OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Bill of Rights and Voting Committee

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

February 9, 2017

Ohio Statehouse
Room 017

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
	Justice Patrick Fischer
	Mr. Edward Gilbert
	Sen. Bob Peterson
	Sen. Michael Skindell

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

BILL OF RIGHTS AND VOTING COMMITTEE

THURSDAY, FEBRUARY 9, 2017
10:30 A.M.
OHIO STATEHOUSE ROOM 017

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of December 15, 2016

  [Draft Minutes – attached]

IV. Presentations

- Article V, Section 2 (Election by Ballot) and 2a (Names of Candidates on Ballot)

  Erik J. Engstrom, Professor of Political Science
  University of California, Davis

  [Law Review Article titled "The Politics of Ballot Choice"- handout]

V. Reports and Recommendations

- None scheduled

VI. 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]

VII. 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]

VIII. Old Business

IX. New Business

X. Public Comment

XI. Adjourn

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, DECEMBER 15, 2016

Call to Order:

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

Members Present:

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

Approval of Minutes:

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

Discussion:

Article V, Section 1
"Qualifications of an Elector"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Adjournment:

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

Approval:

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

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Richard B. Saphire, Chair

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Jeff Jacobson, Vice-chair

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO:	**Chair Richard Saphire, Vice-chair Jeff Jacobson, and Members of the Bill of Rights and Voting Committee**
CC:	**Steven C. Hollon, Executive Director**
FROM:	**Shari L. O'Neill, Counsel to the Commission** **E. Erin Oehler, Student Intern**
DATE:	**January 27, 2017**
RE:	**Ohio Constitution Article V, Section 7 (Primary Elections)**

This Memorandum is being provided to the Bill of Rights and Voting Committee to assist committee members in making a recommendation regarding possible changes to Article V, Section 7 of the Ohio Constitution as it relates to primary elections.

Article V, Section 7 provides:

> All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors in a manner provided by law. Each candidate for such delegate shall state his first and second choices for the presidency, but the name of no candidate for the presidency shall be so used without his written authority.

The section is comprised of the following elements:

- Nominations for elective office in the state, district, county, and municipality are to be made at direct primary elections or by petition, as provided by statute.
- Statutes are to govern the preferential vote for United States Senator.

- Direct primaries are not to be held for township officers.
- Direct primaries are not to be held for municipal officers in municipalities with a population less than 2,000.
- Direct primaries may be held in townships or municipalities with a population less than 2,000 if a majority of the electors of those political subdivisions petition for a direct primary.
- All delegates to political party national conventions are to be chosen by direct vote of the electors according to statutory law.
- All would-be delegates are to state their first and second choices for the presidency, however, the name of no candidate for the presidency shall be used without his/her written authority.

History of the Provision

The 1912 Constitutional Convention

As adopted in 1912, Section 7 read as follows:

> All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors. Each candidate for such delegate shall state his first and second choices for the presidency, which preferences shall be printed upon the primary ballot below the name of such candidate, but the name of no candidate for the presidency shall be so used without his written authority.[1]

Direct Primaries

Initially, nominations for elective offices were made by convention process. However, by 1912, the practice of using conventions to nominate candidates had come to be perceived as "corrupt, boss-controlled, drunken, debauched, and often hysterical."[2] By placing the process under direct, popular control, the use of direct primaries and a petition process was perceived as a way to diffuse the "party boss" system.[3] Section 7 was part of a system of reforms advocated by Theodore Roosevelt and the Progressive Movement. In fact, Roosevelt spoke on the topic when he addressed the Ohio Constitutional Convention in 1912, stating: "the convention system, while it often records the popular will, is also often used by adroit politicians as a method of thwarting the popular will."[4] Discussing the importance of the adoption of the direct primary system, convention delegate Samuel A. Hoskins wrote:

> Much was said during the Convention and since against the direct primary and the Initiative and Referendum, because they might result in nominations, or the adoption of measures, by a minority of those who would be entitled to vote. This objection seems puerile and almost foolish. These two measures come nearer furnishing a medium for the expression of the concrete will of the people than any reform that has yet been devised, and as measuring the progress of popular government they constitute a wonderful advance over the old boss-ridden convention manner of expressing the will of the people.
>
> Those who know the evils of the old convention form of nominations hail with delight the new Constitution, which gives every citizen the right to express his choice of candidates either through the primary or petition. Those familiar with the history of legislation in Ohio must also admit that with the coming of the Initiative and Referendum, and the adoption of the primary system, legislators have been far more responsive to the popular will, and the old annual lobby that met each recurring session of the Legislature is now almost a thing of the past.[5]

In expressing that nominations for elective state and local offices would be by primary elections or by petition, the 1912 Convention delegates were rejecting the convention or caucus-type of system for nominating candidates.[6]

Preferential Vote for United States Senator

A review of the transcript of proceedings of the 1912 Convention reveals that delegates also discussed the inclusion of language allowing for the "preferential vote for United States senators." Prior to 1913, the United States Constitution, Article I, Section 3, provided that U.S. senators would be selected by state legislatures and not by the popular vote. Delegates disagreed that this system provided Ohio with the best representation in Congress. Fayette County delegate Humphrey Jones argued that "[t]o the extent that we can use preferential primaries to indicate the wishes of the people as to who shall be United States senator and who shall be their candidates for president of the United States I am in favor of doing it * * * ."[7] Cuyahoga County delegate Thomas G. Fitzsimmons commented "I have not seen a man elected senator from the state of Ohio in the last thirty years that represented the choice of a majority of the people of this state."[8]

While some delegates expressed that adopting a measure affecting the nomination of a federal officeholder might contravene the U.S. Constitution, the concern was overridden by the sentiment that the convention should go on record as being in favor of the popular nomination of U.S. senators, even if that goal could not be achieved.[9] Despite insufficient support among the delegates for including U.S. senator in the list of offices in the first part of the sentence, delegates did adopt the phrase allowing provision under law for a preferential vote for U.S. senator. But

because the 1912 Convention was almost immediately followed by the 1913 ratification of the Seventeenth Amendment, which allowed election of U.S. senators by popular vote, this portion of Section 7 has never been used.

Township and Small Town Officers

Delegates also discussed a proposal, ultimately adopted, that excused township and small municipality officers from the requirement of participating in a direct primary, unless a majority of the electors petitioned to hold a primary. Hardin County delegate Frank G. Hursh commented that "the present law providing for primaries in townships is worse than a farce. * * * [F]ormerly we used to go into a caucus and put good men on the ticket. * * * As it is today nobody will allow his name to go on the ticket and in many parts of the state, in several of the townships, we have the poorest class of township officers than we have had in years."[10] Morgan County delegate J.W. Tannehill, who introduced the proposed amendment, stated with regard to township and small town elections that "[t]he direct primary is useful where there is an office worthwhile. Nobody wants a township office. I was on an election board two years ago and when we printed the ballots half of the township places were blank. * * * Why go to that expense when nobody wants the office? They can be nominated by a petition. * * * This feature will save every county every other year $1000. It will save the state of Ohio next year $100,000 that is absolutely thrown away."[11]

Nominations through Direct Primary Elections and Petitions

During the 1912 Constitutional Convention, questions arose concerning the language, "be made at direct primary elections or by petition." Hamilton County delegate Henry K. Smith asked delegate J.W. Tannehill "whether * * * nominations may be made both by direct primary elections and petitions."[12] Morgan County delegate J.W. Tannehill responded by saying, "My object in putting the petition in there was just to make it possible to nominate the members for the school board and the judiciary that way if it is desirable."[13] The convention agreed, adding that "in such manner as shall be provided by law" resolved the confusion.[14] The pertinent language as passed reads "shall be made at direct primary elections or by petition as provided by law."[15]

Ohio Constitutional Revision Commission

In the 1970s, the Ohio Constitutional Revision Commission (1970s Commission) debated whether to recommend changes to Section 7. The Election and Suffrage Committee of the 1970s Commission recognized the U.S. Senator preferential vote provision as surplusage in its February 1974 Report, based on the ratification of the Seventeenth Amendment.[16] However, the 1970s Commission failed to recommend any changes to Section 7, and focused its discussion primarily on the "bedsheet ballot" issue, which is described below. There being a lack of a two-thirds majority vote in the 1970s Commission to alter Section 7, no changes were recommended.

Thus, the 1970s Commission's Final Report of June 30, 1977 contained no recommendations for changes to Article V, Section 7. Nevertheless, in 1975, the General Assembly successfully proposed an amendment adding the last two sentences.

Presented as "Issue 6" on the November 4, 1975 ballot, voters were asked whether they wanted to "require the General Assembly to provide by law methods to give each candidate's name reasonably equal treatment on the ballot by rotation or other methods appropriate to the voting procedure used."[17] As the ballot board explained:

> The Ohio Constitution presently prevents the use of voting machines unless an equal number of voting machines or rotational patterns are available in each precinct. The results are added expenses and delays in voting. This is due to the present constitutional requirement that candidates' names be rotated on the ballot so that each candidate's name will be rotated an equal number of times.[18]

The measure passed 1,619,219 to 915,599 (63.88 percent to 36.12 percent).[19]

Voters also approved "Issue 7" on the November 4, 1975 ballot, a measure described as requiring "delegates to national conventions of political parties to be chosen by the voters in a manner provided by law."[20] The explanation for the proposed provision was that:

> The Ohio Constitution currently requires the names of all candidates for delegate or alternate to the national convention of a political party to be listed on the ballot, along with the first and second choice for president of each candidate for delegate. This results in a very lengthy "bed sheet" ballot listing of names.
>
> The proposed amendment would make it possible for the General Assembly to pass a law that would provide for direct selection of delegates to presidential nominating conventions and eliminate the necessity of printing on the ballot the names of both the delegate candidate and the preferred presidential candidate.
>
> Without passage of this amendment, it will be impossible to shorten the presidential primary ballot.

The measure passed 1,653,931 to 906,156 (64.6 percent to 35.4 percent).

Ohio Revised Code

R.C. 3513.01 provides in pertinent part:

> (A) [P]rimary Elections shall be held for the purpose of nominating persons as candidates of political parties for election to offices to be voted for at the succeeding general election.[21]

R.C. 3513.257 provides, in pertinent part:

> Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election * * * shall file not later than four p.m. of the day before the day of the primary election * * * a statement of candidacy and nominating petition as provided in section 3513.261 of the Revised Code.
>
> * * *
>
> The purpose of establishing a filing deadline for independent candidates prior to the primary election immediately preceding the general election at which the candidacy is to be voted on by the voters is to recognize that the state has a substantial and compelling interest in protecting its electoral process by encouraging political stability, ensuring that the winner of the election will represent a majority of the community, providing the electorate with an understandable ballot, and enhancing voter education, thus fostering informed and educated expressions of the popular will in a general election. The filing deadline for independent candidates required in this section prevents splintered parties and unrestrained factionalism, avoids political fragmentation, and maintains the integrity of the ballot. The deadline, one day prior to the primary election, is the least drastic or restrictive means of protecting these state interests. The general assembly finds that the filing deadline for independent candidates in primary elections required in this section is reasonably related to the state's purpose of ensuring fair and honest elections while leaving unimpaired the political, voting, and associational rights secured by the first and fourteenth amendments to the United States Constitution.[22]

As described by the General Assembly, the purpose of imposing a filing deadline by which independent candidates must declare their intention to run promotes party unity in support of the integrity of the ballot, fulling a state purpose of ensuring fair elections.

Primary Process in the United States

The National Conference of State Legislatures describes the various systems for conducting primaries, indicating that in an "Open Primary" any registered voter can cast a vote in a primary, regardless of his or her political affiliation.[23] A "Closed Primary," by contrast, is one in which only voters who are registered as members of a political party prior to the primary date may

participate in the nomination process.[24] While the closed system is perceived as strengthening the party, opponents criticize that it excludes independent or unaffiliated voters.[25]

Ohio is one of 24 states to use a hybrid system of primary elections in which some combination of an open and closed system is maintained.[26] In Ohio, per R.C. 3513.19, an elector may be challenged by a precinct election official at a primary on the basis that the elector is not affiliated with or a member of the political party whose ballot the person desires to vote. Relevant factors in determining party affiliation include the elector's voting record for the current year and immediately preceding two calendar years using criteria in R.C. 3513.05. Thus, an elector is considered to be a member of a political party if he or she has voted in that party's primary election within the preceding two calendar years, or if the elector did not vote in any other party's primary election within the preceding two calendar years. Nevertheless, even an elector with a history of voting a different party's primary ballot may overcome a precinct official's challenge by a statement, issued under penalty of election falsification, that the person desires to be affiliated with and supports the principles of the political party whose primary ballot the person desires to vote. R.C. 3513.19(B).

An additional method of conducting primaries is the "top two" system, in which all candidates, regardless of party, are listed on one ballot with voters picking one candidate.[27] The top two vote getters then become the candidates in the general election. No state uses this for the presidential election, and in Nebraska the method is only used for the nonpartisan legislature and some statewide races. While perceived as empowering independent voters and more moderate candidates, the system has been criticized as reducing ballot access for third party candidates and potentially eliminating party diversity on the general election ballot.[28]

Prior to the 1970s, a majority of states used some form of caucus system to select delegates to the national conventions, but this practice was altered by election reforms in that era. Some states continue to utilize a caucus system, rather than a primary, for nominating candidates, the most prominent example being Iowa, whose caucus is the focus of national attention in presidential election years.

Litigation Involving the Provision

Since its adoption, Article V, Section 7 has been interpreted by courts as mandating that party nominations follow the direct primary process, while independent nominations follow the petition process. *See, State ex rel. Gottlieb v. Sulligan*, 175 Ohio St. 238, 193 N.E.2d 270 (1963). *Gottlieb* recognized that the constitutional provision "leaves a void in the election laws" in that it "does not make provision for those situations which necessarily must arise where vacancies occur in nominations" at an inopportune time. *Id.*, 175 Ohio St. at 241, 193 N.E.2d at 273. Thus, the court concluded that the breadth of the statement in Article V, Section 7 that "all nominations * * * shall be made at direct primary elections or by petition" must be read with the follow-up statement "as provided by law." *Id.*, 175 Ohio St. at 240-41, 193 N.E.2d at 272-73.

In *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582 (6th Cir. 2006), the plaintiff claimed that the combination of two Ohio election regulations – the requirement that all political parties nominate their candidates via primary election, and the requirement that all minor political parties file a petition with the secretary of state 120 days before the primary – imposed an unconstitutional burden on a candidate's First and Fourteenth Amendment rights of free association by effectively preventing the candidate from gaining access to the general election ballot in the 12 months preceding a presidential election. The Sixth Circuit stated, in dicta: "The Ohio Constitution requires that all political parties, including minor parties, nominate their candidates at primary elections." *Id.* at 582, citing Ohio Const. Art. V, Sec. 7. According to the court, at the time of the decision, Ohio law provided two methods for qualifying for a primary: any party receiving at least five percent of the vote for its candidate for governor or president would automatically qualify for the next statewide election (R.C. 3517.01(A)(1)), and all other parties must file a petition no later than 120 days before the primary containing signatures equal to one percent of the total votes cast in the previous election. *Id.* at 582-83. If no petition is filed by that date, the candidate cannot appear on the primary ballot and so would not qualify to participate on the general election ballot. *Id.* The court in *Blackwell* found that Ohio's deadline is the earliest of any deadline reviewed by a federal court, imposing a severe burden on First Amendment rights. *Id.* at 591. The court stated that the collective impact of the rules:

> [I]mposes a severe burden on the associational rights of the [party], its members, and its potential voter-supporters. As the State has not shown that these laws are narrowly tailored to protect a compelling state interest, we find that the Ohio system for minor party qualification violates the First Amendment of the Constitution.

Id. at 595.

Analysis

The committee has asked staff to address some key questions relating to Section 7.

Exclusion of Federal Offices from the Requirements of Section 7

> The first sentence of Section 7 provides that "[a]ll nominations for elective state, district, county and municipal offices shall be made at direct primary elections * * * ." Does the historical record indicate a reason for not including "federal offices" in this requirement? And are there any significant legal issues raised by amending this sentence to include federal offices?

The historical record of Article V, Section 7 does not indicate a reason for leaving out "federal offices" in the requirement. An amendment adding "federal offices" to the provision may raise

concerns similar to those expressed during the discussion at the 1912 Convention about the requirement of popular nomination for United States Senators. In voicing his concerns, delegate D.F. Anderson stated, "we cannot change the constitution of the United States nor can any act we do finally determine how United States senators shall be elected in Ohio, except that it puts us on record in favor of it and to that extent it may help."[29]

"Direct Primary or Petition" Route to Nomination

> The first sentence of Section 7 provides that those persons interested in receiving nomination to the offices therein specified can obtain that nomination via a "direct primary election or by petition as provided by law." While this language might be read as providing anyone interested in securing a nomination two routes to a nomination, there are at least two court decisions that suggest otherwise. One of those decisions, *Libertarian Party of Ohio v. Blackwell, supra*, contains dictum to the effect that the "Ohio Constitution requires that all political parties, including minor political parties, nominate their candidates at primary elections." This language suggests that candidates affiliated with a political party can only secure a nomination to one of the specified offices via the primary, not the petition, process. *See also, Gottlieb, supra.*
>
> Are there other cases that bear on the question whether the "plain meaning" view * * * or the view expressed in the *Blackwell* case represents the "correct" or "better" interpretation of Section 7? Is there any historical material that bears on this question? Finally, assuming that the *Blackwell* view is the better view, can an unaffiliated person (i.e. an independent candidate) secure a nomination to office through either the primary or petition process?

The historical record shows that the delegates of the 1912 Constitutional Convention believed that the addition of "in such manner as shall be provided by law" would resolve confusion as to whether nominations could be made by either direct primary elections or petitions.[30] Courts have further supported this notion. The Ohio Supreme Court in *Gottlieb* stated that "as provided by law" must necessarily be read along with "shall be made at direct primary elections or by petition." *Gottlieb, supra,* 175 Ohio St. at 240, 193 N.E.2d at 270. Additionally, the Sixth Circuit in *Blackwell* stated, in dicta, that the Ohio Constitution requires all political parties to nominate candidates through primary elections. *Blackwell, supra,* at 582.

Under current law, R.C. 3513.01 requires political parties to nominate candidates through primary elections. R.C. 3515.257 requires "each person desiring to become an independent candidate" to complete the petition process. R.C. 3515.257 continues that "the purpose of establishing a filing deadline for independent candidates prior to the primary election * * * is to recognize that the state has a substantial and compelling interest in protecting its electoral process * * * ."

Courts have interpreted Article V, Section 7 as preventing Democratic and Republican affiliated candidates from running as independents in the general election. In *State ex rel. Brown v. Ashtabula Cty. Bd. of Elections*, 142 Ohio St.3d 370, 375, 2014-Ohio-4022, 31 N.E.3d 596, the Supreme Court of Ohio denied a writ of mandamus for a relator whose petition was rejected by the Ashtabula County Board of Elections. Relator in that case sought to become the Democratic nominee for a seat on the Ashtabula County common pleas court, but was unsuccessful in the Democratic Party primary election. Afterward, he filed nominating petitions to be a candidate for judge on the Ashtabula County Western Area Court in the general election. Quoting *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St.3d 338, 673 N.E.2d 1351 (1997), the Court observed that "Ohio clearly has a legitimate interest in preventing potential conflicts among party members, an interest in preventing the possibility of voter confusion, and an interest in preventing candidacies that may conceivably be prompted by short-range goals." *Brown, supra*, 142 Ohio St.3d at 373, 31 N.E.3d at 599.

Similarly, in *Morrison v. Colley*, 467 F.3d 503, 511 (6th Cir. 2006), the Sixth Circuit affirmed the district court's denial of appellant's application for injunctive relief from a decision by the Franklin County Board of Elections to exclude appellant from the ballot as an independent candidate because he was affiliated with a political party. Appellant then circulated petitions seeking placement on the Madison County Republican Party Central Committee and the Ohio Republican Party State Central Committee. After being certified as a candidate in the Republican primary for the state and county committee positions, and appearing on the May 2, 2006 Republican primary ballot, appellant lost both races. He then filed nominating petitions with the board of elections to run as an independent candidate in Ohio's 15th Congressional district. On examining R.C. 3501.01 and R.C. 3513.257, the Sixth Circuit found that "the statutes at issue gave [appellant] sufficient notice that his claims of party affiliation or non-affiliation had to be made in good faith when he filed his independent congressional candidacy petition, * * * and his claim of unaffiliation with a political party was not made in good faith." *Id.* at 511.

In a more recent Sixth Circuit case, *Jolivette v. Husted*, 694 F.3d 760 (6th Cir. 2012), the plaintiff sought the opportunity to run as an independent candidate for an Ohio House seat. However, the plaintiff had numerous recent ties to the Republican party, thus calling into question his status as an independent candidate. The court upheld the constitutionality of R.C. 3513.257, a statute that requires independent candidates to make a good-faith claim that they are free of political party affiliation at the time they submit their petitions for independent candidacy: "By requiring independent candidates to make a good-faith claim of non-affiliation by the day before the primary, Ohio seeks to maintain the integrity of its different routes to the ballot – the partisan primary and the independent petition." *Id.* at 769. The court recognized the validity of the state's claimed justifications for the rule, including the state's interest in avoiding overcrowded ballots, protecting against frivolous or fraudulent candidacies, avoiding confusion, deception,

and frustration of the democratic process, and preventing unrestrained factionalism and political fragmentation. *Id.*

These Ohio state and federal cases follow a line of U.S. Supreme Court cases addressing ballot access for independent or new party candidates. In *Storer v. Brown*, 415 U.S. 724 (1974), the Court addressed a California statutory requirement denying a ballot position to an independent candidate for elective public office if that candidate possesses a registered affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election. In *Brown*, the plaintiffs, who sought to run for the U.S. Congress as independents but were denied a ballot position, had been registered Democrats until early 1972, and therefore were affiliated with a qualified political party within one year of the 1972 primary. Affirming the constitutionality of the statute, the Court stated that "[t]he requirement that the independent candidate not have been affiliated with a political party for a year before the primary is expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot," thus, the restriction involved "no discrimination against independents." *Id.* at 733.

Relying on precedent that included *Jenness v. Fortson*, 403 U.S. 431 (1971) (Georgia's interest in avoiding confusion, deception, and frustration of the democratic process at the general election constitutionally permits the state to require a political organization to demonstrate significant support for a candidate before printing the candidate's name on the ballot); and *Bullock v. Carter*, 405 U.S. 134 (1972) (Texas' imposition of exorbitant filing fees is not necessary to accomplish a legitimate state objective of regulating the number of candidates on the ballot and eliminating spurious candidates), the Court in *Storer* reasoned:

> Against this pattern of decisions we have no hesitation in sustaining [the statute]. In California, the independent candidacy route to obtaining ballot position is but a part of the candidate-nominating process, an alternative to being nominated in one of the direct party primaries. The independent candidate need not stand for primary election but must qualify for the ballot by demonstrating substantial public support in another way. Otherwise, the qualifications required of the independent candidate are very similar to, or identical with, those imposed on party candidates.

Storer, *supra* at 733.

On the other hand, some cases hold that a statutory scheme goes too far if it blocks all challengers to the status quo two-party system. *Williams v. Rhodes*, 393 U.S. 23 (1968), is one such case. In *Williams*, the U.S. Supreme Court analyzed Ohio statutes that required new political parties to satisfy a series of onerous prerequisites in order to qualify a candidate for placement on the ballot. For instance, the statutory scheme required the new party to elect a state central committee consisting of two members from each congressional district and county central committees for each county in Ohio, to elect at the primary delegates and alternates to a national

convention, and to require party candidates to obtain petitions signed by qualified electors totaling 15 percent of the number of ballots cast in the preceding gubernatorial election. As described by the Court, taken together, the various requirements made it "virtually impossible for any party to qualify on the ballot except the Republican and Democratic parties:

> These two Parties face substantially smaller burdens because they are allowed to retain their positions on the ballot simply by obtaining ten percent of the votes in the last gubernatorial election and need not obtain any signature petitions. Moreover, Ohio laws make no provision for ballot position for independent candidates as distinguished from political parties.

Williams, supra at 25-26.

The state argued the statutory requirements were necessary to encourage compromise and political stability. The Court concluded the scheme did not merely favor a two-party system but, in fact, favored two particular parties, in effect tending to give Republicans and Democrats a "complete monopoly." *Id.* at 32. The Court thus concluded that "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." *Id.* at 34.

Section 7 in Relation to R.C. 3513.04 (the "Sore Loser" Statute)

> Has Section 7 played a role in any decision depriving a general election ballot position to an unsuccessful primary candidate now attempting to run as an independent?

As provided in R.C. 3513.04, persons who unsuccessfully sought a party nomination at a primary election are not permitted to become a candidate by nominating petition or by running as a write-in candidate at the general election. Such "sore loser" laws have been criticized as detrimental to a goal of having quality candidates on the ballot because major party candidates who unsuccessfully compete in the primary may be more qualified than candidates who are not required to participate in the primary but gain access to the ballot through nominating petition or write-in candidacy.[31]

Regarding cases referencing Article V, Section 7, *Libertarian Party of Ohio v. Blackwell, supra,* and *Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014), both acknowledged Article V, Section 7, but ultimately focused on arguments related to U.S. Constitutional rights of free speech and association. After further litigation on remand, *Libertarian Party of Ohio v. Husted* came up again before the Sixth Circuit Court of Appeals, which rendered a decision on July 29, 2016 that ruled against the Libertarian Party on several claims relating to R.C. 3501.38(E)(1) and S.B. 193 (changing the method by which minor parties can qualify for the ballot). *Libertarian Party of Ohio v. Husted*, 831 F.3d 382 (6th Cir. 2016). That order was

subject to a motion for a writ of certiorari, which the United States Supreme Court denied on January 9, 2017. *Libertarian Party of Ohio, et al. v. Husted, Ohio Sec. of State, et al.*, No. 16-580.[1]

Significant for the purposes of this memorandum, the Sixth Circuit also concluded that the Libertarian Party's state law claim, which urged that S.B. 193 violates Article V, Section 7 of the Ohio Constitution, was not justiciable because that issue already had been litigated to final judgment by the Franklin County Common Pleas Court in the case of *Libertarian Party of Ohio v. Husted*, No. 16CV554 (Franklin Cty. Ct. Common Pleas June 7, 2016). A copy of that decision is attached. An appeal of the state court decision to the Franklin County Court of Appeals is pending, with the briefing having been completed and the parties awaiting the scheduling of oral argument. *Libertarian Party of Ohio v. Husted*, 10th Dist. No. 16-AP-000496.

In determining that S.B. 193 did not violate Article V, Section 7, the Franklin County Common Pleas Court determined that the section is not self-executing because it relies on supplemental legislation to become operative, and S.B. 193 provides that supplement. Additionally, the court held that even if the provision is self-executing, S.B. 193 complies with the section because both the statute and the constitutional provision provide two methods for candidates to obtain party nomination: either by primary election or by petition.

Most recently, the Ohio Supreme Court on January 20, 2017, issued a decision in *State ex rel. Fockler v. Husted*, 2017-Ohio-224, holding that members of a committee that nominated Gary Johnson and William Weld to appear on Ohio's November 2016 ballot as independent candidates for United States president and vice president did not qualify as a political party because the candidates were not nominated as party candidates but rather as independents. Interpreting statutory law (and not Ohio Const. Art. V, Section 7), the Court found that established political parties, to retain ballot access, had to receive at least three percent of the vote cast in the most recent regular state election. The Court stated:

> When considered together, these statutes make clear that a political group cannot obtain recognized political-party status based on votes obtained by independent candidates. As Husted notes, the 3 percent vote required for a group to "remain[ ]" a political party must be received by the "political party's candidate," as specified in R.C. 3501.01(F)(2)(a). Fockler's candidates could not be the "political party's candidate[s]" because they were nominated and appeared on the ballot as independent candidates, unaffiliated with any political party.

[1] Available at: https://www.supremecourt.gov/orders/courtorders/010917zor_c07d.pdf (last visited Jan. 18, 2016).

> Moreover, because relators were not a recognized political party prior to the election, they are not eligible to "remain[ ]" a political party based on the outcome of the election. As Husted aptly states, only already-recognized political parties are eligible to "remain[ ]" a political party.

Id. at paragraphs 15, 16, footnote omitted.

Population Data for Ohio Municipalities

> Section 7 also provides that direct primaries "shall not be held" for the nomination for the officers of municipalities of "less than two thousand population" unless certain conditions are satisfied. This provision has been a part of Section 7 since at least 1912. At the time that this limitation was first set out in the Ohio Constitution, how many Ohio municipalities had less than two thousand persons? How many municipalities have less than two thousand persons today? How many have less than four thousand or six thousand?

The committee also has asked for data regarding the population limitation in the provision, specifically seeking to learn how many municipalities had a population of less than two thousand in 1912 versus how many have that number today. A survey of 1910 and 2010 census data indicates that in 1910 there were a total of 782 municipal corporations in the State of Ohio, with 624 of them having a population of less than two thousand. Thus, in 1910, approximately 79.8 percent of municipalities had a population less than two thousand. By contrast, in 2010, there were a total of 931 municipal corporations in the state, with 536 of them having a population less than two thousand. The percentage of municipalities with a population less than two thousand thus dropped to 57.6 percent in 2010, representing a reduction of 38.5 percent over the 100-year span.

The committee also requested information on how many municipalities currently have a population of less than four thousand, and how many have a population of less than six thousand. The following chart, based upon 2010 census data, compares population figures:

Less than 2,000	536	Less than 4,000	654
Between 2,000 and 4,000	118	Between 4,000 and 6,000	50
Less than 4,000	654	Total Less than 6,000	704
Total Municipalities	931	Total Municipalities	931
Percentage less than 4,000	70.2%	Percentage less than 6,000	75.6%

From this data, it appears that percentage of municipalities having a population of less than six thousand in 2010 – 75.6 percent – is still a lower figure than the percentage of municipalities having a population of less than two thousand in 1910, which was 79.8 percent.

Provision by Law for Preferential Vote for United States Senator

> Are there good reasons to retain the second major clause that requires that "provision shall be made by law for preferential vote for United States Senator"?

Although they expressed concern about contravening the U.S. Constitution, the delegates of the 1912 Convention chose to adopt a measure allowing for the "preferential vote for United States senator," in order to go on record as supporting the popular nomination of U.S. senators.[32]

This portion of Section 7, as previously stated, has never been used because the ratification of the Seventeenth Amendment occurred almost immediately afterward, in 1913.

Conclusion

Thank you for the opportunity to facilitate the committee's discussion of this topic. If further research is required, staff is pleased to assist.

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[1] *The Proceedings and Debates of the Constitutional Convention of 1912*, Appendix at VIII., Constitution of the State of Ohio with Amendments Proposed by the Constitutional Convention and Approved by the People (September 3, 1912), available at: https://www.supremecourt.ohio.gov/LegalResources/LawLibrary/resources/1912Convention.asp (last visited Dec. 5, 2016).

[2] Quote from J.W. Tannehill, *The Proceedings and Debates of the Constitutional Convention of 1912*, Debates 1225, 1239 (April 16, 1912), *as reprinted in* the Ohio Constitutional Revision Commission Elections and Suffrage Committee Report on Primary Elections 2495, 2497 (February 27, 1974).

[3] *See the Proceedings and Debates of the Constitutional Convention of 1912*, Debates 1225, 1240 (April 16, 1912).

[4] Quote from Theodore Roosevelt, *The Proceedings and Debates of the Constitutional Convention of 1912*, Debates 377-96 (Feb. 21, 1912), *as reprinted in* the Ohio Constitutional Revision Commission Elections and Suffrage Committee Report on Primary Elections (February 27, 1974).

[5] James K. Mercer, Ohio Legislative History, 1909-1913, Columbus: Edward T. Miller Co., 1913, p. 433.

[6] One delegate gave a humorous account of his experience seeking a party nomination under the convention system: "In years gone by when we started from Mahoning county to come down [to Columbus] to a so-called convention, we knew the only service we could perform here would be to buy peanuts and feed the squirrels. Everything was arranged before we came." Quote from D. F. Anderson, *supra*, note 3, at 1244.

[7] Quote from Humphrey Jones, *Id*.

[8] Quote from Thomas G. Fitzsimmons, *Id*. at 1246.

[9] *Id*. at 1244.

[10] Quote from Frank G. Hursh, *Id*. at 1245.

[11] Quote from J.W. Tannehill, *id*. at 1242.

[12] Quote from Henry K. Smith, *id*. at 1246.

[13] Quote from J.W. Tannehill, *id*.

[14] *Id*.

[15] *Id*. at 1242.

[16] *Committee Report on Primary Elections*, Ohio Constitutional Revision Commission Elections and Suffrage Committee 2495, 2500 (February 27, 1974).

[17] https://ballotpedia.org/Ohio_Rotation_of_Candidate_Names_on_Ballots,_Amendment_6_(1975) (last visited Jan. 11, 2016).

[18] *Id*.

[19] http://guides.law.csuohio.edu/c.php?g=190570&p=1258419#x1970 (last visited Jan. 11, 2016).

[20]http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110475.aspx (last visited Jan. 11, 2016).

https://ballotpedia.org/Ohio_Delegates_for_National_Political_Party_Conventions,_Amendment_7_(1975) (last visited Jan. 11, 2016).

[21] R.C. 3513.01

[22] R.C. 3513.257

[23] (used by AL, AK, GA, HI, MI, MN, MO, MN, ND, VT, WI)

[24] (DE, FL, KS, KY, ME, NV, NJ, NM, NY, PA, WY)

[25] *State Primary Election Types*, National Conference of State Legislatures (July 21, 2016), available at: http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx#3 (last visited Dec. 5, 2016).

[26] (AL, AZ, CO, CT, ID, IL, IN, IO, MD, MA, MS, NH, NC, OH, OK, OR, RI, SC, SD, TN, TX, UT, VA, WV)

[27] (CA, NE, LA, WA)

[28] *State Primary Election Types*, National Conference of State Legislatures (July 21, 2016), available at: http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx#3 (last visited Dec. 5, 2016).

[29] Quote from D.F. Anderson, *supra*, note 3, at 1244.

[30] Quote from J.W. Tannehill, *supra*, note 3, at 1246.

[31] Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 Geo. L.J. 1013, 1048-49 (2001).

[32] *Proceedings and Debates of the Constitutional Convention of 1912*, Debates 1225, 1244 (April 16, 1912).

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OHIO CONSTITUTIONAL REVISION COMMISSION

Recommendations for Amendments to the Ohio Constitution

PART 7

ELECTIONS AND SUFFRAGE

March 15, 1975

Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

remove reference to a durational residency requirement. A state may impose a reasonable length of time for registration — perhaps thirty days. The recommendation gives the legislature the flexibility to impose residency requirements that are in accord with the requirements of the Federal Constitution as interpreted.

The second paragraph of Section 1 provides that if an elector does not qualify to vote for state and local officials, he may nevertheless be qualified to vote for President and Vice-President, in Ohio, if he has fulfilled the residency requirements provided by law. Since durational residency requirements have been declared unconstitutional, different residency requirements for voting in state, local and federal elections are no longer needed.

Intent of the Commission

The Commission, recognizing the importance of stating the basic right to vote in the Constitution, believes that Section 1 of Article V should conform with the Twenty-Sixth Amendment to the United States Constitution, and with judicial decisions on residency requirements. Commission members agree that reasonable residency requirements may be desirable to enable potential voters to register.

ARTICLE V

Section 2

Present Constitution	Commission Recommendation
Section 2. All elections shall be by ballot.	No change.

Commission Recommendation

The Commission recommends that no change be made in present Section 2 of Article V.

History and Background of Section

The Ohio Constitution of 1802 provided for elections to be by ballot in Article IV, Section 2. The 1851 Ohio Constitution retained the same language in Article V, Section 2. Court interpretation of the provision has occurred on two issues. In *State ex rel. Bateman v. Bode*, 55 Ohio St. 224, 45 N.E. 195 (1896), the Court affirmed that the discretion to prescribe the form of the ballot resided in the General Assembly. The question whether the constitutional requirement for elections by ballot prohibited the use of voting machines was resolved in *State ex rel. Automatic Registering Mach. Co. v. Green*, 121 Ohio St. 301, 168 N.E. 131 (1929). In that case, the Court interpreted "ballot" to designate a manner of conducting elections to insure secrecy as opposed to viva voce vote, concluding that the use of voting machines was not in violation of Article V, Section 2.

Rationale for Retaining Section

The Ohio Constitution states the fundamental principle of the secret ballot in Article V, Section 2, permitting electors to express their views on election matters without fear of retaliation. The Ohio Supreme Court has held that the use of voting machines conforms with the constitutional requirement for a secret ballot. The Commission believes that this fundamental principle is a proper matter for the Ohio Constitution and should be retained.

ARTICLE V
Section 2a

Present Constitution

Section 2a. 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.

Commission Recommendation

Section 3. 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 method 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 less prominent than the candidate's name. 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.

Commission Recommendation

Section ~~2a~~ 3. 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.~~ 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. ~~Except at a Party Primary or in a non-partisan election,~~ 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 lighter and smaller type face than that in which the candidate's name is printed~~ LESS PROMINENT THAN THE CANDIDATE'S NAME. 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.

History and Background of Section

Section 2a of Article V was added to the Ohio Constitution in 1949, making Ohio the only state to provide for rotation of candidates' names on the ballot in its Constitution. In addition to the rotation feature, the section also requires that candidates be listed by office on the ballot and that the voter vote for each candidate separately, except for electors for President and Vice-President of the United States, who run in tandem. The requirement that voters must vote for each candidate separately prohibits straight party voting, thus precluding casting a vote for all of the candidates of one political party by pulling one lever. Of the several provisions contained in Section 2a, only the language on ballot rotation appears to have raised any significant problems, and it has been the subject of judicial interpretation as recently as 1974.

The Ohio Supreme Court, in *State ex rel. Russell v. Bliss*, 156 Ohio St.

147 (1951) held that the constitutional provision is self-executing and a statute varying the prescribed procedure is unconstitutional and void. Since 1951, two statutes prescribing rotational procedures have been held to violate this section.[1]

Section 2a has been construed to require perfect rotation of names on the ballot, in so far as may be reasonably possible. The issue has been raised in Ohio Courts whether the use of voting machines complies with the constitutional mandate, since this method of voting raises peculiar problems for rotation of names on the ballot. The use of paper ballots permits the voters to be presented with numerous configurations of candidates' names. Statutes require that paper ballots be printed and compiled in planned sequences. Voting machines, however, do not permit rotation in this manner; the order is fixed once the machine is locked, and all voters using the same machine will be presented with the same sequence of candidates' names. Moreover, the expense of a voting machine may result in there being only one or two at a polling place, and many, if not all, voters are exposed to the same order of candidates on the ballot.

In the opinion of the Court of Common Pleas of Mahoning County in *Bees v. Gilronen*, 66 OLA 130 (1953), and of the Attorney General (1957 OAG 984), the constitutional provision permits the use of voting machines, since it requires perfect rotation in so far as may be reasonably possible and perfect rotation may not be reasonably possible, when voting machines are used. In 1974, the Ohio Supreme Court affirmed that Section 2a of Article V of the Ohio Constitution does not absolutely prohibit the use of voting machines (*State ex rel. Roof v. Bd. of Commrs.*, 39 Ohio St. 2d 139 (1974)). In that case, the Court found that statutory language concerning rotation of machine ballots on a precinct by precinct basis (Section 3507.07 of the Ohio Revised Code) was not in compliance with Article V, Section 2a. In its opinion, the Court offered an acceptable way of using voting machines to comply with the Constitution, stating that each precinct using voting machines must have at least two or an even number of machines which, prior to the general election, have been arranged by the board of elections in a serial sequence throughout the county. Voters would be directed to alternate machines so that the various voting machines at a polling place would be used in serial sequence. In the formula proposed by the Court, although the number of alternative sequences in a given precinct is limited by the number of voting machines, when the use of machines by voters is regulated by a planned serial sequence, compliance with the constitutional requirement for rotation in Section 2a is achieved.

Effect of Change

The Commission recommendation removes the self-executing language which has been held to require perfect rotation of names on the ballot, as far as reasonably possible. The amendment, using relative rather than absolute terms, places the responsibility of providing for rotation with the General Assembly. In addition, the amendment removes the words "except at a Party Primary or in a non-partisan election . . .". This misleading language could imply that, in these elections, the political party may be given more prominence than the candidate's name. The word "general" has been removed from "general elections" in the first sentence, so that the provision will apply to all elections. The section number of the provision is changed from 2a to 3, and present Section 3 is being recommended for repeal. A discussion of the reasons for repeal will be found under present Section 3. Throughout, language referring to the method

[1]A provision for voting machine rotation in Section 3507.07 of the Revised Code was declared void in *State ex. rel. Wesselman v. Bd. of Elections of Hamilton County*, 170 Ohio St. 30 (1959). *Bliss* invalidated General Code 4785-80.

of voting has used very general terms to permit the section to apply to new methods of voting and technological changes.

Rationale for Change

The Elections and Suffrage Committee considered several alternative ways of dealing with the rotation provision of Section 2a. Most agreed that ballot rotation is a statutory matter, nothing that Ohio is the only state to provide for rotation in its Constitution. The idea of repeal was rejected because it would open the possibility of the enactment of a law like one in California which places the incumbent's name first on the ballot. The author of a Southern California Law Review article[2] suggests that the California statute violates the Fourteenth Amendment to the United States Constitution. His research indicates that the first-listed candidate has an advange: ". . . as a minimum, one can attribute at least a 5 percent increase in the first listed candidate's vote total to positional bias, and . . . this will be exceeded in most elections." He views this positional advantage as in violation of the one-man, one-vote rule, giving citizens voting for the first person listed an advantage over a group of equal strength with less favorable ballot position.

All shared a desire to retain the principle that no candidate should have an undue advantage or disadvantage by virtue of ballot position. However, the Commission viewed the present language as too restrictive on several accounts. When the constitutional provision is read as an absolute standard of rotation, there are unfortunate consequences. One paper ballot with a printing error or out of order may result in an entire election being invalidated. While fair treatment on the ballot is desirable, the invalidation of an election because in a small number of instances proper rotation did not occur exaggerates the importance of rotation. The constitutional language as presently interpreted restricts the use of new methods of voting, as evidenced by the difficulties encountered in trying to conform the use of voting machines to the rotation language in Section 2a. The tremendous difficulties and expenses boards of elections were encountering in the effort to conform with the Supreme Court ruling in the *Roof* decision were described in detail to the Commission.

One alternative is rotation by precincts rather than rotation by individual ballots. The Court of Appeals in the *Roof* decision suggested that equalization of population by precincts would be acceptable. Precinct population equalization, however, presents considerable problems for election officials, especially in areas with a highly mobile population. In any event, it seemed unwise to write such a specific provision into the constitution.

The Commission's proposal is more flexible than either the present language or the precinct equalization proposal; at the same time, it retains the principle of equal treatment in order to preclude a situation like that of California. The substitution of a relative standard of fairness to candidates for the rigid standard of perfect rotation wherever possible, the Commission thought, would enable the General Assembly and the courts to judge whether the value of a new voting technique might outweigh the advantages of exact rotation. A recent Florida election employed telephonic voice prints, and cable television holds out the possibility of voting by digital return systems. These and other electronic voting methods are being discussed and tested. The Commission felt that Ohio should be free to explore new technology, and believes that the proposed language permits the positional treatment to correspond to the voting method used.

There is a change in the first sentence of the section, "The names of

[2]W. James Scott, Jr. "California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents", 45 So. California Law Review 365 (1972).

all candidates for an office at any general election . . ." The word "general" has been deleted in order to make the provision applicable to all elections. The Commission believes that fair treatment on the ballot by rotation or other comparable methods should be available at all elections, including special elections, which are not included under the present language.

The second part of Section 2a concerns the appearance of the office-type ballot, and permits electors to vote only for candidates individually, except for electors for President and Vice-President of the United States who run as a team. The Commission recommends a language change to remove a misleading statement. The section presently reads "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". The sentence could be read to mean that at a party primary or non-partisan election the candidate's party can be more prominent than the candidate's name. The Commission did not believe that this was the intention of the authors of the section, but that the exception had been included because at a party primary or non-partisan election, the political party does not appear on the ballot. The Commission recommends removing the clause excepting party primaries and non-partisan elections to remove the apparent ambiguity. The Commission recommendation also removes reference to the size and darkness of type, because election methods of the future may not use the printed media for balloting.

The Commission notes that, should a prior recommendation for the joint election of Governor and Lieutenant Governor be adopted, Section 2a will have to be amended to enable voters to vote for these two executive officers jointly.

Intent of the Commission

The proposed revision of Article V, Section 2a is intended to afford every candidate, by law, equitable treatment appropriate to the kind of ballot used in his election. The Commission views the removal of an absolute standard of rotation and the substitution of a relative standard as a more flexible and workable approach to achieving fairness in the balloting process — a result deemed desirable by all Commission members.

ARTICLE V

Section 3

Present Constitution

Section 3. Electors, during their attendance at elections, and in going to, and returning therefrom, shall be privileged from arrest, in all cases, except treason, felony, and breach of the peace.

Commission Recommendation

Repeal

Commission Recommendation

The Commission recommends the repeal of Section 3 of Article V.

History and Background of Section

First included in the 1802 Constitution,[1] the electors' privilege from arrest was retained in the 1851 Constitution. The 1912 Constitutional Convention Debates contain no discussion or interpretation of the provision. There is no case law in Ohio interpreting the provision, and information on the limitations of the privilege implied by the exceptions of treason, felony, and breach of the peace is inferred from cases having to do

[1]Constitution of Ohio, 1802, Article IV, Section 3.

ing state interest.[4] Because the terms "idiot" and "insane" are ambiguous, it would be difficult to show how they meet the test for exclusion. In addition, it was suggested that the mentally retarded might qualify as a "suspect class", having certain relevant characteristics from birth, so that the due process clause of the Fourteenth Amendment might present another constitutional barrier to excluding them from exercising a fundamental right.

The Commission desires to preclude any wholesale exclusion from the electoral process on the basis of mental incompetence. The proposed language requires an adjudication of mental incompetence. The Commission also believes that the restoration to competency should restore the right to vote, and this restoration should be guaranteed by the Constitution. Hence, disfranchisement is limited by the words "only during the period of such incompetency."

Intent of the Commission

The Commission recommends the repeal of present Section 6 and enactment of a new Section 5 to fill the section vacated by the repeal of present Section 5 proposed earlier. The language disfranchising persons "adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency", is deemed a sufficient safeguard of the electoral process with less likelihood of excluding persons who should vote than the present prohibition of Section 6 appears to permit. The Commission believes that by placing these procedures under the auspices of the General Assembly, new attitudes regarding mental illness can be implemented and more uniform standards for determination and review will be possible than are provided under the present language.

[3]Minutes of the Ohio Constitutional Revision Commission, June 17, 1974, p. 11.
[4]*Kramer v. Union Free School District No. 15*, supra.

ARTICLE V
Section 7

Present Constitution

Section 7. All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors. Each candidate for such delegate shall state his first and second choices for the presidency, which preferences shall be printed upon the primary ballot below the name of such candidate, but the name of no candidate for the presidency shall be so used without his written authority.

Commission Recommendation

No recommendation.

Commission Recommendation

The Commission has no recommendation with regard to Section 7 at the present time.

History and Background of Section

A provision regarding the selection of delegates to political party conventions first appeared in the Ohio Constitution in 1912. At the 1912 Constitutional Convention, the evils of the convention method of nominating candidates were discussed. Delegates expressed their preference for direct primaries and Theodore Roosevelt, addressing the convention, advocated direct preferential primaries for the election of delegates to national nominating conventions. He referred to the use of the convention

system by "adroit politicians" to thwart the popular will. Suggestions regarding the application of the direct primary included one that officers such as school board members and judges be nominated by petition to remove these offices from politics, and that townships of less than two thousand population not be required to go to the expense of an election for township offices. The Convention proposed Section 7, which has remained unchanged since approved by the voters in 1912. The section requires, concerning presidential nominations, that all delegates to national conventions be chosen by direct vote of the electors. Each candidate for delegate must state his first and second choice for president, which preferences appear on the ballot below the name of the candidate. In addition, the name of no candidate may be used without his written authority.

The listing of the names of all candidates for delegate on the ballot has resulted in the problem of the "bedsheet" ballot, occasionally presenting voters with a sizeable list of candidates, and at times making the use of electronic voting machines impossible in those circumstances. In the primary election in May, 1972, the Democratic Party departed from the earlier tradition of both parties to bring one slate of delegates and alternates before the voters at the party primary, pledged to a "favorite son". Numerous slates of delegates were offered, and when voting machines could not accommodate all of the names, some precincts used paper ballots instead of or in addition to machines. The confusion that occurred led some groups to call for an end to the individual listing of delegates and alternates of each candidate.

The Elections and Suffrage Committee, together with the Assistant Secretary of State studied several proposed solutions for dealing with the "bedsheet ballot" problem. Committee members felt that the Delegates to the 1912 Constitutional Convention wished to offer voters maximum flexibility, but that they did not anticipate the resultant problem of the extremely long and complicated ballot. A consensus developed to eliminate the requirement that delegates be listed individually with their first and second preferences for president, and substitute language whereby the voters would be able to express their wishes by a variety of methods, as provided by law. The proposal stated that the names of candidates for delegate need not be separately identified on the ballot and may be identified in the manner provided by law. The recommendation, however, failed to secure the 2/3 majority necessary for adoption by the Commission.

ARTICLE XVII

Section 1

Present Constitution

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

Commission Recommendation

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

The term of office of all elective county, township, municipal, and school officers shall be such even number of years not exceeding four as may be prescribed by law.

The general assembly may extend existing terms of office so as to effect the purpose of this section.

Commission Recommendation

The Commission recommends the amendment of Section 1 of Article XVII as follows:

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

Bill of Rights and Voting Committee

February 9, 2017

Presenter

Erik J. Engstrom
Professor, Department of Political Science
University of California, Davis

Erik Engstrom is a political scientist specializing in the study of U.S. political institutions, political parties, and American political history. He is the author of *Partisan Gerrymandering and the Construction of American Democracy* (2013, University of Michigan Press) and co-author of *Party Ballots, Reform, and the Transformation of America's Electoral System* (with Samuel Kernell, 2014, Cambridge University Press). His research articles have appeared in leading political science journals, including the *American Political Science Review* and the *American Journal of Political Science*. His research has been supported by the National Science Foundation.

Professor Engstrom will be presenting on "The Politics of Ballot Choice."

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Bill of Rights and Voting Committee

Planning Worksheet
(Through December 2016 Meetings)

Preamble

Preamble							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Article I – Bill of Rights (Select Provisions)

Sec. 1 – Inalienable Rights (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 2 – Right to alter, reform, or abolish government, and repeal special privileges (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd 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. 3 – Right to assemble (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd 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 – Bearing arms; standing armies; military powers (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd 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. 6 – Slavery and involuntary servitude (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Started							

Sec. 7 – Rights of conscience; education; the necessity of religion and knowledge (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 11 – Freedom of speech; of the press; of libels (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 13 – Quartering troops (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Completed	**4.9.15**	**6.11.15**	**6.11.15**	**7.9.15**	**9.10.15**	**10.8.15**	**10.8.15**

Sec. 17 – No hereditary privileges (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Completed	**4.9.15**	**6.11.15**	**6.11.15**	**7.9.15**	**9.10.15**	**10.8.15**	**10.8.15**

Sec. 18 – Suspension of laws (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 19 – Eminent domain (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 19b – Protect private property rights in ground water, lakes, and other watercourses (2008)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 20 – Powers reserved to the people (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd 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. 21 – Preservation of the freedom to choose health care and health care coverage (2011)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Article V – Elective Franchise

Sec. 1 – Qualifications of an Elector (1851, am. 1923, 1957, 1970, 1976, 1977)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 2 – By ballot (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 2a – Names of candidates on ballot (1949, am. 1975, 1976)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 4 – Exclusion from franchise for felony conviction (1851, am. 1976)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd 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 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd 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 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 8 – Term limits for U.S. senators and representatives (1992)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Transferred to Legislative Branch and Executive Branch Committee							

Sec. 9 – Eligibility of officeholders (1992)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Transferred to Legislative Branch and Executive Branch Committee							

Article XVII – Elections

Sec. 1 – Time for holding elections; terms of office (1905, am. 1954, 1976)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 2 – Filling vacancies in certain elective offices (1905, am. 1947, 1954, 1970, 1976)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2017 Meeting Dates

March 9

April 13

May 11

June 8

July 13

August 10

September 14

October 12

November 9

December 14