



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD  
THURSDAY, DECEMBER 15, 2016

#### **Call to Order:**

Chair Richard Saphire called the meeting to order at 9:41 a.m.

#### **Members Present:**

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

#### **Approval of Minutes:**

The minutes of the July 14, 2016 meeting of the committee were approved.

#### **Discussion:**

*Article V, Section 1*  
*“Qualifications of an Elector”*

Chair Saphire announced the committee would be continuing its review of Article V, Section 1, which sets the requirements for a person to be an elector in Ohio, including age, registration, and residency. He recalled that at a previous meeting the committee had heard presentations from Representative Alicia Reece and from Carrie L. Davis, executive director of the League of Women Voters of Ohio (LWVO), who proposed revisions to the section.

Chair Saphire said among the suggestions was a change that would refer to voting as a fundamental right. He said he is not sure if other state constitutions have that wording, but it might be important to state that because courts and the public generally have considered that to be the case. He said some have suggested removing the section’s explicit requirement that a person be registered for 30 days before being permitted to vote. He said Ohio’s requirement is among the longest periods required by any state and may be the longest permitted by federal law.

He said removing that language from the constitution would give the General Assembly the ability to shorten that period. Chair Sapphire continued that the section contains the requirement that a voter be at least 18 years of age, but that by statute one may register at age 17 and vote in the primary if he or she will be 18 by the time of the general election. He wondered if this statutory law should be explicitly set out in the constitution. He noted a court decision that upheld allowing 17 year-olds to vote in the presidential primary, a decision the secretary of state opted not to appeal.<sup>1</sup> Chair Sapphire said the committee may want to change the wording regarding the residence of the voter, indicating that it might be better to indicate a voter is qualified if he or she is a current resident of the state as opposed to the references to local political subdivisions in the current language. Chair Sapphire said among the ideas proposed was to eliminate the last sentence of the section, which requires the secretary of state to purge from the voting rolls anyone who does not vote in a four-year period. He said this provision, known as the “vote purge” requirement, has been held by the United States Court of Appeals for the Sixth Circuit as being against the National Voter Registration Act (NVRA). He said the current secretary of state does not enforce that last provision. Chair Sapphire added that Vice-chair Jeff Jacobson has proposed adding a voter identification requirement to the section.

Chair Sapphire then asked committee members for their views on potential changes to the section.

Mr. Jacobson noted voting statistics from the secretary of state relating to the ratio of registered voters to voter turnout. He said one thing that stands out is that the 1992 turnout level was 77 percent, but after the passage of the NVRA in 1993, the turnout percentage declined as the voting rolls grew. He said, since that time, the number of registered voters peaked in 2008, yet the percentage of those actually voting has not gone up. He said “If we date all modern improvements to the 2005 decision to allow absentee ballots and take away from one national voting day, the interesting thing is that our participation and number of votes has not materially increased, despite the flurry of law suits.” He said increasing registration has not affected participation. He asserted that, despite claims that actions by the General Assembly and Republicans have worked to suppress voter participation, in the most recent election there was still 71 percent participation, with a drop off of only 26,000 when the voter rolls dropped by much more than that. He said as much as he would like to see a repeal of the no-fault absentee ballot and a move back to having one voting date, he does not think it would be fruitful to pursue any of the proposals that have been presented to the committee. He said he will move that the committee tables the review of Article V, Section 1, and that it move on to more fruitful activities.

Chair Sapphire asked Mr. Jacobson for a formal motion. Mr. Jacobson moved to postpone indefinitely the review of Article V, Section 1. He said he was making this motion, rather than a motion to retain the section as is, because a motion to retain would result in “a much more partisan conversation.”

Committee member Karla Bell said she is interested in the statistics. She said she does not know the differential impact of the purge requirement on minority groups, and would like to see a breakdown based on political party.

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<sup>1</sup> *State ex rel. Schwerdtfeger v. Husted*, Franklin County Common Pleas No. 16CV-2346 (March 11, 2016).

Mr. Jacobson said it would be possible to find out if someone has not voted for four years, but he is not sure if it is possible to find out if registered voters who have abstained from voting are Democrats or Republicans.

Ms. Bell said she assumes someone has evaluated that differential impact since the federal courts have relied on the differential impact as the basis for invalidation. She said she lacks information and she would like to have that researched and have that information available before the committee makes a decision.

Chair Saphire said, concerning litigation regarding the challenge to the state's vote purging policy, the court did not rely on differential impact, although the plaintiffs asserted it in the complaint. He said that issue was not pursued during the course of litigation. But, he said, there is data suggesting the number of people under the previous policy who were disenfranchised by the purge, adding there also is data regarding whether the impact is discriminatory.

Ms. Bell asked Chair Saphire to provide that information and he agreed to do so.

Senator Bob Peterson commented that, while the committee could have an interesting discussion on the topic, for the sake of efficiency it would be better not to have the discussion in great detail at this meeting.

Ms. Bell asked about the present status of voting as a fundamental right under Ohio state law and under federal law. Chair Saphire said federal law as well as the United States Supreme Court and lower federal courts, since the 1960s, have held the right is fundamental, and therefore state and local regulations that significantly burden voters get strict judicial scrutiny. He said reapportionment issues end up in the Ohio Supreme Court, but voting rights not so much. He said the Ohio Supreme Court has interpreted the state constitution as a mirror image of the federal constitution, and that is also the case with regard to voting rights.

Ms. Bell asked about the date of the expansion of the use of the absentee ballot. Mr. Jacobson said this occurred in July or August of 2005. Ms. Bell asked if there is any idea what percentage of the votes is absentee. Chair Saphire said at the last election the number was over 30 percent.

Mr. Jacobson said he does not disapprove of absentee voting, but thinks there should be good reason for a voter to use it.

Chair Saphire said he thinks the evidence regarding the effect of these measures is contested. He said same-day registration, where it is permitted, has a boosting, positive effect. But, he said, it is also the case that there is mixed evidence about the effect of early voting. He said his limited research indicates the statistics are equivocal about whether early voting brings people to the polls.

Committee member Doug Cole said early voting is a matter of statute rather than constitutional. He said, right now, if someone votes early and then comes to the polls to vote on Election Day, the early vote is the one that is counted. He said one wonders if it should be the converse. Mr. Jacobson said some states do it that way.

Ms. Bell noted that if those voters come to the polls on Election Day they will get a provisional ballot. Mr. Cole said if both ballots are returned, however, only the absentee ballot is counted. He added this requirement is by statute.

Mr. Cole noted that the committee has a quorum and could vote on Mr. Jacobson's motion. Mr. Jacobson renewed his motion to "postpone further consideration of this section." Sen. Peterson seconded the motion.

Chair Sapphire asked for clarification of a point of order, wondering whether, if the motion passed, the committee would be able to reconsider the motion or reopen discussion of the section at a later date. Ms. Bell said it would be unfair to take the review off the table with so many members of the committee absent.

Chair Sapphire asked how the matter might be brought back before the committee. Mr. Jacobson said a motion to postpone indefinitely is a final disposition. He said there could be a motion to reconsider, but that must be made by someone who voted with the majority.

Steven C. Hollon, executive director, said he thinks that is correct. He asked whether a decision to postpone indefinitely would prohibit the committee from issuing a report and recommendation saying that it could not reach a consensus regarding the section. He said a report and recommendation would allow the committee to report its proceedings on the matter to the full Commission.

Chair Sapphire said that goes to his concern. He said he would oppose a motion but suspects if it were necessary to bring a motion back before the committee he would vote with the majority in order to be able to do so. He said he would like to see the committee be able to dispose of the issue in some final way, regardless. He said one concern is that if the committee passes this motion and the matter is not brought before the committee for further discussion, it will lie there in limbo, unavailable for final disposition in the form of a recommendation.

Mr. Jacobson said the committee could spend the next year on this topic, but it is not something that can be solved because it is too partisan. Commenting on the presentations the committee heard, he said "We saw a litany of anything people could think of that would liberalize the voting process. We don't see that the rules have contributed the inability of people to participate in our democracy. There has been remarkable little commentary afterward to suggest that Ohio had anything other than a complete fair election and yet the committee will tear itself apart." He reminded the committee of the difficulty experienced in considering Article V, Section 6, relating to mental capacity to vote. He said the best thing to do would be to postpone the conversation.

Ms. Bell said she does not disagree with postponement, but completely removing it from the committee's agenda makes her wary. She said she would vote to postpone the topic until the committee concludes its work on other matters.

Mr. Jacobson agreed and said he would withdraw the motion and go with Ms. Bell's suggestion.

Chair Sapphire asked what the committee would address as its next topic. He said he disagrees with Mr. Jacobson's characterization of this process as partisan. He said there are examples of people being able to act in a nonpartisan way. He said he would hope the committee would decide to retain the provision that exists now if it cannot agree to change it. He said his strongest concern is that the vote purge provision violates federal law and that it is problematic to disenfranchise people who are occasional voters.

Mr. Jacobson withdrew his original motion and offered a new motion to postpone further consideration of Article V, Section 1 until the committee has completed its work on the remaining topics under its purview. Sen. Peterson seconded the motion.

Mr. Cole asked whether it would be better to give a date certain.

Mr. Jacobson then amended his motion to state that the committee would postpone further consideration of Article V, Section 1 to July 1, 2017, noting this would give the opportunity to consider studies that would be available regarding the most-recent election.

A roll call vote was taken, with five in favor, one absent for the vote, and one abstaining.

Chair Sapphire asked the committee about the next topic for consideration. Mr. Hollon directed the committee to its worksheet.

Chair Sapphire said he would like to revisit Article V, Section 7, relating to primary elections. He said the committee had reached consensus on one or two parts of the section but did not finish its review. He said a staff memorandum could be distributed at the next meeting. Chair Sapphire then provided a brief summary of the questions the committee had raised about the section.

**Adjournment:**

With no further business to come before the committee, the meeting adjourned at 10:32 a.m.

**Approval:**

The minutes of the December 15, 2016 meeting of the Bill of Rights and Voting Committee were approved at the February 9, 2017 meeting of the committee.

*/s/ Richard B. Sapphire*  
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Richard B. Sapphire, Chair

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Jeff Jacobson, Vice-chair