**OHIO CONSTITUTIONAL MODERNIZATION COMMISSION**

**BILL OF RIGHTS AND VOTING COMMITTEE**

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**THURSDAY, FEBRUARY 12, 2015**
**9:30 AM**
**OHIO STATEHOUSE ROOM 114**

**AGENDA**

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of December 11, 2014

IV. Reports and Recommendations

- Article I, Section 2 (Right to Alter, Reform, or Abolish Government)
  - Second Presentation
  - Public Comment
  - **Action Item: Consideration and Adoption**

- Article I, Section 3 (Right to Assemble)
  - Second Presentation
  - Public Comment
  - **Action Item: Consideration and Adoption**

- Article I, Section 4 (Bearing Arms; Standing Armies; Military Power)
  - Second Presentation
  - Public Comment
  - **Action Item: Consideration and Adoption**

V. Committee Discussion

- Article V, Section 6 (Idiots and Insane Persons)
- Article V, Section 4 (Felony Disenfranchisement)
- Topics for Future Consideration

VI. Public Comment

VII. Adjourn

**OHIO CONSTITUTIONAL MODERNIZATION COMMISSION**

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**REPORT AND RECOMMENDATION OF THE**
**BILL OF RIGHTS AND VOTING COMMITTEE**

**OHIO CONSTITUTION**
**ARTICLE I, SECTION 2**

**RIGHT TO ALTER, REFORM, OR ABOLISH GOVERNMENT,**
**AND REPEAL SPECIAL PRIVILEGES**

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The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 2 of the Ohio Constitution concerning the right of the people to alter, reform, or abolish government, the right of government to repeal special privileges, and equal protection. 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 2 of the Ohio Constitution and that the provision be retained in its current form.*

## Background

Article I, Section 2, reads as follows:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

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.

Although original to the 1851 Ohio Constitution, a portion of Article I, Section 2 derives from Article VIII, Section 1 of the 1802 Constitution, which stated, in part that: "every free republican government, being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties, and securing their independence; to effect these

ends, they have at all times a complete power to alter, reform or abolish their government, whenever they deem it necessary."[1]

Article I, Section 2 contains provisions that address different but related topics: inherent political power of the people and their right to alter government; equal protection; and special privileges or immunities. Most of Section 2 has no direct corollary in the U.S. Constitution, but two of the provisions contain political principles that reflect the influence of the Declaration of Independence.

*Inherent political power and the right to alter government*

The recognition that "[a]ll political power is inherent in the people" and the further statement that the people "have the right to alter, reform, or abolish *** [government] whenever they may deem it necessary" are derived from the Article VIII, Section 1 of the 1802 Constitution. These statements reflect the Jeffersonian principle contained in the Declaration of Independence that all political power is derived from the people.[2]

*Equal protection and benefits*

Adopted as part of the 1851 Constitution, the "Equal Protection Clause" in Article I, Section 2 provides that "government is instituted for [the people's] equal protection and benefit." That phrase predates, yet corresponds to, the Fourteenth Amendment of the U.S. Constitution with its prohibition against states denying any person the "equal protection of the laws." Although federal equal protection analysis has focused on issues of race, gender, or other immutable characteristics, "there is no indication from the little discussion of the equal protection clause at the 1850-51 convention that it was understood to end or ameliorate racial or gender discrimination *** ."[3]

*Special privileges and immunities*

Adopted as part of the 1851 Constitution, this section's requirement that special privileges and immunities, where granted, are subject to General Assembly alteration has no counterpart in the Declaration of Independence, the Ohio Constitution of 1802, or the U.S. Constitution.

Allowing the General Assembly control over the granting of special privileges or immunities was the part of this section that was heavily debated during the Constitutional Convention of 1850-51. The debate concerned the General Assembly's practice of granting corporate charters containing special privileges and immunities, such as exemptions from future taxation and monopolies on toll roads and canal companies.[4] Ultimately, the provision barred the alteration, revocation, or repeal of previously granted charters (as was required under the Contracts Clause of Article I, Section 10 of the U.S. Constitution), but permitted changes by the General Assembly in future charters. Thus, this clause ultimately was seen as subjecting corporate charters to the will of the General Assembly.

**Amendments, Proposed Amendments, and Other Review**

Article I, Section 2 has not been amended since its adoption as part of the 1851 Ohio Constitution. The 1970s Ohio Constitutional Revision Commission did not recommend any changes in this section.[5]

**Litigation Involving the Provision**

Those portions of Article I, Section 2 addressing the inherent political power of the people and their right to alter government have not been the subject of significant litigation, and the provision concerning "special privileges or immunities" has been the subject of little modern litigation.

Addressing the equal protection guarantee in this section, the Ohio Supreme Court has taken the position that the equal protection guarantee in Article I, Section 2, is "functionally equivalent" to the federal equal protection guarantee[6] and "is to be construed and analyzed identically" to its federal counterpart.[7]

**Presentations and Resources Considered**

There were no presentations to the committee on this provision, but the committee did rely on the Report of the 1970s Ohio Constitutional Revision Commission and on Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), pp.84-88.

**Conclusion**

The Bill of Rights and Voting Committee concludes that Article I, Section 2 should be retained in its current form.

**Date Adopted**

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

## Endnotes

[1] Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), p. 85.

[2] The Declaration of Independence states as follows:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

[3] Steinglass & Scarselli, p. 85.

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

[5] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, April 15, 1976, pp. 16-18, and pp. 444-46 of Appendix K of the Final Report.

[6] *See, e.g., Pickaway Cty. Skilled Gaming, LLC v. Cordray*, 127 Ohio St.3d 104, 109, 2010-Ohio-4908, 936 N.E.2d 944, 951.

[7] *American Assn. of Univ. Professors v. Central State Univ.*, 87 Ohio St.3d 55, 59, 1999-Ohio-254, 717 N.E.2d 286, 291 (on remand from U.S. Supreme Court).

# OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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**REPORT AND RECOMMENDATION OF THE**
**BILL OF RIGHTS AND VOTING COMMITTEE**

**OHIO CONSTITUTION**
**ARTICLE I, SECTION 3**

**RIGHT TO ASSEMBLE**

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The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 3 of the Ohio Constitution concerning the right to assemble and petition. The committee issues this report 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 3 of the Ohio Constitution and that the provision be retained in its current form.*

## Background

Article I, Section 3, reads as follows:

> The people have the right to assemble together, in a peaceable manner, to consult for the common good; to instruct their representatives; and to petition the General Assembly for the redress of grievances.

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.

This provision of the Ohio Constitution is original to the 1851 constitution.

Section 3 corresponds to the First Amendment of the United States Constitution, which, in addition to providing for freedom of religion, freedom of speech, and freedom of the press, protects the right of the people peaceably to assemble, and the right to petition the government for a redress of grievances.[1] While the Ohio Constitution also provides for freedom of religion

and freedom of speech and the press, it does so in separate provisions, Article I, Sections 7 and 11.

The section directly traces its origins to similar language in Article VIII, Section 19 of the 1802 Constitution, which followed the 1776 Pennsylvania Declaration of Rights.[2] Article VIII, Section 19 of the 1802 Constitution provides: "That the people have a right to assemble together in a peaceable manner to consult for their common good, to instruct their Representatives, and to apply to the Legislature for redress of grievances." Other state constitutions predating Ohio's contain similar protections for the rights of assembly and petition, and all stem from similar declarations of rights in much earlier British documents, including the Bill of Rights of 1689, and, most notably, the Magna Carta in 1215.[3]

Ohio's provision, unlike its First Amendment counterpart, is not phrased as a limitation on the power of government but as an affirmative recognition of the rights of the people. The First Amendment also does not contain a right of the people to "instruct their representatives."[4]

**Amendments, Proposed Amendments, and Other Review**

Article I, Section 3 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Ohio Constitutional Revision Commission recognized the right to associate and to petition the government for redress of grievances to be fundamental to the concept of ordered liberty, and that it is circumscribed only by the legitimate exercise of police powers in order to protect the health and safety of the citizenry.[5] Thus, the 1970s Commission recommended that no change be made to the provision.[6]

**Litigation Involving the Provision**

The Supreme Court of Ohio recognizes the fundamental nature of the right of the people to assemble. See *State v. Schwing*, 42 Ohio St. 2d 295, 302, 328 N.E.2d 379, 384 (1975) ("Both the federal (Amendment I) and the state (Section 3, Article I) constitutions recognize the inherent right of the people to assemble together in meetings."). Nonetheless, there are no significant Ohio cases construing the "right to assemble" clause of Article I, Section 3, and the court has rarely cited it. In the 1970s, the Ohio Constitutional Revision Commission noted that when the Ohio courts have failed to interpret this provision consistently with the First Amendment of the United States Constitution, they have been reversed. *See Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (holding a city ordinance making it "unlawful for three or more persons to assemble *** on *** sidewalks and there conduct themselves in a manner annoying to persons passing by" as unconstitutionally vague), *rev'g* 21 Ohio St.2d 66 (1970).

There are no reported Ohio cases construing the instructions clause.

**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 3 should be retained in its current form.

**Date Adopted**

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

## Endnotes

[1] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[2] Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), p. 89.

[3] Howard, A. E. Dick. Magna Carta: Text and Commentary. Revised ed. Charlottesville: Published for the Magna Carta Commission of Virginia, The UP of Virginia, (Revised Ed. 1964), p. 27.

[4] Steinglass & Scarselli, *supra.*

[5] Recommendations of the Education and Bill of Rights Committee, November 19, 1975, p. 4726.

[6] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, April 15, 1976, p. 18, and p. 446 of Appendix K of the Final Report.

# OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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**REPORT AND RECOMMENDATION OF THE**
**BILL OF RIGHTS AND VOTING COMMITTEE**

**OHIO CONSTITUTION**
**ARTICLE I, SECTION 4**

**BEARING ARMS; STANDING ARMIES; MILITARY POWER**

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The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 4 of the Ohio Constitution concerning the right to bear arms, the prohibition against maintaining standing armies during peacetime, and the subordination of the military to the civil power. The committee issues this report 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 4 of the Ohio Constitution and that the provision be retained in its current form.*

## Background

Article I, Section 4, reads as follows:

> The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

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.

This provision of the Ohio Constitution is original to the 1851 Constitution, although Article VIII, Section 20, of the 1802 Constitution contained a prior version providing "[t]hat the people have a right to bear arms for the defense of themselves and the State; and as standing armies in time of peace are dangerous to liberty, they shall not be kept up: and that the military shall be kept under strict subordination to the civil power."[1]

The Ohio Supreme Court analyzed this provision as follows:

> The language of Section 4, Article I of the Ohio Constitution is clear. This provision is divided by two semicolons, coordinating three independent clauses. Rather than focusing merely on the preservation of a militia, as provided by the Second Amendment, the people of Ohio chose to go even further. Section 4, Article I not only suggests a preference for a militia over a standing army, and the deterrence of governmental oppression, it adds a third protection and secures to every person a fundamental *individual* right to bear arms for "their *defense and security* ***." (Emphasis added.) This clause was obviously implemented to allow a person to possess certain firearms for defense of self and property. Accord *State v. Hogan* (1900), 63 Ohio St. 202, 218-19, 58 N.E. 572, 575.

*Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 43, 616 N.E.2d 163, 169 (1993).

Prior to the United States Supreme Court decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008)(treating the Second Amendment to the United States Constitution as providing an individual right to bear arms), federal courts had construed the Second Amendment as not granting individuals a right to bear arms.

During this pre-*Heller* period, the Ohio Supreme Court interpreted the Ohio provision as conferring a greater right in the individual to possess firearms for self-protection than that afforded by the U.S. Constitution.[2] Significantly, the Court in *Arnold* clarified at paragraph one of its syllabus that the Ohio Constitution was a document of independent force that could provide greater protections than its federal counterpart:

> The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

**Amendments, Proposed Amendments, and Other Review**

Article I, Section 4 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Ohio Constitutional Revision Commission noted the differences between the 1802 provision, which granted the right to bear arms to individuals both for self-protection and for protection of the state, and the 1851 provision, which only indicated the right to bear arms for self-defense and security. The 1970s Commission attributed the difference to the notion of the "citizen-soldier" that was prevalent in the early days of Ohio statehood. The 1970s Commission

observed, however, that it was impossible to know if this change was significant because there was no record of a debate on the issue.[3]

The Ohio Constitutional Revision Commission recommended no change in this section.

**Litigation Involving the Provision**

Article I, Section 4 has been the subject of litigation involving the regulation of the sale and ownership of assault weapons, *see Arnold, supra,* and the individual's ability to carry a firearm in a public place. *See Klein v. Leis,* 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633. The Ohio Supreme Court has ruled that, while fundamental, the right to bear arms is not absolute, and reasonably may be restricted in the interests of the health, safety, morals or general welfare of the public.[4]

Issues concerning the right to bear arms under Article I, Section 4 also have arisen in the context of disputes concerning the scope of the home rule power under Article XVIII, Section 3, and the Ohio Supreme Court generally has deferred to state legislation. *See City of Cleveland v. State,* 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370 (R.C. 9.68 is a general law that displaces municipal firearm ordinances, is part of a comprehensive statewide legislative enactment and applies uniformly across the state; therefore it does not unconstitutionally infringe municipal home rule authority); *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967 (addressing the relationship between Ohio's concealed carry statutes, R.C. 2923.126 and R.C. 9.68, and Article XVIII, Section 3, and concluding that a city ordinance prohibiting firearms in municipal parks conflicted with a statewide comprehensive legislative enactment and thus was not enforceable). *But see City of Cincinnati v. Baskin,* 112 Ohio St.3d 279, 2006-Ohio-6422, 859 N.E.2d 514 (upholding city ordinance that prohibited the possession of semi-automatic rifles with a capacity of more than ten rounds, finding no conflict with state statutes that prohibited possession of semi-automatic firearm capable of firing more than thirty-one cartridges without reloading).

**Presentations and Resources Considered**

There were no presentations to the committee on this provision. However, in considering Article I, Section 4, the committee reviewed a fifty-state survey of similar provisions that indicated nearly every state constitution protects the individual's right to bear arms, with some, like Ohio's, recognizing that the military is subordinate to the civil power.

**Conclusion**

The Bill of Rights and Voting committee concludes that Article I, Section 4 should be retained in its current form.

**Date Adopted**

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

## Endnotes

[1] Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), p. 90.

[2] *Id.*

[3] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, April 15, 1976, p. 19, and p. 447 of Appendix K of the Final Report.

[4] *See, e.g., Arnold, supra,*; *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633.

**OHIO CONSTITUTIONAL MODERNIZATION COMMISSION**

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**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:** **February 5, 2015**

**RE:** **Ohio Constitution Article V, Section 6 (Idiots and Insane Persons)**

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This Memorandum is being provided to the Bill of Rights and Voting Committee in an effort to assist committee members in reaching a consensus and making a recommendation regarding possible changes to Article V, Section 6 of the Ohio Constitution.

Article V, Section 6 currently reads:

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

Based upon memoranda that have been provided to the committee; a presentation by Michael Kirkman, Executive Director of Disability Rights Ohio; and previous discussion by committee members, Commission staff perceives that the committee would like to amend the language in Section 6 and meet four specific goals in doing so.

First, staff understands that the committee would like to remove the objectionable "idiots and insane" language from the Section 6 and replace it with an appropriate and more sensitive reference to persons of diminished mental capacity. Next, staff believes the committee would like to expressly provide authority to the General Assembly to exclude from voting those who are mentally incompetent for the purposes of voting. Staff also has a sense that a majority of the committee would recommend amending the current provision to specifically allow the General Assembly to provide for a judicial process by which mental competency for the purpose of voting is determined. Finally, staff recognizes that the committee would like the provision to specify that the disenfranchisement is only for the period of time during which the elector is subject to a mental disability for the purposes of voting.

With these goals in mind, Commission staff proposes that the committee adopt one of the following as a replacement for Article V, Section 6:

**First Alternative**

**The General Assembly shall have the power to exclude an otherwise qualified elector from voting while mentally incompetent to vote, as determined by judicial process.**

**Second Alternative**

**The General Assembly shall have the power to exclude an otherwise qualified elector from voting during the period in which the elector has been determined by judicial process to be mentally incompetent to vote.**

We believe these alternatives meet the goals stated above and provide several additional benefits.

First, the proposed language is simple and direct. They provide a straightforward declaratory statement on what power the General Assembly has in this matter. They place an economy on the use of words by saying what needs to be said and nothing more. This, it seems to Commission staff, should be a goal of drafting constitutional provisions. Second, these alternatives follow the use of terms and language in Article V, Section 1, which refers to those who can vote in the state as being "qualified electors." Third, they avoid the use of the term "privilege" which is in the current Section 6, but which can be confusing when compared with the legal precedent that voting is a right recognized under federal law. Fourth, these proposals acknowledge that the incompetency could be temporary and that voting rights must be restored if the elector's mental condition improves. Finally, they follow the use of language in Article V, Section 4, which deals with limiting the right to vote of felons, by starting the section with the same phrase used in that provision "The General Assembly shall have the power to exclude…." This provides a parallel sentence structure in these successive provisions, which is useful to reader comprehension.

Staff presents these proposals to the committee in order to facilitate the committee's discussion of the topic by making it easier for the committee to work from two sentences rather than more numerous possibilities. As part of the process, staff recommends that committee members suggest changes that will cause the resulting provision to better reflect the consensus of the committee.

Please let us know if you have any questions regarding this matter.

**MEMORANDUM**

**TO:** **OCMC Bill of Rights and Voting Committee**

**FROM:** **Karla Bell**

**DATE:** **February 12, 2015**

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Shari did a wonderful job in her memo, providing a lot of detail, thoughtful reasoning and research. I have given some consideration to the order in which the Committee should address the propositions. A simple up/down vote could be taken on several of them, in order to move things expeditiously.

**PROPOSED OUTCOME**

1) **Should the present language of Article 6 be removed?**

   A. **Pro:** The terms are antiquated, offensive and not meaningfully employed in Ohio statutory law. Moreover, the prior commission received expert testimony that the provision is probably unconstitutional as violative of both the equal protection and due process clauses of the 14th Amendment.

   B. **Con**: None articulated so far, except a general preference not to disturb the constitution.

2) **Should there be new language?**

   A. **Pro:** Both Senator Skindell and Dean Steinglass believe the broad language of entitlement in Article V, Section 1 arguably precludes the legislature from acting on its own to limit the right or privilege to vote. Many, if not most, representatives and senators

would agree that those who are mentally incompetent should not be allowed to vote.

B. **Con:** Any authorization of elector disqualification based upon mental competence necessarily creates a greater and more serious risk of vote fraud than that created by constitutional silence.

   Consider: Who would be allowed to make a challenge? Family members? Trained psychologists? Anyone who went into the registrar's office and filled out a form? (Nightmare Scenario #1: Someone goes in and fills out such a challenge to, say, every Democratic voter in the precinct.) Poll workers? (Nightmare scenario #2: A poll worker challenges every young black male.)

   When must the challenge be made? 30 days before the election? At the time of attempted voting?

   Both of those apparently reasonable choices in fact create insoluble problems. Challenge 30 days before the election raises a host of due process issues: How would notice be given to the challenged elector? What if s/he never receives it, and simply doesn't appear? Is the voter mentally incompetent by default? Who would hear the challenge? Who would arrange for the judges—and lawyers for both sides—and how could this all be resolved before election day? What happens if it is not?

   Challenge the day of the election would, probably, require the voter to fill out a Provisional Ballot, and everyone knows only about a third of those are ever found valid. Plus, there would be a wait while all the challenges went through whatever form of hearing was specified, again with the cost and delay of lawyer and judicial time, as well as the time and cost to the voter.

   Think of the burdens thrust on those challenged. Do we really want to make it harder for people to vote? And, really, other

than (my own) single tale of someone being used as a prop, there has been no report of a general occurrence of incompetents voting in an election.

It seems the fundamental question is whether we are creating for Ohio a more valid and fair electoral process that is unlikely to be manipulated or invite fraud. There is a genuine question of whether providing authorization for disqualification of electors on the grounds of mental incompetence does that.

**IF NEW PHRASING, THERE MUST BE DECISIONS ON THE BASIC PHRASING OF THE PROPOSED PROVISION**

3) **Should the language be phrased as a limit on legislative power or as a right of the voter?**

Example 1: "The General Assembly shall have the power…"

A. **Pro:** This aligns with the language of the prior section regarding felons, producing consistency in the document.

Example 2: "Except as provided in , an elector's right to vote shall not be.."

B. **Pro:** This arguably is a stronger expression of support for an individual's right to vote, and implicitly puts the burden of proof upon those seeking to deny that right.

4) **Should voting be referred to as a "right" or a "privilege"?**

A. **Argument for "right":** The Supreme Court has recognized voting as a fundamental right.

B. **Argument for "privilege**": Consistency in language in the Ohio constitution. As Shari pointed out, Article V, Section 4 regarding felonies refers to "the privilege of voting."

**POSSIBLE ADDITIONS TO THE CONSTITUTIONAL PROVISION**

**5) Should the constitutional provision provide for a heightened burden of proof?**

A. Pro: This would help ensure electors would retain the right to vote. A showing of "clear and convincing evidence" is required in other court hearings removing a person's rights.

B. Con: This is a policy matter which should be determined by the legislature.

**6) Should the constitutional provision specify a right to counsel?**

A. Pro: Enumeration of this right will insure it is provided in a hearing that may strip an elector of the right to vote.

B. Con: Because the right to vote is fundamental, due process will require this anyway, so there is no need to specify this. *Bell* v. *Marinko*, 235 F. Supp.2d 772, citing *Doe v. Rowe*. (I can't give a pin cite because the search engine I am using doesn't show page numbers; sorry.)

**7) Should the constitutional provision require a judicial adjudication?**

A. **Pro:** This would insure that no administrative agency or department could make a finding removing an elector's right to vote.

B. **Con**: The prior objection was wordiness, but Shari's excellent suggestion of simply adding the word "judicial" really handles this.

8) **Should the statute specify what it means to be "mentally incompetent to vote" or clarify that only a mental disability related to voting would disqualify a voter**? (See Shari's memo at Question 4, Page 2):

This is an issue that was not part of an extended discussion in the last session, but after doing some research, my answer to these questions is that, if we are going to allow disqualification, we MUST specify the level and kind of incompetence which will result in removal from the rolls. I would ask the Committee to consider the Ohio and federal statutes discussed when drafting the constitutional provision.

The statutory definition of "incompetent" and "mentally incompetent" appears in Chapter 21 of the Ohio Revised Code pertaining to Guardians & Conservatorships:

> "[A] any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within this state."

See: Ohio Rev. Code Section 2111.01 (D), specifying that this definition will be used in Revised Code Chapters 2101 to 2131; Ohio Rev. Code Section 2135.01 stating that, as used in Sections 2135.01 to 2145, "incompetent" has the same meaning as in section 2111.01.

In addition to the problems potentially created by the by the state code, federal law specifically reserves to the states the right to disenfranchise electors, "by reason of…mental incapacity." 42 U.S.C. Section 1973gg-6 (a) (3) (B). Consistent with this, multiple state constitutions bar any person who is "not mentally competent" from voting. See, e.g., Minnesota, Article VII, Section 1; Michigan, Article 1, Section 2; Georgia Article II, Section 1; Louisiana, Article 1, Section 10 (A). This is not my understanding of what the committee seeks to do.

**Recommendation regarding wording (if alternate language is to be adopted)**

Because we would be adopting a meaning of "mental capacity" different than that referenced in state and federal law, and use it in a way that is not the most popular in state constitutions, I think we need to make it clear**:** We need to plainly state what it means to be "mentally competent to vote."

The Committee could use the definition, or at least some part of the definition employed in *Doe v. Rowe*, 156 F. Supp. 35, 51 (the one circulated by Shari).The court in that case described "mental capacity to vote" as **"the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself**." Id. at 51 This could be pared down to" **mental capacity to understand the nature and effect of voting**" or modified slightly to, **"mental capacity [ability?] to understand the purpose and effect of voting."**

Another phrasing proposed by Shari, in under Question 4 at page 2 of her memo is also excellent, and shorter: **the elector "lacks the ability to understand the act of voting."** This might be modified to **"lacks the mental capacity to understand the act of voting,"** or **"lacks the mental ability to understand the act of voting."** Using "ability" would also employ a term not already defined in the Code.