



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

OHIO CONSTITUTION ARTICLE V, SECTION 2a

NAMES OF CANDIDATES ON BALLOT

The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article V, Section 2a of the Ohio Constitution concerning the names of candidates on the ballot. It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The Commission 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 Jon 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 an 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 Bill of Rights and Voting 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.

Action by the Bill of Rights and Voting Committee

After formal consideration by the Bill of Rights and Voting Committee, the committee voted on March 9, 2017 to issue a report and recommendation recommending that Article V, Section 2a be retained in its present form.

Presentation to the Commission

On March 9, 2017, Christopher Gawronski, legal intern, on behalf of the Bill of Rights and Voting Committee, presented a report and recommendation for no change to Article V, Section 2a, relating to the order of names of candidates on the ballot. Mr. Gawronski said the report describes the current provision, deriving from a 1949 constitutional initiative, was intended to bar straight-party voting, 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. He said the report outlines the presentations offered on the issue, and concludes with the committee's sense that the current wording provides the necessary flexibility to the General Assembly to provide for the specifics of name rotation based on the needs of new voting methods and technologies, so that no change is necessary.

Action by the Commission

At the Commission meeting held April 13, 2017, Bill of Rights and Voting Committee Chair Richard Saphire moved to adopt the report and recommendation for Article V, Section 2a, a motion that was seconded by Commission member Kathleen Trafford. Upon a roll call vote, the motion passed unanimously, by a vote of 25 in favor, with none opposed, and five absent.

Conclusion

The Ohio Constitutional Modernization Commission recommends that Article V, Section 2a be retained in its present form.

Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on March 9, 2017 and April 13, 2017, the Commission voted to adopt the report and recommendation on April 13, 2017.

/s/ Charleta B. Tavares
Senator Charleta B. Tavares, Co-chair

/s/ Jonathan Dever
Representative Jonathan Dever, Co-chair

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.