Section 23 of the Pennsylvania Constitution of 1790 states: "That no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." http://www.duq.edu/academics/gumberg-library/pa-constitution/texts-of-the-constitution/1790 (accessed April 24, 2015).

Article XII, Section 25 of the 1792 Kentucky Constitution provides: "That no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." http://www.kyhistory.com/cdm/ref/collection/MS/id/9926 MSS145_1_20 (accessed April 24, 2015).

Only minor differences in punctuation distinguish these three provisions from Article VIII, Section 22 of Ohio's 1802 Constitution.

For a discussion of the quartering provisions in the Kentucky Constitution, see Robert M. Ireland, The Kentucky State Constitution, 2nd Ed. (Oxford UP, 2012). A similar discussion regarding the Tennessee Constitution may be found at Lewis L. Laska, The Tennessee State Constitution (Oxford UP, 2011), p. 64.

[17] Steinglass & Scarselli, *supra*, p. 112.

[18] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, April 15, 1976, pp. 36-37, and pp. 464-65 of Appendix K of the Final Report.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE I, SECTION 17

NO HEREDITARY PRIVILEGES

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 17 of the Ohio Constitution concerning the granting or conferring of hereditary privileges. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that no change be made to Article I, Section 17 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article I, Section 17, reads as follows:

> No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this State.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution. Article I, Sections 9 and 10 of the U.S. Constitution similarly prohibit the granting of titles of nobility.[1]

That hereditary titles and privileges had no place in the emerging egalitarian ideals of the American colonies is a concept reflected in the writings of prominent statesmen, political theorists, and constitutional framers of the time. As observed by Alexander Hamilton, "Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner-stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people."[2]

The prohibition of such titles and distinctions also was seen as necessary to the survival of the young republic, when the hard-won gains of the Revolutionary War were threatened by both British and French trade interference and other acts of aggression in the period leading up to the War of 1812. Out of the fear that foreign influence, bought with hereditary titles and aristocratic privileges, could weaken nationalistic resolve, constitutional framers both at the federal and state levels included prohibitions against such "titles of nobility" in their constitutions.[3] Hereditary titles were seen as the antithesis of a societal aspiration that rejected Old World notions of birthright and a fixed social status in favor of liberty, equality, and economic opportunity. As Thomas Jefferson wrote on the occasion of the fiftieth anniversary of the signing of the Declaration of Independence, and near the end of his life:

> That form which we have substituted, restores the free right to the unbounded exercise of reason and freedom of opinion. All eyes are opened, or opening, to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God.[4]

Article I, Section 17, adopted as part of the 1851 Ohio Constitution, is virtually identical to Section 24 of Article VIII of the 1802 Constitution, which reads: "That no hereditary emoluments, privileges, or honors shall ever be granted or conferred by this state." [5] The record of the 1802 Constitutional Convention does not reflect the provision's source, but it is identical to the analogous provision in Article II, Section 30 of the Tennessee Constitution of 1796.

Amendments, Proposed Amendments, and Other Review

Article I, Section 17 has not been amended since its adoption as part of the 1851 Ohio Constitution.[6] The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this section.[7]

Litigation Involving the Provision

Article I, Section 17 has not been the subject of significant litigation.

Presentations and Resources Considered

There were no presentations to the committee on this provision.

Conclusion

The Bill of Rights and Voting Committee concludes that Article I, Section 17 should be retained in its current form.

Date Adopted

After formal consideration by the Bill of Rights and Voting Committee on April 9, 2015 and _____, the committee voted to adopt this report and recommendation on _____.

Endnotes

[1] U.S. Const. Art. I, Section 9 reads, in part: "No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state." Section 10 reads, in part: "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." http://www.archives.gov/exhibits/charters/constitution_transcript.html (accessed April 24, 2015).

[2] The Federalist No. 84 (A. Hamilton). http://www.gutenberg.org/files/1404/1404-h/1404-h.htm#link2H_4_0084 (accessed April 24, 2015).

[3] *See e.g.*, Gideon M. Hart, The "Original" Thirteenth Amendment: the Misunderstood Titles of Nobility Amendment, 94 Marq. L. Rev. 311 (2010-2011), pp. 335-47.

[4] Letter to Roger C. Weightman, June 24, 1826 (Thomas Jefferson), as reprinted in 50 Core American Documents, Christopher Burkett, Ed., (Ashland Univ., Ashbrook Press, 2013), pp. 136-37.

[5] Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), p.123.

[6] *Id.*

[7]Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, April 15, 1976, pp. 42-43, and pp. 470-71 of Appendix K of the Final Report.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: **Chair Richard Saphire, Vice Chair Jeff Jacobson, and Members of the Bill of Rights and Voting Committee**

FROM: **Steven C. Hollon, Executive Director**

DATE: **May 29, 2015**

RE: **Competency to Vote - Sentence Diagram and Questions**

At the direction of the committee at the end of its April 9, 2015 meeting, staff has attempted to diagram a sentence that presents the committee with several options for language to use in replacing the current language in Article V, Section 6 which currently reads as follows:

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

The following presents a diagram posing alternative phrases the committee may wish to include in the body of the sentence followed by a brief discussion of the options presented.

Diagram

No person who

(1) [has been adjudicated to]

(2) [lack/lacks the mental capacity] *or* [be/is mentally incompetent] to

(3) [vote] or [understand the act of voting] shall be

(4) [permitted to vote] *or* [entitled to the privileges of an elector]

during the time of such incapacity.

Alternative Phrases

There are four phrases the committee needs to consider including in the provision, with two options to consider in three of those phrases. The phrases/options are presented to the committee as questions.

Should there be a requirement that one needs to be "adjudicated" to lack mental capacity or to be mentally incompetent?

The first question the committee needs to answer is whether the provision should include a standard that requires adjudication that one lacks mental capacity or is mentally incompetent. The use of the term "adjudication" suggests the decision has been made by a judicial body and that due process requirements have been met. The term also places the burden on the state to prospectively limit a voter's ability to vote rather than placing the burden on the voter to come forward to claim or enforce his or her ability to vote after being prevented from doing so by a non-judicial body on the basis that he or she lacks mental capacity or is mentally incompetent.

Should the provision refer to individuals as "lacking mental capacity" or as being "mentally incompetent"?

The next question the committee needs to answer is whether the person who the provision is attempting to limit from voting should be referred to as "lacking mental capacity" or as being "mentally incompetent." Michael Kirkman of Disability Rights Ohio suggests the term most accepted by disability rights professionals when referring to this segment of our population is "mental capacity." However, of the 38 states that limit a person's ability to vote because of a lack of competence, 21 states directly reference some form of the phrase "mentally incompetent" or use the word "incompetent" while only one state (Missouri) uses the phrase "mental incapacity."

Should the phrases "mental incapacity" or "mental incompetency" refer to "voting" or to "understanding the act of voting"?

The committee then needs to answer the question as to what the lack of mental capacity or mental incompetency should refer. Should it be as to voting or as to possessing an understanding of the act of voting? Is lacking the mental capacity to vote different than lacking the mental capacity to understand the act of voting? Is being mentally incompetent to vote different than being mentally incompetent to understand the act of voting?

Should the prohibited activity be the act of "voting" or engaging in the "privileges of an elector"?

The final question the committee should address is whether the activity it wishes to limit is "voting" or "engaging in the privileges of an elector." Article V, Section 1 defines who may vote in Ohio by setting out the "qualifications of an elector." The current version of Article V, Section 6 refers to "the privileges of an elector." What does "the privileges of an elector" mean? Is it just the act of voting? Does it refer to the ability to hold office? Is it the standard for being able to circulate a petition or does it suggest who may serve as a polling judge? If the committee simply wants to limit the ability of a person who lacks mental capacity or mental competency to engage in the act of voting rather than limiting other political activity, then simply stating that a person cannot "vote" resolves the question. If the committee wishes to limit the person from engaging in

a broader array of political activity, then the committee may wish to use the phrase "engaging in the privileges of an elector" instead.

Another question the committee may also wish to consider in this context is whether to refer to voting as a "right" or a "privilege." Of course, the committee can choose not to answer this question by determining that it simply wishes to state that a person who lacks mental capacity should not be "permitted to vote." By choosing this option, the provision would then not reference voting as either a "right" or a "privilege."

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

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

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

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

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

A Brief History of Article V, Section 4

Article V, Section 4 of the Ohio Constitution provides:

> The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony.

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

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

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

Felony Disenfranchisement Nationally

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

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

Arguments against Felony Disenfranchisement

Restoring Full Citizenship

This committee has been presented with several arguments against felony disenfranchisement. First, advocates of expansive voting rights state that felony disenfranchisement alienates felons from society. This is problematic, proponents argue, because the criminal justice system is simultaneously attempting to reintegrate those individuals into society. In this way, felony

disenfranchisement stands in opposition to the modern goals of the criminal justice system: rehabilitation and reintegration of former prisoners into society.

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

Disparate Impact of Disenfranchisement

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

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

Legal Challenges to Disenfranchisement

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

Public Opinion and Goals of Disenfranchisement

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

disenfranchisement laws have not been realigned to these modern goals. Additionally, these groups state that disenfranchisement has not been shown to deter future crime.

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

Suggestion Offered to the Committee

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

Endnotes:

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

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

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

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

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

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

[7] *Id.*

[8] *Id.* at 5.

[9] *Id.* at 4.

Bill of Rights and Voting Committee

Planning Worksheet
(May 2015)

Article I – Bill of Rights (Select Provisions)	
Sec. 1	Inalienable Rights (1851)
Notes:	
Sec. 2	Right to alter, reform, or abolish government, and repeal special privileges (1851)
Notes:	**Report and recommendation approved by committee (02.12.2015)**
Sec. 3	Right to assemble (1851)
Notes:	**Report and recommendation approved by committee (02.12.2015)**
Sec. 4	Bearing arms; standing armies; military powers (1851)
Notes:	**Report and recommendation approved by committee (02.12.2015)**
Sec. 6	Slavery and involuntary servitude (1851)
Notes:	
Sec. 7	Rights of conscience; education; the necessity of religion and knowledge (1851)
Notes:	
Sec. 11	Freedom of speech; of the press; of libels (1851)
Notes:	
Sec. 13	Quartering troops (1851)
Notes:	**Report and recommendation first presentation (04.09.2015)**
Sec. 17	No hereditary privileges (1851)
Notes:	**Report and recommendation first presentation (04.09.2015)**
Sec. 18	Suspension of laws (1851)
Notes:	
Sec. 19	Eminent domain (1851)
Notes:	
Sec. 19b	Protect private property rights in ground water, lakes, and other watercourses (2008)
Notes:	
Sec. 20	Powers reserved to the people (1851)
Notes:	
Sec. 21	Preservation of the freedom to choose health care and health care coverage (2011)
Notes:	

Bill of Rights and Voting Committee

Planning Worksheet
(May 2015)

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

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