OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
CONSTITUTIONAL REVISION AND UPDATING COMMITTEE

FOR THE MEETING HELD
THURSDAY, DECEMBER 15, 2016

Call to Order:

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

Members Present:

A quorum was not present with Chair Mulvihill and committee members Beckett, Cupp, and Sawyer in attendance.

Approval of Minutes:

There being no quorum, the minutes of the November 10, 2016 meeting of the committee were not approved.

Presentations and Discussion:

Chair Mulvihill began the meeting by providing an overview of the various ideas the committee has explored regarding changes to the initiated constitutional amendment and initiated statute processes. He said the committee would be hearing from interested parties regarding their suggestions for improving the redraft of the initiative and referendum process.

Donald J. McTigue, Attorney
McTigue & Colombo LLC

Chair Mulvihill recognized Attorney Donald J. McTigue to present his comments regarding the redraft of Article II, Sections 1 through 1g, relating to the initiative and referendum process.

Mr. McTigue said his recommendation is that the initiated constitutional amendment petition process should stay the same in terms of when the ballot issue is submitted to voters, primarily because both general elections are well attended by voters, and sometimes proponents need to get

the issue before the voters sooner rather than later. He said there is no reason to change the constitution in this regard because that issue has not been the source of problems in terms of timing or the processing of petitions. In addition, he said, the voters should have the same right as the General Assembly to determine at which election a petition should be submitted.

Mr. McTigue continued that the current constitution provides for a ten-day cure period after the Ohio Supreme Court determines the signatures are not sufficient. He said that provision is important and should be retained, explaining that petition efforts often do not get underway until after an extended process of building a coalition and getting agreement to the text of the petition. He said being able to have the additional time is important because proponents can fall short in getting the exact number of signatures needed from various counties. Mr. McTigue said having that time also reduces the impetus to challenge the petition in court. He said keeping that measure would necessitate reworking the deadlines that are in the redraft. He said the ten-day cure period is especially important with regard to referendum petitions, since referendum proponents have only 90 days to get their signatures. So, he said, at a minimum, the committee should consider restoring the ten-day cure period for referendum petitions.

Mr. McTigue also recommended that the committee address the standards for ballot language to be followed by the ballot board under Article XVI. He said ballot language has been a source of contention over the years, and that is where games are played. He suggested amending Article XVI to include a provision relating to the ballot board prescribing ballot language. He said he did not provide language for this concept because Article XVI was not part of the redraft.

Mr. McTigue directed the committee's attention to a marked-up version of the redraft of the subject sections, noting the edits he included that would resolve some of the problems he saw with the procedures. He said his biggest complaint is that the General Assembly passes laws that do not facilitate the process but rather restrict the right of citizens to propose initiated amendments, laws, and referenda. He said it is important to address a specific law requiring that, in addition to filing the petition, a proponent must simultaneously file a full electronic copy and sign a verification that it is a true copy. He said the problem with this requirement is that it adds expense because proponents have to scan everything. He said there may be 20,000 part petitions, but every page must be scanned and submitted electronically, which is an expensive process.

Chair Mulvihill asked about the expense. Mr. McTigue answered one of his clients had to hire three outside firms, and spent about $30,000 to complete this task. He said a related problem is that referendum petitions must be processed in only 90 days, requiring referendum proponents to budget time at the end to scan the petitions. He estimated that scanning takes about ten days off of the already limited time proponents have. He said the statute also requires a full index for the scan. Mr. McTigue explained the statute was enacted as a way to deal with public records requests that were burdening the secretary of state because the courts ruled the secretary had to provide copies of petitions. So, he said, the General Assembly enacted law requiring proponents to submit an electronic copy at the same time they submit their petitions, and this electronic copy is used to fulfill public records requests. He said while the law resolved the secretary of state's public records problem, it did so by placing an expensive and time-consuming burden on citizens.

Representative Bob Cupp said he could understand how creating an index would be time consuming, but wondered why scanning would take so long. Mr. McTigue said the index is not that time consuming because one can create a searchable index as scanning occurs. But, he said, the scanning takes a lot of time because pages are double-sided, and each document must be named. He said, in addition, staples must be removed in order to scan, and hard copies must then be re-stapled and returned to county order.

Chair Mulvihill wondered if Mr. McTigue was suggesting that the ballot language should be addressed after the petition goes to the attorney general, rather than at the end of the process. Mr. McTigue said handling the language up front with the ballot board would be advantageous.

Chair Mulvihill asked how gamesmanship was being used to affect proponents' ability to get an issue on the ballot. Mr. McTigue said this occurs not just with regard to the language but also regarding the title. He said, as an example, in 2015 the marijuana legalization initiative was given a ballot title that uses the word "monopoly," even though the word "monopoly" is not in the petition, and that this characterization was added for prejudicial effect. Mr. McTigue said the title is applied at the end, after the petition is submitted. He said it would be useful to have that decision made up front, which would eliminate the initial statutory procedure requiring 1,000 signatures, going to the attorney general, and other tasks which use up a lot of time. He said it would then be possible to have the ballot title and the ballot language printed on the petitions.

Referencing Section 1a in the redraft, Mr. McTigue directed the committee's attention to his suggestion that proponents be permitted to propose an amendment at any time after the general election in an even-numbered year, rather than on the last day of May of an odd-numbered year. He said moving the date back to the day after the general election gives as much time as possible.

Mr. McTigue said he is not in favor of the redraft's requirement of a supermajority to approve a proposed initiative, a requirement that is not applied to legislatively-proposed constitutional amendments. He said having this requirement for initiated amendments puts citizens at a disadvantage. Regarding conflicting amendments, he said a supermajority is not needed, and that he would add a sentence indicating that the Ohio Supreme Court should have exclusive jurisdiction to determine if a conflict exists.

Mr. McTigue said he would change the draft of Section 1b(D) regarding the statutory initiative to indicate that the secretary of state must transmit a copy of the full text of the proposed law to the General Assembly the same or the following day. He said that issue was just litigated in the Ohio Supreme Court this year.[1] He added that he would remove the requirement that the petition be transmitted to the General Assembly because it could be thousands of pages long.

Chair Mulvihill asked whether the concern is that the secretary of state could run out the clock. Mr. McTigue said that is not exactly the reason; rather, under the current constitution, the General Assembly has four months to review and decide whether to act after the proposed law is transmitted, and this period only commences after the proposed law and the petition are verified. As a result, he said, this year the proposed law did not get transmitted to the General Assembly until February 5, thereby pushing back the commencement of the General Assembly's four-month

[1] *Ohio Mfrs. Assn. v. Ohioans for Drug Price Relief Act,* 147 Ohio St.3d 42, 2016-Ohio-3038, 59 N.E.3d 1274.

period. He said that timeline basically made it impossible to get a statutory initiative on the ballot in 2016. He said there may not be the same problem under the revised timetable in the redraft. He said, under the current model he is not sure petitioners are hurt by the delay of transmission to the General Assembly, but it would be to the benefit of the General Assembly to have as much time as possible for review. He said that change also could aid the petitioners because, if the General Assembly has more time to consider it, it may adopt something to possibly meet proponents' needs.

Committee member Roger Beckett asked Mr. McTigue to clarify why the proposal regarding requiring a supermajority would not be adequate. Mr. McTigue said he has no particular problem with requiring a supermajority as long as issues are resolved related to redistricting. He said votes fall on ideological lines, so currently Ohio does not have a representative General Assembly due to gerrymandering. He said that lessens the protective effect of the current requirement of a supermajority in the General Assembly.

Describing his suggested changes to Section 1c, relating to the referendum process, Mr. McTigue said there is a serious problem with going to the attorney general with a summary. He said referendum proponents have only 90 days after the law is signed and filed, and they lose up to 30 days by having to approach the attorney general's office first. So, he said, referendum proponents lose time at the beginning, and at the end because of the requirement for the electronic copy.

Addressing proposed Section 1e, dealing with challenging petitions, Mr. McTigue said this was an area where there have been many problems. He said the current provision (located at Section 1g) gives original, exclusive jurisdiction to the Ohio Supreme Court over all challenges to petitions and signatures. He said the current model does not provide for recovery of signatures, affecting the timelines for completing other tasks. He cited a recent example in which proponents had enough signatures as verified by the secretary of state, but opponents went to court because they disagreed with what the secretary of state accepted. At the same time, the proponents went to court because some signatures were thrown out. Mr. McTigue said the Supreme Court dismissed the proponents' case as premature because proponents still had enough signatures, but opponents' case was partially successful and got more signatures thrown out, causing proponents to fall below the threshold for the required number of signatures. He said, although the court ultimately agreed they had enough signatures all along, the process caused delay and cost money. He said, for that reason, he was suggesting a change that would clarify that the Supreme Court should decide the validity and invalidity of the signatures and the sufficiency or insufficiency of the petitions. He said this would make sure everything would be dealt with at the same time.

Mr. McTigue said he would like to see changes to the language adopted as a result of the passage of Issue 2 in November 2015, now provided in the redraft at Section 1h. He advocated that the ballot board decide prior to circulation whether the proposed amendment creates a monopoly. He said he also would recommend removing the language about the proposed amendment being in violation of part of the section.

Chair Mulvihill thanked Mr. McTigue for his presentation and asked if he could provide a short memorandum outlining his various suggestions for changes to the redraft. Mr. McTigue agreed to do so.

Ann Henkener
League of Women Voters of Ohio

Chair Mulvihill welcomed Ann Henkener, of the League of Women Voters of Ohio, to present to the committee her views on possible ways to improve the initiative and referendum process. Ms. Henkener said she agrees with Mr. McTigue's recommendations, noting her experience with constitutional amendments has come in the context of redistricting reform. She said there is no reason to make the constitutional amendment process more difficult. She said it is difficult right now to get something on the ballot. She said one way to improve that situation would be to lower the number of signatures required. She noted that only California and Florida exceed Ohio in the number of petition signatures needed. She said some states have a higher percentage but a smaller population, so there is no comparison. She said a 55 percent supermajority requirement is unreasonable, but if it is adopted it should also apply to the General Assembly. She also disagreed that placement of citizen's initiatives on the ballot should be limited to certain years.

Regarding initiated statutes, Ms. Henkener said increasing the number of signatures from three to five percent defeats the benefit of having a safe harbor because knowing the legislature cannot change the statute for three to five years is not enough incentive for proponents to justify having to get so many signatures. She suggested an improvement would be to have a longer safe harbor period along with the ability to go back to the voters if a change needs to be made.

Ms. Henkener said her views on the ballot board are consistent with those of Mr. McTigue, noting her experience in working on a redistricting reform proposal in which the board rejected the ballot language at the end of a long and expensive petition gathering process. She said she was alarmed to see an article in the *New York Times* that described lobbyists meeting with secretaries of state across the country to try to affect ballot language. She said she looks at ballot language as something the secretary of state and the ballot boards should perform as part of their duty to serve voters, rather than something they do in their political party capacity. She said ballot language should not be prejudicial, or used to sway the voters, but rather a way to indicate to voters what the issue is. She said a five-member board eliminates the problem of the deadlock, but that also makes it partisan, adding the partisan nature of the secretary of state influences the partisan nature of the ballot board.

Ms. Henkener said she supports Mr. McTigue's observations about timing. She said under the current system, if someone disagrees with the ballot language, there is one chance to get the Ohio Supreme Court to review the challenge and then the ballot language comes back to the same people on the ballot board and there is no further recourse. She said this must be done at least 75 days before the election, and the board traditionally meets in August. She said by the time they meet, there is time for only one appeal.

Chair Mulvihill asked whether Ms. Henkener is suggesting a change in the composition of the ballot board, or a change in the time when the board meets. Ms. Henkener said she would like to change the composition, but said she is unsure what arrangement would be an improvement. She said there could be a requirement of an equal number of persons on the board, but then there is a deadlock. She said that issue has been raised with regard to the formation of a redistricting

commission. She said the decision regarding the ballot language should go up front so that proponents know where they stand. She said the bar is pretty high for petitioners to prove there is a problem with the ballot language as provided by the ballot board. She said she would recommend lowering the standard so that the board would be more sensitive toward neutral language.

Chair Mulvihill asked whether, if the committee were to recommend moving the ballot board review to the front end, and voters are reading the language itself, that would take care of the problem. Ms. Henkener said that would not exactly resolve the problem. She said she would like to be able to submit the language to the ballot board, allowing petitioners to get a first crack at drafting the language that is on the ballot. She said she would like for the proponents to submit language that has to be seriously considered, and that language should prevail unless there is something wrong with it.

Chair Mulvihill asked, regarding the current procedure, whether someone who is asked to sign a petition is reading a summary. Ms. Henkener said that is correct, and that the summary is provided by the attorney general.

Chair Mulvihill asked what would happen if there were no summary, and petition signers would only be looking at the ballot language. Ms. Henkener said it would be fair to review proponents' language for accuracy, but the ballot language needs to be something the proponents have written, rather than language provided by the ballot board.

Mr. Beckett asked about the statistics regarding the number of signatures required. He said, looking at the percentages, Ohio falls in the middle, with a number of states requiring ten percent or higher. Ms. Henkener said some larger states have lower percentages, and that this is related to the absolute number of signatures.

Chair Mulvihill remarked that Ohio is the third most populous state of those that have the initiative process. He wondered whether Ms. Henkener was recommending any changes to the geographic distribution requirement.

Ms. Henkener replied that the requirement of 44 counties is half of the state. She said this makes the process more difficult and more likely to need the assistance of paid petition circulators. She said most good government advocacy groups do not have a presence in 44 counties.

There being no further questions for Ms. Henkener, Chair Mulvihill thanked her for her presentation.

Catherine Turcer, Policy Analyst
Common Cause Ohio

Chair Mulvihill recognized Catherine Turcer, policy analyst with Common Cause Ohio. Ms. Turcer directed the committee to a handout consisting of data compiled by the Ballot Initiative Strategy Center indicating how different states approach the preparation of ballot language. She commented that it is extremely difficult for proponents to collect sufficient signatures, and it is

disappointing when the effort falls apart at the end, as occurred with a redistricting reform effort in which she was involved. She said she would like the ballot board review to be moved to the front to address these problems early in the process. She said this gives time for some litigation and discussion. She noted there are nine states where the proponent creates the title and the summary. She said proponents should have first crack at drafting the language.

Chair Mulvihill noted one purpose of raising the voting percentage to 60 percent for constitutional amendments is that if the measure originates in the General Assembly it is vetted, whereas if the measure is by citizens there is not that same opportunity to work through issues. Ms. Turcer said in the initiative process, even if there is a disagreement, there is still a significant amount of time invested. Chair Mulvihill said he assumes proponents would not bring in people who are going to advocate against the proposal, as would happen in the legislature. Ms. Turcer disagreed, saying advocacy groups put out public language and solicit comments from all sides of an issue. She said there is much give and take. Ms. Henkener agreed, saying when she was involved in the redistricting reform effort, her group discussed their proposal with every elected official who would talk to them.

Rep. Cupp observed that constitutional requirements cut both ways, and party control may change. He said it may be hard to be neutral, but that one must be careful not to tilt things strongly in one direction or another.

Ms. Turcer said that is why she likes voters to be part of the conversation. She said the citizen initiative allows everyone to hear from different voices. She said it is hard to look at this and think "how do we do this in a way that honors the voters." She said it is better for the voters for proponents to be able to take care of the ballot title and summary at the front end rather than at the back end.

Chair Mulvihill expressed that the committee is taking the long view and not trying to respond to a particular political issue. Rather, he said, the goal is to make the process easier and better for everyone without regard.

Representative Mike Curtin, who was in the audience, said there is no question that the ballot board has done political things since its creation in 1978, including adopting prejudicial language and sending proponents back to the drawing board, but the suggestion of giving proponents an upfront advantage would be "a dire mistake." He agreed that it would be useful to improve the ballot board process, but that the initiative industry has deep pockets, and giving a benefit of the doubt to proponents will result in seeing things embedded in Ohio law that would not be desired. He noted that, in the instance of Issue 3 in 2015, the issue was not specifically marijuana legalization, but rather the problem with embedding a business plan in the constitution. Rep. Curtin said the elected officials in the General Assembly and on the ballot board need to take ownership of that language, and much can be done to improve how the ballot board works and how to have language that improves the process. He said he cannot agree with giving the benefit of the doubt to proponents.

Chair Mulvihill asked whether Rep. Curtin was recommending the improvements occur legislatively or constitutionally. Rep. Curtin answered that this probably could be done legislatively.

There being no further questions or comments, Chair Mulvihill thanked Ms. Turcer for her presentation.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:22 p.m.

Approval:

The minutes of the December 15, 2016 meeting of the Constitutional Revision and Updating Committee were approved at the January 12, 2017 meeting of the committee.

/s/ Dennis P. Mulvihill
Dennis P. Mulvihill, Chair

/s/ Charles F. Kurfess
Charles F. Kurfess, Vice-chair