



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

FOR THE MEETING HELD  
THURSDAY, SEPTEMBER 10, 2015

#### **Call to Order:**

Vice-chair Jeff Jacobson called the meeting of the Bill of Rights and Voting Committee to order at 9:37 a.m.

#### **Members Present:**

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

#### **Approval of Minutes:**

The minutes of the June 11, 2015 meeting of the committee were approved.

Committee member Karla Bell asked for a correction to her remarks as recorded on page four of the minutes, saying that one sentence did not indicate what she had actually said. She agreed that the sentence could be removed from the minutes. The committee then approved the minutes as corrected.

#### **Reports and Recommendations**

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

*Steven C. Hollon*  
*Executive Director*

Executive Director Steven C. Hollon presented a draft report and recommendation regarding Article V, Section 6, relating to the disenfranchisement of mentally incapacitated persons.

Mr. Hollon said staff was presenting it for the committee's consideration. He said that the committee may want to change the title to avoid use of the phrase "idiots and insane persons,"

perhaps instead using the phrase “mental capacity to vote” or something of that nature. He said the staff thinks it has captured the sense of the committee, having narrowed down the different issues and factors related to this topic.

Vice-chair Jacobson then asked for discussion on the report and recommendation.

Vice-chair Jacobson said he sees there being two questions: first, does there need to be an expressed acknowledgement of an adjudication or can there just be a statement without mentioning an adjudication?

He said the second question is: what is it that a person in such a mental state loses, acknowledging that the committee has considered several formulations, and that the language provided in the report and recommendation is an additional formulation. He said it seems to him that the first choice in the report and recommendation, that the amendment needs to express a need for an adjudication, is a matter of conviction. He said the committee was trying to get at something that addressed people’s concerns rather than retreat to armed camps.

Ms. Bell said that the second issue involves two things, how you phrase it: “mental capacity to vote” was agreed on, and that was one issue. She added, the second issue is whether there is a right or privilege to vote.

Vice-chair Jacobson said he meant to identify mental capacity to vote as a part of the second issue. He said his argument is that the concept of “privileges of an elector” involves doing more than voting. He said only electors can do certain things, adding that the problem he has with saying “rights” is that “we could be seen as deliberately excluding privileges,” which was a word used in the original section. He said he is worried the committee would be saying the only right affected is the right to vote. He said he thinks it is safer and less problematic to refer to the individual’s rights and privileges, whatever they may be, and that it is preferable to be “vague and all-encompassing in our vagueness, because rights and privileges would seem to run the gamut.” He said this phrasing wouldn’t leave anything out. He remarked that this statement differs from what he has suggested before.

Senator Michael Skindell commented that the privileges of an elector are very broad. He said, “for a director to be a director he has to be an elector. If you have a stroke as a director, do you automatically lose your position and your health care benefits?” He continued, asking whether this means that when a stroke victim would gain back his abilities, the governor could reappoint. He said his question is whether the committee has a grasp of what all of the privileges of an elector are. Vice-chair Jacobson said he assumes if that situation has arisen no one has ever enforced this section to permanently remove someone from office.

Ms. Bell said that is one of the things that was addressed by the 1970s Commission, including whether medical testimony would be required to determine whether capacity was present. She said presumably the committee would want the determination to be made by someone who was qualified and could provide medical or psychiatric evaluation. Sen. Skindell said Ms. Bell’s comment touches on the issue of an adjudication, or lack of it. He said he believes there is a

constitutional provision that says a state director has to be an elector. So if someone is not an elector because of a mental incapacity, he cannot serve as a director.

Vice-chair Jacobson said he is concerned that if the committee is worrying about whether someone can't keep their job, the committee is letting the very specific circumstance defeat the general purpose the committee is trying to accomplish.

Sen. Skindell said he has brought this issue up in the past, asking whether the committee has a handle on what the privileges of an elector are. He said the privileges do include signing an initiative or referendum petition, as well as other acts, with other ramifications.

Committee member Doug Cole said he has a more mundane concern: the way it is written in the report and recommendation, the committee has instituted an ambiguity: no person who is X shall have either A or B. Vice-chair Jacobson agreed that the "ands and ors" are not as one might think when it comes to statutory construction.

Representative Ron Amstutz said the committee could say "as well" and it would have the same effect as "and". Vice-chair Jacobson said the Legislative Service Commission would have an opinion on this, and may not agree that is the solution.

Ms. Bell said the committee could change the recommendation as to the rights and privileges concept. She said they could modify the proposed recommendation to read that "No person who [has been adjudicated to lack][lacks] the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity."

Vice-chair Jacobson agreed that the new language proposed by Ms. Bell is meant to be all encompassing, saying everything is either a right or a privilege, or both.

Ms. Bell then moved to change the report and recommendation to read "rights and privileges of an elector." Mr. Cole seconded the motion. Vice-chair Jacobson then asked for discussion. Sen. Skindell asked for clarification of whether the section would read "rights and privileges of an elector," and this was confirmed.

A vote was taken, with all voting in favor except for Sen. Skindell. Vice-chair Jacobson reported that the motion had carried.

The committee then turned to the question of mental capacity as it should be referenced in the recommendation. Vice-chair Jacobson and Ms. Bell agreed that the proposed new section appropriately referenced "mental capacity to vote."

Vice-chair Jacobson then turned to the question of whether the committee needs to put into the constitution the requirement of an adjudication.

Judge Patrick Fischer said he goes back to the minutes the committee just passed, referencing his comments on page four. He said the legislature has not provided for an adjudication of mental capacity, and that, basically, the board of elections in each county handles it. He said the person

whose voting ability is challenged then has to bring a writ of mandamus. He described a writ of mandamus as “a bizarre and unusual writ,” and that the proceedings for a writ are different than for a usual court proceeding. He asked, as a practical matter, when would the adjudication occur, every two or four years when the electoral rolls are cleared? He said the requirement of an adjudication adds something that is just not practical, unless you want to have many cases in the court system. He wondered whether the committee would be creating more problems than it is solving by requiring an adjudication. He said he understands the goal, but that it creates more problems than it actually takes care of.

Ms. Bell said the legislature could determine the appropriate procedure, and that would be in line with the proposals of the 1970s Commission. She added that changes in attitudes toward mental health over time mean that the legislature is in the best position to adopt laws reflecting the latest information, as opposed to attempting to address it in the constitution. She said the solution would be to give the legislature the right to set up procedures, because these are policy issues that are appropriately determined by the legislature.

Vice-chair Jacobson said use of the word “lacks” as opposed to the phrase “has been adjudicated to lack,” would allow the legislature to act. He said his fear is that this will cause prosecutors to have to come into court with a mass of names of persons who are residents of a facility, to say all must be adjudicated to lose the right to vote. He said as a former party chairman he knows that has happened from time to time. He asked “Do you want to make a requirement that the state set up a ‘star chamber’ to consider the mental capacity of its citizens?”

Ms. Bell directed the committee to a quote from the report of the 1970s Commission, indicating a lack of guidance resolving how hearings must be conducted and whether medical evidence would be required. She read from the report that “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.”

Vice-chair Jacobson agreed that this may be an issue but said it is for the General Assembly to determine. Judge Fischer commented that the 1970s Commission issued its recommendation before provisional balloting came into use, and that provisional balloting could take care of that issue rather easily. Ms. Bell said that the provisional balloting form is too complicated. Vice-chair Jacobson disagreed that provisional ballots are a problem, saying there were a lot of provisional ballots counted in the last election.

Vice-chair Jacobson asked whether there were any other arguments or proposed amendments to the wording, and suggested the committee take a vote.

Rep. Amstutz said he thinks the common sense approach allows for an improvement. He said, “for us to improve the provision, the committee needs to use the simple ‘lack’ and not put the word adjudication there.” He said the need for adjudication will arise, but that needs to happen not in language in the constitution.

The committee then took a straw poll on whether to include “has been adjudicated to lack” in the recommendation. Three members of the committee, Ms. Bell, Sen. Skindell, and Representative Kathleen Clyde, voted to include that language. Four members of the committee, Vice-chair Jacobson, Mr. Cole, Judge Fischer, and Rep. Amstutz, voted not to use the phrase “has been adjudicated to lack.”

Mr. Hollon then explained the procedure for approving a report and recommendation. He said this is the first presentation, and that the committee meets again in November. He said at that time the committee will have a new draft of the report and recommendation using the word “lacks” and will indicate the other change as “rights and privileges of an elector.” He said it will be up to the chair and the committee to determine if those changes would result in the report and recommendation being a first reading. He said the other question is whether the rest of the report and recommendation is acceptable to the committee. He said, if not, the committee will make changes if needed.

Ms. Bell suggested, given that the committee has voted 4-3 at one meeting to include adjudication, and now 4-3 to exclude adjudication, whether it would be alright to continue to put both options in the proposed language. Vice-chair Jacobson remarked that the committee, comprised of an even 10 members, will deadlock if all attend and again vote as they have been voting.

Mr. Hollon said if that happens, the committee might let the full Commission determine the question. Vice-chair Jacobson said he is not comfortable passing that duty on to the Commission, saying, from his perspective, the provision can only be done in a certain way, one narrow, the other more broad, and that the versions are not equal. He said he would be uncomfortable in presenting both to the full Commission.

Rep. Clyde asked a procedural question, wondering whether, when the agenda indicates there is a report and recommendation, it is an “action item.” Mr. Hollon answered that, if there is going to be a final vote, it is an action item. He said in this instance, staff is presenting options as a first presentation; it is not the final vote. Rep. Clyde said the process has been a little unclear, wondering what the vote means. She asked whether this is an informal editing process that is getting the committee to language for which the committee has a more formal process. Mr. Hollon said the committee has cinched down the language during the last few meetings.

Vice-chair Jacobson explained that the vote the committee had just taken was not the final vote. Mr. Cole asked whether there would be a roll call vote on the final recommendation, and Vice-chair Jacobson agreed that is what would occur.

Mr. Hollon said that, on the agenda next time, the committee will have this report and recommendation as a second presentation, action item, with language reflecting today’s vote. Vice-chair Jacobson requested that staff also edit parts of the report and recommendation that might be inconsistent with the changes in the language that the committee just adopted.

Sen. Skindell asked what rights and privileges of an elector existed in 1851, both in the constitution and by statute, and wondered if any rights and privileges have been added since

then. He said he feels this is important to his consideration of this issue, because rights and privileges are much broader now than in 1851.

Vice-chair Jacobson commented that the constitution is a living document, and the extent to which there are more privileges today, they are meant to be included and restored. Sen. Skindell said his concern is that, when considering an amendment to this provision, should the committee consider the rights and privileges of an elector that are different than they were in 1851. He said, “if, now in statute, the General Assembly says a judge has to be an elector, and that judge has a stroke and is temporarily incapacitated, does that mean he has to forfeit his office? Or does he remain in office during that mental incapacity.”

Vice-chair Jacobson said Sen. Skindell is talking about a different provision of the constitution and its impact on statute. He said what “rights and privileges” means is not governed by this section of the constitution. Sen. Skindell said his point is that the “rights and privileges of an elector” has changed since 1851, and what he is suggesting is the committee needs to understand that when discussing mental incapacity.

Judge Fischer said the word “elector” is important because of the United States Constitution. He said in 1803 and 1851, constitutional convention delegates were trying to make the Ohio Constitution consistent with the U.S. Constitution. He said he concluded that eliminating “elector” would be a mistake.

Sen. Skindell said, with regard to mental capacity, he is not comfortable taking away the right to vote and privileges of an elector. He said he wants to be sure the committee is considering this.

Rep. Amstutz said what Sen. Skindell is arguing is how a court would interpret the particular situation he described, but the question of whether the person is qualified at the outset is different from if something affects the person’s mental capacity.

Sen. Skindell said if a person lacks the mental capacity to be an elector, the definition of “elector” is different than it was in the 1800s.

Senior Policy Advisor Steven H. Steinglass said that the word privilege is only used five or six times in the 1851 constitution, mostly outside of this context. He said it was not used in Article V, Section 1, but was used in Section 4 for felon disenfranchisement, and in Section 6. He said privilege is not a word that runs through the constitution outside of the one article the committee is looking at. He said the question may be different regarding statutory law.

Mr. Cole referenced one statute, Ohio Revised Code 1907.13, “Qualifications of County Court Judges,” that references being an “elector.” He said he can see the point that if a person has lost the rights and privilege of an elector he is no longer a qualified elector. But, he wondered, what clarity can the committee get on this?

Vice-chair Jacobson said he understands the concern, but the question asked for research will illuminate the question. He wondered whether the committee needs to clarify what specific rights and privileges one might lose by losing the ability to be an elector.

Mr. Cole said this is a statutory problem. Judge Fischer said if one is unable to vote, he shouldn't be a judge. Sen. Skindell expressed his concern that a stroke victim, even after rehabilitation, could forfeit his office. Mr. Cole said that is a statutory problem. Sen. Skindell continued that his point is that the law is different from 1851.

Vice-chair Jacobson said he is unaware this issue has ever come up. He said the committee is being careful about specifically saying "during the incapacity." He said the General Assembly should change the law if it is a problem.

Ms. Bell asked whether the question really relates to the policies that exist regarding leave and illness. She said there are protections available under the law, for example the Americans with Disabilities Act.

Sen. Skindell maintained that the committee needs to have an understanding of the meaning of "rights and privileges" before acting. He asked if staff could provide research on that question. Vice-chair Jacobson said the chair would have to request this. Mr. Hollon said he would consult Chair Saphire about the research question.

### **Committee Discussion:**

#### *Article V, Section 4 (Felon Disenfranchisement)*

Vice-chair Jacobson then turned the committee's attention to the question of felon voting under Article V, Section 4 (Felon Disenfranchisement). Mr. Hollon said in the summer of 2014, the committee had held a straw vote to keep the language in the provision, but then Professor Douglas A. Berman from the Ohio State University Moritz College of Law presented to the committee on the section in October 2014. He said the committee had not held a great deal of discussion after that. He said staff needs to know whether the committee wants to keep Section 4 as is, or whether there is some suggestion about changing the language.

Judge Fischer said Prof. Berman wanted to know if there could be a provision for someone to petition the governor to be able to vote while in prison. Vice-chair Jacobson said the General Assembly has the right to make the decision on restoration of voting rights for felons. He asked whether the governor should have that right.

Mr. Cole observed that the General Assembly could provide for that by statute now, but the question is whether the constitution should say that.

Mr. Hollon said staff needs a preliminary indication of the committee's intention on this question. He said the committee did say keep the section as it is, but wondered whether that had changed after Prof. Berman's presentation.

Mr. Cole moved to recommend retaining the section as is, and Ms. Bell seconded. The committee voted unanimously to retain the section as is. Mr. Hollon then said next time staff will provide the committee with a first presentation of a report and recommendation recommending retention of Article V, Section 4 as is.

*Article V, Section 1 (Who May Vote)*

Vice-chair Jacobson then directed the committee to the last item on the agenda, which was a discussion for the first time of Article V, Section 1 (Who May Vote). Vice-chair Jacobson suggested the committee may want to look at the section's listing of political subdivisions, asking what that means and whether it could be revised. He said the issue could be put on the agenda for next time, and Mr. Hollon suggested staff could prepare a memorandum on the section.

Mr. Cole noted the difference in the language between Section 1 and the statute he had referenced (R.C. 1907.13) about qualifications to run for judge. He said the constitutional provision refers to "qualifications of an elector," while the statute refers to having to be a "qualified elector." He said the difference in those two phrases might suggest a solution to Sen. Skindell's concerns.

**Adjournment:**

With no further business to come before the committee, the meeting adjourned at 10:50 a.m.

**Approval:**

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

*/s/ Richard B. Sapphire*

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Richard B. Sapphire, Chair

*/s/ Jeff Jacobson*

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Jeff Jacobson, Vice-chair