OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
CONSTITUTIONAL REVISION AND UPDATING COMMITTEE

FOR THE MEETING HELD
THURSDAY, JANUARY 14, 2016

Call to Order:

Chair Dennis Mulvihill called the meeting of the Constitutional Revision and Updating Committee to order at 1:04 p.m.

Members Present:

A quorum was present with Chair Mulvihill, and committee members Abaray, Beckett, Cupp, Jordan, Readler, Sykes, and Wagoner in attendance.

Approval of Minutes:

The minutes of the November 12, 2015 meeting of the committee were approved.

Discussion:

Chair Mulvihill began the meeting by describing that, at its last meeting, the committee had been discussing the supplemental petition in Article II with regard to initiated statutes. He said the committee asked staff, and then the Legislative Service Commission ("LSC") through Senator Larry Obhof, a former member of the committee, to draft changes to the initiated statute provisions that will be used as part of the committee's ongoing discussion. He said key changes include an increase in the percentage of electors needed on the initial petition from three percent to five percent, the elimination of the supplemental petition, and the provision of a "safe harbor" from legislative repeal of an initiated statute.

Chair Mulvihill said LSC provided the committee with four different versions. He said he picked out the one that he thinks reflects the committees' wishes, which is the draft numbered "LR 131 0172-1." Chair Mulvihill said the committee would use that version as a working model, and asked the committee to take a few minutes to review the draft before commencing discussion.

Chair Mulvihill indicated that his thought is to discuss the draft and have interested parties provide their perspective on the changes under consideration. He also invited staff to participate in the discussion.

Committee member Mark Wagoner drew attention to lines 160-62 of the draft, dealing with the publication issue. He said, as technology changes, that topic may be one for the committee to explore. Chair Mulvihill agreed, saying this topic was raised at a previous meeting.

Committee member Janet Abaray noted that the draft proposal mentions amendment of the constitution, rather than simply dealing with statutory changes. She wondered why that is, if the committee had only intended to deal with the statutory initiative at this time. Chair Mulvihill explained that all of the initiative and referendum sections are interconnected, and he is not sure how the committee can parse them out. He explained that, in the LSC draft, anything underlined is new language.

Ms. Abaray asked about geographic distribution, wondering if there was a proposal to change that provision. Chair Mulvihill said that topic was not part of what was requested for this draft proposal.

Ms. Abaray asked whether there needed to be a definition of what would constitute an amendment, wondering whether, for the General Assembly to adopt an amendment as described in the provision, it would have to adopt language that was "word for word." Chair Mulvihill answered that this concern is addressed in division "C" on page three of the proposed amendment.

Senior Policy Advisor Steven H. Steinglass commented that the draft seems to assume an automatic referral to the ballot if the proposed statute is not adopted. He said that approach is not necessarily preferred. He said the proponents of a statutory change might conclude they would not want to go to the ballot if the legislature enacts a statute that accomplishes the same goals.

Representative Robert Cupp said the draft appears to require the statutory initiative to be placed on the ballot regardless, even if the legislature proposes a minor technical change the proponents would agree with. He added there could be a situation in which a committee of the General Assembly is divided. He said it is unclear what is meant by "a committee" of the legislature.

Chair Mulvihill said he noticed lines 23 through 31 seem to have a contradictory feature. Those lines require the secretary of state to verify the statutory initiative petition, and to transmit it to the General Assembly, additionally requiring that if the legislature passes the proposed provision, either as petitioned for or in an amended form, it will be subject to the referendum, and if it is not passed, passed in an amended form, or if no action is taken within four months, it will be submitted to the electors for their approval or rejection.

Ms. Abaray asked, because the committee is providing a three-year safe harbor provision, what would happen if the proponents introduce a statute that is blatantly unconstitutional. She said it would take three years to challenge it in the Ohio Supreme Court, making her wonder whether there should be a provision giving the Court original jurisdiction to consider the provision. Chair

Mulvihill asked whether she was referring to the possibility of seeking an advisory opinion from the Court. Ms. Abaray answered that Justice Paul Pfeiffer had appeared before the Judicial Branch and Administration of Justice Committee to advocate for original jurisdiction for the Ohio Supreme Court, but not in this context.

Mr. Steinglass directed the committee to Article II, Section 1g, providing for original jurisdiction. He wondered whether that jurisdiction covered all eventualities, suggesting research could be provided on this. Ms. Abaray commented that she was reading that section as only covering judicial review of the signatures on the petition.

Mr. Wagoner said he envisions the process as being if the General Assembly does not enact what is put before it and the proposal is passed by the voters, it is a law. He said he does not know why one would draw a distinction between laws enacted by General Assembly, as opposed to by initiative, wondering why the Court would have original jurisdiction over one but not the other.

Ms. Abaray said she raised the issue because of the three-year guarantee that the legislature cannot change the initiated statute. Mr. Wagoner noted that merely because there are three years in which the General Assembly cannot change the law, it does not mean it cannot be challenged in the courts. Chair Mulvihill explained this is one way to give people using this route some confidence that the statute will be there for a while.

Ms. Abaray asked what happens after a statute gets passed and the people decide they want to get rid of it, wondering if there would be a guarantee that it would not be subject to a referendum for three years. Chair Mulvihill answered that the only thing the safe harbor does is to keep the General Assembly from repealing the statute. He said there is nothing to prevent the people from repealing the law by referendum. Mr. Steinglass agreed that an initiated statute is subject to the referendum. He added that if the General Assembly should pass the law sought by the proponents, another group could come forward and submit the statute to the referendum process.

Chair Mulvihill noted his concern regarding language at the bottom of page two of the proposed resolution, at line 50. That line reads that the initiated statute will go into effect unless the General Assembly takes no action before four months expires, giving the legislature four months to decide what to do. Chair Mulvihill asked what the phrase "no action" means in that context. He said "action" could mean the legislature discusses the provision, continues to discuss the provision, and/or does not pass the provision, so long as the proposal is on the agenda. He wondered whether there was ambiguity in the phrase that could create problems.

Mr. Steinglass noted that same language is repeated in a repealed section, so may have been interpreted by the courts. Chair Mulvihill reiterated that the committee does not want a provision that would allow the General Assembly to interpret "action" in a broad manner.

Executive Director Steven C. Hollon commented that "action" may be a term of art, thus "no action" means the General Assembly has not adopted what is before them. Rep. Cupp said, in terms of the General Assembly's procedures, if one house does something intermediate, it does not count. He said there are two actions: pass or no pass. Mr. Wagoner said he reads the provision as meaning that if a proposed statute is simply referred to committee and discussed, it does not delay the four-month period.

Ms. Abaray said when the committee began its discussion of the statutory initiative, there was a concern about whether economic benefit provisions were being put into the constitution, for example casino gambling, and the recent marijuana legalization proposal. She said she wonders whether, because the anti-monopoly provision (Issue 2) was passed, it is now more difficult to amend the constitution, and whether that fact will cause people to reconsider using the constitutional amendment process. She questioned whether the committee now needs to do more to make it easier to use the statutory initiative.

Chair Mulvihill explained that the business interest concern is a subset of a larger category of topics the committee is trying to prevent being put in the constitution. He said it is unclear whether the passage of Issue 2 will affect the thought process of proponents of changes to the constitution. He said the initiated statute has rarely been used, and when it has been used, voters have approved statutory changes only three times. Mr. Steinglass explained that initiated statutes have only gone to the ballot 11 times. Chair Mulvihill continued that the committee's work is not done, adding that Issue 2 did not provide a strict prohibition on monopolistic interests being placed in the constitution; rather, a proposed amendment creating a monopoly now must be presented to voters twice if it is to be adopted.

Mr. Steinglass said, considering states that have both types of initiative, there are 10 or 11 states that permit both the statutory and the constitutional initiative. He said in Ohio proponents take the constitutional route 85 percent of the time. In other states, he said, 50 or 60 percent is the general number. He said data shows that the statutory initiative is underutilized in Ohio, a fact that led the committee to look to ways to strengthen the statutory initiative.

Ms. Abaray asked how the percentages of vote requirements compare, specifically how many signatures are needed for the statutory as opposed to the constitutional initiative. Mr. Steinglass explained for initiated statutes, proponents need three percent on the original petition and three percent on the supplementary petition. For a constitutional initiative, proponents need ten percent up front.

Mr. Hollon explained to the committee the content of two charts that were provided to the committee. He said the charts are intended to show the number of counties and their population, explaining that the geographic requirement for the signatures is 44 counties.

Committee member Roger Beckett mentioned the single subject rule, asking how the legislature abides by that and wondering whether it applies to initiated statutes. He said the proposed change amends Sections 1b and 1g, which include reference to constitutional amendments. He asked whether Section 1a, dealing with the constitutional initiative, could be included in this proposal without violating the single subject rule.

Chair Mulvihill suggested that the committee address the initiated statute first before going on to address Section 1a. Mr. Beckett said that would be acceptable but that the committee should leave open the possibility of amending Section 1a later.

Mr. Steinglass said if the General Assembly wanted to package diverse amendments relating to the initiative and referendum processes, that action would be subject to the one amendment rule.

Chair Mulvihill said the committee would have to discuss whether the proposed changes will all go in one presentation to the General Assembly.

Ms. Abaray said the committee may want to come to a consensus on the whole package. Chair Mulvihill said the committee has discussed that question and agreed, but is now dealing with the statutory initiative process. Ms. Abaray said she is not clear on whether the committee is attempting to reach agreement on a recommendation that will be in isolation. Chair Mulvihill explained there would be no recommendations until the committee finishes addressing Sections 1b and 1g together, saying it is easier to limit the discussion to initiated statutes and then have the discussion about how to present recommendations.

Rep. Cupp asked whether there is any indication why the statutory initiative procedure was adopted as a two-step process in relation to the petitions. Mr. Steinglass answered that, in 1912, the hotly contested issue was whether to have a direct or indirect statutory initiative, and convention delegates chose the indirect method. He said he is not sure why the two-step process was adopted. Mr. Beckett said he suspects, given the move toward populism, three percent was perceived as a good low barrier for proponents of a statutory law. He added, by only requiring three percent, proponents could "fire a shot across the bow" that could spur the legislature to act.

Mr. Wagoner said he suspects that the reason a supplemental petition was required may have been for a situation in which the legislature sought to amend what was presented.

Rep. Cupp wondered if there is any restriction on using the same signers from the initial petition, indicating that proponents might just have two petitions signed at once. Mr. Steinglass answered that his assumption is that the two petitions must have to have different signatures. He continued that, in 2008, constitutional provisions dealing with the initiative were changed to create an earlier deadline for the signatures. The result was that people who might be interested in a supplementary petition had less time available for gathering the signatures. He said the change put those who wanted to use the supplemental petition in a bind, explaining that is one reason why it made sense for the committee to consider the requirement of a supplementary petition.

Rep. Cupp commented that the change also potentially places the Ohio Supreme Court in a bind, because it gives the Court only ten days to hear challenges. He said Section 1g needs to be revisited for this reason.

Chair Mulvihill asked Rep. Cupp where such challenges are filed. Rep. Cupp explained that they are filed in the board of elections, and, in the past, were heard by the court of common pleas, and then the court of appeals, or were all moved to Franklin County where they were heard together. He said that has been changed so that, under current law, there now are very few people reviewing the challenges to the petitions.

Mr. Steinglass wondered if a challenge in those circumstances is directed toward the secretary of state's determination as to whether the signature requirements are met. He said he would like to know more about this procedure.

Mr. Wagoner commented that line 107 of the proposed resolution seems to imply it is the court looking at the petition signature by signature. Mr. Steinglass noted the General Assembly is allowed to handle this issue by statute, so that statutory law may answer the question.

Committee member Chad Readler said he supports the general direction of the committee. He wondered whether a three-year safe harbor period is sufficient to incentivize the statutory initiative option.

Chair Mulvihill explained how the choice of three years came about. He said that figure was just a starting point and that five years would be fine, too. He suggested the committee should try to get its preferences drafted in a manner that covers the concerns that have been raised, and suggested there be one more meeting to discuss the changes. He also suggested the committee invite presenters such as Don McTigue and Maurice Thompson to offer their opinions of the proposed changes.

Mr. Steinglass directed the committee to a previous memorandum he provided, dated April 9, 2014, in which he discussed safe harbor provisions in other states.

Mr. Beckett said he would like information on the percentages used by other states that have signature requirements.

Following up on an earlier thread of discussion, Mr. Steinglass noted that the "one amendment" rule is located in Article XVI, Section 1, in the last line. He said Ohio did not have a one-amendment rule for initiated amendments until 2008, when the provision was adopted by reference through some indirect procedures. He explained that Article II, Section 1g was amended in 2008, and included the same language in one paragraph – stating that the ballot language shall be prescribed by the Ohio ballot board in the same manner and subject to the same terms and conditions as are applied to resolutions submitted by the General Assembly. He said the fact this is actually a "one amendment" rule is not immediately obvious, but that is the part of Section 1g that made the one amendment rule applicable to initiated amendments.

Ms. Abaray asked for clarification, wondering if Article II, Section 15(D) only applies to statues enacted by the General Assembly. Mr. Steinglass answered affirmatively, saying that section does not apply to an initiated constitutional amendment.

Rep. Cupp noted there is a provision that says the limitation on the General Assembly enacting laws is also a limitation on the statutory initiative, meaning someone initiating a statute must have it relate to only one subject.

Next Steps:

The committee having concluded its discussion, Chair Mulvihill asked what should be the next step.

Mr. Steinglass suggested one next step could be to try to answer all the questions that were raised by the committee at the meeting, but offered that it may be appropriate to introduce some sections, subsections, and paragraphs, redesigning the initiative and referendum provisions to

make them more readable. He said the committee could introduce changes to the statutory initiative process as a proposal that both changes statutory initiative and makes it all readable. He said he does not think that would violate the single amendment rule. He added that Article II, Sections 1b and 1g are prime candidates for reorganization.

Chair Mulvihill commented that a larger reorganization was a primary point that drove the committee's interest in the statutory initiative. Mr. Steinglass added that LSC was modestly doing this, but the sections could use more in-depth change.

Chair Mulvihill asked the committee for its opinions on whether it wants to continue with these concepts, discuss the publication issue, and/or consider the timeliness "85 days" issue as raised by Rep. Cupp. He said he would like to see another draft proposal based on the committee's conversation.

Mr. Beckett said the most complex issue raised is the question of what happens when the General Assembly acts on a topic proposed by statutory initiative, noting in almost every case the General Assembly is going to amend the proposal in some form. He wondered if there are other states that use the indirect statutory initiative without a supplemental petition. Mr. Steinglass said there are, and suggested the committee could use those states as a model.

Chair Mulvihill said he would like to continue the conversation, have staff bring that language to the committee, and to avoid making changes while the committee determines what other states have done. He said the committee could then start to narrow the language after the next meeting.

Mr. Steinglass said staff could look at the minutes to try to identify all of the questions that have been asked, and could try to provide answers. He said he can also provide information about the other states.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 2:15 p.m.

Approval:

The minutes of the January 14, 2016 meeting of the Constitutional Revision and Updating Committee were approved at the March 10, 2016 meeting of the committee.

/s/ Dennis P. Mulvihill

Dennis P. Mulvihill, Chair

/s/ Charles F. Kurfess

Charles F. Kurfess, Vice-chair