



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Bill of Rights and Voting Committee

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

Part I

March 9, 2017

Riffe Center for Government and the Arts
Room 1948

OCMC Bill of Rights and Voting Committee

Chair Mr. Richard Saphire

Vice-chair Mr. Jeff Jacobson

Ms. Karla Bell

Rep. Kathleen Clyde

Mr. Douglas Cole

Rep. Jonathan Dever

Justice Patrick Fischer

Mr. Edward Gilbert

Sen. Bob Peterson

Sen. Michael Skindell



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

BILL OF RIGHTS AND VOTING COMMITTEE

THURSDAY, MARCH 9, 2017

9:30 A.M.

RIFFE CENTER FOR GOVERNMENT AND THE ARTS ROOM 1948

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

➤ Meeting of February 9, 2017

[Draft Minutes – attached]

IV. Reports and Recommendations

➤ Article V, Section 2a (Names on the Ballot)

- Review of Report and Recommendation
- Public Comment
- Discussion
- **Possible Action Item: Consideration and Adoption**

[Report and Recommendation – attached]

➤ Article V, Section 2 (Elections by Ballot)

- First Presentation of Report and Recommendation
- Public Comment
- Discussion

[Report and Recommendation – attached]

V. Committee Discussion

➤ Article V, Section 7 (Primary Elections)

The committee chair will lead discussion regarding Article V, Section 7 (Primary Elections) and what revisions, if any, the committee would like to make to the provision.

[Memorandum by Shari L. O'Neill titled "Ohio Constitution Article V, Section 7," dated February 3, 2017 – attached]

VI. 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]

VII. Old Business

VIII. New Business

IX. Public Comment

X. Adjourn



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, FEBRUARY 9, 2017

Call to Order:

Chair Richard Saphire called the meeting to order at 10:36 a.m.

Members Present:

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

Approval of Minutes:

The minutes of the December 15, 2017 meeting of the committee were approved.

Presentations and Discussion:

Chair Saphire began the meeting by indicating that Article V, Section 2a, relating to names on the ballot, and Section 7, relating to primary elections, briefly had been considered by the committee in June and July of 2014. He said the committee voted to recommend retaining those sections in their current form; however, this was prior to the Commission having staff or formal procedures for reporting committee recommendations.

Chair Saphire said although the committee might be said to have concluded its consideration, after consulting with staff he thought it would be better for the committee to follow current procedures by creating a report and recommendation relating to these sections. Thus, he said, he would like to have the committee consider Article V, Sections 2a and 7, as well as Section 2, which provides for elections to be by ballot, before publishing its conclusions in a formal report and recommendation.

He said, with this plan in mind, the committee would be hearing presentations from both an elections expert with knowledge of ballot preparation, and a political science professor who has written about the ballot process.

Matthew Damschroder

Deputy Assistant Secretary of State and Director of Elections

Office of the Secretary of State

“The Order of Candidate Names on the Ballot”

Chair Sapphire introduced Matthew Damschroder, assistant secretary of state and chief of staff for Ohio Secretary of State John Husted. He indicated that Mr. Damschroder is the former director of the Franklin County Board of Elections.

Mr. Damschroder said in the 1950s and 60s, boards of elections in Ohio had hand-counted paper ballots. He said there were several forms of ballot: a presidential ballot, a party-type ballot, a nonparty ballot, and a question-and-issue ballot. He said the voter would sign in at the polling place and tear off a sheet from a pad for each of the different ballots. Mr. Damschroder said that process continued as counties implemented punch card systems, and other new technology, on into the 1980s and 90s when boards of elections began using optical scan sheets and touch screens.

He continued that, within each of those categories, contests appear in the order of statewide, then district, then county, then any offices within the county, noting that some counties have districts for their county commissions.

Regarding rotation of names, he said within each office contest candidate names are rotated. He said Ohio is the only state that has rotation built into the constitution. Other states require rotation by state law, and in some states all ballots are the same in alphabetical order. He noted that, in Illinois, names are drawn out of a hat to establish ballot order.

Mr. Damschroder said, in Ohio, the procedure is for the first precinct in the county to have a straight alphabetical order, and the next precinct shifts down one, and so on. He said the goal, within a county, is for every candidate in a contest to have the opportunity to have his or her name first. He said there is research indicating a statistical advantage to being first, so the idea behind rotation is to prevent any one candidate from having an advantage. He noted that, now that Ohio has no-fault absentee voting and a larger percentage of ballots being cast early, Secretary of State Husted requires all counties to follow the same layout for absentee ballots that would appear on the ballot if the voter would see at the polls on Election Day. As a result, a precinct’s voters receive the exact same ballot regardless of whether they are voting early, absentee, or in person.

Regarding questions and issues, Mr. Damschroder said there is also a type of rotation that happens on an annual basis, with statewide questions always being the first to appear. However, he said the categories of other issues rotate year to year. For example, he said it is possible that this year if countywide issues are at the top, next year school levies or township issues would be first.

Mr. Damschroder having concluded his remarks, Chair Sapphire asked if the committee had questions.

Vice-chair Jeff Jacobson asked about the length of lines at the polls, wondering if long lines are a recent development. Mr. Damschroder said more attention being given to the usability of the ballot by the voter, noting that the conversation in the academic literature and the profession is how to make the ballot as understandable as possible. He said the issue of long lines for voting is more of a recent issue, and the lines the voters experienced in Ohio in 2004 is something that drew a lot of national attention. He said the situation in Ohio has dramatically improved in terms of how long it takes to vote, either in person early or on Election Day.

Mr. Jacobson asked when Ohio started shrinking the number of precincts. Mr. Damschroder noted a law that passed before the 2004 election that lowered the maximum number of voters in a precinct to 1400. Mr. Jacobson wondered whether the explanation for the long lines could be the lack of voting stations and personnel at a precinct, rather than an issue with the ballot system itself.

Mr. Damschroder answered that, in 2004, voter lines were due to two issues: a lack of voting machines because of a lack of federal funds, and a lengthy ballot with a system that could not handle the workload. He said, since 2004, measures have been taken to make the system more efficient.

Committee member Doug Cole asked whether Mr. Damschroder could offer any changes or has concerns about current provisions in Article V. Mr. Damschroder stated that his main focus was on Section 2a, and that he did not have any issues or concerns regarding that section. He added he would be willing to review other sections to see if there is a need for change.

Committee member Karla Bell asked whether there has been a reduction of the number of polling places in Ohio since 2004. Mr. Damschroder said her question could be answered by considering polling places and individual stations, and by considering precincts where there are a fixed number of people in a precinct. He stated that there are fewer individual polling places than there used to be. One reason, he noted, is that it can be difficult to find appropriate facilities for polling places. For example, he said finding locations that are accessible to those with disabilities can be challenging.

Ms. Bell asked where she could find information about the history of the number of polling places. Mr. Damschroder stated that he was unsure whether that information was archived, but that he does have information about the number of precincts and a current listing of individual polling places.

Committee member Ed Gilbert asked whether poll workers are being trained sufficiently to serve minority voters, specifically relating to what poll workers should and should not say to voters. He asked whether there is any mandatory training at the state level to address these issues. Mr. Damschroder said there are statewide training resources available for poll workers, including a manual and online training offered by the secretary of state. He stated that there is specific training on how to interact with voters, especially voters with disabilities.

Ms. Bell commented that, as a poll observer in the last election, she was distressed by the lack of information poll workers had. She stated that the manual that they were given was too long, almost 600 pages, and that poll workers were unfamiliar with it. She stated that it seemed as if no one had walked through the process with the poll workers and that no one seemed to know what the procedures were.

Mr. Damschroder stated that training classes for poll workers are three hours long in Franklin County, with an opportunity for any poll worker to do supplemental training. He stated that the training is led by the board of elections and that he would be sure to pass along the concern about untrained poll workers.

Chair Sapphire asked how rotation of ballots and absentee ballots are handled. Mr. Damschroder answered that Secretary Husted requires all boards of election to use the same ballot rotation for absentee voting, whether in person or by mail.

Chair Sapphire asked if he receives the ballot associated with his address when he votes, and Mr. Damschroder answered in the affirmative.

Chair Sapphire asked whether the secretary of state has considered an all-electronic voting system, using Oregon as an example, and what that would entail. Mr. Damschroder said he is unaware of any states having widespread online voting, except for the states that use it for overseas and military voters. He said he does not see sufficient confidence from voters that would support the state moving in that direction.

Chair Sapphire said one concern might be whether Section 2, which requires voting to be done by ballot, contemplates machine voting, and whether allowing online voting would raise some issues under the constitution.

Senator Bob Peterson commented that, in his home county, which is a rural county where having sufficient funds is a challenge, the board of elections consolidated precincts, put polling places in better facilities, and has experienced increased voter turnout. However, he said, the change created a challenge in that the number of seats on the central committee of both parties decreased from 38 or 39 to 21. He said, although the consolidation of precincts promoted efficiency, it lowered political participation.

Mr. Damschroder said his office has heard from multiple counties about this issue, and there have been conversations with both parties about changing the law to allow additional seats or at-large seats on the central committees.

There being no further questions, Chair Sapphire thanked Mr. Damschroder for his presentation.

Erik J. Engstrom
Professor of Political Science
University of California, Davis
“The Politics of Ballot Choice”

Chair Sapphire introduced Erik J. Engstrom, professor of political science from the University of California, Davis. Chair Sapphire indicated Professor Engstrom specializes in the study of United States political institutions, political parties, and American political history. Chair Sapphire indicated Prof. Engstrom co-authored, with Jason M. Roberts, a recent law review article entitled “The Politics of Ballot Choice,” which was provided to the committee for its review.¹

Prof. Engstrom began by noting Ohio has interesting history related to ballot laws. Providing a brief history of how elections were conducted in the 19th century, he said balloting was not the responsibility of state governments. Rather, he said, the political parties themselves were printing the ballots and distributing them to voters. The parties would print the candidates for their own party on that ballot, and a voter would get a ballot from a party and cast that ballot. He said balloting was quite different, so, in effect, voters were almost forced to vote a straight party ticket by default. He added that voting was not secret – others could observe and monitor voters as they cast their ballots. He said the lack of a secret ballot created the potential for vote buying.

Prof. Engstrom continued that, at the end of the 19th century, states began to reform the way they conducted elections by developing the Australian, or “secret” ballot, with Massachusetts being the first state to adopt the change. He said this new ballot has the format largely used now in the United States. In addition, he said ballots are now printed and distributed by the state, rather than the political parties. He noted an additional feature, which is that the ballot is consolidated so that, instead of just a Republican or Democratic party ballot, it has all the candidates listed, allowing a voter to split his or her vote more easily. He said a final important feature is that now voting is conducted in secret, using a curtain or a voting booth. He said it took about 30 years for all states to adopt some form of the new secret ballot, with Ohio being an early adopter in 1891.

Prof. Engstrom said, despite these changes, the states still varied in the types or formats of ballots they chose to use. He said the ballot format most commonly in use now is the office-bloc format, which lists the candidates office by office. He said this is the format Ohio uses, as a result of a voter referendum in 1949 to switch from the party column to the office-bloc format.

Chair Sapphire asked whether other states constitutionalize ballot order requirements. Prof. Engstrom said most states do it by statute, and Ohio seems to be unique in setting it out in the constitution.

Prof. Engstrom continued that the other format states use is a party column, listing the candidates in columns by party. He said states also can use a single party ticket by making a mark above the column, but states have been moving away from that.

¹ Erik J. Engstrom and Jason M. Roberts, *The Politics of Ballot Choice*, 77 Ohio St. L.J. 839 (2016).

Prof. Engstrom having concluded his remarks, Chair Sapphire asked if committee members had questions.

Referencing the Australian secret ballot, Mr. Cole asked whether this was a way to buy votes and validate that voters were voting a particular way. Prof. Engstrom stated that this was correct and that the idea was to prevent fraud and intimidation at the voting booth.

Mr. Cole asked whether absentee ballots might interfere with the goal of avoiding fraud or whether it could raise the prospect for the type of conduct that caused the adoption of secret ballots. He also asked if there was any research that had been done in this area. Prof. Engstrom said he was not aware of any research, but recognized it to be an interesting question.

Ms. Bell asked whether there was any trend within the 50 states concerning independent candidates having the opportunity to get on the ballot. Prof. Engstrom said some states have thresholds that are quite substantial in terms of filing fees, or gathering a large number of signatures, while other states have fairly minimal thresholds. He said, as a historical side note, one reason that the parties were amenable state-controlled balloting was that it helped them control the influence of minor parties better than the old party balloting system. So, he said, state control meant that the state could control who gets on the ballot and so reduce the influence of minor parties.

Mr. Gilbert asked whether Prof. Engstrom had recommendations for changes to Article V. Prof. Engstrom said he does not have any recommendations, noting ballot format is very political. He said there is litigation going on in Michigan as that state tries to switch from one format to another. He noted he found Article V, Section 2a confusing in its reference to an “elector.” He said at first he thought it referred to the Electoral College, but that it became clear that it means “voter” when it is read in context.

Mr. Gilbert observed that nothing in the constitution says a ballot is secret, wondering if the committee should consider adding the word “secret” to Article V, Section 2. Prof. Engstrom said some states, such as Montana, have a provision that says the ballot must be secret. He said he assumes in Ohio the ballot is secret according to statute, but the requirement could be put in the constitution.

Chair Sapphire said the requirement is well-established by Ohio Supreme Court decisions interpreting Section 2.

There being no further questions, Chair Sapphire thanked Prof. Engstrom for his presentation.

Chair Sapphire then opened the floor for discussion regarding changes or modifications to Article V, Sections 2 and 2a.

Mr. Gilbert suggested the committee discuss whether to add “secret” to the constitution, saying he is shocked the word is not already included in Section 2.

Chair Sapphire suggested that the concept of a secret ballot may be so entrenched that it may not be necessary to add the word “secret.”

Senior Policy Advisor Steven H. Steinglass provided history on the need for a secret ballot, stating that in 1912, Section 2 was held to bar the use of voting machines. He continued that, in the 1920s the Ohio Supreme Court identified the need for secrecy of the ballot, changing that position. He said that is the last and most authoritative statement on secrecy, with there being no challenges since the 1920s.

Mr. Gilbert asked whether online voting would present an issue when suggesting that the vote be kept secret. Mr. Steinglass stated that he was unsure how that would work.

Mr. Gilbert moved that the committee recommend Article V, Section 2 be amended to add the word “secret.” Ms. Bell seconded the motion. The motion passed unanimously.

Chair Sapphire asked if there were any changes being recommended for Section 2a.

Mr. Steinglass gave an historical account of Section 2a, stating that using the Australian ballot exacerbated the problem of roll off. He said in 1903 legislation was adopted allow political parties to endorse a ballot measure, which helped with that problem. Chair Sapphire asked whether straight ticket party voting takes care of roll off. Mr. Steinglass replied that it depends on how one considers ballot issues.

Upon a motion to recommend retaining Section 2a in its current form, the committee voted unanimously in favor of the motion.

There being no recommendation to amend Section 2a, Chair Sapphire indicated two separate reports and recommendations should be prepared: one recommending the addition of the word “secret” to Section 2, and one recommending no change to Section 2a.

Chair Sapphire suggested that Article V, Section 7 be discussed at the committee’s next meeting in March. Referring committee members to a staff memo regarding Section 7, Chair Sapphire said one issue was brought before the committee in reference to getting rid of the preferential United States Senate ballot because the Seventeenth Amendment rendered the provision superfluous.

Ms. Bell asked about the prior actions by the committee regarding Section 7. Chair Sapphire stated that there were no specific proposals, other than the notion that the committee had approved getting rid of the preferential treatment of senators. He said the committee would continue its review of Section 7 in March.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:03 p.m.

Approval:

The minutes of the February 9, 2017 meeting of the Bill of Rights and Voting Committee were approved at the March 9, 2017 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 2a

NAMES OF CANDIDATES ON BALLOT

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article V, Section 2a of the Ohio Constitution concerning the names of candidates on the ballot. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article V, Section 2a be retained in its current form.

Background

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 2a reads as follows:

The names of all candidates for an office at any election shall be arranged in a group under the title of that office. The general assembly shall provide by law the means by which ballots shall give each candidate's name reasonably equal position by rotation or other comparable methods to the extent practical and appropriate to the voting procedure used. At any election in which a candidate's party designation appears on the ballot, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in less prominent type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States, and other than candidates for governor and lieutenant governor) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Proposed by initiative in 1949, Section 2a was intended to bar straight-party voting by emphasizing the candidates for office rather than their political parties.¹ Previously, voters could cast a straight-party vote by marking a single “X” on the ballot, a method known as the “party column format.”² With the adoption of Section 2a, boards of elections began using an office-bloc or office-type ballot by which voters would cast their vote for each individual candidate for office.³

Originally, the section required each candidate’s name to appear, where reasonably possible, “substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs.”⁴ In 1974, the Supreme Court of Ohio addressed whether this requirement prohibited the use of voting machines and other means of voting that rotated names on a precinct-by-precinct basis. *See State ex rel. Roof v. Hardin Cty. Bd. of Commrs*, 39 Ohio St.2d 130, 314 N.E.2d 172 (1974). The Court held that “although the Constitution does not prohibit the use of voting machines, it does require that among the various methods of machine rotation that are economically and administratively feasible, the only method that may be utilized is the one which most closely approaches perfect rotation. Precinct-by-precinct rotation does not comply with this requirement and is, therefore, unconstitutional.” *Id.*, 39 Ohio St.2d at 134, 314 N.E.2d at 176.

To address the issue, voters approved an amendment in 1975 that allowed the General Assembly “to provide by law the means by which ballots shall give each candidate’s name reasonably equal position by rotation or other comparable methods to the extent practical and appropriate to the voting procedure used.”⁵

In 1976, Section 2a again was amended to indicate the governor and lieutenant governor, like the United States president and vice president, are exempt from the requirement that candidates appear on the ballot and must be voted on as separate candidates.⁶

While most states require ballot rotation by statute, Ohio is the only state to prescribe ballot rotation by constitutional provision.⁷

Amendments, Proposed Amendments, and Other Review

In its March 1975 report, the Ohio Constitutional Revision Commission (1970s Commission) recommended removal of Section 2a’s self-executing language that had been interpreted as requiring perfect rotation of names on the ballot, instead preferring to allow the General Assembly to enact law providing for rotation.⁸ Acknowledging that no candidate should be able to gain an advantage by ballot position, the 1970s Commission found the “perfect rotation” requirement to be too restrictive in that it could be used to invalidate election results due to simple printing errors, prevent the use of emerging new technologies for voting, and cause other difficulties and expenses for county boards of elections.⁹ The 1970s Commission further recommended that Section 2a be expanded to cover all elections, not merely general elections, removing a clause that could be interpreted as emphasizing party over candidate names in a primary or non-partisan election, and removing reference to type-size and appearance because future ballots may not be printed.¹⁰ The 1970s Commission asserted its recommendations were

intended to “create a more flexible and workable approach to achieving fairness in the balloting process.”¹¹

Litigation Involving the Provision

The Supreme Court of Ohio has acknowledged that voting irregularities, such as the failure to properly rotate candidate names and problems with voting machines, may be grounds for setting aside the results of an election. *See In re Election of Nov. 6, 1990, for the Office of Attorney General of Ohio*, 58 Ohio St. 3d 103, 569 N.E.2d 447 (1991). However, before election results are invalidated, it must be established by “clear and convincing” evidence that such irregularities occurred and that they affected enough votes to change or make uncertain the result of the election. *Id.*, 58 Ohio St.3d at 105, 569 N.E.2d at 450.

Presentations and Resources Considered

Damschroder Presentation

On February 9, 2017, Matthew Damschroder, assistant secretary of state and chief of staff for Ohio Secretary of State John Husted, and former director of the Franklin County Board of Elections, presented to the committee on the order of candidate names on the ballot.

Mr. Damschroder said in the 1950s and 60s, boards of elections in Ohio had hand-counted paper ballots. He said there were several forms of ballot: a presidential ballot, a party-type ballot, a nonparty ballot, and a question-and-issue ballot. He said the voter would sign in at the polling place and tear off a sheet from a pad for each of the different ballots. Mr. Damschroder said that process continued as counties implemented punch card systems, and other new technology, on into the 1980s and 90s when boards of elections began using optical scan sheets and touch screens. He continued that, within each of the ballot categories, contests appear in the order of statewide, then district, then county, then any offices within the county, noting that some counties have districts for their county commissions.

Regarding rotation of names, Mr. Damschroder said, within each office contest, candidate names are rotated. He said Ohio is the only state that has rotation built into the constitution. He described that other states require rotation by state law, and in some states all ballots are the same in alphabetical order. He noted that, in Illinois, names are drawn out of a hat to establish ballot order.

Mr. Damschroder said, in Ohio, the procedure is for the first precinct in the county to have a straight alphabetical order, and the next precinct shifts the list of candidate names down one, and so on through each of the precincts. He said the goal, within a county, is for every candidate in a contest to have the opportunity to have his or her name first. He said there is research indicating a statistical advantage to being first, so the idea behind rotation is to prevent any one candidate from having an advantage. He noted that, now that Ohio has no fault absentee voting and a larger percentage of ballots being cast early, Secretary of State Husted requires all counties to follow the same layout for absentee ballots that would appear on the ballot the voter would see at

the polls on Election Day. As a result, a precinct's voters receive the exact same ballot regardless of whether they are voting early, absentee, or in person.

Regarding ballot questions and issues, Mr. Damschroder said there is also a type of rotation that happens on an annual basis, with statewide questions always being the first to appear. However, he said the categories of other issues rotate year to year. For example, he said it is possible that this year if countywide issues are at the top, next year school levies or township issues would be first.

Engstrom Presentation

On February 9, 2017, Erik J. Engstrom, professor of political science from the University of California, Davis, presented to the committee on the politics of ballot choice, which is the topic of a recent law review co-authored by Prof. Engstrom.¹²

Prof. Engstrom began by noting Ohio has interesting history related to ballot laws. Providing a brief history of how elections were conducted in the 19th century, he said balloting was not the responsibility of state governments. Rather, he said, the political parties themselves would print the ballots and distribute them to voters. The parties would print the candidates for their own party on that ballot, and a voter would get a ballot from a party and cast that ballot. He said balloting was quite different, so, in effect, voters were almost forced to vote a straight party ticket by default. He added that voting was not secret – others could observe and monitor voters as they cast their ballots. He said the lack of a secret ballot created the potential for vote buying.

Prof. Engstrom continued that, at the end of the 19th century, the states began to reform the way they conducted elections by adopting the Australian, or “secret” ballot, with Massachusetts being the first state to adopt the change. He said this new ballot has the format largely used now in the United States. In addition, he said ballots are now printed and distributed by the state, rather than the political parties. He noted an additional feature, which is that the ballot is consolidated so that, instead of just a Republican or Democratic party ballot, all the candidates are listed, allowing a voter to split his or her vote more easily. He said a final important feature is that now voting is conducted in secret, using a curtain or a voting booth. He said it took about 30 years for all states to adopt some form of the new secret ballot, with Ohio being an early adopter in 1891.

Prof. Engstrom said, despite these changes, the states still varied in the types or formats of ballots they chose to use. He said the ballot format most commonly in use now is the office-bloc format, which lists the candidates office by office. He said this is the format Ohio uses, as a result of a voter referendum in 1949 to switch from the party column to the office-bloc format. Prof. Engstrom said most states prescribe ballot order by statute, with Ohio being unique in setting out the requirement in the constitution.

Discussion and Consideration

After a brief discussion, the committee agreed that the various amendments to Section 2a, particularly the 1975 amendment that allows the General Assembly the flexibility to enact law to honor the provision's goal of ballot fairness while accommodating new voting methods and technologies, allow the section to continue to serve the state well. Thus, the consensus of the committee was that no changes to the section are warranted at this time.

Conclusion

The Bill of Rights and Voting Committee recommends that Article V, Section 2a be retained in its present form.

Date Issued

After considering this report and recommendation on March 9, 2017, the Bill of Rights and Voting Committee voted to issue this report and recommendation on _____.

Endnotes

¹ Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution* 215 (2nd prtg. 2011); Erik J. Engstrom and Jason M. Roberts, *The Politics of Ballot Choice*, 77 Ohio St. L.J. 839, 854 (2016).

² *Id.*

³ *Id.*

⁴ As originally adopted in 1949, Section 2a read as follows:

The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

⁵ Amendment 6 appeared on the November 4, 1975 ballot as the "Ohio Rotation of Candidate Names on Ballots Amendment." Available at: [https://ballotpedia.org/Ohio_Rotation_of_Candidate_Names_on_Ballots,_Amendment_6_\(1975\)](https://ballotpedia.org/Ohio_Rotation_of_Candidate_Names_on_Ballots,_Amendment_6_(1975)) (last visited Feb. 26, 2017); <https://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110475.aspx> (last visited Feb. 26, 2017).

The rotation requirements of Section 2a are effectuated by R.C. 3513.15, which provides:

The names of the candidates in each group of two or more candidates seeking the same nomination or election at a primary election, except delegates and alternates to the national

convention of a political party, shall be rotated and printed as provided in section 3505.03 of the Revised Code, except that no indication of membership in or affiliation with a political party shall be printed after or under the candidate's name. When the names of the first choices for president of candidates for delegate and alternate are not grouped with the names of such candidates, the names of the first choices for president shall be rotated in the same manner as the names of candidates. The specific form and size of the ballot shall be prescribed by the secretary of state in compliance with this chapter.

It shall not be necessary to have the names of candidates for member of a county central committee printed on the ballots provided for absentee voters, and the board may cause the names of such candidates to be written on said ballots in the spaces provided therefor.

The secretary of state shall prescribe the procedure for rotating the names of candidates on the ballot and the form of the ballot for the election of delegates and alternates to the national convention of a political party in accordance with section 3513.151 of the Revised Code.

R.C. 3505.03 sets out the requirements for use of the “office-type ballot,” indicating, in part:

On the office type ballot shall be printed the names of all candidates for election to offices, except judicial offices, who were nominated at the most recent primary election as candidates of a political party or who were nominated in accordance with section 3513.02 of the Revised Code, and the names of all candidates for election to offices who were nominated by nominating petitions, except candidates for judicial offices, for member of the state board of education, for member of a board of education, for municipal offices, and for township offices.

⁶ Amendment 1 on the June 1976 Ballot, proposing, inter alia, to require the lieutenant governor to be elected jointly with the governor. The measure passed by a margin of 61.16 percent to 38.84 percent. Ballotpedia, “Ohio Joint Election of Governor and Lieutenant Governor, Amendment 1 (June 1976), available at [https://ballotpedia.org/Ohio_Joint_Election_of_Governor_and_Lieutenant_Governor,_Amendment_1_\(June_1976\)](https://ballotpedia.org/Ohio_Joint_Election_of_Governor_and_Lieutenant_Governor,_Amendment_1_(June_1976)) (last visited Feb. 26, 2017); <https://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110276.aspx> (last visited Feb. 26, 2017).

⁷ Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 7, Elections and Suffrage, 16 (March 15, 1975), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt7%20elections%20and%20suffrage.pdf>, (last visited Feb. 26, 2017).

⁸ *Id.* at 17.

⁹ *Id.* at 18.

¹⁰ *Id.* at 19.

¹¹ *Id.*

¹² See Engstrom & Roberts, *supra*, note 1.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE V, SECTION 2

ELECTION BY BALLOT

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article V, Section 2 of the Ohio Constitution concerning the requirement that elections be by ballot. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article V, Section 2 be amended to include that the ballot must be secret.

Background

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 2 reads as follows:

All elections shall be by ballot.

Adopted as part of the 1851 constitution, Section 2 was taken verbatim from Article IV, Section, 2 of the 1802 Constitution, and has never been amended.

The 19th century saw significant changes to the electoral process, particularly concerning the widespread adoption of what became known as the secret, or "Australian," ballot. Proponents of the Australian ballot urged the use of an official ballot that included the names of all the candidates for office, was printed at public expense, was distributed only at polling places, and was marked in secret.¹ In 1888, Massachusetts became the first state to adopt the Australian ballot, and virtually all of the states embraced this reform by the turn of the century.²

Secrecy of the ballot was the most important feature of the Australian ballot, and prior to its adoption Americans used to vote with ballots provided them by political parties, with their voices (*viva voce*), with their hands, or with their feet.³ Of the many variants of the Australian ballot, in 1891 Ohio chose the party column format, which stayed in place throughout the first half of the 20th century.^{4 5}

Ohio ballot reform in the latter portion of the 19th century addressed corrupt practices that included stuffing ballot boxes, engaging in kick-back schemes, and buying votes, all activities enabled by the fact that voters were not provided a list of candidates, could remove ballots from the polling location, and were not required to place ballots directly into the ballot box.⁶ Upon his election in 1890, Ohio Governor James E. Campbell sought to secure a “free, secret, untrammelled and unpurchased ballot which shall be honestly counted and returned.”⁷ That effort culminated in the General Assembly’s 1891 enactment of the Australian Ballot Law.

Although the Ohio Constitution does not explicitly require a secret ballot, a dispute in the early 20th century about whether voting machines violated Section 2 ultimately resulted in case law holding that the ballot is secret.

In *State ex rel. Karlinger v. Bd. of Deputy State Supervisors of Elections*, 80 Ohio St. 471, 89 N.E. 33 (1909), the Supreme Court of Ohio held the General Assembly lacked the power to adopt a statute permitting the use of voting machines, and that the proposed machines violated Section 2’s requirement that elections be by ballot. Acknowledging conflicting court decisions from around the country, the court expressed skepticism about the reliability of voting machines and the ability of voters to quickly master the machine and cast their vote. *See Id.*, 80 Ohio St. at 488-89, 89 N.E. at 36.

The delegates to the 1912 Ohio Constitutional Convention, taking a more progressive view, proposed an amendment to permit the use of voting machines, but voters rejected the proposal, leaving the question of voting machines unsettled.⁸ In *State ex rel. Automatic Registering Machine Co. v. Green*, 121 Ohio St. 301, 310, 168 N.E. 131, 134 (1929), the Supreme Court of Ohio overruled *Karlinger* and upheld the use of voting machines, holding, as syllabus law, that the term “ballot” “designates a method of conducting elections which will insure secrecy, as distinguished from open or viva-voce voting.”

In reaching this decision, the Court relied on decisions from other states upholding the use of voting machines, as well as an article by Professor John H. Wigmore, who stated that “his search has convinced him that in common usage the term *ballot* has always been used, without an adjective, to express the idea of a vote cast in such a way that its purport is unknown at the time of casting – in short, of ‘secret’ voting.” *See Green, supra*, 121 Ohio St. at 308, 168 N.E. at 134 (citing Wigmore, *Ballot Reform: Its Constitutionality*, 23 American Law Review 719, 725 (1889)). Finally, the Court recognized that the meaning of constitutional provisions must be permitted to evolve as new technologies develop.⁹

Amendments, Proposed Amendments, and Other Review

In the 1970s, the Ohio Constitutional Revision Commission (1970s Commission) did not recommend a change to Section 2, concluding that the fundamental principle of the secret ballot – that “voters must be permitted to express their views on election matters without fear of retaliation” – is a proper matter for the constitution.

Litigation Involving the Provision

The Supreme Court of Ohio’s only recent opportunity to consider Section 2 involved a criminal case in which the defendant was charged with five counts of ballot tampering. In *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, a county board of elections employee was accused of marking the ballots of nursing home residents in favor of a candidate that was not their preference. When the county prosecutor sought to introduce the allegedly tainted ballots, which had been seized pursuant to a valid warrant, the defendant argued Section 2 required the ballots’ secrecy. In rejecting this argument, the Court first noted that Section 2 “aspires to ballot secrecy, but it is not self-executing.” *Id.* at ¶ 24. The Court then decided the question based on statutory law, concluding that the statutory requirement of ballot secrecy applies only to election proceedings and not to the admission of evidence in a criminal trial, adding, “applying statutory ballot secrecy to preclude using a ballot as evidence of a crime conflicts with a board of elections’ duties to investigate and gather evidence of election irregularities.” *Id.* at ¶ 33.

Presentations and Resources Considered

Engstrom Presentation

On February 9, 2017, Erik J. Engstrom, professor of political science from the University of California, Davis, presented to the committee on the politics of ballot choice, which is the topic of a recent law review co-authored by Prof. Engstrom.¹⁰

Prof. Engstrom began by noting Ohio has interesting history related to ballot laws. Providing a brief history of how elections were conducted in the 19th century, he said balloting was not the responsibility of state governments. Rather, he said, the political parties themselves would print the ballots and distribute them to voters. The parties would print the candidates for their own party on that ballot, and a voter would get a ballot from a party and cast that ballot. He said balloting was quite different, so, in effect, voters were almost forced to vote a straight party ticket by default. He added that voting was not secret – others could observe and monitor voters as they cast their ballots. He said the lack of a secret ballot created the potential for vote buying.

Prof. Engstrom continued that, at the end of the 19th century, the states began to reform the way they conducted elections by adopting the Australian, or “secret” ballot, with Massachusetts being the first state to adopt the change. He said this new ballot has the format largely used now in the United States. In addition, he said ballots are now printed and distributed by the state, rather than the political parties. He noted an additional feature, which is that the ballot is consolidated

so that, instead of just a Republican or Democratic party ballot, all the candidates are listed, allowing a voter to split his or her vote more easily. He said a final important feature is that now voting is conducted in secret, using a curtain or a voting booth. He said it took about 30 years for all states to adopt some form of the new secret ballot, with Ohio being an early adopter in 1891. He noted that some states have a constitutional provision that says the ballot must be secret, but Ohio has not constitutionalized this requirement.

Discussion and Consideration

In considering Article V, Section 2, committee members expressed surprise that Ohio has not expressly required a secret ballot in its constitution. Some committee members indicated that, because the requirement is well-established and has been recognized by the Supreme Court of Ohio since the 1920s, it may not be necessary to add the word “secret” to Section 2. Ultimately, the committee agreed that embedding the concept of a secret ballot in the state’s foundational document would emphasize the importance of protecting the integrity of the voting process by emphasizing the need for ballots to be secret.

Conclusion

The Bill of Rights and Voting Committee concludes that the concept of a “secret ballot” is so important to the voting process that the Ohio Constitution should include a reference to that requirement. Therefore, the committee recommends Article V, Section 2 be amended to state that “All elections shall be by secret ballot.”

Date Issued

After considering this report and recommendation on March 9, 2017 and _____, the Bill of Rights and Voting Committee voted to issue this report and recommendation on _____.

Endnotes

¹ See generally L. E. Fredman, *The Australian Ballot: The Story of an American Reform* (1968); see also Erik J. Engstrom & Jason M. Roberts, *The Politics of Ballot Choice*, 77 Ohio St. L.J. 839, 842-43 (2016).

² See Alan Ware, *Anti-Partism and Party Control of Political Reform in the United States: The Case of the Australian Ballot*, 30 Brit. J. Pol. Sci. 1, 9 (2000).

³ See Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, *The New Yorker* (Oct. 13, 2008). Available at: <http://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors> (last visited Feb. 26, 2017). See also, Eldon Cobb Evans, *A History of the Australian Ballot System in the United States*, 1917.

⁴ In their introduction to their law review article on ballot formats, Professors Engstrom and Roberts identified a number of state variations in ballot formats.

Some states line candidates in party columns while others list candidates by office. Some states provide for party emblems at the top of the ballot. Others provide a box at the top of the ballot

allowing voters to simply cast a straight ticket with one check mark. Moreover, states have varied in how long they have stuck with one type of ballot.

Engstrom & Roberts, *supra*, note 1 at 841.

⁵ Ohio first adopted what is known as the party column format of the ballot, but it switched to the office bloc format in 1949 with the adoption of Article V, Section 2a, of the Ohio Constitution. *See, id.* at 854-56.

⁶ *Australian Ballot*, Ohio History Central, http://www.ohiohistorycentral.org/w/Australian_Ballot [https://perma.cc/F267-AFJQ].

⁷ *Id.*

⁸ The proposed amendment on voting machines provided as follows: “All elections shall be either by ballot or by mechanical device, or both, preserving the secrecy of the vote. Laws may be enacted to regulate the preparation of the ballot and to determine the application of such mechanical device.” Proceedings and Debates of the Constitutional Convention of the State of Ohio, Vol. 2, 1321, 1795, & 1959 (1913).

⁹ The Court stated:

It was manifestly impossible for the framers of the Ohio Constitution to foresee all of the mechanical developments of our modern age. Just as our forefathers in drafting the national Constitution could not foresee the time when the term ‘post roads’ would be applied to airplane traffic – a traffic through air lanes which have not the slightest physical resemblance to the highway, as it has been known from the time of the Egyptians down – so the framers of the Ohio Constitution could not well foresee the time when a voter, by manipulating a lever, could mark either a straight ticket or a split ticket with exactly the same definiteness of individual expression as when he marks the ballot in his hand. However, surely the impress upon the record of a machine is not much farther removed from marking the ballot than the impress upon the key of the typewriter is removal from the actual making of characters of the alphabet by hand. If typewriting is the equivalent of long-hand, how can voting by machine be said essentially to differ, except in its efficiency, from voting by the old system of the ballot?

We think that the constitutional provision was meant merely to relate to the essential secrecy of the indication of the voter’s choice; that this secrecy has been demonstrated to be retained and enhanced by the use of voting machines; that, by the vast weight of authority, the Karlinger Case was an incorrect decision, and therefore we overrule that holding.

Automatic Registering Machine Co., 121 Ohio St. at 310-11, 168 N.E. at 134.

¹⁰ *See* Engstrom & Roberts, *supra* note 1.

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Bill of Rights and Voting Committee

Planning Worksheet (Through February 2017 Meetings)

Preamble

Preamble							
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 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. 4 – Exclusion from franchise for felony conviction (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	12.10.15	12.10.15	1.14.16	1.14.16

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	11.12.15	3.11.16	4.14.16	4.14.16	5.12.16	

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
Transferred to Legislative Branch and Executive Branch Committee							

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
Transferred to Legislative Branch and Executive Branch Committee							

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2017 Meeting Dates

April 13

May 11

June 8

July 13

August 10

September 14

October 12

November 9

December 14