MINUTES

ELECTIONS COMMITTEE
MARCH 9, 1977

Members Present: Chairman Mann
Mr. Sena
Mr. Chaney
Mr. Goodman
Mr. Horn
Mr. Kosinski (late)
Mrs. Wagner

Members Absent: None

Chairman Mann called the meeting to order at 5:10 p.m. He informed the committee that there would be no testimony but action would be taken on AB 136, AB 158 and AB 159.

AB 158: Removes voting machine provisions from NRS.

Mr. Mann explained that there had been one amendment added to this bill at the last meeting on March 2, 1977 amending Page 3, Section 6, line 3 by deleting the word "five" and inserting "at least three (3)." He said he had received a letter from Stan Colton of the Voters Registrars Office pertaining to Page 7, lines 1 - 3, which read in part: "...by deleting the words, 'in any precinct or district in which ballots are used.' Ballots by inference in this section are paper ballots. All ballots countywide, used or unused, would have to be accounted for before any counting of votes could commence. This section was originally established for paper ballot precincts where the votes are actually counted at the precinct, and therefore the counting of used and unused ballots could be done in a matter of minutes. The wording of this section now would require that all ballots countywide could not be counted until all ballots used or unused are accounted for. This would create a delay that could range as high as five or six hours before any votes could be counted." After discussion the committee felt that this change should be checked with David Howard, Chief Deputy Secretary of State, and decided to hold the bill until such time.

AB 159: Removes limitations on political candidates' campaign expenditures.

Assembly

Chairman Mann stated that all this bill did was to put the law back to the constitutional status that it had prior to legislation enacted

two years ago that was overtunred by the courts. Mrs. Wagner stated she had been concerned about the bracketing out of three sections of NRS on line 11, page 2, which dealt with filing of reports afterwards but had checked further and found this covered well enough in other NRS sections. Mr. Chaney moved a DO PASS on AB 159, seconded by Mr. Sena. Chairman Mann, Mr. Sena, Mr. Chaney and Mr. Horn voted yes, Mr. Goodman voted no, and Mrs. Wagner abstained. The motion was carried four to one. Mr. Mann will speak to this bill on the floor.

AB 136: Requires state or counties to pay cost of election recount if demanding candidate prevails.

Chairman Mann said there had been no adverse testimony on this bill. Mrs. Wagner moved a DO PASS on AB 136, seconded by Mr. Horn and unanimously carried by the committee present. Mr. Mann asked Mr. Horn to speak to this bill on the floor.

AB 132: Establishes a system of random arrangement for candidates' names on ballots.

Mr. Horn read his report on AB 132 which cited several cases in other states, stated nine reasons why Nevada did not directly relate to these cases, and gave his recommendations to the committee. This report is attached as Exhibit A and herewith made a part of this record. On page 13 of this report Mr. Horn refered to page 10 of the Nevada State Election Laws Bulletin No. 77-18 which is attached as Exhibit B and herewith made a part of this record.

Chairman Mann asked that copies of page 13 of Mr. Horn's report and of page 10 of the Nevada State Election Laws Bulletin No. 77-18 be sent to Speaker Dini and Assemblyman Demers. He then commended Mr. Horn for his time and effort and for his excellent report.

The meeting was adjourned at 6:05 p.m.

Respectfully submitted,

Patricia Hatch

Patricia Hatch, Assembly Attache

59TH NEVADA LEGISLATURE

ELECTIONS COMMITTEE
LEGISLATIVE ACTION

DATE MARCH 9, 1977

SUBJECT AB 159: Removes limitations on political candidates' campaign expenditures.

MOTION: DO PASS

Do Pass ___ Amend ___ Indefinitely Postpone ___ Reconsider ___

Moved by Mr. Chaney Seconded By Mr. Sena

AMENDMENT _____

Moved By _____ Seconded By _____

AMENDMENT _____

Moved By _____ Seconded By _____

	MOTION		AMEND		AMEND	
VOTE:	Yes	No	Yes	No	Yes	No
MANN	X					
SENA	X					
CHANEY	X					
GOODMAN		X				
HORN	X					
KOSINSKI						
WAGNER	ABSTAINED					

TALLY: 4 1

Original Motion: Passed X Defeated ___ Withdrawn ___

Amended & Passed _____ Amended & Defeated _____

Amended & Passed _____ Amended & Defeated _____

Attach to Minutes March 9, 1977
Date

59TH NEVADA LEGISLATURE

ELECTIONS COMMITTEE
LEGISLATIVE ACTION

DATE MARCH 9, 1977

SUBJECT AB 136: Requires state or counties to pay cost of election recount if demanding candidate prevails.

MOTION: DO PASS

Do Pass X Amend ___ Indefinitely Postpone ___ Reconsider ___

Moved by Mrs. Wagner Seconded By Mr. Horn

AMENDMENT _____

Moved By _____ Seconded By _____

AMENDMENT _____

Moved By _____ Seconded By _____

	MOTION		AMEND		AMEND	
VOTE:	Yes	No	Yes	No	Yes	No
MANN	___	___	___	___	___	___
SENA	___	___	___	___	___	___
CHANEY	___	___	___	___	___	___
GOODMAN	___	___	___	___	___	___
HORN	___	___	___	___	___	___
KOSINSKI	___	___	___	___	___	___
WAGNER	___	___	___	___	___	___

TALLY: CARRIED UNANIMOUSLY

Original Motion: Passed X Defeated ___ Withdrawn ___

Amended & Passed _____ Amended & Defeated _____

Amended & Passed _____ Amended & Defeated _____

Attach to Minutes March 9, 1977 Assembly
Date

EXHIBIT A

A Report on AB 132

for

The Assembly Committee on Elections

The Subcommittee having examined numerous materials and information, will attempt to summarize the various points of view while outlining the problem, and finally making a recommendation.

Almost all candidates believe that with all other things being equal they will increase their vote tally if they are alphabetically listed first on the ballot.

This notion in and of itself raises several questions; however, beyond these questions a careful look at the political party of the candidate or his ideological position may be in and of itself the prime factors for some voters. In strong Democratic or Republican districts, just the fact that you belong to the major party is enough to ensure victory regardless of what letter your surname begins with. The same can hold true in strong labor districts or management districts or conservative districts or liberal districts. These factors can be the primary reason for victory or defeat regardless of your name or position on the ballot. The same holds true for your race, color, religion, sex or creed, and to deny these factors would be to discount reality. The political party name which appears on the ballot along side the candidates name is a discriminating variable just by its presence on the ballot and its impact can be monumental.

In other races it may be name recognition, the candidates

appearance, choice of colors used in campaign literature and style or type of printing, as well as, the candidates financial support to reinforce the name identification or create an image, the background or family name, incumbency, visibility of the office and campaign publicity instead of his surname or ballot position, will be the determining factors in the election.

Now for a moment if we were to ignore all of these variables and consider the candidates to be equal, and assume the absence of minimal information, how then does the voter make the choice?

The two most frequent areas for analysis center around "alphabetical order" and "position on the ballot." It is very difficult to get a pure study because of all of the other variables or reasons that a voter could select a candidate, but for argument sake lets assume we can. The studies and court cases that were researched show conflicting results, but most feel that it is the ballot position and not the alphabetical order that is the major factor in accounting for difference in ballot races. However, this conclusion was overshadowed when Prof. Delbert Taebel from the University of Texas pointed out in his study such factors as the overall ballot size, the position of a particular race on the overall ballot, the number of name identification scores of the candidate and the number of candidates, all of which have an impact on the results of any study. Prof. Taebel in his study validates the hypothesis that the first place ballot position is especially important in those races with unknown candidates. He doesn't, however, attempt to define unknown or separate it into degrees of knowness. Taebel points further the importance of the first ballot position in minor importance races

and adds that, "even though the data might indicate irrational behavior of voters, it also suggests that our sample voters exercised some degree of rationality by opting not to vote at all for unknown candidates."

In summary, Prof. Taebel's data tends to support the proposition that ballot placement of candidates is an important structural feature in accounting for voting patterns and that it is especially critical in election contests in which the candidates are relatively unknown.[1]

The British Study conducted by Upton and Brook sought to examine positional bias in the outcome of an election. Their conclusion was that while the actual additional votes garnered by being first on the ballot may be small even where the impact is greatest (3 per cent in the election of with the lowest profile, Greates London Council Elections), where the impact on the outcome of the election is significant in these low profile races. However, in their study of much higher profile general elections of 1964, the British researchers were unable to conclude that ballot position affected election results at all.[2]

Both of the studies point to the idea that the lower the position of the race on the ballot, the greater the advantage of first-listed candidates. The higher the position or profile of the race, the more difficult it is to draw any conclusions.

The California Study which delt with the California Ballot Position Statutes and was published in the Southern California Law Review was the first of many that were examined that highlights the point that it probably is not the alphabet which determines the

allocation of the donkey vote, but rather the slight preference for candidates listed first on the ballot. This is reinforced by the fact that at the time of this study, California used a rotational ballot method, except that incumbents were always listed first. Again, this study supported the previous two studies in which the first position factor was especially important in low profile races.[3]

In the California court case of Gould vs Grubb, it is well to note that this case dealt with the incumbent's advantage of being first on the ballot.

The letter directed to Assemblyman Mann stated that the traditional placement of candidates' names alphabetically on the election ballots was ruled unconstitutional. This was supported by the State Election Laws Bulletin No. 77-18, which said the same thing; however, a careful and detailed study of the court case will show both of these statements missed the entire point of the case. Gould vs Grubb dealt with the "incumbent first" and was not directed toward alphabetical listing. The court ruled that the incumbent being first on the ballot was unconstitutional. This court case, the California study, the British study and Taebel's study are all harmonous because they show that it is not the alphabetical listing but the first position on the ballot that adds the advantage. In the case of Gould vs Grubb the advantage went to the incumbent because he was always listed first. The entire case was directed to this issue and not to the alphabetical listing. Similar court cases dealing with an "incumbent first" election ballot procedure were: Mexican-American Political Association vs Brown, and Diamond vs Allison. The court concluded that the alleged ballot position

advantage was not a fact properly the subject of judicial notice. They felt that they were matters for the legislature and not the courts. The city of Santa Monica argued in the Grubb case that the expert testimony established at most only that a ballot position preference pertains to low visibility elections and that no competent evidence demonstrated that the forthcoming city council election fell into that category. The city's objection didn't prevail; however, had the incumbent not have been listed first, the city's reasoning would have been logically sound.

Following a 4 day trial at which both parties introduced considerable expert testimony on the question of whether or not a candidate gained any significant advantage by virtue of a top ballot position, the trial court rendered a formal finding that such "ballot positional" advantage did infact exist, both "in general, and also with respect to the April 10, 1973, election" for the Santa Monica City Council. Concluding that the city had demonstrated neither a rational basis nor any compelling state or city interest to justify the priority placement granted incumbents, the court held that the ballot procedure at issue violated the equal protection clause of both the state and federal constitutions because the placing of the incumbent first admitted that an advantage of being first did exist; therefore no nonincumbent could have this same advantage. This violated his equal rights.

The city contends that in placing all incumbents on top of the ballot, the election provision facilitates efficient, unconfused voting, in this regard, the city asserts that in most elections the principal decision for most voters is deciding whether to vote for

or against the incumbent's name at the head of the ballot permits the voters to isolate this candidate quickly and without confusion.

In addition to the question of the validity of the "incumbent first" ballot procedure, the instant case also presents the issue of the constitutional permissibility of an "alphabetical order" ballot listing procedure. The trial court rendered no explicit findings of fact or conclusions of law on this issue. (see page 1346 section 9)[4]

Arizona by the very nature of its state law is discriminatory as pointed out in Kautenburger vs Jackson. First the legislature enacted section 16-533 which required alternation on paper ballots. No other reason exists for the statute except that otherwise there would result disadvantage to some candidates. The Arizona legislature in admitting that there is some advantage to being first on the ballot inacted A.R.S. 16-533 which alternates the name of primary candidates so that each candidate shall appear substantially an equal number of times at the top, bottom and intermediate places on the list of candidates in which he belongs. Any variation from this rotation method would be ruled unconstitutional. The A.R.S. admits an advantage to the top ballot position therefore creating discrimination and privileges for other candidates listed first on the ballot.

Second, ARS in section 16-796, subsection "C" provides "the provisions of this section shall not apply where voting machines are used." Section 16-796 provides "In a primary election where voting machines are used the names of candidates for any particular office shall appear on the voting machine in alphabetical order

according to the first letter of the surnames of the candidates."

Under the law which was enacted in this statute any order other than rotation is unconstitutional whether it be alphabetical or alternating alphabetical or reverse alphabetical. These orders would not allow equality to all citizens because of the way the law is written. So Judge Robert S. Tullar's decision came as no real surprise when he declared this section unconstitutional and directing the names of candidates to be rotated on the voting machine on the most practicable and fair way possible.

Appellant contends that the method by which names of candidates are placed upon the ballot is a matter of legislative and not judicial concern and the court should not interfere. Conceding it is a legislative matter; the court is concerned and will interfere in the event the method prescribed by the legislature unconstitutionally discriminates in favor of one candidate against another.

In Gould vs Grubb the incumbent was listed first and this was ruled unconstitutional and in the case of Kautenburger vs Jackson the state had enacted legislation requiring rotation and as in Gould vs Grubb admitting "first ballot position" advantage. The Arizona case had conflicting laws which were ruled unconstitutional. After considerable research it is difficult for me to see a direct relationship between these cases and Nevada for 9 reasons:

1) Nevada's Revised Statutes do not discriminate by allowing the incumbents name to be first on the ballot, as was the case in California. Nor has Nevada admitted by law that the first position is an advantageous position on the ballot, thus discriminating against those who may not be first.

2) Nevada's Revised Statutes do not contradict each other as did Arizona's and require both rotation and alphabetical order when using a voting machine. The A.R.S. admits ballot preference in their laws and requires rotation. Anything contradicting this would violate equal rights and be ruled unconstitutional.

3) "First Ballot Position" and not alphabetical order is the assumed advantage. If Nevada assumes this to be true, AB 132 which requires "lots be drawn" does not alter the discrimination because whether by "lot" or by alphabet, someone would still be first on the ballot. Rearranging the sequence or name order does not solve the assumed "first ballot position" advantage, nor is it a fairer or less discriminatory approach.

Our own Legislative Research Department recognized this problem in a page memo to me dated March 1, 1977, which asked, "If the problem is that being first on the ballot in Nevada may favor candidates with names beginning with letters earlier in the alphabet than their opponents, is AB 132 a solution?" "... It (AB 132) simply rearranges the bias according to whichever letter of the alphabet is chosen for the first slot."

I concure with our Legislative Research Dept. that the "lot drawing method" is not the answer.

4) Would the alphabetical listing be ruled constitutional in Nevada if it were taken to court on its own merits and not clouded with major discriminations as in the cases in Arizona and California? It would be very difficult to prove discrimination in Nevada without examining such factors as the significance of alphabetical distribution of the general population of Nevada as a whole, then match

these with the registered voters in Nevada, then pairing it with voters and population and the candidates in a given district, as well as all of the other voter variables. The alphabetical case would have to prove that it is discriminatory against something, and if it is only the "first ballot position" that seems to be advantageous, you must then also show that the candidate could never be first on the ballot or in some other way has been discriminated against. Nevada does not have the same discriminatory election laws that both California and Arizona had, so it becomes tougher still to prove a case of alphabetical discrimination.

On August 16, 1976 in Las Vegas, Nevada, District Judge Michael J. Wendell in the case of Mike Schaefer vs Stanton Colton, case No. A157351 dismissed the motion "finding no factual basis to make that conslusion."

The record of telephone conversation on ballot order with voter registrar Stan Colton and Mary Lou Cooper as transcribed by Mrs. Cooper on March 7, 1977 :

Mary Lou Cooper: What kinds of things did you present to the court in Schaefer v. Colton that convinced the court that being first on the ballot was not preferential or discriminatory?

Stan Colton: We took a look into some elections for the past 10 years. In particular, we looked at the Justice of the Peace race where a lot of candidates file. There appeared that in this part of the country, there was no distinct advantage to being on the top of the ballot.

Mary Lou Cooper: These were primary races?

Stan Colton: Primary races. In general elections there are only a few names on the ballot so the order makes little difference.

We looked also at the 1974 Public Administrator primary race. There were 24 Democratic candidates. The man who won was in second position on the ballot. The second highest vote getter was in the middle. Third highest was next to the the last on the ballot.

I found no indication on that list of candidates that anyone had a distinct advantage by being at the top of the ballot.

Mary Lou Cooper: What is your opinion of randomized listing of candidates as opposed to alphabetical listing?

Stan Colton: If we randomize, the problem is that everyone will be going into the voting booth and finding candidates not in alphabetical order. They are accustomed to looking for alphabetical listings. They will have a difficult time locating that individual so it will also take up additional time. It will take at least one-third longer to vote. We would then have to increase the amount of voting units by approximately one-third.

We can handle the randomized ballot system but it is going to cause some problems. I don't think Nevada is at the point that the guy at the top has an advantage. Voters know their candidates better in Nevada than voters in states with larger populations.

In the Nevada Assembly in 1977 and 1969 it contained 22 Assemblyman with their surnames beginning with the letters A - L and 18 surnames beginning with the letters M - Z. Both the A - L per cent was 57.5% and the M - Z was 42.5%. The reason that these two sessions were selected was that one occurred when the Republicans were in power and the other when the Democrats were, and yet there is no difference in percentage between the two and little significance in the 22 to 18 breakdown.

5) The impact on the outcome of the election is significant only in the low profile races as pointed out in both the Taebel and British studies. In the British researcher's study of high profile

races they were unable to conclude that ballot position affected election results at all.

In the Irish Study by Robson and Walsh their results contradicted the British study. The major finding of this study is that candidates, particularly nonincumbents, receive an advantage if they are alphabetically first among their party's candidates. The researchers then point out that the alphabetical distribution of names of members of their house of representatives varies significantly from the population as a whole. Their house is overrepresented by politicians with names beginning with A - L. This, however, is not the case in the Nevada Assembly but is the case currently in the Nevada Senate (13 - 7) again, pointing out conflicts in hypotheses.[5]

6) The ballot is a matter of legislative and not judicial concern and court shall not interfere. Conceding it is a legislative matter, as in both the Arizona and California court cases, the court is concerned and will interfere in the event the method prescribed by the legislature unconstitutionally discriminates in favor of one candidate against another. The Nevada District Court did not interfere in the last election and in the case of Schaefer vs Colton it dismissed the motion.

7) Applying the so-called "first on the ballot position advantage" and the alphabetical advantage to the last (November 1976) general election for the 40 Assembly seats, we find only 15 of those who won were also first on the ballot out of 40 while 25 were not. It is well to note, however, that Weise, Wagner, May and Howard had no opponents, but it is also safe to assume based on Alphasequence that 3 of the 4, and maybe 4 of the 4, wouldn't have been

first on the ballot had they had an opponent.

In the 31 primary Assembly races examined for the same year 10 of the eventual winners were first on the ballot where 21 of the eventual winners were as high as second on the ballot or as low as fifth (both Assembly 8 and 10 districts) with others being fourth of 4, or fourth of 5, or fourth of 7 in the ballot order, and yet were still able to win.

Using these studies to examine and to prove a case of constitutional discrimination in favor of "first ballot position or alphabetical order" in Nevada would not only frustrate the researcher, but lead him to believe that first on the ballot could be a determent to winning.

8) All of the variables listed at the beginning of this report must be taken into consideration in any constitution court case and will further cloud the discrimination issue.

9) The letter from the Secretary of States office which I hope was based on the Nevada State Election Laws Bulletin No. 77-18 is tainted because of the report and the report in and of itself is misleading. The report uses the Arizona and California cases to support their position of alphabetical discrimination. My report supports another position. Their report on page 10 supports the position of a lottery system for determining position. To support this they use the case of Gould vs Grubb and quote from that case. I might add that case ruled that incumbents first and alphabetical order on the ballot was unconstitutional. Please now read their quote on page 10 of that report and note the two spots that words were omitted. I suggest they were omitted intentionally to support this bulletin's

position for if the entire quote were left in, it would contradict their position and the court's eventual ruling. Had the bulletin contained the entire quote, it would have said, "Although a lottery system for determining ballot position may strike some as whimsical or capricious, such a system, unlike an incumbent first or alphabetical order scheme, does not continually work a disadvantage upon a fixed class of candidates; all candidates are at least afforded an equal opporutnity to obtain the preferential ballot position" (122 cal. Rptn. at 387). Depending on who files against you in Nevada you may be listed first on the ballot; however this quote, taken out of context is used to support the "incumbent first discrimination position" which does not apply in Nevada and yet in the Bulletin it is used to support the lottery system and oppose the alphabetical order system by omitting key words like whimsical which is used to describe the lottery method and incumbent first which is the reason the alphabetical order was ruled unconstitutional. I suggest a careful examination of similar reports before using them to support any position in the future.

Recommendations

If the legislature is to do anything at all, which I question the necessity based on this research, I would definitely suggest not using the lottery system. The Legislative Research Dept. and this study support not using that system. I am convinced, based on this study, that the alphabetical order currently used under Nevada law does not present a current constitutional question; however should the legislature seek another method of listing candidates on the

ballot, the best alternative found would be the "system of ballot rotation." That is where each candidate is listed in a different position on the ballot on an equal per cent of the total ballots cast; thus, for example, if there are 3 candidates, each candidate appears in the top position on one-third of the ballots, each appears in the middle position on one-third of the ballots, and each appears last on one-third of the ballots.

Respectfully submitted,

Assemblyman Nick J. Horn
March 8, 1977

FOOTNOTES

1. Delbert A. Taebel, "The Effect of Ballot Position on Electoral Success" American Journal of Political Science, Vol. XIX, No. 13. pp. 519-526.

2. J. G. Upton and D. Brooks, "The Importance of Positional Voting Bias in British Elections" Political Studies, Vol. 22, pp. 178-190.

3. "California Ballot Posision Statutes: An Unconstitutional Advantage to Incumbents," Southern California Law Review, Vol. 45, pp. 365-395.

4. Gould v. Grubb, 536 Pacific Reporter, 2nd Series Cal. pp. 1337-1348 (Cal. 1975).

5. Christoper Robson and Brendan Walsh, "The Importance of Positional Voting Bias in the Irish General Election of 1973," Political Studies, Vol. 22, pp. 191-203.

ballot procedure. Although a lottery system for determining ballot position may strike some as * * * 'capricious,' such a system, unlike an * * * 'alphabetical order' scheme, does not continually work a disadvantage upon a fixed class of candidates; all candidates are at least afforded an equal opportunity to obtain the preferential ballot position. There may well be other nondiscriminatory means for determining ballot placement. It is for the appropriate legislative body, and not this court, to choose between such constitutionally acceptable alternatives." (122 Cal. Rptr. at 387.)

California Elections Code § 10217 now provides for a system of drawings to establish "randomized alphabets." The section also provides for the automatic rotation of the position of candidates' names among the California assembly or supervisorial districts.

It is proposed that a random method of arranging candidates' names be adopted for Nevada. To change from the conventional to the random method, a new section must be added to NRS. The five existing sections which require the conventional manner of listing must be appropriately amended. The new section would require the secretary of state to make a single, public drawing of the letters of the alphabet on the day after the close of filing for candidates in each even-numbered year. The resulting random order of letters would be used for determining the order of candidates' names for state and local offices, including city offices, in all elections to be conducted during the ensuing biennium.

The employment of the random arrangement would be similar to that of the conventional alphabet. The random arrangement would be applied first to the initial letter and then if necessary to the second and succeeding letters of the name. After each drawing the secretary of state would furnish a copy of the current random arrangement to the county clerks or registrars of voters in time for the preparation of ballots.

Proposed legislation to accomplish a change to the method of random arrangement is attached as Exhibit C.