



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE CONSTITUTIONAL REVISION AND UPDATING COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 10, 2016

Call to Order:

Chair Dennis Mulvihill called the meeting of the Constitutional Revision and Updating Committee to order at 11:07 a.m.

Members Present:

A quorum was present with Chair Mulvihill, Vice-chair Kurfess, and committee members Beckett, Cupp, Jordan, Sykes, and Wagoner in attendance.

Approval of Minutes:

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

Discussion:

Chair Mulvihill began the meeting by indicating that the committee would be continuing its discussion of methods for streamlining the statutory initiative process as described in Article II, Sections 1b and 1g. Chair Mulvihill thanked staff for the recent memorandum that provided an in-depth response to questions raised in the committee's January meeting.

Chair Mulvihill continued that, in January, the committee was discussing dispensing with the supplementary petition requirement. He said it became clear to him in reading what other states have done that only Ohio uses this particular supplemental petition procedure. He said, while other states have a supplemental petition procedure, in those states proponents have an option as to whether they want to use a direct or indirect statutory initiative process, and that only the indirect process has the supplemental petition requirement. Senior Policy Advisor Steven H. Steinglass confirmed this comment, indicating that in those states, typically, proponents of an initiated statute use the direct route and so do not use a supplemental petition.

Chair Mulvihill asked the committee whether it would agree that the supplemental petition is an unnecessary burden on the statutory initiative process.

Committee member Mark Wagoner said he believes the supplemental petition process is not necessary. He said having a five percent signature requirement initially would cover it, and that the supplemental petition does not add anything.

Committee member Roger Beckett said the advantage the supplemental petition gives is that it serves as the trigger as to whether the initiated statute would go on the ballot. He agreed the supplemental petition is not necessary, but that the committee needs to consider addressing what happens if the General Assembly deals with the issue and the proponents no longer want the initiative to go on the ballot. He suggested there needs to be a method for allowing the proponents to withdraw their petition.

Mr. Steinglass noted that, among the six states that have the indirect initiative, some give the legislature an opportunity to review the proposed statute and, if it is not approved in the format proposed, it automatically goes to the ballot. He said the issue was discussed, but not in great depth because he could not find a lot on it for the memo. Mr. Steinglass noted a suggestion that the contents of the proposed statute could be written to decide whether it goes on the ballot. He observed that automatically going to the ballot raises a problem if action taken by the General Assembly is sufficient.

Mr. Steinglass continued that, in 1912, convention delegates rejected the idea that a proponent committee, acting on its own, should decide whether to pursue the statutory initiative after action by the General Assembly. He said it was a democratic view that the people should decide, and so delegates came up with the idea of requiring a supplemental petition. He observed the problem is that it has gotten squeezed from both ends in terms of time to do a supplemental petition. He said the supplemental petition has outlived its usefulness and makes the statutory initiative far less attractive. Mr. Steinglass said the question is what acts as the trigger if there is no supplemental petition requirement. He observed that the revised code procedure indicates a group pushing something on the ballot can keep it off the ballot by notifying the secretary of state in time to take it off the ballot.

Chair Mulvihill asked Mr. Steinglass whether he interprets the Legislative Service Commission (LSC) draft version of a revised Section 1b(B) to require the proposed law to go on the ballot. Mr. Steinglass agreed that the draft version sends the proposed statute straight to the voters.

Asking for clarification, Senator Kris Jordan wondered whether the draft version only deals with the statutory initiative, and Mr. Steinglass confirmed. Sen. Jordan then asked whether other states' statutory initiative procedures make it less likely that people will use the constitutional initiative route. Mr. Steinglass answered that, looking at the states having both the constitutional and the statutory initiative, 80 percent of the instances in which people seek to initiate a proposal in Ohio they go the constitutional route. He said that is significantly higher than the average around the country, which is 45 percent. He continued, among states that have both courses open, Ohio is more likely to see a constitutional amendment as opposed to an initiated statute. By contrast, he said, in Illinois 100 percent of their initiated activity is constitutional, but Illinois has had only one initiated amendment.

Sen. Jordan asked whether, if a proposal goes through this process and changes state law, how long the legislature has to wait to get rid of it. Mr. Steinglass explained in Ohio there is no safe

harbor or anti-tampering provision, so that the General Assembly could the next day take action to repeal it or change it. He said, although that has never happened, there have only been three instances where the initiated statute has been taken to the voters. He noted the argument was made that the General Assembly would not reject the work product of the people in a cavalier manner.

Mr. Wagoner said the committee is trying to encourage the initiated statute route; he views it as a package deal to also address making amending the constitution a more deliberative process.

Chair Mulvihill directed the committee to the following language from the draft version, at Section 1b(B):

If said proposed law shall be passed by the general assembly, either as petitioned for or in an amended form, it shall be subject to the referendum.

He asked whether this language is a contradiction.

Mr. Steinglass noted that the sentence deals with the possibility the statute has passed in amended form, noting it is also possible for proponents of the amended form to take their original proposal to the voters. He said if a group does not like the statute as passed but amended, seeking the supplementary petition under current law has the same effect as a referendum in the sense that it suspends the effective date of the new statute. He said the missing trigger is the big issue.

Chair Mulvihill asked committee members what should be the triggering event.

Mr. Beckett directed the committee to Mr. Steinglass's memo at page ten on how other states handle this.

Mr. Steinglass said Michigan has an indirect initiative procedure, but does not require additional signatures in order for the initiative to go right to the voters. He said he is not sure that any states have the proponents operating the trigger.

Mr. Beckett asked whether, if it is likely that the proposed statute will be sent directly to the ballot, in practice would the legislature draft an alternative to that statute if they agree that the issue needs to be addressed. He wondered if, in any case, in practice there are competing issues on the ballot.

Mr. Steinglass said he asked that question but could not find evidence of that. He said Nevada and Michigan explicitly provide that the issue goes directly to the voters, and both have provisions in which the legislature can propose alternatives on the ballot.

Chair Mulvihill asked, in states with the indirect initiative, how frequently their legislatures pass those statutes in amended form.

Mr. Steinglass said there is no definitive information, but he has a sense that the indirect is not used that often when people have a choice.

Chair Mulvihill said he would like to know because the committee may have to foresee circumstances that do not currently exist. He wonders if the committee is holding up the process by trying to address a nonexistent problem, and that he wants to assuage concerns about whether there is a problem in states that have the indirect statutory initiative.

Mr. Steinglass said if the legislature believes that a proposed statute heading toward the ballot should not be going to the ballot, there should be a barrier. He said the committee could draft language giving the General Assembly a role to play.

Mr. Beckett commented that Michigan, in terms of the indirect, seems to be the outlier, and so does Nevada. Their process is indirect, but no additional signatures are required. He wondered how those states address this issue.

Mr. Steinglass said he has not seen anything written about that circumstance. He said, when he checked the Michigan Constitution, it did not provide qualifying language saying “shall go to the ballot but * * *,” so to fully answer the question requires looking at the Michigan statutes. He said he does not have the statistics for how many times the Michigan statutes have been amended through the initiative process. He said Ohio does not record when a statute proposed by initiative is adopted by the General Assembly. He added, there are “a couple of instances where we know, but it is random. In those instances it never goes to the ballot because the legislation proposed was accepted by the General Assembly.”

Mr. Beckett said he would propose that the committee essentially have a direct initiative but include a simple “exit ramp” for the proponents who submitted the petition, allowing them to withdraw if the legislature addresses their issue. He said the way this process is likely to unfold is that the General Assembly takes up the issue, wants to refine it, and if petitioners are satisfied, then they can withdraw it. He said that seems reasonable to him, but practically speaking the impression is that there is no record of how many times that has happened.

Mr. Steinglass directed the committee to Ohio Revised Code 3519.08(A), suggesting that the statute provides the “exit ramp.” He said if the committee wants to be cautious it could create a section in the constitution, but would have to be careful about that.

Representative Bob Cupp commented that this suggestion would essentially require constitutionalizing the statutory initiative proponent committee that, right now, only exists in statute.

Mr. Steinglass agreed with Rep. Cupp’s observation. Rep. Cupp continued that, instead of entirely eliminating the supplemental petition, the provision could have a smaller number of signatures be the trigger, but it would be necessary to limit who could do that. He said he is not sure that is a solution.

Mr. Steinglass commented that Massachusetts only requires .5 percent on a supplemental petition, and so makes the requirement as unburdensome as possible.

Chair Mulvihill asked whether the committee is generally satisfied with the proposed five percent on the initial petition.

Mr. Beckett noted it is among the lower of the requirements out there. Chair Mulvihill asked if Mr. Beckett thought it should be higher, and Mr. Beckett said he did not think it mattered a lot.

Rep. Cupp said in 1912, when these thresholds were put in place, it would have been more difficult to collect these signatures due to travel constraints, and no ability to have electronic transmittal. He said then, the percentage would have been a higher hurdle than it is now. He said it would be an interesting question whether this is actually too low a threshold. He noted although Ohio does not want to shut out citizens from being able to use this process, it also is important to avoid the result occurring in states where there is a long list of statutory initiatives every election.

Mr. Steinglass said it is important to put the 1912 convention in context. He remarked that he is struck by how contentious the signature-gathering step has become, with many challenges in the courts. He said the constitution refers to signatures of electors, rather than to qualified electors, or registered voters. He said in 1912 Ohio did not even have registered voters as registration was not required. So, he said, in a sense a big part of the fight over signatures includes questions about whether someone is a qualified elector, or registered voter. He concluded that is one instance in which the process has become more complicated.

Mr. Wagoner said, with regard to percentage as threshold, it depends on whether there is a direct or indirect process. He said, in indirect, there is at least a quality control process, and the legislature will take a look at it. He said, "if we go direct, the signature limit should be higher."

Chair Mulvihill said he understands the direct route avoids the General Assembly. He noted the indirect route gives the General Assembly the opportunity to get involved. He wondered how different that is from now, where if the General Assembly does not act it goes to the ballot.

Mr. Steinglass said there is no precedent for what happens when competing issues go to the ballot. He said he sees mentioning this in a constitutional provision as creating a failsafe by giving the General Assembly a formal role and giving petitioners an easier way to go to the ballot if they are not satisfied. He said it is more likely the General Assembly will be supportive of a role that includes them.

Chair Mulvihill said, assuming the statutory initiative process continues to be indirect, should the General Assembly need four months to consider whether to adopt the proposed statute.

Rep. Cupp said the General Assembly can act fairly quickly, wondering if four months could become three months. He said the petition would have to be filed before the end of the year preceding the General Assembly and that January is not an active month.

Mr. Steinglass said Michigan and Nevada give their legislatures 40 days to act on a proposal, additionally requiring that statutes proposed by initiative take precedence in time over legislation, other than budget bills.

Chair Mulvihill asked whether the proponent committee should be constitutionalized, adding there needs to be a procedure addressing a situation in which the General Assembly passes an amended version of the proposed statute.

Mr. Steinglass asked whether Chair Mulvihill was describing a situation in which the General Assembly has passed an alternative version and the petitioners have to make a decision as to whether the alternative is acceptable or whether to pursue placing their version on the ballot.

Chair Mulvihill added “or it automatically goes to the ballot without allowing the committee to make a decision.” He continued that if the committee is going to work from the draft of the indirect initiative as provided by LSC, the failure of the General Assembly to act means the proposed statute automatically goes to the voters. He said the question is also, if the General Assembly does act, but it is not identical, then what should happen.

Mr. Steinglass said following the procedure outlined in the Revised Code, the petitioners could withdraw without constitutionalizing the proponent committee. Chair Mulvihill wondered if there is a timing element in the Revised Code section. Mr. Steinglass said the time limit is that 70 days before the election petitioners could pull the issue from the ballot.

Chair Mulvihill wondered if the provision could say “as prescribed by law.” Mr. Steinglass said LSC may want to do some tinkering. He said this is a drafting issue; we need guidance from professional drafters.

Rep. Cupp asked whether timing matters, and whether placing the proposed statute on the ballot will cost money. Mr. Steinglass said proposed statutes only go on a general election ballot.

Mr. Wagoner said whenever anything goes to ballot, he would have a problem if there is not a hard brake. He said if there is to be some sort of brake mechanism, he would like to see it stop the process. This would allow the proponent committee to decide whether to proceed to the ballot, because no one knows better than they do what was intended. He said his concern is creating an issue that has to be litigated in the courts, which would invariably happen. He would like the proponent committee itself to decide if what the General Assembly has enacted accomplishes its goals.

Mr. Beckett asked whether, if the proponent committee is not constitutionalized, language could be proposed that would describe who submits the arguments or explanations. He said the statute gives the petitioners the ability to name the individuals who will draft that argument or explanation, wondering if they would be the same individuals who could pull the proposed statute from the ballot.

Mr. Wagoner asked whether there are five members of a proponent committee. Mr. Steinglass said that is the number he sees, but his is not sure. Mr. Beckett directed the committee to Section 1g in the LSC draft.

Chair Mulvihill directed the committee to R.C. 3519.02, indicating that the proponent committee is created to represent petitioners in all matters.

With regard to determining how to revise the current draft, Chair Mulvihill asked Rep. Cupp to approach LSC to ask for changes to the proposed revision. He said it would be important to have LSC reference the committee that has already been created under R.C. 3519.02, and has the ability to withdraw the petition under R.C. 3519.08, and to have that as the braking procedure. He said the plan is to keep five percent for now, and decide if that number should change later.

Chair Mulvihill identified two other issues. Regarding the concept of a safe harbor provision, he said only 10 of 21 states have safe harbors, according to Mr. Steinglass's memo. He said it would also be important to consider the issue of electors versus registered voters, wondering if it would save the secretary of state and attorney general trouble by redefining who can sign.

Mr. Steinglass added it is important to ask whether the provision could be modified to include the use of modern technology in the area of initiatives. He said the current system seems complex when it does not need to be. He said maybe there are other issues related to the whole process.

Chair Mulvihill said he would be in favor of allowing online and written petitions, and that it might be possible to have the secretary of state's office come to address that.

Mr. Steinglass said he ran across provisions in state constitutions that address issues of using technology, and could take a closer look. Chair Mulvihill agreed that should be done.

Mr. Steinglass asked whether it makes sense to take a deeper look at the six states that have the supplemental petition and competing proposals. Chair Mulvihill answered that the relevant sections of the Revised Code address that problem, so that task is not necessary. Mr. Steinglass said he will take a deeper look at the six states that have the indirect.

Chair Mulvihill said he does not want to make too many decisions before discussing the safe harbor concept, wondering if committee members had any thoughts on this.

Rep. Cupp said he is confused by the provision stating that the people who prepare the arguments may be named in the petition, but also saying the General Assembly shall name them. Mr. Steinglass said there is a fallback on this, they are a little different, and he will double check.

Mr. Beckett said, when talking about modernization related to publishing, he would be open to eliminating language about publication. He said it is unlikely that someone will sneak something onto the ballot without people knowing about it, so that is a non-issue. He said his other concern is that it strikes him how detailed and complex these sections are. He understands it is good to include details, but his opinion is that a number of the details should be prescribed by law and not by constitution. He wondered if the committee should be looking at this language in a broader sense and trying to make it more understandable.

Chair Mulvihill agreed with that point, noting Section 1g as an example. He said first he would like to get another draft and see what that looks like. The next draft would get rid of the supplemental petition, include an "exit ramp," provide the number of signatures, and a safe harbor. He said then the committee can get into easier decisions regarding publication requirements.

Mr. Steinglass observed it would have been an anathema in the 1912 Constitutional Convention to avoid putting in lots of details, and that delegates put self-executing provisions because they were highly suspicious of the General Assembly. He continued that past efforts to clean up and make these sections more readable have rarely gone beyond adding subsections.

Chair Mulvihill said the safe harbor is three years in the current draft, and that the committee will continue to discuss that concept next time. He suggested the best place to put the addition is in the current draft at the end of line 32.¹

Vice-chair Kurfess asked whether there has been discussion regarding paragraph D, specifically whether there should be a change to the language indicating that if there are conflicting proposed laws the one with the most votes prevails. He observed that it looks as if the coming election might involve there being a proposed statute on the ballot, and a proposed constitutional amendment on the ballot dealing with the same subject but obviously conflicting. He wondered what would happen if they both pass.

Chair Mulvihill commented that the same thing happened a few years ago in relation to the smoking issue, but in the end, because of the final vote, there was no problem.

Mr. Steinglass added it might also help to see Issues 2 and 3 on the November 2015 ballot.

Chair Mulvihill thanked Mr. Kurfess for his comment, noting the issue is something to address. Mr. Steinglass noted that is a common provision that other states have.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:21 p.m.

Approval:

The minutes of the March 10, 2016 meeting of the Constitutional Revision and Updating Committee were approved at the May 12, 2016 meeting of the committee.

/s/ Dennis P. Mulvihill

Chair Dennis P. Mulvihill, Chair

/s/ Charles F. Kurfess

Charles F. Kurfess, Vice-chair

¹ A copy of the LSC Draft referenced in these Minutes is provided as Attachment A.