

**Co-Chair**  
Charleta B. Tavares  
Assistant Minority Leader  
15<sup>th</sup> Senate District



**Co-Chair**  
Ron Amstutz  
Speaker Pro Tempore  
1<sup>st</sup> House District

## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### MINUTES FOR THE MEETING HELD THURSDAY, MAY 12, 2016

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

Co-chair Ron Amstutz called the meeting of the Ohio Constitutional Modernization Commission ("Commission") to order at 1:38 p.m.

#### **Members Present:**

A quorum was present with Commission Co-chairs Tavares and Amstutz, and Commission members Abaray, Asher, Beckett, Bell, Clyde, Cole, Coley, Cupp, Curtin, Fischer, Gilbert, Jacobson, Jordan, Kurfess, McColley, Mills, Mulvihill, Readler, Sapphire, Sawyer, Skindell, Sykes, Taft, Talley, and Wagoner in attendance.

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

The minutes of the April 14, 2016 meeting of the Commission were reviewed and approved.

#### **Standing Committee Reports:**

##### *Organization and Administration Committee*

Mark Wagoner, chair of the Organization and Administration Committee, provided the Ohio Constitutional Modernization Commission's third quarter budget report. He indicated the Commission has paid out 67 percent of its annual budget of \$600,000. With \$150,000 carried over from the last fiscal year, Mr. Wagoner said the Commission only expended a little more than 54 percent of its budget. He said the greatest percentage of spending was for supplies and maintenance, with \$24,000 out of \$34,000 spent. He said the least percentage of spending was for payroll, at 66 percent, roughly \$318,000. He said the Commission is \$44,000 under budget in the first three quarters, and \$190,000 under budget when including the carry over. Mr. Wagoner commended Steven C. Hollon, executive director, and staff for "running a tight ship." He said Mr. Hollon presented on the Commission's work before the Sunset Review Committee, and that his presentation was well-received.

## **Subject Matter Committee Reports:**

### *Education, Public Institutions, and Local Government Committee*

Chad Readler, chair of the Education, Public Institutions, and Local Government Committee, reported the committee met last month, discussing Article VI, Section 4, relating to the state board of education and superintendent of public instruction. He said the committee may have recommendations for change and will take that subject up again at its next meeting. He noted also, at the next meeting, Senator Bill Coley will present regarding casinos in the state constitution.

### *Finance, Taxation, and Economic Development Committee*

Doug Cole, chair of the Finance, Taxation, and Economic Development Committee, reported the committee held a special meeting that morning, at which it approved two reports and recommendations. He said the committee now has three reports and recommendations regarding Article VIII to go to the Coordinating Committee for its approval. He said the committee is nearing the end of its work on Article VIII and will be turning to the other articles in the coming months.

### *Judicial Branch and Administration of Justice Committee*

Janet Abaray, chair of the Judicial Branch and Administration of Justice Committee, said her committee did not meet last month, but next month has arranged to hear a speaker on the topic of the grand jury system in Hawaii, which has aspects that may be of interest in the committee's consideration of whether to recommend changes to Ohio's system.

### *Bill of Rights and Voting Committee*

Richard Sapphire, chair of the Bill of Rights and Voting Committee, reported the committee met earlier, and began its review of Article V, Section 1, relating to the qualifications of an elector. He said the committee heard presentations by Carrie L. Davis, with the League of Women Voters of Ohio, and by Representative Alicia Reece. He said the committee will continue that discussion at its next meeting.

### *Constitutional Revision and Updating Committee*

Dennis Mulvhill, reporting as chair of the Constitutional Revision and Updating Committee, said the committee is continuing its work on the statutory initiative, with a goal of encouraging citizens who want to initiate law to take the statutory, rather than the constitutional, route. He said the committee is working on rewrites of Article II, Sections 1b and 1g, removing the supplemental petition requirement and resolving conflicts if multiple similar petitions result in ballot issues. He said the committee will progress to addressing the constitutional initiative, and is picking up steam and may be reaching consensus soon on these issues.

## *Legislative Branch and Executive Branch Committee*

Fred Mills, chair of the Legislative Branch and Executive Branch Committee, said his committee would be meeting later to again discuss Congressional redistricting and get an update on efforts to reform that process. He said the committee next would be beginning a methodical review of other assigned sections of Article II.

### **Reports and Recommendations:**

#### *Article V, Section 6 (Mental Capacity to Vote)*

Co-chair Amstutz then recognized Richard Saphire, chair of the Bill of Rights and Voting Committee, for a second presentation on Article V, Section 6 (Mental Capacity to Vote).

Mr. Saphire reviewed the contents of the report and recommendation, which currently provides language disenfranchising “idiots” and “insane persons.” Mr. Saphire said the committee agreed those descriptors are offensive, but members engaged in extensive discussion regarding whether the constitution should include a provision disqualifying mentally impaired voters, and whether, if such a provision is retained, what the replacement language should say. Mr. Saphire said the majority of the committee wanted to emphasize that, if disenfranchisement occurs, it must be as a result of procedures enacted by the General Assembly. Thus, he said, a majority of the committee agreed that Article V, Section 6 should be repealed and replaced by language stating:

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.

Co-chair Amstutz then recognized Senator Michael Skindell, a member of the Commission, who submitted written comments in opposition to the report and recommendation on behalf of himself and Representative Kathleen Clyde.

Sen. Skindell indicated that he and Rep. Clyde agree that the reference to “idiots” and “insane persons” in the section should be repealed, but said they oppose the language recommended by the Bill of Rights and Voting Committee. He said, by denying such persons “the privileges of an elector,” the section not only denies an individual of the fundamental right to vote but also denies individuals all other privileges as an elector. He said Section 6 not only denies the fundamental right to vote, but the ability to run as a candidate, be a signatory on a candidate or issue petition, or to hold public office.

Sen. Skindell noted the contemporary view of the United States Supreme Court is that the right to vote is not to be abridged by the states except in rare circumstances, and so the denial of this right can only be accomplished through laws that are narrowly drawn to serve a compelling state interest.

Thus, he said, there is no need to replace the existing language. Citing Ohio Revised Code Chapter 3599, he said statutory law makes it illegal for a person to vote for another who cannot knowingly and voluntarily cast a vote. Sen. Skindell indicated that if the related statutory

provisions are not sufficient to protect against someone voting for another, the General Assembly can strengthen those provisions without causing conflict with the Ohio Constitution. He indicated that some 15 states do not have constitutional provisions disenfranchising such persons, and that he and Rep. Clyde prefer that the section be repealed and not replaced.

Sen. Skindell said if the Commission's consensus is to replace the existing language, then it should only be replaced with a requirement that disenfranchisement only occur after an adjudication. He said this is the approach taken by the Constitutional Revision Commission in 1975, which recommended the following language:

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.

Sen. Skindell said, at the time, the Commission opined that "adjudication" was an adequate safeguard to ensure that people were not improperly denied the right to vote, but noted that some scholars opine that such an adjudication provision cannot withstand strict scrutiny.

Co-chair Amstutz then opened the floor for discussion by Commission members.

Commission member Ed Gilbert said he joins with Sen. Skindell on this alternative course of action. He said he was vocal in the committee, saying that the provision should be repealed, but as a compromise, he would agree to the replacement language Sen. Skindell proposed.

Commission member Janet Abaray asked what was the thought of the committee if the proposed section were adopted but the General Assembly would fail to act to create legislation on this issue. Commission member, and Bill of Rights and Voting Committee Vice-chair, Jeff Jacobson said in that case it would not be possible to disenfranchise anyone. He said that is why the committee used the phrase "under law" in its recommendation. He said there are plenty of provisions in the constitution that give the General Assembly the right to decide, with the idea that a court can come along and invalidate that provision. The General Assembly has to write a law and only under that law could someone be disenfranchised. He said "nothing in what we are proposing changes that, but it does remove the offensive language."

Commenting on Ms. Abaray's question, Mr. Saphire said that same question was directed to him by the Coordinating Committee, saying he agrees with Mr. Jacobson's analysis. He said it is his understanding that, as things now stand, the only way someone can be disenfranchised is through a procedure established for involuntarily committing someone to a mental institution. He said, to the extent that is true, then it is the case that if the General Assembly does not act there is no self-executing provision.

Sen. Skindell said the focus should not be on the person with the disability. He said, as mentioned by Michael Kirkman, executive director of Disability Rights Ohio, the focus should be on the basis of voting. He said, if a person is at such a level of mental incapacity that another must vote for him, he is no longer voluntarily voting. Sen. Skindell said the focus of the discussion is to repeal the archaic language, and then to make sure someone is not improperly voting for someone else. But, he said, "we already have laws about that. If the General

Assembly needs to make adjustments it should be done that way.” He added, if someone fills out a ballot for such a person, that is election fraud. He said “we should ensure that all people have a role in our process of democracy.”

Mr. Jacobson commented that where this issue is most likely to arise is not in the polling place, but when pollworkers go to nursing homes to assist residents. He said, as a former party chairman he got reports that generally one representative from each party would try their best to assist the person in casting a vote, including asking questions and trying to record what the answers to the questions were. To the extent to which elections can be contested, the pollworkers would disagree about the response of the voter. He said “it is a messy part of democracy, but what this proposed replacement section would do is make sure the pollworkers can’t decide on their own that the person is not capable of voting.” He noted the concerns raised by Sen. Skindell are not the issue. He said this is not a situation of someone attempting to cheat but with a situation in which the pollworkers are deciding what to do. He said the committee’s recommended language “lets us get this unhappy issue out of Ohio’s constitution in a way that allows for a compromise going forward.”

Commission member Karla Bell said, to Mr. Jacobson, that he had indicated the pollworkers could be the ones to determine mental capacity. But, she said there is no limitation in this language; the General Assembly could specify that pollworkers could make that determination.

Mr. Jacobson said the General Assembly could write all kinds of laws, but the General Assembly is not the ultimate arbiter of that question. He said the committee is saying that, like other provisions of Ohio law, the General Assembly should decide and let the courts determine if the way the law is written protects people’s rights.

Ms. Bell said the only way there is judicial resolution is if a pollworker disenfranchises and the voter is willing to sue. She said, it puts the burden on the person denying the vote.

Mr. Jacobson said there is already this question in election law, and there is ongoing litigation about these types of issues.

Commission member Pat Fischer said “I beg you, let’s move forward. The language is a compromise; it is a compromise that works” He asked “what we are doing if we continue to debate this word for word? The language from the 1970s group has sat there for 40 years, if it was so great, why has nothing happened?” He said the current language is insulting, and must be removed, but has to be replaced with something. He said “If we can’t push through our first legitimate change after that much scrutiny then we are not doing a very good job. I heartily ask you to support the report and recommendation of the committee.”

Commission member Charles Kurfess noted there are two different approaches in the current recommendation versus the recommendation from 40 years ago. He said the present language attempts to require action by the General Assembly, while the 1970s language says legislative action is discretionary. He asked whether, under the current recommended language, the legislature could simply say as a matter of law those who are patients or residents are determined to be incapable of voting.

Ms. Bell answered that, presently, Ohio law provides that if someone has been committed involuntarily, that person's right to vote cannot be eliminated without a separate determination that they are incapable of voting. That finding itself is not enough.

Mr. Sapphire agreed, saying, as a 40-year civil liberties lawyer, if the legislature did that it would be clearly unconstitutional.

Mr. Jacobson said Ohio has had this provision for 100 years or more, but there appear to be no cases that have ever arisen where people have raised objections to the process or been deprived or come to the level where they had to deal with a deprivation of rights. He said, while this is a good theoretical argument, the issue of how to fix it is a solution in search of a problem. He concluded the problem is the offensive language.

Representative Emilia Sykes commented that if a recommendation is not the position or the goal of the full Commission, "it is not fair to say just because a committee has done work the Commission has to rubber stamp it." She added, the goal is to get rid of offensive language but it is also offensive to remove someone's right to vote. She said, if this has not been an issue for over 100 years, why not get rid of the language?

Mr. Gilbert said he joined Rep. Sykes in this statement.

Mr. Sapphire said while he agrees with Rep. Sykes that the Commission is not bound by the committee's decision, from the committee's point of view this became a case of "the perfect becoming an enemy of the good." He said the committee spent hours on this, reviewing 15 or 20 different draft proposals. He said this is the best that the group can come up with; if the Commission can do better then do so.

Ms. Abaray asked whether, if this provision is repealed, would it be unconstitutional for the legislature to enact laws.

Mr. Sapphire said yes, because Article V, Section 1 provides the only other definition of "qualifications of an elector."

Mr. Wagoner said the issue goes to an elector and not just to voting. He asked what the committee's consideration was regarding holding public office.

Mr. Sapphire said this was discussed and is covered in the report and recommendation. He said he is not sure the committee reached a conclusive final assessment of it. He said, it is possible that if this provision is adopted and the General Assembly enacts a provision that is applied to disqualify a person from voting because of lack of capacity, if that person is also a public office holder someone may remove them from office.

Co-chair Amstutz said the proposed language provides the opportunity to put a conditional hold on the privileges of an elector as opposed to a disqualification. So, he said, he feels comfortable that the range applies to all the duties of an elector not just to voting.

Co-chair Tavares said those comments give her pause, since “you can’t take someone out of office and put them back in. If you said a person is no longer a qualified elector and all of those privileges go away, you may not know how long that period is.”

Commission member Herb Asher wondered, if the need for this provision is that, without it, the legislature would not be able to address the issue of voting, could the provision be limited to voting and not the broader “privileges of an elector.”

Mr. Wagoner noted that is what the 1970s Commission was proposing.

Mr. Jacobson disagreed that removing “privileges of an elector” would bring the current proposal in line with the 1970s recommendation. He said the issue was discussed in the committee, and that it was concluded that the phrase “privileges of an elector” was important to retain.

Sen. Skindell said he had asked Professor Wilson Huhn, when he presented to the committee, whether using the phrase “mental capacity to vote” broadened the category of individuals who are being excluded from the rights and privileges of an elector, as versus the words “idiots” and “insane persons.” He said Professor Huhn said that is a broader category, and that the provision would be adding people who could be disenfranchised. Sen. Skindell said Professor Huhn raised multiple times this impact of using the phrase “privileges of an elector.” Sen. Skindell said someone who loses the qualifications of an elector for a temporary amount of time would lose his public office, and could not regain that office when he regains that capacity.

Mr. Jacobson noted the Americans with Disabilities Act indicates a person could not be removed from office in that way.

Co-chair Amstutz thanked the Commission for its discussion and asked if there is a motion. Mr. Jacobson moved to adopt the report and recommendation for Article V, Section 6, with Judge Fischer seconding the motion.

Mr. Mills asked whether Commission members who have left the meeting have the ability to vote later under Commission rules. Co-chair Amstutz said he was not aware of such a rule, but said this could be decided later if the vote is close.

Co-chair Amstutz then called for a roll call vote, which was as follows:

Co-chair Tavares – nay  
Co-chair Amstutz – yea  
Abaray – yea  
Asher – yea  
Beckett – yea  
Bell – nay  
Brooks – absent  
Clyde – nay  
Cole – absent  
Coley – yea  
Cupp – yea

Curtin – yea  
Davidson – absent  
Fischer – yea  
Gilbert – nay  
Jacobson – yea  
Jordan – yea  
Kurfess – yea  
Macon – absent  
McColley – yea  
Mills – yea  
Mulvihill – yea  
Peterson – absent  
Readler – yea  
Saphire – yea  
Sawyer – nay  
Skindell – nay  
Sykes – nay  
Taft – yea  
Talley – nay  
Trafford – absent  
Wagoner – yea

Requiring a vote of 22 votes to pass, the motion failed, by a vote of 18 in favor, 8 opposed, with six absent.

Co-chair Amstutz said the motion did not pass and that the matter is not recommended at this time.

**Adjournment:**

With no further business to come before the Commission, the meeting adjourned at 2:53 p.m.

**Approval:**

The minutes of the May 12, 2016 meeting of the Commission were approved at the June 9, 2016 meeting of the Commission.

*/s/ Charleta B. Tavares*

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Co-chair  
Senator Charleta B. Tavares  
Assistant Minority Leader

*/s/ Ron Amstutz*

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Co-chair  
Representative Ron Amstutz  
Speaker Pro Tempore