



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Bill of Rights and Voting Committee

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

May 11, 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

Rep. Jonathan Dever

Justice Patrick Fischer

Mr. Edward Gilbert

Sen. Bob Peterson

Sen. Michael Skindell



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

BILL OF RIGHTS AND VOTING COMMITTEE

THURSDAY, MAY 11, 2017
11:00 A.M.
OHIO STATEHOUSE ROOM 017

AGENDA

- I. Call to Order
- II. Roll Call
- III. Approval of Minutes
 - Meeting of March 9, 2017
 - [Draft Minutes – attached]*
- IV. Report and Recommendation
 - Article V, Section 2 (Election by Ballot)
 - Presentation of Report and Recommendation
 - Public Comment
 - Discussion
 - **Possible Action Item: Consideration and Adoption**
 - [Report and recommendation – attached]*
- V. Next Steps
 - The committee chair will lead discussion regarding the committee's informal recommendations for the sections remaining for review.
 - [Memorandum by Shari L. O'Neill titled "Status of Review of Remaining Sections Assigned to the Committee" – attached]*

[Planning Worksheet – attached]

VI. Old Business

VII. New Business

VIII. Public Comment

IX. Adjourn



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 9, 2017

Call to Order:

Chair Richard Saphire called the meeting to order at 9:39 a.m.

Members Present:

A quorum was present with Chair Saphire, Vice-chair Jacobson, and committee members Bell, Clyde, Cole, Gilbert, Peterson, and Skindell in attendance. At the invitation of the chair, Representative Jonathan Dever participated as an ex officio non-voting member of the committee.

Approval of Minutes:

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

Reports and Recommendations:

Article V, Section 2 (Elections by Ballot)

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

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

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

Chair Sapphire asked the committee for any comments or discussion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion:

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

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

Chair Sapphire said he concurs with that position.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Adjournment:

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

Approval:

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

Richard B. Saphire, Chair

Jeff Jacobson, Vice-chair

This page intentionally left blank.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE V, SECTION 2

ELECTION BY BALLOT

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

Recommendation

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

Background

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 2 reads as follows:

All elections shall be by ballot.

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

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

Secrecy of the ballot was the most important feature of the Australian ballot, and prior to its adoption Americans used to vote with ballots provided them by political parties, with their

voices (*viva voce*), with their hands, or with their feet.³ Of the many variants of the Australian ballot, in 1891 Ohio chose the party column format, which stayed in place throughout the first half of the 20th century.^{4 5}

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

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

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

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

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

Amendments, Proposed Amendments, and Other Review

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

Litigation Involving the Provision

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

Presentations and Resources Considered

Engstrom Presentation

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

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

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

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

Discussion and Consideration

In considering Article V, Section 2, some committee members expressed that embedding the concept of a secret ballot in the state’s foundational document would emphasize the importance of protecting the integrity of the voting process by emphasizing the need for ballots to be secret. Initially, committee members sought to add the word “secret” to Section 2 on the basis that the recommendation would merely constitutionalize a concept that is already accepted under case law.

However, after further consideration, a majority of the committee concluded that, because the requirement is well-established and has been recognized by the Supreme Court of Ohio since the 1920s, it may not be necessary to add the word “secret” to Section 2.

In reaching this conclusion, committee members commented that adding the word “secret” could be interpreted as indicating a greater level of secrecy than is already understood to be the case, potentially permitting an argument that absentee ballots are not appropriate. Other members similarly cautioned that a change could have unintended consequences, such as potentially affecting issues surrounding voter coercion and voter fraud. In the absence of evidence that problems have arisen due to the lack of a provision expressly requiring ballots to be secret, committee members were reluctant to recommend a constitutional change. Ultimately, the committee’s consensus was to leave the section in its present form.

Conclusion

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

Date Issued

After considering this report and recommendation on March 9, 2017 and May 11, 2017, the Bill of Rights and Voting Committee voted to issue this report and recommendation on May 11, 2017.

Endnotes

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

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

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

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

Some states line candidates in party columns while others list candidates by office. Some states provide for party emblems at the top of the ballot. Others provide a box at the top of the ballot allowing voters to simply cast a straight ticket with one check mark. Moreover, states have varied in how long they have stuck with one type of ballot.

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

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

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

⁷ *Id.*

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

⁹ The Court stated:

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

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

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

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

This page intentionally left blank.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: Chair Richard Saphire, Vice-chair Jeff Jacobson, and
Members of the Bill of Rights and Voting Committee

FROM: Shari L. O'Neill, Interim Executive Director and
Counsel to the Commission

DATE: May 11, 2017

RE: Status of Review on Remaining Sections Assigned to the Committee

For the committee's convenience, staff is providing a brief memorandum describing the status of the committee's work on the remaining sections assigned for review.

Article I Bill of Rights

Preamble

The committee has not reviewed the Preamble.

Section 1 (Inalienable Rights)

The committee has not reviewed this section.

Section 6 (Slavery and Involuntary Servitude)

In March 2016, the committee considered a draft report and recommendation on this section. The committee heard a presentation by Representative Emilia Sykes related to a proposal to remove the portion of the provision that permits involuntary servitude as punishment for crime. The committee considered whether to address that question in conjunction with the Legislative Branch and Executive Branch Committee in relation to Article II, Section 41, relating to prison labor.

Section 7 (Rights of Conscience; Education; Religion)

The committee has not reviewed this section.

Section 11 (Freedom of Speech; Press)

The committee has not reviewed this section.

Section 18 (Suspension of Laws)

The committee has not reviewed this section.

Section 19 (Eminent Domain)

The committee has not reviewed this section.

Section 19(b) (Private Property Rights in Groundwater, Lakes, Watercourses)

The committee has not reviewed this section.

Section 21 (Freedom to Choose Healthcare)

The committee has not reviewed this section.

Article V Elective Franchise*Section 1 (Qualifications of an Elector)*

The committee received a memorandum on this section, but agreed to postpone consideration of the issues raised by the section until July 2017.

Section 7 (Primary Elections)

The committee discussed this section in 2014. The following are two excerpts from the committee's discussion at that time:

The Committee next considered Article V, Section 7 of the Ohio Constitution, pertaining to "Primary Elections." With respect to this provision, the Committee took the following action:

- The Committee voted to delete the following language from the first sentence of this Provision: "*and provision shall be made by law for a preferential vote for the United States Senator,*". The Committee concluded that this language

was rendered superfluous by the adoption of the Seventeenth Amendment of the United States Constitution, after which United States Senators were chosen by direct election of the people of Ohio.

- The Committee considered the question whether the first sentence of the provision should be amended to include nominations to *federal* office among the nominations that “shall be made by direct primary or elections or by petition as provided by law.” Members of the Committee could see no apparent reason for not recommending such an amendment, but took no vote on this issue. This matter will be referred to the Commission’s counsel for further research and consideration.

- The Committee next resumed discussion from its May meeting of the provision’s requirement that all nominations for elective state, district, county and municipal offices “shall be made at direct primary elections or by petition as provided by law....” In light of relevant court decisions, the Committee believed that further study was necessary to determine the proper meaning of the requirement that certain nominations for elective office be made by primary and others through “petition as provided by law.” The Committee decided to refer this matter to the Commission’s counsel for further research and consideration.

- Finally, the Committee considered the last two sentences in Article V, Section 7, pertaining to the selection of delegates to national political conventions. While Committee members expressed no concerns with respect to the substance of these sentences, there was discussion about whether the use of the male pronoun (“his”) in the last sentence to describe the delegate to which the sentence refers was appropriate, and whether the sentence could be modified to delete that use. The Chair agreed to inquire whether the Commission had already undertaken a process to address the Constitution’s use of gendered pronouns.”

Finally, the Committee began its consideration of Article V, Section 7. The Committee discussed recent court decisions interpreting the provision’s requirement that “[a]ll nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law....” First, the Committee discussed whether the provision should be changed so that it explicitly applied to “federal” as well as state offices. Second, the Committee discussed whether the second major clause of the provision, pertaining to “a preferential vote for United States senator” was obsolete and should therefore be deleted. And finally, the Committee believed that further study was necessary to determine the proper meaning of the requirement that certain nominations for elective office be made by primary and

others through “petition as provided by law.” The Committee agreed that the Chair should contact the Ohio Secretary of State’s and Attorney General’s offices, as well as others, to solicit additional views on these questions.

In addition, the committee recently received a memorandum and discussed Section 7 at its March 2017 meeting.

Article XVII Elections

Section 1 (Time for Holding Elections)

The committee has not reviewed this section.

Section 2 (Filling Vacancies in Certain Elective Offices)

The committee has not reviewed this section.

Privacy

At the request of one of its members, the committee agreed to review the issue of privacy. The committee received a memorandum on this issue in May 2016. However, the committee has not had the opportunity to address the issue.

Bill of Rights and Voting Committee

Planning Worksheet (Through April 2017 Meetings)

Preamble

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

Article I – Bill of Rights (Select Provisions)

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

Sec. 2 – Right to alter, reform, or abolish government, and repeal special privileges (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	12.11.14	2.12.15	2.12.15	3.12.15	4.9.15	6.11.15	6.11.15

Sec. 20 – Powers reserved to the people (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	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 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Article V – Elective Franchise

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

Sec. 2 – By ballot (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	3.9.17						

Sec. 2a – Names of candidates on ballot (1949, am. 1975, 1976)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	3.9.17	N/A	3.9.17	3.9.17	3.9.17	N/A	4.13.17

Sec. 4 – Exclusion from franchise for felony conviction (1851, am. 1976)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	11.12.15	N/A	11.12.15	12.10.15	12.10.15	1.14.16	1.14.16

Sec. 6 – Idiots or insane persons (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	9.10.15	11.12.15	3.11.16	4.14.16	4.14.16	5.12.16	

Sec. 7 – Primary elections (1912, am. 1975)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

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

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

This page intentionally left blank.

This page intentionally left blank.

This page intentionally left blank.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2017 Meeting Dates

June 8

July 13

August 10

September 14

October 12

November 9

December 14