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.

/s/ Richard B. Saphire

Richard B. Saphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-Chair