



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, FEBRUARY 12, 2015

Call to Order:

Chair Sapphire called the meeting of the Bill of Rights and Voting Committee to order at 9:30am.

Members Present:

Committee Members Sapphire, Amstutz, Bell, Cole, Fischer, Peterson, and Skindell were in attendance.

Approval of Minutes:

The Committee approved the minutes of the December 11, 2014 meeting.

Topics Discussed:

Executive Director Steven Hollon presented for the second time three separate reports and recommendations on Article I. The Committee had previously reviewed the reports and recommendations at the December 11, 2014 meeting of the committee. Chair Sapphire emphasized that the Committee seeks comments on the recommendations.

Report and Recommendation on Article I, Section 2 (Right to Alter, Reform, or Abolish Government and Repeal Special Privileges)

Director Hollon presented the report and recommendation on Article I, Section 2, on which the committee recommends no changes. Article I, Section 2 contains provisions that address three different but related topics: 1) inherent political power and the right to alter government, 2) equal protection and benefits, and 3) special privileges and immunities. This provision is original to the 1851 Ohio Constitution, and some of its language derives from the 1802 Constitution. There is no corollary in the United States Constitution. Although its inclusion was heavily debated at the 1851 Constitutional Convention, it has not been amended since its implementation. The 1970s Ohio Constitutional Revision Commission also did not recommend any changes to this provision, and it has generated no significant litigation. For these reasons, the report and recommendation states the committee recommends that Article I, Section 2 be retained in its current form.

Chair Sapphire asked for comments and there were none. He then called for a motion to approve the proposal. The motion was made by committee member Douglas Cole and seconded by

committee member Judge Patrick Fischer. It was then approved by unanimous vote of the committee.

*Report and Recommendation on Article I, Section 3
(Right to Assemble)*

Director Hollon then presented the report and recommendation on Article I, Section 3, on which the committee recommends no changes. Article I, Section 3 contains the right to assemble and the right to petition. This provision has its origins in the 1802 Constitution. Other constitutions that contain similar protections include the United States Constitution, the British Bill of Rights of 1689, and the Magna Carta in 1215. Notably, Ohio's provision is not phrased as a limitation on government power, but as an affirmative right of the people. It has not been amended since its adoption into the Ohio Constitution, and the 1970s Ohio Constitutional Revision Commission did not recommend any changes. There were no presentations to the committee and no reported cases about this provision.

Chair Sapphire asked for comments and there were none. He then called for a motion to approve the proposal. The motion was made by Mr. Cole and seconded by Judge Fischer. It was then approved by unanimous vote of the committee.

*Report and Recommendation on Article I, Section 4
(Bearing Arms; Standing Armies; Military Power)*

Director Hollon next presented the report and recommendation on Article I, Section 4, on which the committee recommends no changes. Article I, Section 4 contains the right to bear arms and place limitations on standing armies. This provision is original to the 1851 Constitution, and similar language existed in the 1802 Constitution. The Supreme Court of Ohio has analyzed this provision and has stated that the right to bear arms is a fundamental, individual right. In that respect, the Ohio Constitution confers greater right to the people to bear arms than does the United States Constitution. Nearly every state constitution protects the right to bear arms. For these reasons, the Committee recommends that Article I, Section 4 be retained in its current form.

Chair Sapphire asked for comments and there were none. He then called for a motion to approve the proposal. The motion was made by Judge Fischer and seconded by committee member Karla Bell. It was then approved by unanimous vote of the committee.

The committee will report these three recommendations to the Coordinating Committee at its next meeting. They will then be presented to the full Commission at its meeting in April.

Article V, Section 6 (Idiots and Insane Persons)

Chair Sapphire introduced the committee's discussion of Article V, Section 6, by describing what was discussed in the previous meeting. He also stated that he would like to come out of today's meeting with a proposal. Michael Kirkman, Executive Director of Disability Rights Ohio, was invited to return to the committee after his testimony in the last meeting.

Chair Sapphire extended his appreciation to the Commission staff for their work on recommendations to change the language of Article V, Section 6. The Chair then gave the floor to Ms. Bell.

Ms. Bell stated that she would like to move swiftly through the aspects of the possible changes about which there is little controversy. She then listed the reasons to remove the current language from Article V, Section 6, and stated that no reasons to keep the language have been raised. Chair Sapphire then called for a motion to remove the present language. Committee member Rep. Ron Amstutz asked whether a motion to remove the present language would preclude a motion to replace the language. Ms. Bell said no, that removing the language would clear the way for discussion about replacing the language. Mr. Cole suggested that removal and replacement of the language should be discussed together instead of separately. Ms. Bell granted that request and called Mr. Kirkman to the podium.

Mr. Kirkman discussed the alternative language suggestions offered by the Commission staff. These alternatives use the phrase "mentally incompetent to vote" in reference to individuals that are covered under this provision of the constitution. Mr. Kirkman suggested that the words "competent" and "incompetent" are falling out of favor. Instead, he asked the Committee to consider using the phrase "lack of capacity." He specified that there are two types of capacity: legal capacity and functional capacity.

Chair Sapphire asked whether someone who is adjudicated incompetent is automatically disqualified from voting. Mr. Kirkman replied no, that under current law, there must be a very specific finding as to competency to vote. Mr. Kirkman continued to say that "incompetent" is a purely legal term. It is used in guardianship and criminal codes. Not only has it fallen out of favor, but it has a different legal meaning than the committee is trying to capture in Article V, Section 6. Capacity, he said, is an expression of what an individual can do as opposed to what an individual cannot do. Mr. Cole asked whether capacity is more specific and incompetent is more general. Mr. Kirkman replied yes, capacity is a more specific term. Ms. Bell then directed the committee to the definitions of capacity and incompetent in the prepared materials.

Mr. Kirkman stated his belief that incompetent will be removed from the Ohio Revised Code over the next five years. For example, statutes covering Ohio protective services have switched to a capacity model as opposed to an incompetence model. Mr. Cole asked how the language would read if the provision were to use the word "capacity" and suggested that it might say "lacking mental capacity to vote." Mr. Kirkman replied yes, that is an appropriate use of that language. Mr. Kirkman also stated using the more accurate term will add to conversations about protecting individual's rights.

Chair Sapphire asked about the role of guardians in instances of incapacity to vote. If an individual is adjudicated incompetent in general, and a guardian is appointed, the guardian has the ability to make decisions for that person. That being said, Chair Sapphire asked whether the guardian of an individual who is adjudicated incompetent to vote has the ability to vote for the

person. Mr. Kirkman replied that guardians are probably not able to vote in the place of someone who lacks the capacity to vote. There are limits on what guardians are able to do. For instance, guardians do not have the right to agree to marriage. There are some decisions that, if the individual cannot make them him/herself, those decisions cannot be made.

Ms. Bell asked how questions about guardians would arise. She stated that courts have regular meetings with guardians where these questions could be decided. The process would entail talking with the individual to see whether he or she understands what it means to vote. If so, the court would not take action. However, this process has not been utilized because this question has never been raised at court. Mr. Kirkman said that issues of guardianship can come up if someone it is challenged at a polling place.

Chair Sapphire stated that the infrequency of a capacity issue being raised should be considered as the committee decides what to do with the language of Article V, Section 6. If the committee repeals the language and does not replace it, Chair Sapphire said, voting rights in Ohio would be established by Article V, Section 1. Chair Sapphire then asked whether repealing and not replacing the language of Article V, Section 6 would make the current statutes and practice of disqualifying individuals based on mental capacity unconstitutional. Mr. Kirkman agreed that repealing this provision would create a strong presumption that every Ohioan, regardless of capacity, is qualified to vote. However, he also stated that either course of action – repealing the provision or replacing it with capacity language – has unknown elements. Both could be subject to challenge.

Ms. Bell commented that repealing Article V, Section 6 might limit the General Assembly's ability to decide that those who are incompetent are not eligible to vote. Mr. Kirkman replied that there is precedent in other countries for establishing a basic notion that every citizen has the right to vote. There are models on which to base such a provision.

Chair Sapphire then commented on the length of time the committee has spent discussing this provision of the constitution, given that this particular situation almost never arises. It is very unlikely that, if the committee were to repeal this provision, the issue would arise any more than it does now. Chair Sapphire continued by saying that, if the General Assembly wants to enter into this policy area, it should do that; eventually, case law will accumulate and that will create the standard in Ohio.

Mr. Cole expressed his concern that repealing the language without replacing it would be unacceptable to the voters. It would appear as though the Commission's reason for repealing Article V, Section 6 is because we want insane people to vote. However, if we update the language, the voters might better understand the Commission's intent.

Ms. Bell stated, however, that it might be politically unacceptable to have replacement language. She believes that the committee should consider the risk of voter fraud for whichever decision the committee adopts. Ms. Bell also discussed which parties would be able to make a challenge. She then stated the fundamental question to be answered as the committee decides the future of Article V, Section 6: are we creating a more valid and fair electoral process?

Mr. Cole stated his belief that the committee is "borrowing trouble" by being concerned over which parties are able to make a challenge. Voter challenges already exist on other grounds, so

this is not a new problem that poses unique challenges. Additionally, no evidence suggests that challenges have arisen from the provision before. Mr. Cole stated that he is more interested in how the committee can replace the current language of Article V, Section 6 with terms that are not offensive but maintain the same concept. Chair Sapphire then directed the committee to the two language proposals listed in the staff memo. Ms. Bell also directed the committee to language suggestions in her memo.

Mr. Cole noted a key change to the language in the staff proposals. The current version of Article V, Section 6 is self-executing. The General Assembly is not required to act. Under the proposed language, the General Assembly is required to act. Additionally, both versions of the proposed language used the word “incompetent” instead of “lacking capacity.” Mr. Cole expressed a preference for the self-executing type of provision, but suggested the language use capacity instead of competence. He also noted the phrase “as determined by judicial process” is inherent in the constitution, but there is no harm in adding that language to the provision. However, since the constitution is a foundational document, there exists an incentive to use less language and have the details be filled-in with case law.

Chair Sapphire noted that the staff proposals contain language that limits the legal inability to vote only as long as the period of incapacity. Voting rights are restored when capacity is restored. Mr. Kirkman believes this is appropriate. The foundation should be that voters are presumed to have the capacity to vote, but that a process exists in order to determine whether voters do not have such a capacity. Mr. Kirkman also stated that strong social and legal policy exists around self-determination and presumption of capacity. This is a trend in federal law and regulations. Mr. Cole then noted that this presumption is already inherent in Article V, Section 1 of the Ohio Constitution. He is unsure whether additional language in Article V, Section 6 is needed to establish this presumption.

Director Hollon discussed the structure of the two alternative language proposals in the staff memo. He stated the staff intended to follow the sentence structure of Article V, Section 4, which addresses felons’ right to vote, when writing these proposals. The goal was to retain consistency in the constitution. Mr. Cole stated the difference between Section 4 and Section 6 of Article V is that felons have the capacity to vote. Individuals who do not have the mental capacity to vote cannot legitimately be given the choice to vote. Mr. Cole also believes it unnecessary to define capacity to vote in the section, particularly because it is rarely an issue practically.

Chair Sapphire said that he understood the rationale behind leaving the definition of capacity to the discretion of the General Assembly, but noted that there is a symbolic element of a provision of the constitution that disenfranchises a group of individuals. If the matter was framed entirely as a power of the General Assembly, the provision would have the same effect, because the General Assembly will not specifically extend voting rights to individuals who do not have the capacity to vote. Mr. Kirkman countered by saying that the current statutes in the Ohio Revised Code addressing this issue are “a mess.” If the constitution confers on the General Assembly the ability to change those laws, it would give the General Assembly the opportunity to look back at those sections of the code and repeal what is currently there. Ms. Bell asked whether Mr. Kirkman preferred a specific exclusion listed in the constitution. Mr. Kirkman responded that he preferred the General Assembly to have discretion.

Rep. Amstutz suggested that Article V, Section 6 should state that “the General Assembly shall pass laws” excluding those who do not have the capacity to vote from voting. He then asked about a recently-introduced bill that would upgrade the law around adult protective services. In that bill, no change was proposed as it relates to the “competency” language throughout those laws. Rep. Amstutz asked whether that bill should include capacity language, since capacity seems to have a different meaning in other sections of the code. Mr. Kirkman responded that incapacity language has been specific to adult protective services. Incompetence, on the other hand, is used in the context of guardianship services. He then noted that over the last 20 years, guardianship has been blending with adult protective services, and the field is moving in this direction.

Ms. Bell offered her support of this approach, in which Article V, Section 6 would give the General Assembly the power to enact incapacity voting laws, or command that the General Assembly do so. Committee member Sen. Skindell then stated that the current provision denies the right to vote to a certain group of individuals outright. The General Assembly can always pass a law defining these words in the constitution. If the General Assembly does not act, then it is up to the courts to define the terms. Mr. Cole then recommended keeping the structure of the constitutional provision the same and simply modernizing the language. If the structure remains the same, Mr. Cole believes two options exist for how the General Assembly interacts with that structure. Either the constitution will say that “The General Assembly shall pass” laws, or it will say that “The General Assembly may pass” laws. In the second option, the constitutional provision does not become effective if the General Assembly does not act. Mr. Cole asserted that the committee does not want that outcome. The first option, he stated, compels the General Assembly to act one way or another, which he said is preferable. Sen. Skindell agreed that it is best to let the General Assembly or the courts define the parameters of the language.

Mr. Cole proposed that the provision should read: “No person who has been judicially determined to lack the capacity to vote shall have the privileges of an elector.” He suggested that the provision should not include any statement about the General Assembly. Rep. Amstutz said the word “judicially” should be removed from Mr. Cole’s proposed revision. He believes that the constitution should not have language that mandates a judicial determination. Mr. Cole agreed with Rep. Amstutz’s concern. He said that the judicial determination process is still implicit in the language.

Sen. Skindell noted that one problem historically experienced is that individual board of elections officers and judges will hold the determination power for themselves. He believes this will continue to occur if the word “judicially” is not in the provision. This allows individuals to make determinations about capacity to vote. This will be the case unless the General Assembly specifies the process.

Judge Fischer commented that judicial determination will be the process used regardless of whether it is embedded in the constitution. He also noted that, currently, these determinations are not appealable decisions. A writ of mandamus is the only way to appeal. Judge Fischer suggested the committee should decide what the process should look like for the next 50 years. Chair Sapphire responded that this is a reason to repeal Article V, Section 6, and not replace it. Judge Fischer disagreed, and stated that the language should be replaced. He believes that repeal would be defeated by the voters.

Mr. Cole made a motion to amend Article V, Section 6 to say the following: “No person who lacks the mental capacity to vote shall be entitled to the privileges of an elector during the time of such incapacity.” Committee member Sen. Bob Peterson seconded the motion.

Sen. Skindell commented that the court will generally defer to the current process for determining incapacity; unless it is determined to be a violation of voting rights laws or is inconsistent with the constitution. If the General Assembly does not act and the secretary of state issues an order, the courts generally will defer to the secretary of state. Judge Fischer responded that this will depend on the level of scrutiny applied. Mr. Cole noted that it is difficult to predict how the courts will act, but that, generally, constitutional words are subject to interpretation by courts, and the courts look to other sources for guidance when interpreting. Mr. Cole said the court will likely take upon itself the power to interpret what this provision means, but that it also will look to the General Assembly and secretary of state for guidance. He emphasized that any consultation with the secretary of state would be for guidance, not deference.

Chair Sapphire proposed that the committee table the motion. He suggested the proposal be considered during the first part of the next committee meeting in April. He asked Commission staff to provide the committee with a critical analysis of the language that Mr. Cole proposed.

A vote was taken on the motion to table the proposition and the committee was unanimously in favor. Chair Sapphire thanked Mr. Kirkman for his assistance.

Adjournment:

With no further business, the committee adjourned at 11:45 a.m.

Attachments:

- Notice
- Agenda
- Roll call sheet
- Kirkman materials

Approval:

These minutes of the February 12, 2015 meeting of the Bill of Rights and Voting Committee were approved at the April 9, 2015 meeting of the committee.

/s/ Richard B. Sapphire

Richard B. Sapphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice Chair