



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 9, 2017

Call to Order:

Chair Richard Saphire called the meeting to order at 9:39 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. At the invitation of the chair, Representative Jonathan Dever participated as an ex officio non-voting member of the committee.

Approval of Minutes:

The minutes of the February 9, 2017 meeting of the committee were approved, as corrected.

Reports and Recommendations:

Article V, Section 2 (Elections by Ballot)

Chair Saphire began the meeting by recognizing Christopher Gawronski, legal intern, for the purpose of providing a first presentation of a report and recommendation for Article V, Section 2 (Election by Ballot). Chair Saphire explained that, because the report and recommendation was for a change to the section, a second presentation would be required before the committee could vote on whether to issue the report and recommendation.

Mr. Gawronski described the report as indicating the committee's position that Article V, Section 2 be amended to include the word "secret," so the provision would read: "All elections shall be by secret ballot." He continued that the report explains the background of the section, indicating it originated in the 1802 constitution and has never been amended. He said the report and recommendation describes the history of balloting, indicating that the use of the secret,

“Australian,” ballot in the late 19th century was intended to address corrupt practices that included stuffing ballot boxes, engaging in kick-back schemes, and buying votes. Mr. Gawronski stated that the report outlines case law related to the section, specifically a decision by the Supreme Court of Ohio in 1929 holding that the term “ballot” means a voting method that “will insure secrecy.” He said the report further describes the work of the Ohio Constitutional Revision Commission in the 1970s, which, while not recommending a change to Section 2, concluded that a secret ballot is a fundamental principle and a proper matter for the constitution. He said the report also summarizes a presentation by Professor Erik Engstrom of the University of California, Davis, concerning the history of ballots in Ohio, particularly noting that some states have a constitutional provision that says the ballot must be secret, but Ohio has not constitutionalized this requirement. Mr. Gawronski said the report concludes that the committee decided to embed the concept of a secret ballot in the constitution to emphasize the importance of protecting the integrity of the voting process by emphasizing the need for ballots to be secret.

Chair Sapphire asked the committee for any comments or discussion.

Committee member Karla Bell noted a comment by committee member Doug Cole at the last meeting in which she said Mr. Cole questioned whether absentee ballots can truly be deemed secret since information identifying the voter is provided. She asked whether modifying the constitution would unnecessarily draw attention to that issue.

Chair Sapphire expressed that he did not think that would be the case. Noting litigation related to the use of absentee ballots, he said the Ohio Supreme Court has clarified that the principle of secrecy is inherent in the current provision. He said the proposal to add the word “secret” would simply make that explicit by emphasizing the importance of secrecy. He said he is unsure whether a challenge to the absentee ballot system on the basis of the lack of secrecy would be affected by a change to the existing provision.

Mr. Cole said he is not sure he shares that view because, as a litigator, he is familiar with the argument that there must be a purpose to adding a word to an existing provision. He said he can see an argument that absentee ballots are not, by definition, secret in the sense that they are filled out in the voter’s place of residence, and the voter has every opportunity to show the ballot to others before sending it in. He said if there is going to be a constitutional requirement for a “secret” ballot; it could be interpreted as indicating more than simply voters wanted a level of secrecy provided for that was not inherent in the implied secrecy that the court had already found in the term ballot. He noted a concern that, by adding the word “secret,” the committee may be creating an environment in which someone could suggest that absentee ballots are not appropriate.

Ms. Bell said she agrees that the addition of the word suggests there should be a heightened standard.

Senior Policy Advisor Steven H. Steinglass said a key part of the Australian ballot was that ballots would be produced by government and provided to people at the polling place. He said that method took the place of a practice in which different parties provided their own ballots. He said the Australian ballot principle also included the concept of secrecy. He suggested that the

report and recommendation could reflect the committee discussed this issue and put the word secrecy in to codify existing practice. He said the report could indicate that there is no intent to alter current procedures concerning absentee ballots or voters who need assistance in casting a ballot.

Chair Sapphire asked whether Mr. Steinglass believes the current report reflects that idea. Mr. Steinglass said he would review the report but asked whether the phrase “absentee ballot” is included. Mr. Cole said he did not believe the phrase was included.

Ms. Bell suggested including a reference to electronic voting, since this method also could implicate concerns regarding secrecy. She said the report should more emphatically declare that the change would merely incorporate existing law, and is not intended to invalidate any present or future voting methods.

Chair Sapphire said, ultimately, if the recommendation goes on the ballot, its success would depend on how the question was posed to the voters. He asked Mr. Cole if he could comment on how the issue of absentee ballots might be framed up for consideration by the electorate.

Mr. Cole said he is not sure of the purpose of adding “secret” because there has been a fairly strong notion in Ohio law that ballots are secret, and that the need for secret ballots does not preclude the use of absentee ballots.

Senator Mike Skindell commented that there are several levels of secrecy on a ballot. He said one level protects against the government identifying individual voters. He said another level of secrecy involves making sure someone is not voting for someone else. He noted the example of an employer who wants an employee to vote in a certain manner. He said Ohio law prohibits a voter from taking a photograph of the completed ballot in order to share it with others. He said this was in order to stop voters from selling their votes or being coerced to vote in a certain way. He said the committee should examine the broader impact before adding the word “secret.”

Adding to Sen. Skindell’s example, Vice-chair Jeff Jacobson said it might not be an employer who wants to influence a vote; it could also be a union, spouse, or pastor. He said, after considering the issue, he has concluded the recommendation to add the word “secret” is a solution in search of a problem. He said he worries about the potential for unintended consequences.

Chair Sapphire asked committee member Ed Gilbert, who initially proposed adding the word “secret,” to comment on the concerns expressed by other committee members. Mr. Gilbert said his position is that, if the law is that the ballot must be secret, there is no reason why this could not be expressly stated in the constitution. He continued that the recommendation would merely be placing in the constitution a concept that is already accepted under case law. He said, by using an absentee ballot, or by obtaining assistance in voting, a voter is exercising a right to give up secrecy.

Chair Sapphire said the committee has heard two positions that are reasonable. He asked whether committee members would like to vote on whether to add the word “secret” to Section 2.

Representative Kathleen Clyde said she would like to obtain more information and opinion on the question. She said she agrees that there are potential unintended consequences to adding the word “secret.” She said she respects the importance of how the concept has evolved over time to mean a secret ballot. She suggested the committee might hear from an election law expert on the topic, and also could benefit from input from election officials or voting advocates.

Chair Sapphire expressed that having many presentations may result in as many different opinions and may not help resolve the issue.

Mr. Jacobson asserted there is no need for additional testimony, adding that voter advocates have not suggested there is a problem in this area. He said, since current law is settled and it is widely accepted that ballots are secret, there is no need to make a change.

Chair Sapphire expressed that if adding the word “secret” would raise questions, then perhaps it is better to leave the provision as is.

Ms. Bell said she is concerned about what a change would mean to the use of absentee ballots and other alternative forms of ballots in special circumstances.

Mr. Gilbert said past discussion clarified for him that the proposed change would not cause problems. But, he said he agrees that the issue has been discussed sufficiently.

Mr. Cole said he agrees the committee should target constitutional changes to actual or expressed problems.

Mr. Gilbert stressed that the charge of the Commission is to modernize the constitution, so making the constitution match case law and current notions is part of the charge of the committee.

Mr. Gilbert moved that the committee proceed with the issuing the report and recommendation to change Article V, Section 2 to include the word “secret,” and Chair Sapphire seconded the motion. Upon a roll call vote, the committee voted against adding the word “secret,” with Mr. Gilbert and Chair Sapphire being the only members in favor of the motion.

Mr. Jacobson presented a new issue related to secrecy, indicating that concerns have been raised regarding the ability to “hack” election results. He said, currently, Ohio does not have electronic voting via the internet, so there is no chance for such “hacking” to occur. However, he said, there have been suggestions that Ohio could use electronic voting in the future. He said to avoid problems, perhaps the constitution should have a prohibition on online voting in order to ensure a physical record is always kept and results cannot be tampered with.

Chair Sapphire suggested that this would be a new issue on the committee’s already large agenda. He suggested having informal discussion with staff in order to clarify this suggestion for possible incorporation into Section 2. There was consensus on this approach. Therefore, no further action will be taken on Section 2.

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

Chair Sapphire continued to recognize Mr. Gawronski for the purpose of providing a first presentation of a report and recommendation for no change to Article V, Section 2a, relating to names on the ballot.

Mr. Gawronski indicated that the report explains the background of Section 2a, specifically that the provision was proposed by initiative in 1949 and was intended to bar straight-party voting by emphasizing the candidates for office rather than their political parties by using an office-bloc format. He said the report indicates the provision was subsequently amended twice to clarify how rotation of names on ballots is to occur. Mr. Gawronski said the report describes related presentations to the committee by Matthew Damschroder, assistant secretary of state, who described the current procedure for rotating names on Ohio ballots, as well as by Professor Engstrom, who noted that Ohio is the only state to prescribe name rotation on ballots by constitutional provision rather than by statute. Mr. Gawronski said the report and recommendation expresses the committee's conclusion that the current provision allows the necessary flexibility to the General Assembly to provide for name rotation based on the needs of new voting methods and technologies, and that, therefore, the committee recommends no change.

Chair Sapphire said, to his knowledge, the section has not caused problems for the boards of elections. There being no comments or concerns by the committee, Chair Sapphire asked for a motion. Mr. Cole moved for the committee to issue the report and recommendation, and Mr. Jacobson seconded the motion. Upon a roll call vote, the motion passed unanimously.

Discussion:

Chair Sapphire announced that the committee also would be considering Article V, Section 7, relating to primary elections. He noted the section was discussed by the committee at meetings in 2014, at which time there was a consensus relating to the portion of the provision requiring a preferential vote for United States Senators. He said the committee agreed that portion of the provision was rendered superfluous as a result of adoption of the Seventeenth Amendment to the United States Constitution. He asked for committee members' suggestions for modifications or changes to Section 7.

Agreeing with Mr. Gilbert's comment about the committee's role in modernizing the constitution, Mr. Cole suggested the committee consider removing the reference to preferential vote for U.S. Senator.

Chair Sapphire said he concurs with that position.

Rep. Clyde agreed with Mr. Cole and said she first would like to explore the issue before voting to remove the language.

Mr. Jacobson asked Mr. Cole why he wished to explore the issue first.

Mr. Cole said the committee should explore how to accomplish the goal because he is not sure that simply striking those words is the right approach.

Mr. Jacobson said striking the words is the right approach if the committee is trying to get rid of unnecessary language. He said he is not sure a study is needed in order to do that.

Mr. Cole said he would be more comfortable having a proposed draft. He wondered if the change would just be to strike “and provision shall be made by law for a preferential vote for United States senator.”

Mr. Jacobson agreed, indicating there could be a semi-colon in place of the comma that is currently before that phrase.

Mr. Cole said he wonders why the first clause in that sentence, that references “elective state, district, county and municipal offices,” does not include federal offices.

Chair Sapphire said the answer to that question has not been determined. He said the issue with that is whether adding “federal” would be preempted by federal law, and also whether there is a need for that addition.

Mr. Jacobson said, arguably, a congressional seat would be included in the use of the word “district.” He said the practice has been to consider a congressional office as a “district office,” an approach that accommodates dealing with districts that are larger than one county.

Mr. Cole said the reason he suggested the committee consider the issue rather than simply striking language is that it would be important to hear from people who work with that language to see if adding the word “federal” might change something important.

Mr. Jacobson asked whether adding the word “federal” suggests that no one can appear on Ohio’s general presidential election ballot without winning a primary in Ohio. He said there is no current problem identifying that congressional and senatorial primaries belong in this rubric and are treated the same way, but the language relating to a preferential vote is a different concept that is no longer in use.

Mr. Gilbert said he would support having additional information before deciding to remove the language.

Mr. Jacobson suggested that a report and recommendation could be prepared that eliminates the phrase without adding the word “federal.” He said speakers could then appear before the committee to opine whether the word “federal” should be added. He said the report and recommendation could then be amended at the meeting.

Chair Sapphire noted a previous concern he had raised regarding whether part of Section 7 suggests that anyone who wants to run for office can get on the ballot through use of a petition, or whether party candidates must use the primary process. He said the United States Court of Appeals for the Sixth Circuit has ruled that this language means that major political parties and

their candidates get access to the ballot during the primary, while independent candidates and minor political parties largely have access to the ballot through the petition process. He said at this time his conclusion is that it is not necessary to consider a change to Section 7 in relation to that issue.

Chair Saphire then turned to the remaining provisions for the committee's review. He said he would talk with staff and maybe consult with Mr. Jacobson about these sections. He said a remaining issue is what to do about the report and recommendation regarding Article I, Section 6 on slavery. He explained that there is an issue regarding the portion of the provision that allows involuntary servitude "for the punishment of crime."

Rep. Clyde asked whether staff could provide the testimony to the committee by voter advocacy and other groups that might have touched on the issues surrounding Article V, Section 7. Chair Saphire said the discussion on the issue occurred prior to staff and prior to the preparation of minutes, but that he would see if there are references that could be provided to the committee.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:48 a.m.

Approval:

The minutes of the March 9, 2017 meeting of the Bill of Rights and Voting Committee were approved at the May 11, 2017 meeting of the committee.

/s/ Richard B. Saphire
Richard B. Saphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair