



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD  
THURSDAY, FEBRUARY 9, 2017

#### **Call to Order:**

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

#### **Members Present:**

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

#### **Approval of Minutes:**

The minutes of the December 15, 2016 meeting of the committee were approved.

#### **Presentations and Discussion:**

Chair Saphire began the meeting by indicating that Article V, Section 2, regarding elections by ballot, Section 2a, relating to names on the ballot, and Section 7, relating to primary elections, briefly had been considered by the committee in June and July of 2014. He said the committee voted to recommend retaining Sections 2 and 2a in their current form; however, this was prior to the Commission having staff or formal procedures for reporting committee recommendations. He said the committee took no action regarding Section 7.

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

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

*Matthew Damschroder*

*Deputy Assistant Secretary of State and Director of Elections*

*Office of the Secretary of State*

*“The Order of Candidate Names on the Ballot”*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms. Bell commented that, as a poll observer in the last election, she was distressed by the lack of information poll workers had. She stated that poll workers were unfamiliar with even the state-issued easy guide for poll workers. She stated that it seemed as if no one had walked through the process with the poll workers and that no one seemed to know what the procedures were.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Adjournment:**

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

**Approval:**

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

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

/s/ Jeff Jacobson  
Jeff Jacobson, Vice-chair