



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 10, 2016

Call to Order:

Chair Richard Saphire called the meeting to order at 9:38 a.m.

Members Present:

A quorum was present with Chair Richard Saphire, Vice-chair Jeff Jacobson, and committee members Amstutz, Bell, Cole, Fischer, Gilbert, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the November 12, 2015 and the December 10, 2015 meeting of the committee were approved.

Presentations:

Chair Saphire began by introducing Veronica Scherbauer and Amy O'Grady from the Office of the Attorney General, who were present for the purpose of introducing the committee to the topic of human trafficking in relation to Article I, Section 6 (Slavery and Involuntary Servitude).

Ms. Scherbauer identified herself as a member of the community outreach team and the coordinator for criminal justice initiatives for the attorney general's office. She said in that role she coordinates the office's community outreach efforts related to human trafficking issues.

Ms. Scherbauer identified human trafficking as "modern day slavery," noting that slavery did not end with the Emancipation Proclamation but continues today. She said it is estimated that 21 million people are victims of forced labor around the world, with 4.5 million of them being victims of forced sexual exploitation. She said these "most vulnerable people in our society" suffer silently as traffickers reap the benefits. She indicated traffickers generate over \$150

billion a year in illegal profits in labor sectors that include domestic work, agriculture, construction, manufacturing, and entertainment.

Ms. Scherbauer said Ohio House Bill 262, passed in 2012, requires local law enforcement to collect human trafficking information and forward it to the Ohio Bureau of Criminal Investigation. She said, according to Ohio data from 2015, there were 102 human trafficking investigations resulting in 104 arrests and 33 convictions. She stated that, during that time, local law enforcement identified 203 victims of human trafficking, with many under age 21 and some as young as 12.

Ms. Scherbauer then concluded her remarks, and Chair Sapphire thanked her for her presentation.

Chair Sapphire asked whether, under Ohio law, trafficking is addressed in the context of kidnapping, or whether there are special criminal statutes for trafficking. Ms. Scherbauer said there are statutes specifically governing trafficking, explaining that these statutes are being used to prosecute human traffickers.

Committee member Ed Gilbert said it is his understanding Ms. Scherbauer is explaining slavery and involuntary servitude, asking how slavery is being defined.

Ms. Scherbauer answered that slavery is forcing people to work for another against their will. She said, essentially the individual being trafficked is being forced either physically or psychologically.

Mr. Gilbert said he would advocate that Article I, Section 6 remain, but asked, if it were removed, how that might affect the work of the attorney general's office in prosecuting trafficking cases. Ms. Scherbauer answered that people believe slavery does not exist today, but that it is essential to communicate that it does exist and that government is serious about the issue. She said the topic needs to remain relevant and in front of everyone today.

Committee member Karla Bell asked whether cases involving prostitution due to drug addiction would also be considered trafficking cases. Ms. Scherbauer said every investigation is different, but that there must be a commercial aspect for a case to be considered trafficking.

Chair Sapphire wondered whether there is a way to revise the provision to improve responsiveness to the problem of human trafficking. He asked if Ms. Scherbauer is aware of states that have dealt with trafficking in their state constitutions. Ms. Scherbauer said her office would need to explore these questions more in depth. She explained that human trafficking is a newer issue, with the first federal law not being passed until 2000, suggesting that states may not have altered their constitutions yet.

Mr. Gilbert asked whether Ms. Scherbauer would agree that taking this language out of the constitution would send a wrong signal. Ms. Scherbauer said it is important to bring more attention to the problem.

There being no further questions, Chair Sapphire thanked Ms. Scherbauer and asked her to provide the committee with any information she might obtain regarding constitutional activity on this issue in other states.

Executive Director Steven C. Hollon explained to the committee that, although staff provided a draft of a report and recommendation on Article I, Section 6, it was not being submitted for a first presentation because this was the committee's first opportunity to hear presentations or engage in discussion on the matter.

Chair Sapphire asked the committee whether it had comments or questions regarding the draft report and recommendation.

Mr. Gilbert asked whether the committee had previously expressed an intention to recommend removal of the provision, to which Chair Sapphire replied in the negative.

Mr. Hollon explained that, at next meeting, staff could complete the unfinished portion of the report and recommendation and bring it to the committee as a first presentation.

Chair Sapphire then asked whether members of the public wished to provide comments about Article I, Section 6. He recognized Representative Emilia Sykes, a member of the Commission but not a member of the committee, who explained she was appearing on behalf of the Ohio Legislative Black Caucus.

Rep. Sykes urged the committee to take under careful consideration the language in Article I, Section 6. She said the caucus is mindful and sensitive to the issue and wants to be sure Ohio is taking a stand against slavery in all its forms. She said the caucus wants to be sure the committee has thoughtful and reasonable dialog concerning the provision, assuring that there are no injustices and protecting the welfare of all Ohio citizens.

Chair Sapphire asked whether there are suggestions or ideas from the caucus.

Rep. Sykes said the caucus will be submitting something in writing, explaining its members have been engaged in town halls across the state. She said a portion of the provision that allows involuntary servitude "for the punishment of crime" was a subject of discussion on their tour. She said the language from the Thirteenth Amendment of the United States Constitution is more detailed, and that the caucus would like the committee to consider making the provision as strong as it can be.¹ Chair Sapphire noted that the issue will be on the agenda for the next meeting, and welcomed Rep. Sykes or other interested parties to submit information on the topic.

Mr. Gilbert asked whether Rep. Sykes would be suggesting new language. Rep. Sykes said the caucus is working on that, adding the caucus hopes to work with members of the committee to be sure that any suggested change reflects that Ohio is taking a strong position against slavery.

¹ The Thirteenth Amendment reads, in part: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Mr. Gilbert asked how many presentations of the report and recommendation would occur. Mr. Hollon explained the committee could have its first presentation at its May meeting, which could be the only presentation if no change is recommended. He added that, if there is a desire to explore new language, there could be additional presentations at the direction of the committee.

Mr. Gilbert observed that if Rep. Sykes wished to suggest a modification to the section, it would be helpful to have that language before the May meeting.

Committee Discussion:

Article V, Section 6 (Mental Capacity to Vote)

Chair Sapphire then turned the committee's attention to a report and recommendation for Article V, Section 6, relating to the mental capacity to vote. Thanking staff and members of the committee for efforts to improve the proposed language, he said the committee now has a report and recommendation that is being presented for a final consideration and vote. Chair Sapphire described that the committee has been dealing with the issue for a year and a half, and called for a motion to issue the report and recommendation.

Committee member Patrick Fischer moved to issue the report and recommendation, with committee member Doug Cole seconding the motion.

Vice-chair Jacobson then read the proposed new section to the committee:

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.

Chair Sapphire then invited discussion on the motion.

Summarizing the committee's work on the revision, Mr. Jacobson said the issue has been difficult in some ways. He said everyone agreed that the words "idiots and insane persons" do not belong in the constitution. He said the committee also agreed that poll workers or others should not arbitrarily determine mental incapacity as a way of depriving someone of the ability to vote. However, he said the committee has struggled with how best to convey this concept. He said there is a general agreement that the constitution should not require an adjudicatory action, but that it should be left to the General Assembly to determine the right process or procedure. He added some committee members wanted to tell the General Assembly what to adopt while others wanted to leave it open. He said "under law" conveys that it is not an arbitrary act, but that the committee still struggled in reaching a further consensus.

The committee then discussed an alternative draft of proposed language that reads:

The General Assembly shall provide that no person who, pursuant to the statutes enacted, is determined to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

Commenting on this alternative, Judge Fischer said in November 2015 the committee had a seven-to-two vote on the language in the current report and recommendation, indicating that the phrase “under law” was good. He said the phrase “pursuant to statutes enacted” cuts out court involvement as well as secretary of state directives because it takes out the word “law.” He said, “under law” takes into account statutes, directives, and court decisions. The phrase “pursuant to the statutes enacted” is limiting, and could harm people the committee is trying to protect. He said he concluded the language “under law,” agreed to in November, is better.

Mr. Cole said he agrees with Judge Fischer, but for slightly different reasons. He said he would be opposed to saying “pursuant to the statutes enacted” for the reason that it seems repetitive of what is already there in the language the committee had agreed to.

Chair Sapphire said the committee had hoped to have a representative from the secretary of state’s office here to talk about what the secretary of state does in this area. He said his current understanding is that under existing Ohio law, the only way to disenfranchise is through an adjudication by a probate court, and that no secretary of state or public official has the authority to disenfranchise. He said, if he is correct, then by definition there would be due process, and under existing law the only way someone will be disenfranchised would be after an adjudication. He said that understanding affects the way he approaches this issue now.

Ms. Bell said she is not sure she follows the legal analysis, and that the proposal says the General Assembly is charged with determining what factors would result in someone being considered incompetent. She said anyone who meets those standards would be disenfranchised.

Judge Fisher clarified that the phrase “pursuant to statute” would remove authority from two different entities that deal with election law because “you have statutes, you have case law, and you have secretary of state directives. You are cutting out two other parts of the government.”

Mr. Jacobson said, in working on a new draft of the language, it was not the intention to do that. He said the consensus was not necessarily to require a prior adjudication. He said the goal was to say this is not an arbitrary or capricious action.

Mr. Gilbert said he agrees with Judge Fischer’s analysis, but that is why when the committee started this process he thought it was important to find some related interpretation of the Americans with Disabilities Act (ADA), but that there was nothing out there to provide that information. He said “we are not going to agree on the language,” adding that voting “is a basic right we should not be playing around with, and [the provision] should be stricken.” He said “the ADA is up in the air on this and we are asking for trouble” to continue to have such a provision in the constitution.

Mr. Cole asked how members who support the phrase “pursuant to statutes” believe it changes or provides a benefit. Ms. Bell said it provides flexibility for the legislature to decide whether to require a hearing. She said there had been so much concern about not requiring an adjudicatory determination that the idea was to hand it to the legislature to determine appropriate procedures.

Mr. Cole acknowledged that point, but said the phrase “the General Assembly shall provide” covers that concern for him. He said because the issue is subject to federal overrides, there are limits to how much Ohio can deviate. He said the language does not change anything about the ultimate path. He noted, regarding Mr. Gilbert’s support for removing the provision entirely, he fails to see what that would achieve. He said the federal protections already exist, and that Article V, Section 6 is an independent statement of the view of the citizens of Ohio that mental incapacity should disqualify.

Responding to Mr. Gilbert, Chair Saphire said the committee discussed removing the provision, but most members were not in favor of that. He said one concern is if the provision is eliminated there can be no way to prohibit someone from voting even if they are incompetent. He said, in that instance, anyone would be entitled to vote, but members of the committee had concerns about that idea, believing that there are at least some people who should be precluded from voting.

Mr. Gilbert expressed concern that the inability to define what would constitute “mentally incapacitated for the purpose of voting” should prevent a constitutional provision on the issue.

Judge Fischer suggested that the committee keep the provision as broad as possible for as long as possible. He added that the provision is 150 years old. He said, using the phrase “under law” is broader, and, as time evolves, things may change as more is learned about mental health. He said the draft using the phrase “under law” allows the General Assembly, the courts, or the secretary of state to change the law to reflect changes in thinking about the issue.

Mr. Jacobson said he thinks it is important to get rid of the current language, but at the same time he does not want to preclude what has developed in Ohio because it has not yielded bad results. He said he is heartened to hear there are judicial procedures that are followed. Because of this, he said, the constitution does not have to specify the adjudicatory procedure, adding that it also means the legislature has developed an appropriate approach that is working, as suggested by the absence of court cases. As a result, he said, disenfranchisement cannot be done in an arbitrary way, making him more comfortable with the language approved in November.

Committee member Representative Ron Amstutz said, in his opinion, both versions have redundancy but just of a different kind. He said he could live with either one, and does not agree with Judge Fischer in terms of language. He said the phrase “under law” could be eliminated with the same result. He said he is fine using the phrase “under law.”

Ms. Bell said Judge Fischer’s remarks persuaded her that there are disadvantages to limiting the language to statute. She said she would like to hear more about procedures that are actually followed by elections officials.

Chair Saphire said his understanding is that that, under current law, the exclusive way to disenfranchise is through adjudication by the probate court. He said it cannot be done formally or informally by election officials or anyone else, because under existing law that is the only mechanism.

Mr. Gilbert observed that when the committee first considered the issue, the main problem was viewed to be the language “idiots and insane persons.” He said the committee wondered how the provision was being interpreted, but there was no case precedent. He said that is why he thinks the section should be stricken.

Senior Policy Advisor Steven H. Steinglass said there are not a lot of cases because issues have not risen to the point of generating the cases. He suggested the committee is making the issue more complicated than it needs to be, and complimented the “under law” version of the proposal as a “beautiful compromise.”

Chair Saphire commented that the committee does know, based on testimony by Disability Ohio Executive Director Michael Kirkman, that this is not an issue that arises frequently, if at all, in the state. Chair Saphire noted a comment at a previous meeting by Mr. Jacobson that the committee should not feel a need to get something perfect to deal with a problem that largely does not exist.

Mr. Jacobson then called the question.

Chair Saphire noted that Senators Bob Peterson and Michael Skindell had needed to leave the meeting early, but might be able to return if they were needed for the vote. Contact with the senators’ offices revealed the senators would be unable to return to the meeting, and so Chair Saphire opted to proceed without them.

The committee then held a roll call vote on the question of whether to issue the report and recommendation for Article V, Section 6 (Mental Capacity to Vote). Specifically, the report and recommendation recommended the following language to substitute for the current provision disenfranchising persons identified as “idiots” and “insane persons”:

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 roll call vote of the committee members present revealed the following members in favor of issuing the report and recommendation:

Richard Saphire
Jeff Jacobson
Rep. Amstutz
Karla Bell
Doug Cole
Judge Fischer

The following committee member opposed issuing the report and recommendation:

Ed Gilbert

Chair Sapphire announced the motion passed by a vote of six to one. He expressed appreciation to committee and staff for their patience and hard work in bringing this issue to a close.

Mr. Hollon described the procedure for advancing the report and recommendation to the Commission. He said the report and recommendation will go to the Coordinating Committee at its next meeting, and could be considered by the full Commission on the same day, if it is approved by the Coordinating Committee prior to the full Commission meeting. He said, if that occurs in April, it might be possible for the report and recommendation to be voted on by the Commission in May.

Next Steps:

Chair Sapphire then called the committee's attention to Article V, Section 1, concerning the qualifications of an elector. He said he anticipates that the provision will be subject to in-depth discussion at the next meeting. He identified the section as an important provision that has been subject to a fair amount of litigation. He noted many people feel strongly about the subject, citing as an example a "Voter's Bill of Rights" introduced at a prior meeting in a presentation by Representative Alicia Reece. He said Rep. Reece will be working with staff to identify people and organizations that are interested in addressing the committee on issues related to Article V, Section 1. Chair Sapphire encouraged members of the committee to also let him know of organizations or individuals having an interest.

Judge Fischer said he had a comment about the agenda in general. He said he has been urging the committee to focus on electronic privacy and would like to insert it into the agenda. He said it is important to balance the interests of law enforcement and of individual privacy, and that this is an issue that would be important to the constitutional modernization effort. He urged the committee to take up that issue next.

Chair Sapphire noted the committee's initial plan for the order in which it would consider its assigned sections. Chair Sapphire observed that the issue of privacy was included in the plan but was slated to be considered last. He said the question of privacy in general, and electronic privacy in particular, is a large subject, and is likely to consume a significant part of the committee's time.

Mr. Jacobson said he thinks the committee should focus on electronic privacy first, acknowledging that the voting issues raised by Article V, Section 1 are likely to be controversial and may not be able to be resolved in the amount of time remaining for the committee's work. He said, on the topic of electronic privacy, the committee might be able to make an impact.

Chair Sapphire said the committee has authority to set its own agenda. He said the committee appears to have a consensus that it could address Article V, Section 1 and the question of electronic privacy on a dual track. He said he will work with staff to develop material for background.

Mr. Gilbert said the issue of electronic privacy will take a lot of time, and is very important. He said he hopes the committee will set aside adequate time to deal with that issue.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:46 a.m.

Approval:

These minutes of the March 10, 2016 meeting of the Bill of Rights and Voting Committee were approved at the May 12, 2016 meeting of the committee.

/s/ Richard Saphire

Richard B. Saphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair