



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Bill of Rights and Voting Committee

Prof. Richard Saphire, Chair
Jeff Jacobson, Vice-chair

December 10, 2015

Ohio Statehouse
Room 017

OCMC Bill of Rights and Voting Committee

Chair Mr. Richard Saphire

Vice-chair Mr. Jeff Jacobson

Rep. Ron Amstutz

Ms. Karla Bell

Rep. Kathleen Clyde

Mr. Douglas Cole

Hon. Patrick Fischer

Mr. Edward Gilbert

Sen. Bob Peterson

Sen. Michael Skindell

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

BILL OF RIGHTS AND VOTING COMMITTEE

THURSDAY, DECEMBER 10, 2015

9:30 A.M.

OHIO STATEHOUSE ROOM 017

AGENDA

- I. Call to Order
- II. Roll Call
- III. Approval of Minutes
 - Meeting of November 12, 2015
 - [Draft Minutes – attached]*
- IV. Reports and Recommendations
 - Article V, Section 6 (Mental Capacity to Vote)
 - Second Presentation
 - Public Comment
 - Discussion
 - **Possible Action Item: Consideration and Adoption**
 - [Report and Recommendation – attached]*
- V. Presentations
 - None scheduled
- VI. Committee Discussion
 - None scheduled

VII. Next steps

- The committee chair will lead discussion regarding the next steps the committee wishes to take in preparation for upcoming meetings.

[Planning Worksheet – attached]

VIII. Old Business

IX. New Business

X. Public Comment

XI. Adjourn



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, NOVEMBER 12, 2015

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order at 9:38 a.m.

Members Present:

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

Approval of Minutes:

The minutes of the September 10, 2015 meeting of the committee were approved.

Reports and Recommendations

Article I, Section 20 (Powers Reserved to the People)

Chair Saphire recognized Shari L. O'Neill, counsel to the Commission, who provided the first presentation of the report and recommendation for Article I, Section 20 (Powers Reserved to the People). Ms. O'Neill indicated that Article I, Section 20, stating that the powers retained by the people will not be impaired or denied by the enumeration of other rights in the constitution, was adopted as part of the 1851 Ohio Constitution. She described that the section mirrors language from both the Ninth and Tenth Amendments to the United States Constitution, and expresses the view that the powers of the government are derived from the people. She indicated the report and recommendation describes the history of the limited litigation involving the provision, with courts generally citing Article I, Section 20 only in conjunction with other sections of the Bill of Rights. Ms. O'Neill said the report and recommendation concludes that the committee recommends that Article I, Section 20 be retained in its current form.

Senator Michael Skindell moved to recommend no change to Article I, Section 20. This motion was seconded by Judge Patrick Fischer, and a roll call vote was held. By unanimous vote of all present at the time of the vote, the committee voted to issue the report and recommendation for Article I, Section 20.

Article V, Section 4 (Exclusion from Franchise for Felony Conviction)

Ms. O'Neill then provided the first presentation of the report and recommendation for and Article V, Section 4 (Exclusion from Franchise for Felony Conviction). Ms. O'Neill indicated that this section relates to the power of the General Assembly to exclude from the privilege of voting or being eligible to office any person convicted of a felony. She said the provision was adopted as part of the 1851 Ohio Constitution, and was amended in 1976, after a recommendation by the Ohio Constitutional Revision Commission to substitute the word "felony" for the phrase "bribery, perjury, or other infamous crime." Ms. O'Neill described that the section empowers the General Assembly to enact laws that exclude felons from voting or holding office, rather than directly disenfranchising, and that the General Assembly enacted laws on this topic in Ohio Revised Code Chapter 2961. Referring to litigation involving the subject of felon disenfranchisement, Ms. O'Neill noted the report and recommendation discusses case law upholding the disenfranchisement of felons on the basis that the Fourteenth Amendment to the United States Constitution guarantees the right to vote "except for participation in rebellion, or other crime," thus finding an "affirmative sanction" for felony disenfranchisement, and that the section has been cited in Ohio in relation to its restriction on eligibility for public office of persons convicted of a felony. Ms. O'Neill stated the report and recommendation describes the committee's discussion of the issue, documenting its consensus that Ohio's disenfranchisement of felons only during the period of their incarceration is a reasonable approach that appropriately balances the goals and interests of the criminal justice system with those of incarcerated felons.

She said the report and recommendation sets forth the committee's conclusion that the provision should be retained in its current form.

Upon motion by Judge Fischer, with second by Vice-chair Jeff Jacobson, the committee voted unanimously to recommend no change to Article V, Section 4.

As a point of order, Chair Sapphire then asked the committee whether it would be in favor of issuing the two reports and recommendations after only one presentation, as is now permitted by the Rules of Procedure and Conduct in circumstances in which the committee is recommending no change. There being no objection, Mr. Jacobson then moved that the initial vote recommending no change to Article I, Section 20 be vacated, which was seconded by Judge Fischer. Without objection, the motion was agreed to. Sen. Skindell then moved to issue the report and recommendation recommending no change to Article I, Section 20, and that it be retained in its current form. This motion was seconded by Judge Fischer, and a roll call vote was held. By unanimous vote of all present at the time of the vote, the committee voted to issue the report and recommendation for Article I, Section 20.

There being no objections to having only one presentation of the report and recommendation for Article V, Section 4 before forwarding it to the Commission, Judge Fischer then moved to issue the report and recommendation for no change to Article V, Section 4, and that it be retained in its current form. This motion was seconded by Mr. Jacobson, and a roll call vote was held. By unanimous vote of all present at the time of the vote, the committee voted to issue the report and recommendation for Article V, Section 4.

Committee Discussion:

Article V, Section 6 (Mental Capacity to Vote)

Chair Sapphire then turned the committee's attention to its review of Article V, Section 6, relating to the mental capacity to vote. Noting that he had not attended the committee's previous meeting on September 10, 2015, Chair Sapphire said that his review of the meeting minutes caused him to understand that the vote taken at the last meeting was a straw poll rather than a final vote, so that no first presentation of a formal report and recommendation had occurred.

Mr. Jacobson objected to this characterization, saying it was clear in the previous meeting that the presentation of the report and recommendation was the first reading. He cautioned that, if each time the wording of the recommendation is changed another "first presentation" is required, there could be no progress in the work of the Commission. He said the committee took a straw poll because it was trying to finalize the text of its recommendation.

Committee members then expressed different views regarding the effect of the discussion and vote taken at the last meeting. Chair Sapphire asked the committee for a motion that would allow the committee to reach a formal conclusion about whether the presentation at the current meeting constitutes a second hearing.

Mr. Jacobson moved that the presentation on November 12, 2015 constitutes a second hearing. Committee member Doug Cole seconded the motion, and discussion on the motion was held.

Committee member Karla Bell expressed that the vote changes at each meeting because a different majority is present.

Mr. Jacobson clarified that the committee is not voting on the recommendation, but is voting about whether this is the second presentation. He said the problem is not that the committee hasn't given it enough consideration, but that it is focusing on side issues, and missing the opportunity to remove language that doesn't belong in the constitution. He said if the committee can't compromise here, it hurts the whole process.

Chair Sapphire said he disagrees that these are side political issues, but agreed the committee should vote on whether this is a second hearing.

Mr. Cole said he agrees with the underlying sentiment that these issues have been fully vetted, and he believes the committee is in a position to vote. He said this is not a situation where there is a lack of information.

Representative Kathleen Clyde said she agrees that the committee did take a formal procedural vote at its last meeting. She said there are substantive differences that may delay the committee, but she said she agrees that a first action was taken.

The committee then took a roll call vote of the committee members present. The following committee members were in favor of declaring that the presentation on November 12, 2015 constituted a second hearing:

Richard Saphire
 Jeff Jacobson
 Rep. Amstutz
 Rep. Clyde
 Doug Cole
 Judge Fischer
 Sen. Skindell

The following committee member was opposed to declaring that the presentation on November 12, 2015 is a second hearing:

Karla Bell

Chair Saphire then recognized Wilson R. Huhn, professor emeritus at the University of Akron School of Law, who spoke on behalf of the American Civil Liberties Union of Ohio (“ACLU”) regarding the committee’s consideration of Article V, Section 6 (Mental Capacity to Vote).

After describing the constitutional due process requirements relating to the right to vote, Professor Huhn advocated for removing Article V, Section 6, saying the General Assembly would still retain the ability to establish procedures for denying the right to vote to persons who are incapable of voting.

Chair Saphire said the presumption is that if someone satisfies the qualifications listed in Article V, Section 1, and no other constitutional provision limits the person’s voting rights, the person constitutionally is entitled to vote. He asked, if that is so, where does the General Assembly get its authority to step in and limit the right to vote? Prof. Huhn answered that these provisions speak to the constitutional rights of the individual, rather than being a limitation on the powers of the government. He said the government always retains the ability to limit constitutional rights so long as there is a compelling governmental interest. He said the right to vote similarly could be limited to protect the integrity of the electoral process.

Seeking further clarification, Chair Saphire asked whether the General Assembly has the inherent authority to step in. Prof. Huhn said the government retains its police powers, and that

limiting the right to vote would be necessary to prevent some people from voting who have extreme mental incapacity.

Mr. Jacobson noted that legislative actions can be interpreted in ways that may not have been intended by their drafters, wondering if the same thing could happen when a provision in the constitution is enacted. He asked, if Article V, Section 6 is removed, could a court decide that meant the people of Ohio no longer wish their legislature to exercise that authority?

Prof. Huhn agreed that is a possible interpretation. He said a court could say to enact one is to exclude the other, or could conclude voting is a right and there is no intent to limit the legislature.

Ms. Bell said she agrees removal is the best, but doesn't think that option will win. She noted Prof. Huhn's comment that if Article V, Section 6 can't be abolished, the committee could track the language proposed by the 1970s Constitutional Revision Commission, which stated that the General Assembly has the power to deny the right to vote. She asked why Prof. Huhn would recommend that.

Prof. Huhn said that is his backup, or alternate, phrasing for the section. He said he would recommend requiring an adjudication because every person has a fundamental right to self-govern, noting only a small percent of persons fall into the category of severely impaired. He said, on a theoretical level, he sees all of those people as equals, but because there is a compelling governmental interest they could be adjudicated unable to vote.

Mr. Cole noted that Prof. Huhn seems to believe it would be appropriate to prevent some mentally impaired people from voting, asking what Prof. Huhn finds inappropriate about the language the committee is considering that would accomplish that result.

Prof. Huhn answered that the right to due process is fundamental; it is a due process concern that makes him want to include the word "adjudication" in the provision.

Mr. Cole said the federal constitution imposes restrictions on limitations on the franchise as well as providing substantive and procedural due process. He wondered whether the proposed constitutional language could be interpreted as being consistent with federal restrictions.

Prof. Huhn said the integrity of the electoral process is important, but so is the dignity of the persons involved. He said the notion that a person could be challenged and prevented from voting without a prior adjudication is very troubling to him.

Mr. Cole asked whether there is anything in the proposed language that would prevent the use of an adjudicative process. Prof. Huhn answered there is nothing to prevent it but also nothing to require it.

Judge Fischer noted the procedure whereby someone contesting the ability of another to vote must file a protest with the board of elections 20 days before the election and, if someone doesn't

like the result, a writ of mandamus must be sought. Prof. Huhn said that procedure does not constitute an adjudication by an appropriate body, and that an administrative agency lacks the expertise to determine mental capacity.

Judge Fischer continued, saying that is what the legislature has put into effect; he doesn't like it, it is an unusual process, but it is a process. Prof. Huhn said he does not know much about that procedure, but he doubts it satisfies due process. He said the board of elections is not appropriate for conducting an adjudication in this context, giving an analogy that a person is not determined to be a felon (and so unable to vote) by a board of elections but by a criminal proceeding in a court.

Sen. Skindell remarked that the difference, in part, between the existing provision of the constitution and the provision under consideration is that the version under consideration just has "mental capacity to vote," while the existing provision says "no idiot or insane person." He asked, "is there a difference between 'mental capacity' and 'idiot or insane'?"

Prof. Huhn said he doesn't know what was meant by idiot in 1851, but by 1910 it was someone with an IQ of less than 25. He said "if you take it literally and use the medical definition of the time, that phrase substantively was okay." He said "mental capacity" means far more than that. He said experts use methods to evaluate performance that are far more than a simple IQ test, adding that people have abilities based on living skills, communication skills, and common sense.

Following up, Sen. Skindell said, hypothetically, or practically, using the term "mental capacity" is a lot broader, and would exclude a larger group. Prof. Huhn agreed with this statement.

Prof. Huhn noted that the use of the word "privilege" would be adequate to cover the right to vote. He said "privilege" is an archaic term used to determine this kind of constitutional right. He said, to modern ears, the word privilege sounds like something that can be taken away, and that it would be better to call it the "right to vote."

Mr. Jacobson followed up on this statement by asking whether Prof. Huhn was implying that activities referred to as "privileges" are something other than a right. Prof. Huhn said historically privileges were government-sponsored activities that all male adult citizens had the ability to participate in, for example running for office or serving on a jury. He said "immunities," (as in the "privileges and immunities clause") were freedoms.

Mr. Jacobson said he concedes there must be some kind of procedure before someone goes to the poll and asks for a ballot, but his concern is that the use of the word "adjudicated" implies some sort of process in front of a judge, involving counsel and other formal procedures. He asked whether Prof. Huhn would find it acceptable to require a prior determination, possibly a process set up by the General Assembly.

Prof. Huhn said a constitution will be interpreted according to the intent of the people who wrote it. He said before someone is committed to an institution, there must be notice and a hearing.

He said, for example, in a guardianship setting, the burden of proof is on those seeking to impose the guardianship. He said the constitution places the burden of proof on the government and that it is very important for the constitution to say there should be an adjudication.

Ms. Bell noted that there is a guarantee of the civil rights of patients contained in a Revised Code section relating to persons who are admitted to a hospital or taken into custody. She said in that instance, the General Assembly requires a separate adjudication prior to depriving someone of a right to vote.

Prof. Huhn then concluded his remarks, and Chair Sapphire thanked him for his presentation.

Ms. Bell then asked if Michael Kirkman, executive director of Disability Rights Ohio, who was present in the audience, could answer some questions. Chair Sapphire then recognized Mr. Kirkman.

Ms. Bell asked Mr. Kirkman about the board of elections procedure for preventing persons from voting. Mr. Kirkman said there is a process for this, but he is not sure what the standard is for disqualifying someone. Ms. Bell asked what kind of notice is given when someone is taken off the voting rolls, and whether notice by publication is sufficient. Mr. Kirkman said notice by publication is sufficient as a last resort, but that notice procedure has to do with disqualifying someone because of a change in residency, which is not this situation.

Chair Sapphire inquired about Mr. Kirkman's statement, in his November 10, 2015 letter to the committee, that he sees adjudication as a side issue. Mr. Kirkman answered that, prior to disenfranchisement, some kind of hearing process is going to happen anyway because it is required under federal law. Chair Sapphire said he is more concerned with the burden of proof than with the actual process afforded the individual, because the burden on the individual can be severe if voting rights are removed prior to an adjudication and the individual has to initiate litigation to get his rights back.

Mr. Kirkman said there is dispute about what "capacity to vote" is. He said he continues to be bothered that felons have more rights in the constitution than people with disabilities, and that the burden of proof is on the person least likely to be able to challenge the disenfranchisement. He said Article V, Section 4 is a good template because it acknowledges the role of the General Assembly in deciding exactly what circumstances should affect voting rights in this context.

Mr. Jacobson suggested to the committee a revision of the language under consideration, as follows:

The General Assembly shall have the power to exclude from the rights and privileges of an elector during the time of incapacity any elector who is determined to lack the mental capacity to vote.

Chair Sapphire said the language would be improved if it said "determined according to procedures determined by the General Assembly."

Mr. Cole said he appreciates Mr. Jacobson's efforts, but his concern is that on this issue the committee is having difficulty differentiating a statutory process from a constitutional process. He said the fewer words the better, adding "it doesn't serve us to ensconce in the constitution too much nuance and statutory construct. The fundamental notion we are trying to express is that those who lack the capacity to vote shouldn't vote. If we try and create too much statutory construct around that it is hard to understand. Also what we are trying to put there is part of due process protections there already."

Ms. Bell said she agreed with a statement made by Executive Director Steven C. Hollon in a previous memorandum to the committee that the use of the term "adjudication" suggests a decision made by a judicial body and that due process has been met, and also that it puts the burden on the state, rather than on the voter. She said adjudication shifts the burden to the state to be sure it has proven its case.

Chair Sapphire suggested the committee adjourn until next time because it was the scheduled time for the meeting to conclude. Mr. Jacobson objected, indicating that the committee should continue to discuss the issue in order to bring the topic to a conclusion. He then made a formal proposal for new language:

The General Assembly shall have the power to exclude from the rights and privileges of an elector during the time of incapacity any elector who is determined under law to lack the capacity to vote.

Judge Fischer commented that it is important that the committee change the offensive language in Article V, Section 6. He said, "this committee has spent months on this issue; there are a lot of issues important to this committee, and it is time to move on one way or another."

Mr. Cole said he has a procedural concern, indicating if the committee is completely rewriting the language, he would struggle with calling this a second reading. He asked whether the committee could vote on whether to adopt the language that came out of the previous meeting and see if there is a majority in favor of it.

Mr. Cole then moved to adopt the language approved at the last meeting, which was seconded by Judge Fischer. The committee then held a discussion on the motion.*

Mr. Jacobson said he thinks there is majority support for language from the last meeting. He said it could be helpful to clarify that there should be some prior determination, but that his concern about adjudication is that it requires a formal court process. Adding that requirement of a prior determination would help reach a broader consensus, he agreed that the committee has considered this a long time. He said the committee could save seeking a broader consensus for the Commission as a whole, if people would prefer.

* That language states: "No person who lacks the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity."

Ms. Bell said the committee has been deadlocked on this issue; it is evenly split depending on who shows up. She said she is concerned the committee would be in a position of sending to the Commission a recommendation that is disapproved by a significant portion of the committee. She said she could support Mr. Jacobson's proposal.

Chair Sapphire said he agrees with Fischer, Cole, and Ms. Bell. He said, if he had to vote on the current proposal he would move against it, but that he could support Mr. Jacobson's proposed language.

Mr. Jacobson said he wishes the committee could wrap this up today. Mr. Cole said he doesn't believe the committee can rewrite the proposal and call it a second reading.

Chair Sapphire reminded the committee there is a motion on the floor. Ms. Bell moved to amend the motion and instead adopt the language suggested by Mr. Jacobson. Chair Sapphire then asked for a second, but none was provided at that time.

Rep. Amstutz then suggested another wording of the language that would include the phrase "the General Assembly shall exclude...." Thus, it would read:

The general assembly shall exclude from the rights and privileges of an elector during the time of incapacity an elector who is determined under law to lack the mental capacity to vote during the period of this incapacity.

Mr. Jacobson said the problem with that phrasing is that it uses the word "elector" twice. Judge Fischer suggested using the language originally proposed, but add at the beginning that "the General Assembly shall provide under law that...."

Mr. Jacobson agreed to this change, and offered the following:

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 asked whether this would constitute a second reading, adding whether or not it is a second reading, there is nothing to preclude a third reading.

Mr. Jacobson then made a substitute motion that the motion regarding his former proposal be stricken. This motion was seconded by Ms. Bell.

Ms. Bell then withdrew her motion to amend.

Mr. Jacobson then moved to amend the original motion, and that the following language be adopted by 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.

A roll call vote of the committee members present was taken on the motion to amend. The following committee members were in favor of amending the motion:

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

The following committee members opposed to amending the motion:

Rep. Clyde
Sen. Skindell

Sen. Skindell asked for clarification as to whether the report and recommendation was subject to a final vote to be referred to the Commission, to which Chair Saphire answered no.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:15 a.m.

Approval:

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

Richard B. Saphire, Chair

Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE V, SECTION 6

MENTAL CAPACITY TO VOTE

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article V, Section 6 of the Ohio Constitution concerning the disenfranchisement of mentally incapacitated persons. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

Based on the following and for the reasons stated herein, the committee recommends that Article V, Section 6 in its current form be repealed, and that a new section be adopted as follows:

~~No person who lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.~~

The General Assembly shall provide that no person who has been legally determined to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

Background

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 6 reads as follows:

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

The clear purpose of the provision is to disqualify from voting persons who are mentally incapacitated. The provision modifies the broad enfranchisement of United States citizens over

the age of 18 who otherwise meet the qualifications of an elector, as contained in Article V, Section 1.¹

When this provision was adopted as part of the 1851 Ohio Constitution, words such as “idiot,” “lunatic,” and “feeble-minded,” were commonly used to describe persons of diminished mental capacity. In modern times, however, the descriptors “idiot” and “insane person” have taken on a pejorative meaning and are not favored. Throughout the 1800s, an “idiot” was simply a person with diminished mental capacity, what later was termed “mental retardation,” and what is now referred to as being “developmentally disabled.” Further, the word “idiot” conveyed that it was a permanent state of mental incapacity, possibly congenital, as opposed to “mania” “dementia,” or “insanity,” which signified potentially transient or temporary conditions.² Today, the word “idiot” has become an insult, suggesting someone who is willfully foolish or uninformed.³

The use of both the word “idiot” and the phrase “insane person” in Article V, Section 6 suggests that the privileges of an elector were to be denied both to persons with permanently diminished mental capacity, as well as to persons whose condition is or could be temporary.

In one of the few cases discussing the meaning and origin of the words “idiot” and “insane persons” in this provision, the Marion County Common Pleas Court in 1968 observed:

From my review of legal literature going back to 1800 it seems apparent that the common definition of the word “idiot,” as understood in 1851 when our present Constitution was in the main adopted, meant that it refers to a person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. I am unable to find anything indicating any real change in this definition to this date. * * *

The words “insane person,” however, most commonly then as well as now, refer to a person who has suffered such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life. It seems quite apparent that some persons who once had normal reason and sense faculties become permanently insane. Others lose their normal perception and reason for relatively short periods of time such as day, a week, or a month or two, and then regain their normal condition for either their entire life or for some lesser indeterminate period. During these lucid intervals such persons commonly exercise every characteristic of normality associated with all those persons who have never, even for a short period, been deprived of their normal reasoning faculties.

Baker v. Keller, 15 Ohio Misc. 215, 229, 237 N.E.2d 629, 638 (Marion CP Ct. 1968).

Amendments, Proposed Amendments, and Other Review

Article V, Section 6 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Elections and Suffrage Committee (“E&S Committee”) of the Ohio Constitutional Revision Commission (“1970s Commission”) discussed whether to amend the provision in order to remove the “idiot” and “insane person” references. The E&S Committee’s discussion centered both on the words themselves, which were recognized as outdated and potentially offensive, as well as the provision’s vagueness:

The present provision concerning mental illness and voting is unsatisfactory for several reasons. First, the constitutional language is simply a direct prohibition. The General Assembly is not expressly given the power to determine which mental conditions are such that a person should not vote, nor to establish procedures for determining who does or who does not fall into the categories. Statutory authority for the courts to deny the vote to involuntarily committed patients is nevertheless provided in [Ohio Revised Code] section 5122.15, dealing with legal incompetency. But this provision carries out neither the letter nor the spirit of the constitutional prohibition. The law now tolerates the voting of some persons who may in fact be mentally incompetent. A voluntary patient who does not request a hearing before the probate court retains his civil rights, among them the right to vote. The loss of the right to vote is based upon the idea that a person in need of indeterminate hospitalization is also legally incompetent. But there are other persons whose right to vote may be challenged on the basis of insanity, either at the polls or in the case of contested election results. In these instances, there are no provisions resolving how hearings must be conducted, by whom, or even the crucial question of whether medical evidence shall be required. The lack of procedure for determining who is “insane” or an “idiot” could allow persons whose opinions are unpopular or whose lifestyles are disapproved to be challenged at the polls, and they may lose their right to vote without the presentation of any medical evidence whatsoever.⁴

The E&S Committee acknowledged that “large scale and possibly arbitrary exclusion from voting are a greater danger to the democratic process than including some who may be mentally incompetent to vote.” The E&S Committee concluded that “a person should not be denied the right to vote because he is ‘incompetent,’ but only if he is incompetent for the purpose of voting,” ultimately recommending a revision that would exclude from the franchise persons who are “mentally incompetent for the purpose of voting.”⁵ The 1970s Commission voted to submit this recommendation to the General Assembly, specifically proposing repeal of the section and replacing it with a new Section 5 that would read:

The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency.⁶

For reasons that are not clear, the General Assembly did not present this issue to the voters.

Litigation Involving the Provision

Only two Ohio Supreme Court cases refer to this provision. An early case, *Sinks v. Reese*, 19 Ohio St. 306 (1869), cited it to support a holding that some votes by mentally-impaired residents of an asylum could be disqualified; however, the court counted a vote by a resident who was “greatly enfeebled by age,” because “the reverence which is due to ‘the hoary head’ ought to have left his vote uncontested.” The court also mentioned the provision in *State ex rel. Melvin v. Sweeney, Secy. of State*, 154 Ohio St. 223, 94 N.E.2d 785 (1950), in which the court held constitutional a statutory provision that required county boards of elections to provide ballot assistance to physically disabled voters, but prohibited them from providing similar assistance to illiterate voters.

The provision also was cited in the context of an election in which a person of diminished mental capacity was alleged to have been improperly allowed to vote. *In re South Charleston Election Contest*, 1905 Ohio Misc. LEXIS 191, 3 Ohio N.P. (n.s.) 373 (Clark County Probate Court, 1905), involved a contested election relating to the sale of liquor in which one voter was deemed by the court to be mentally incompetent for the purpose of voting, with the result that the election was so close as to be declared null and void.

Baker v. Keller, supra, a common pleas case, cited Article V, Section 6 in relation to its conclusion that a litigant could not base a motion for new trial on the allegation that a mentally ill juror should have been disqualified where there had been no adjudication of incompetence.

More recently, a Maine federal court decision has been relied on in other jurisdictions for its holding that imposition of a guardianship for mental health reasons does not equate with mental incapacity for purposes of voting. *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001), concluded that federal equal protection and due process guarantees require a specific finding that an individual is mentally incompetent for the purpose of voting before disqualification can occur. *Doe v. Rowe* was cited in *Bell v. Marinko*, 235 F. Supp.2d 772 (N.D. Ohio 2002), for the proposition that, because voting is a fundamental right, disenfranchisement based on residency requirements must be predicated on notice and an opportunity to be heard.

Presentations and Resources Considered

Michael Kirkman, Disability Rights Ohio

On December 11, 2014, Michael Kirkman, executive director of Disability Rights Ohio, a legal advocacy and rights protection organization, presented to the committee on the topic of voting rights for the disabled. Mr. Kirkman attended the committee meeting again on February 12, 2015, to provide additional assistance as the committee discussed potential changes to Article V, Section 6.

According to Mr. Kirkman, society’s perception of mental disability has changed since 1851, when neglect, isolation, and segregation were typical responses. Social reform after the Civil War helped create institutions for housing and treating the mentally ill, but there was little

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Research that assisted the Committee’s consideration of this issue included Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 McGeorge L.Rev. 931 (2007); James T. McHugh, *Idiots and Insane Persons: Electoral Exclusion and Democratic Values Within the Ohio Constitution*, 76 Albany L.Rev. 2189 (2013); Kay Schriener, *The Competence Line in American Suffrage Law: A Political Analysis*, Disability Studies Quarterly, Vol. 22, No. 2, page 61; Kay Schriener & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 Ohio St. L.J. 481 (2001).

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In reviewing possible changes to Article V, Section 6, the committee first considered whether to simply replace the offensive references with more appropriate language, leaving the rest of the section intact. However, some members emphasized the importance of additionally stating that any disenfranchisement due to lack of mental capacity must last only during the period of incapacity.

The committee also discussed whether to retain the section’s “self-executing” status, or whether to include language that would specifically authorize or require the General Assembly to create laws governing the disenfranchisement of mentally incapacitated persons. On this question, some members asserted that expressly requiring or empowering the General Assembly to act was unnecessary because this legislative authority is inherent. Ultimately, it was the consensus of the committee that expressly requiring or enabling action by the General Assembly is unnecessary is necessary in order to acknowledge an evolving understanding of the concept of “mental capacity for the purpose of voting,” and so the committee concluded that the section need not should include such language.

The committee also addressed what would be the appropriate descriptor for persons whose mental disability would disqualify them from voting. On this question, the committee found persuasive Michael Kirkman’s assertion that the preferred modern reference is to an individual’s “incapacity,” rather than to his or her “incompetence.” Members of the committee agreed that “mental incapacity” would be an acceptable phrase to substitute for “idiots” and “insane persons.” Combined with the committee’s consensus that disenfranchisement should occur only during the time of the individual’s incapacity, allowing voting to be restored to persons who recover their mental capacity, the committee concluded that the appropriate phrase should be “mental incapacity to vote.”

The committee also considered the significance of the use of the phrase “privileges of an elector” in the section, as opposed to using the phrase “privileges of a voter” or “rights of a voter.” One committee member noted that “privileges of an elector” would not indicate merely voting, but would include activities such as running for public office or signing a petition. Further discussion centered on the symbolic or other differences between using the word “privilege” and using the word “right,” as well as the inclusion of the word “entitled” in the section. Some committee members expressed a strong preference for having the new section refer to voting as a “right,” a word choice they believed would signify the importance of the act of voting, and emphasize the constitution’s protection of the individual’s voting prerogative. Other committee members were reluctant to change the reference to “privileges of an elector,” because of the possibility that the original meaning and application of that phrase would be lost. Several members acknowledged that the “privilege versus right” controversy was larger than could be thoroughly addressed or satisfactorily resolved by the committee, and that, in any case, its resolution was not necessary to revising the section.

As a compromise, the committee agreed to recommend that the phrase read “rights and privileges of an elector,” so as to embrace both the concept of voting as a right and the concept, articulated in the original language of the section, of an “elector” having privileges beyond those of simply voting.

Debate arose over whether to include an explicit reference to judicial review, due process, or adjudication, as a prerequisite to disenfranchisement. Some committee members said they were inclined to exclude the reference based on their view that due process must be satisfied regardless of whether the provision expressly mentions the need for it. These committee members indicated that a constitutional provision that expressly requires adjudication could complicate or interfere with current procedures for ascertaining whether an individual is capable of voting. Other committee members said requiring adjudication would emphasize that the burden is on the state to prove that an individual’s mental state disqualifies him or her from voting, rather than the burden being on the individual to prove sufficient mental capacity to vote. Some members sought to include language that would emphasize that voting is a right that should not be removed absent adjudication. Those members expressed the view that a constitutional provision that doesn’t express this concept is not fair to the citizen.

~~On taking a straw poll, committee members realized they were evenly~~ The committee was divided between those who wanted to include a reference to adjudication, and those who did not. As a way of addressing the issue of adjudication, the committee ~~Acknowledging persuasive arguments on either side of the issue, and not wishing to delay the process of modifying the section by further discussion of a question on which the committee was unlikely to reach a consensus, the committee~~ decided the amendment should require the General Assembly to enact laws governing the legal determination of whether a person lacks the mental capacity to vote. The committee also agreed ~~concluded that its recommendation could~~ should focus on substituting the references to “idiots” and “insane persons” with the adjective phrase “lacks the mental capacity to vote.” The committee further concluded that the provision could recognize both the “rights” ~~to vote~~ and the “privileges” of an elector, and that the disenfranchisement would only be during the period of incapacity.

~~Because the committee failed to reach a consensus about adjudication, it~~ A majority of the committee ~~concluded that the decision of whether to expressly require an adjudication could be left to the full Commission. the phrase “lacks the mental capacity to vote” was preferred over “has been adjudicated to lack the mental capacity to vote” because the simple use of the word “lack” suggests that the determination of whether someone lacked that capacity would occur before disenfranchisement. Alternately, the Commission could forward the committee’s recommendation to the General Assembly without resolving the question, allowing the issue to be worked out in the legislative process.~~

The Bill of Rights and Voting Committee concluded that the considerations and interests supporting the change proposed by the 1970s Commission remain relevant today. Specifically, current knowledge regarding mental illness and cognitive impairment, as well as modern distaste for adjectives like “idiot,” continue to provide justification for amending this provision.⁸

Additionally, the current provision does not require that the subject individual be mentally incapacitated for the purposes of voting. The committee concluded that, without this specific element, the current provision lacks proper protection for persons asserted to be incapable of voting due to mental disability.

In addition to these considerations, the committee acknowledged the view that voting is a right, and that an individual possesses the “privileges of an elector,” which may include the ability to sign petitions or run for public office. Thus, the committee desired the new provision to signify that it is both of these potentially separate rights or interests that are infringed when a person is determined to lack mental capacity for the purpose of voting.

Conclusion

Based on these considerations, the Bill of Rights and Voting Committee recommends that Article V, Section 6 be repealed and replaced with the following new provision:

~~*No person who lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.*~~

The General Assembly shall provide that no person who has been legally determined to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

The recommended amendment serves the goal of:

- Requiring the General Assembly to enact laws relating to the disenfranchisement of persons lacking the mental capacity to vote;
- Removing all outdated or pejorative references to mentally incapacitated persons;
- Specifying that the disenfranchisement only applies to the period of incapacity; and
- Requiring that only mental incapacity *for the purposes of voting* would result in disenfranchisement.

Date Issued

After considering this report and recommendation on September 10, 2015, November 12, 2015, and December 10, 2015, the Bill of Rights and Voting Committee voted to issue this report and recommendation on _____.

Endnotes

¹ Article V, Section 1 provides:

Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to

vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.

² Although the discipline of psychology was in its infancy in the 1800s, the Ohio Supreme Court’s description of insanity in 1843 reflects a surprisingly modern view:

*** [I]t should be remembered that “insanity is a disease of the mind, which assumes as many and various forms as there are shades of difference in the human character. It exists in all imaginable varieties, and in such a manner as to render futile any attempt to give a classification of its numerous grades and degrees that would be of much service, or, under any circumstances, safe to be relied upon in judicial investigations. It is an undoubted fact, that, in determining a question of lunacy, the common sense of mankind must ultimately be relied on, and, in the decision, much assistance cannot be derived from metaphysical speculations, although a general knowledge of the faculties of the human mind, and their mode of operations, will be of great service in leading to correct conclusions. *Clark v. State*, 12 Ohio 483 (Ohio 1843), quoting Shelford on Lunacy, 38.

A full citation to “Shelford on Lunacy” is Leonard Shelford, *A Practical Treatise on The Law Concerning Lunatics, Idiots, and Persons of Unsound Mind, with an Appendix of The Statutes of England, Ireland, and Scotland, Relating to Such Persons and Precedents and Bills of Costs* (London, Wm. McDowall. 1833).

³ See Merriam Webster Dictionary, <http://www.merriam-webster.com/dictionary/idiot> (1. *usually offensive*: a person affected with extreme mental retardation; 2. a foolish or stupid person). For further discussion of nineteenth century scientific and political views on the subject of disenfranchisement of the mentally incompetent, see Kay Schriener, *The Competence Line in American Suffrage Law: A Political Analysis*, 22 *Disability Stud. Q.*, no. 2, 2002, at 61; and Kay Schriener and Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 *Ohio St. L.J.* 481 (2001).

⁴ Ohio Constitutional Revision Commission (1970-77), Proceedings Research, Volume 5, Elections and Suffrage Committee Report, 2502, 2515 (Apr. 22, 1974), <http://www.lsc.ohio.gov/ocrc/v5%20pgs%20195-2601%20elections-suffrage%202602-2743%20local%20govt.pdf> (last visited Oct. 28, 2015).

⁵*Id.* at 2516.

⁶ Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Constitution, Part 7, Elections and Suffrage, 23-25 (Mar. 15, 1975) <http://www.lsc.ohio.gov/ocrc/recommendations%20pt7%20elections%20and%20suffrage.pdf> (last visited Oct. 28, 2015).

⁷ A discussion of Due Process and Equal Protection jurisprudence related to state constitutional provisions that disenfranchise the mentally impaired may be found in Jennifer A. Bindel, *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 *N.Y.U. Ann. Surv. Am. L.* 87 (2009).

⁸ Since the 1970s, the General Assembly has undertaken efforts to purge the Ohio Revised Code of outdated or pejorative references to persons having diminished mental capacity, and to protect the civil rights of persons subject to guardianships. Thus, Am. Sub. H.B. 53, introduced and passed by the 127th General Assembly, removed all statutory references to “lunatic,” “idiot,” “imbecile,” “drunkard,” “deaf and dumb,” and “insane,” in 29 sections of the Revised Code, replacing them, where necessary, with more modern references.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE V, SECTION 6

MENTAL CAPACITY TO VOTE

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article V, Section 6 of the Ohio Constitution concerning the disenfranchisement of mentally incapacitated persons. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

Based on the following and for the reasons stated herein, the committee recommends that Article V, Section 6 in its current form be repealed, and that a new section be adopted as follows:

The General Assembly shall provide that no person who has been legally determined to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

Background

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 6 reads as follows:

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

The clear purpose of the provision is to disqualify from voting persons who are mentally incapacitated. The provision modifies the broad enfranchisement of United States citizens over the age of 18 who otherwise meet the qualifications of an elector, as contained in Article V, Section 1.¹

When this provision was adopted as part of the 1851 Ohio Constitution, words such as “idiot,” “lunatic,” and “feeble-minded,” were commonly used to describe persons of diminished mental capacity. In modern times, however, the descriptors “idiot” and “insane person” have taken on a pejorative meaning and are not favored. Throughout the 1800s, an “idiot” was simply a person with diminished mental capacity, what later was termed “mental retardation,” and what is now referred to as being “developmentally disabled.” Further, the word “idiot” conveyed that it was a permanent state of mental incapacity, possibly congenital, as opposed to “mania” “dementia,” or “insanity,” which signified potentially transient or temporary conditions.² Today, the word “idiot” has become an insult, suggesting someone who is willfully foolish or uninformed.³

The use of both the word “idiot” and the phrase “insane person” in Article V, Section 6 suggests that the privileges of an elector were to be denied both to persons with permanently diminished mental capacity, as well as to persons whose condition is or could be temporary.

In one of the few cases discussing the meaning and origin of the words “idiot” and “insane persons” in this provision, the Marion County Common Pleas Court in 1968 observed:

From my review of legal literature going back to 1800 it seems apparent that the common definition of the word “idiot,” as understood in 1851 when our present Constitution was in the main adopted, meant that it refers to a person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. I am unable to find anything indicating any real change in this definition to this date. * * *

The words “insane person,” however, most commonly then as well as now, refer to a person who has suffered such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life. It seems quite apparent that some persons who once had normal reason and sense faculties become permanently insane. Others lose their normal perception and reason for relatively short periods of time such as day, a week, or a month or two, and then regain their normal condition for either their entire life or for some lesser indeterminate period. During these lucid intervals such persons commonly exercise every characteristic of normality associated with all those persons who have never, even for a short period, been deprived of their normal reasoning faculties.

Baker v. Keller, 15 Ohio Misc. 215, 229, 237 N.E.2d 629, 638 (Marion CP Ct. 1968).

Amendments, Proposed Amendments, and Other Review

Article V, Section 6 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Elections and Suffrage Committee (“E&S Committee”) of the Ohio Constitutional Revision Commission (“1970s Commission”) discussed whether to amend the

provision in order to remove the “idiot” and “insane person” references. The E&S Committee’s discussion centered both on the words themselves, which were recognized as outdated and potentially offensive, as well as the provision’s vagueness:

The present provision concerning mental illness and voting is unsatisfactory for several reasons. First, the constitutional language is simply a direct prohibition. The General Assembly is not expressly given the power to determine which mental conditions are such that a person should not vote, nor to establish procedures for determining who does or who does not fall into the categories. Statutory authority for the courts to deny the vote to involuntarily committed patients is nevertheless provided in [Ohio Revised Code] section 5122.15, dealing with legal incompetency. But this provision carries out neither the letter nor the spirit of the constitutional prohibition. The law now tolerates the voting of some persons who may in fact be mentally incompetent. A voluntary patient who does not request a hearing before the probate court retains his civil rights, among them the right to vote. The loss of the right to vote is based upon the idea that a person in need of indeterminate hospitalization is also legally incompetent. But there are other persons whose right to vote may be challenged on the basis of insanity, either at the polls or in the case of contested election results. In these instances, there are no provisions resolving how hearings must be conducted, by whom, or even the crucial question of whether medical evidence shall be required. The lack of procedure for determining who is “insane” or an “idiot” could allow persons whose opinions are unpopular or whose lifestyles are disapproved to be challenged at the polls, and they may lose their right to vote without the presentation of any medical evidence whatsoever.⁴

The E&S Committee acknowledged that “large scale and possibly arbitrary exclusion from voting are a greater danger to the democratic process than including some who may be mentally incompetent to vote.” The E&S Committee concluded that “a person should not be denied the right to vote because he is ‘incompetent,’ but only if he is incompetent for the purpose of voting,” ultimately recommending a revision that would exclude from the franchise persons who are “mentally incompetent for the purpose of voting.”⁵ The 1970s Commission voted to submit this recommendation to the General Assembly, specifically proposing repeal of the section and replacing it with a new Section 5 that would read:

The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency.⁶

For reasons that are not clear, the General Assembly did not present this issue to the voters.

Litigation Involving the Provision

Only two Ohio Supreme Court cases refer to this provision. An early case, *Sinks v. Reese*, 19 Ohio St. 306 (1869), cited it to support a holding that some votes by mentally-impaired residents of an asylum could be disqualified; however, the court counted a vote by a resident who was “greatly enfeebled by age,” because “the reverence which is due to ‘the hoary head’ ought to have left his vote uncontested.” The court also mentioned the provision in *State ex rel. Melvin v. Sweeney, Secy. of State*, 154 Ohio St. 223, 94 N.E.2d 785 (1950), in which the court held constitutional a statutory provision that required county boards of elections to provide ballot assistance to physically disabled voters, but prohibited them from providing similar assistance to illiterate voters.

The provision also was cited in the context of an election in which a person of diminished mental capacity was alleged to have been improperly allowed to vote. *In re South Charleston Election Contest*, 1905 Ohio Misc. LEXIS 191, 3 Ohio N.P. (n.s.) 373 (Clark County Probate Court, 1905), involved a contested election relating to the sale of liquor in which one voter was deemed by the court to be mentally incompetent for the purpose of voting, with the result that the election was so close as to be declared null and void.

Baker v. Keller, supra, a common pleas case, cited Article V, Section 6 in relation to its conclusion that a litigant could not base a motion for new trial on the allegation that a mentally ill juror should have been disqualified where there had been no adjudication of incompetence.

More recently, a Maine federal court decision has been relied on in other jurisdictions for its holding that imposition of a guardianship for mental health reasons does not equate with mental incapacity for purposes of voting. *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001), concluded that federal equal protection and due process guarantees require a specific finding that an individual is mentally incompetent for the purpose of voting before disqualification can occur. *Doe v. Rowe* was cited in *Bell v. Marinko*, 235 F. Supp.2d 772 (N.D. Ohio 2002), for the proposition that, because voting is a fundamental right, disenfranchisement based on residency requirements must be predicated on notice and an opportunity to be heard.

Presentations and Resources Considered

Michael Kirkman, Disability Rights Ohio

On December 11, 2014, Michael Kirkman, executive director of Disability Rights Ohio, a legal advocacy and rights protection organization, presented to the committee on the topic of voting rights for the disabled. Mr. Kirkman attended the committee meeting again on February 12, 2015, to provide additional assistance as the committee discussed potential changes to Article V, Section 6.

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In reviewing possible changes to Article V, Section 6, the committee first considered whether to simply replace the offensive references with more appropriate language, leaving the rest of the section intact. However, some members emphasized the importance of additionally stating that any disenfranchisement due to lack of mental capacity must last only during the period of incapacity.

The committee also discussed whether to retain the section's "self-executing" status, or whether to include language that would specifically authorize or require the General Assembly to create laws governing the disenfranchisement of mentally incapacitated persons. On this question, some members asserted that expressly requiring or empowering the General Assembly to act was unnecessary because this legislative authority is inherent. Ultimately, it was the consensus of the committee that expressly requiring or enabling action by the General Assembly is necessary in order to acknowledge an evolving understanding of the concept of "mental capacity for the purpose of voting," and so the committee concluded that the section should include such language.

The committee also addressed what would be the appropriate descriptor for persons whose mental disability would disqualify them from voting. On this question, the committee found persuasive Michael Kirkman's assertion that the preferred modern reference is to an individual's "incapacity," rather than to his or her "incompetence." Members of the committee agreed that "mental incapacity" would be an acceptable phrase to substitute for "idiots" and "insane persons." Combined with the committee's consensus that disenfranchisement should occur only during the time of the individual's incapacity, allowing voting to be restored to persons who recover their mental capacity, the committee concluded that the appropriate phrase should be "mental incapacity to vote."

The committee also considered the significance of the use of the phrase "privileges of an elector" in the section, as opposed to using the phrase "privileges of a voter" or "rights of a voter." One committee member noted that "privileges of an elector" would not indicate merely voting, but would include activities such as running for public office or signing a petition. Further discussion centered on the symbolic or other differences between using the word "privilege" and using the word "right," as well as the inclusion of the word "entitled" in the section. Some committee members expressed a strong preference for having the new section refer to voting as a "right," a word choice they believed would signify the importance of the act of voting, and emphasize the constitution's protection of the individual's voting prerogative. Other committee members were reluctant to change the reference to "privileges of an elector," because of the possibility that the original meaning and application of that phrase would be lost. Several members acknowledged that the "privilege versus right" controversy was larger than could be thoroughly addressed or satisfactorily resolved by the committee, and that, in any case, its resolution was not necessary to revising the section.

As a compromise, the committee agreed to recommend that the phrase read “rights and privileges of an elector,” so as to embrace both the concept of voting as a right and the concept, articulated in the original language of the section, of an “elector” having privileges beyond those of simply voting.

Debate arose over whether to include an explicit reference to judicial review, due process, or adjudication, as a prerequisite to disenfranchisement. Some committee members said they were inclined to exclude the reference based on their view that due process must be satisfied regardless of whether the provision expressly mentions the need for it. These committee members indicated that a constitutional provision that expressly requires adjudication could complicate or interfere with current procedures for ascertaining whether an individual is capable of voting. Other committee members said requiring adjudication would emphasize that the burden is on the state to prove that an individual’s mental state disqualifies him or her from voting, rather than the burden being on the individual to prove sufficient mental capacity to vote. Some members sought to include language that would emphasize that voting is a right that should not be removed absent adjudication. Those members expressed the view that a constitutional provision that doesn’t express this concept is not fair to the citizen.

The committee was divided between those who wanted to include a reference to adjudication, and those who did not. As a way of addressing the issue of adjudication, the committee decided the amendment should require the General Assembly to enact laws governing the legal determination of whether a person lacks the mental capacity to vote. The committee also agreed its recommendation should focus on substituting the references to “idiots” and “insane persons” with the adjective phrase “lacks the mental capacity to vote.” The committee further concluded that the provision could recognize both the “rights” and “privileges” of an elector, and that the disenfranchisement would only be during the period of incapacity.

The Bill of Rights and Voting Committee concluded that the considerations and interests supporting the change proposed by the 1970s Commission remain relevant today. Specifically, current knowledge regarding mental illness and cognitive impairment, as well as modern distaste for adjectives like “idiot,” continue to provide justification for amending this provision.⁸

Additionally, the current provision does not require that the subject individual be mentally incapacitated for the purposes of voting. The committee concluded that, without this specific element, the current provision lacks proper protection for persons asserted to be incapable of voting due to mental disability.

In addition to these considerations, the committee acknowledged the view that voting is a right, and that an individual possesses the “privileges of an elector,” which may include the ability to sign petitions or run for public office. Thus, the committee desired the new provision to signify that it is both of these potentially separate rights or interests that are infringed when a person is determined to lack mental capacity for the purpose of voting.

Conclusion

Based on these considerations, the Bill of Rights and Voting Committee recommends that Article V, Section 6 be repealed and replaced with the following new provision:

The General Assembly shall provide that no person who has been legally determined to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

The recommended amendment serves the goal of:

- Requiring the General Assembly to enact laws relating to the disenfranchisement of persons lacking the mental capacity to vote;
- Removing all outdated or pejorative references to mentally incapacitated persons;
- Specifying that the disenfranchisement only applies to the period of incapacity; and
- Requiring that only mental incapacity *for the purposes of voting* would result in disenfranchisement.

Date Issued

After considering this report and recommendation on September 10, 2015, November 12, 2015, and December 10, 2015, the Bill of Rights and Voting Committee voted to issue this report and recommendation on _____.

Endnotes

¹ Article V, Section 1 provides:

Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.

² Although the discipline of psychology was in its infancy in the 1800s, the Ohio Supreme Court's description of insanity in 1843 reflects a surprisingly modern view:

*** [I]t should be remembered that "insanity is a disease of the mind, which assumes as many and various forms as there are shades of difference in the human character. It exists in all imaginable varieties, and in such a manner as to render futile any attempt to give a classification of its numerous grades and degrees that would be of much service, or, under any circumstances, safe to be relied upon in judicial investigations. It is an undoubted fact, that, in determining a question of lunacy, the common sense of mankind must ultimately be relied on, and, in the decision, much assistance cannot be derived from metaphysical speculations, although a general knowledge of the faculties of the human mind, and their mode of operations, will be of great service in leading to correct conclusions. *Clark v. State*, 12 Ohio 483 (Ohio 1843), quoting Shelford on Lunacy, 38.

A full citation to “Shelford on Lunacy” is Leonard Shelford, *A Practical Treatise on The Law Concerning Lunatics, Idiots, and Persons of Unsound Mind, with an Appendix of The Statutes of England, Ireland, and Scotland, Relating to Such Persons and Precedents and Bills of Costs* (London, Wm. McDowall. 1833).

³ See Merriam Webster Dictionary, <http://www.merriam-webster.com/dictionary/idiot> (1. *usually offensive*: a person affected with extreme mental retardation; 2. a foolish or stupid person). For further discussion of nineteenth century scientific and political views on the subject of disenfranchisement of the mentally incompetent, see Kay Schriener, *The Competence Line in American Suffrage Law: A Political Analysis*, 22 *Disability Stud. Q.*, no. 2, 2002, at 61; and Kay Schriener and Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 *Ohio St. L.J.* 481 (2001).

⁴ Ohio Constitutional Revision Commission (1970-77), Proceedings Research, Volume 5, Elections and Suffrage Committee Report, 2502, 2515 (Apr. 22, 1974), <http://www.lsc.ohio.gov/ocrc/v5%20pgs%20195-2601%20elections-suffrage%202602-2743%20local%20govt.pdf> (last visited Oct. 28, 2015).

⁵*Id.* at 2516.

⁶ Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Constitution, Part 7, Elections and Suffrage, 23-25 (Mar. 15, 1975) <http://www.lsc.ohio.gov/ocrc/recommendations%20pt7%20elections%20and%20suffrage.pdf> (last visited Oct. 28, 2015).

⁷ A discussion of Due Process and Equal Protection jurisprudence related to state constitutional provisions that disenfranchise the mentally impaired may be found in Jennifer A. Bindel, *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 *N.Y.U. Ann. Surv. Am. L.* 87 (2009).

⁸ Since the 1970s, the General Assembly has undertaken efforts to purge the Ohio Revised Code of outdated or pejorative references to persons having diminished mental capacity, and to protect the civil rights of persons subject to guardianships. Thus, Am. Sub. H.B. 53, introduced and passed by the 127th General Assembly, removed all statutory references to “lunatic,” “idiot,” “imbecile,” “drunkard,” “deaf and dumb,” and “insane,” in 29 sections of the Revised Code, replacing them, where necessary, with more modern references.

Bill of Rights and Voting Committee

Planning Worksheet (Through November 2015 Meetings)

Article I – Bill of Rights (Select Provisions)

Sec. 1 – Inalienable Rights (1851)

Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 2 – Right to alter, reform, or abolish government, and repeal special privileges (1851)

Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	12.11.14	2.12.15	2.12.15	3.12.15	4.9.15	6.11.15	6.11.15

Sec. 3 – Right to assemble (1851)

Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	12.11.14	2.12.15	2.12.15	3.12.15	4.9.15	6.11.15	6.11.15

Sec. 4 – Bearing arms; standing armies; military powers (1851)

Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	12.11.14	2.12.15	2.12.15	3.12.15	4.9.15	6.11.15	6.11.15

Sec. 6 – Slavery and involuntary servitude (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Started							

Sec. 7 – Rights of conscience; education; the necessity of religion and knowledge (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 11 – Freedom of speech; of the press; of libels (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 13 – Quartering troops (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	4.9.15	6.11.15	6.11.15	7.9.15	9.10.15	10.8.15	10.8.15

Sec. 17 – No hereditary privileges (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	4.9.15	6.11.15	6.11.15	7.9.15	9.10.15	10.8.15	10.8.15

Sec. 18 – Suspension of laws (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 19 – Eminent domain (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 19b – Protect private property rights in ground water, lakes, and other watercourses (2008)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 20 – Powers reserved to the people (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	11.12.15	N/A	11.12.15				

Sec. 21 – Preservation of the freedom to choose health care and health care coverage (2011)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Article V – Elective Franchise

Sec. 1 – Who may vote (1851, am. 1923, 1957, 1970, 1976, 1977)

Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 2 – By ballot (1851)

Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 2a – Names of candidates on ballot (1949, am. 1975, 1976)

Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 4 – Exclusion from franchise (1851, am. 1976)

Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	11.12.15	N/A	11.12.15				

Sec. 6 – Idiots or insane persons (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	9.10.15						

Sec. 7 – Primary elections (1912, am. 1975)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 8 – Term limits for U.S. senators and representatives (1992)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 9 – Eligibility of officeholders (1992)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Article XVII – Elections

Sec. 1 – Time for holding elections; terms of office (1905, am. 1954, 1976)

Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 2 – Filling vacancies in certain elective offices (1905, am. 1947, 1954, 1970, 1976)

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2016 Meeting Dates (Tentative)

January 14

February 11

March 10

April 14

May 12

June 9

July 14

August 11

September 8

October 13

November 10

December 8