OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
CONSTITUTIONAL REVISION AND UPDATING COMMITTEE

FOR THE MEETING HELD
THURSDAY, NOVEMBER 12, 2015

Call to Order:

Chair Dennis Mulvihill called the meeting of the Constitutional Revision and Updating Committee to order at 11:10 a.m.

Members Present:

A quorum was present with Chair Mulvihill, Vice-chair Kurfess, and committee members Abaray, Beckett, Macon, Readler, and Sykes in attendance.

Approval of Minutes:

The minutes of the September 10, 2015 meeting of the committee were approved.

Presentations:

"Update on Status of Anti-Monopoly Ballot Initiative"

Steven C. Hollon
Executive Director

Chair Mulvihill recognized Executive Director Steven C. Hollon, who presented to the committee on the November 3, 2015 election results, specifically with regard to state Issue 2.

Mr. Hollon said that Issue 2 arose out of Substitute Senate Joint Resolution 4, a proposal to amend the constitution to prohibit the use of the constitutional initiative to grant a monopoly, oligopoly, or cartel for exclusive financial benefit or to establish a preferential tax status. The measure arose out of the efforts of Representative Michael F. Curtin, a member of the Commission. Mr. Hollon said the amendment requires proponents of an exclusive economic interest to present the question to voters on two separate ballots. He said that preliminary

election results indicate that 3,076,763 votes were cast, out of which 1,587,060, or 51.58 percent, voted in favor of Issue 2, with 1,489,703, or 48.42 percent, voting against Issue 2.

Mr. Hollon also indicated that Issue 3 on the ballot was the marijuana legalization initiative promoted by ResponsibleOhio. He said out of the 3,126,027 votes cast, 2,003,641, or 64.10 percent, voted against the initiative, while 1,122,386, or 35.90 percent, voted for it.

"The Ohio Indirect Statutory Initiative"

Steven H. Steinglass
Senior Policy Advisor

Chair Mulvihill then recognized Senior Policy Advisor Steven H. Steinglass, who presented on the topic of the statutory initiative.

Chair Mulvihill asked Mr. Steinglass whether the passage of Issue 2 will prevent proponents of the marijuana initiative from initiating an amendment that would tax different plots of land differently. Mr. Steinglass said if there is an effort to classify differently, it would be necessary to look at the text of the limitation.

Committee member Janet Abaray asked if the initiative and referendum provisions had always existed side by side. Mr. Steinglass answered they were all presented to the voters by a single recommendation of the 1912 Constitutional Convention.

Vice-chair Charles Kurfess asked whether actions that would be prohibited by initiative could be accomplished by the General Assembly. Mr. Steinglass said yes, Article II, Section 1a is a substantive limitation on the use of the initiative, but not a limit on the General Assembly. Mr. Kurfess commented that he has a degree of discomfort in saying the people cannot do it but the legislature can, in any area. Chair Mulvihill said the committee did discuss that issue in previous meetings.

Mr. Kurfess followed up, commenting that the General Assembly could not pass legislation violating this section and submitting it to the people for a vote, clarifying that he is referring to the taxation aspect.

Mr. Steinglass said that is correct, adding that the legislature could propose through a joint resolution an amendment asking that the constitution be amended, but Mr. Kurfess is referring to a provision of Article II, Section 26 that has been interpreted to prevent the General Assembly from, in effect, proposing a law and having people vote on it as a plebiscite. Some states have such a provision, but Ohio does not, except on the narrow subject of education.

Mr. Kurfess asked whether a statute could violate this section and be subject to a referendum, saying he is thinking there is no way the public could ever address the issue.

Mr. Steinglass said if an effort was made to initiate a statute that could not be initiated because of the limitation in Article II, Section 1e, it would raise the question whether the constitution could

permit pre-election review to knock it off the ballot. He said, typically, the Ohio Supreme Court does not permit pre-election judicial review relating to the substance of the constitutionality of the proposal for the ballot. He said the Court does permit review, however, in a limited circumstance, specifying that the Court exercises review in terms of original jurisdiction in cases involving the one-subject rule. He said he does not know what would happen if someone tried to advance a statute that violated Section 1e. He suggested that, in such a case, the secretary of state would have to make an initial determination of whether it goes on the ballot, and either way there would be litigation. He added if the Court d does not intervene pre-election, it could do so post-election, but this is uncharted territory.

Chair Mulvihill commented with regard to eliminating the supplemental petition that if the committee is going to encourage people to take the statutory initiative route, the supplemental signature requirement is one of the major hurdles because it doubles the work.

Mr. Steinglass clarified that there is a supplementary petition and a vote, and that in terms of the process the committee could eliminate the supplementary petition and still go to the General Assembly first, wait 120 days and then go to the people with some other trigger other than the collection of the signatures. He added it is at least theoretically possible to gather the signatures on a statute, and the statute could bypass the General Assembly and go right to the people. He said the discussion has bundled a couple of different concepts, and one concept is whether the proposed statute should stop at the General Assembly and give the General Assembly an opportunity to review, consider, or change the proposed statute. He said the other questions is if indirect statutory initiative is retained, what is done to trigger the vote, whether it would be another collection of signatures or allowing the committee that was collecting the signatures simply to conclude that the changes made in the General Assembly were good but not good enough, and that the proponents want to take it to a ballot without getting another 100,000 signatures.

Chair Mulvihill said the committee has heard from people that work in this area that the supplemental petition is an impediment. He added there is also a concern that if an issue passes, the next day the General Assembly can just repeal it, and so there is no comfort in a successful initiative process. He said, "if we leave it as is, I do not know how we are encouraging anyone to pursue the initiated statute route."

Mr. Steinglass said there are three big issues: (i) whether the statutory initiative should be indirect or direct; (ii) whether there should be a requirement of a supplementary petition; and (iii) whether there should be a safe harbor provision. He said Ohio does not have a track record on statutory initiatives because there have only been three successful initiated statutes. He said there is no legal protection for initiated statutes, although some argue there is a political protection for a statute adopted by the people. But, he said, these are the three steps along the way where a conversation about big issues could take place.

Chair Mulvihill then called on the committee to comment on the question of whether or how to revise the statutory initiative procedure. He asked Mr. Steinglass to outline the three issues again for the committee.

Mr. Steinglass said these questions are:

1. With regard to the direct or the indirect initiative, does the proposed initiated statute go right to the voters or does it stop in the General Assembly?

2. Assuming it should go to the General Assembly first, what happens to initiate a vote of the people? Is it just the committee that supported the statute saying move forward because it does not like what the General Assembly did, or do they have to re-collect signatures?

3. The statute has now been approved by the voters, how safe is it, is there a safe harbor or anti-tampering provision that prevents the legislature from making changes?

Committee member Roger Beckett said one of the features that he likes about the Ohio indirect statutory initiative is that it has a very low percentage of signature requirements, adding there are only 21 states that allow these kinds of statutory requirements, with the only state lower than Ohio being North Dakota at two percent. He said most are five or six percent or some larger number. He said, in terms of giving the people of Ohio the opportunity to present an issue to the legislature that it is not addressing, having that low three percent requirement is a very good thing because it sends a strong message to the legislature that this is something voters want it to tackle. He said the committee does not know how many petitions were submitted where the legislature actually dealt with that issue and it never did make it to the ballot because there is no data on that. He remarked, "in terms of the question of spending tens of millions of dollars and being able to gather more signatures, for organizations to collect the number of signatures, what we have in Ohio gives more power directly back to the people, to a smaller number of people to raise an issue," adding "getting it on the ballot, that part needs to be tweaked, but there is some virtue to this indirect system with a low signature requirement."

Agreeing with Mr. Beckett, Chair Mulvihill noted, however, that the statutory initiative option has not been utilized. He wondered if it is because it is double the work, or if it is because the General Assembly can change the result. He said he has no problem with the indirect method so long as the proponents are not required to start over. He said people who want to change the law go to the General Assembly first and lobby, or talk to a member who might sponsor a bill, so "it is not as though the General Assembly has not considered the issue before such that the indirect initiative gives the General Assembly the first time to think about it." He said there is always time for the General Assembly to get involved if it wants to. "So if we want to keep the indirect route what we have to do is allow the people who sponsored it to go directly to the people should the General Assembly not act, without having to go back to get more signatures."

Committee member Janet Abaray asked, to the extent that there is a huge expense with trying to either get an amendment or a statute passed through these processes, whether there is information about how many initiatives are driven by a small group with a specific financial interest. She said, if there are many of these instances, should not the committee be looking at what is going to happen now if they will be thwarted from the constitutional route (because Issue 2 has passed) and may now want to opt for the statutory route.

Mr. Steinglass said he is not sure how often actual grass roots groups jump into this. He said he does know that the need to get supplementary signatures is a big impediment for real grass roots groups because if the initiative is being funded by someone with a big checkbook they write another check for the supplementary period. A real grass roots group has trouble having enough resources to get through the supplementary period. He said there may be some groups after Issue 2 who are forced to go the statutory route, and that is probably a good thing if you believe the constitution should be reserved for more basic kinds of matters.

Chair Mulvihill disagreed, saying Issue 2 does not completely prevent a constitutional initiative for a monopoly, just requires it to be a two-step process. He said it is not possible to be sure yet whether the limitation imposed by Issue 2 is a substantive limitation.

Chair Mulvihill asked Mr. Beckett what his position would be if the committee makes a proposal that leaves the statutory initiative indirect, eliminating the supplemental petition and allowing the proponent to go directly to the voters if it does not like what the General Assembly does.

Mr. Beckett said one of largest concerns is that we have such a low percentage of signatures required, so that if the committee were to recommend something like Chair Mulvihill suggested, he would like to increase that percentage amount. The question he has is whether that creates an additional barrier for a grass roots group that is harder to cross than doing the three percent initially and then the three percent for the supplemental. He said he likes the low percentage to get the General Assembly's attention, but not for getting something on the ballot. Chair Mulvihill said the committee does not want to erect barriers and that he thought Mr. Beckett was touting the virtue of the lower threshold. Mr. Beckett clarified he is touting it in terms of sending a message to the legislature that this is an issue they should deal with, but he would not suggest that the committee create a terribly low threshold for getting something on the ballot. He said three percent is very low compared to other states, and he guesses there would be many people in the legislature who would be hesitant to do that. Chair Mulvihill clarified, stating that what Mr. Beckett is saying is that he would consider taking out the supplemental petition requirement but would want a higher threshold than three percent.

Mr. Readler suggested a revision that would require proponents to get five percent up front, rather than initially three and then an additional three later.

Mr. Kurfess asked a procedural question, wondering what would occur if the legislature enacts legislation as a result of what proponents have submitted, and the legislation is not substantially at variance with what the proponents want but the proponents still want their version on the ballot. He asked whether the proponents can add a repeal of what the legislature has done.

Mr. Steinglass said his assumption is the proponents could try to initiate their own statute, but their initial proposal would be enacted and it would be up to the courts to sort it out, presumably giving great deference to the subsequently-enacted statute on the same topic. He said it could get pretty confusing because it is not clear the General Assembly would do precisely in the same language what the proponents would do. He said there is no mechanism now for the proponents to shift their proposal around, rather, it is an all-or-nothing kind of procedure. He said he could see some tactical maneuvering going on with a process like that.

Mr. Kurfess asked whether the committee should consider some language that would address that issue and make it clear what happens if there is that kind of conflict. Mr. Steinglass said it would be possible to look at that. He cautioned, however, that anything that gets done could be seen as removing power from the General Assembly and so a prudent course would be not to do multiple things. He said he likes the idea of keeping the indirect statutory initiative, and then changing the supplementary petition procedure, which changes work together relatively nicely because that plan respects the role of the General Assembly but makes it easier to give proponents a proper role in both initiating and in going to the voters. He said this seems appropriate in a representative democracy that has a direct democracy as part of it.

Chair Mulvihill asked the committee its opinion about leaving the statutory initiative indirect but removing the supplemental petition requirement. Ms. Abaray asked about increasing the time for getting supplemental signatures. Mr. Steinglass said a concern about the supplementary petition is it is hard to change the time because of absentee and early voting and the need to place items on the ballot by a certain date. He said what used to look like a 90-day period has shrunk to a 60-day period. He said a change to the provision could give the General Assembly only 90 days to make its determination, but that option raises some additional issues. Ms. Abaray said that alternative might be a little less controversial than changing the supplementary petition requirement. Chair Mulvihill said that the committee has heard some testimony on this indicating that would be effective. She said the committee has to take into account that the constitutional amendment that just passed (Issue 2) is going to change the fact pattern, and that there is now restriction on the constitutional side that wasn't there before.

Chair Mulvihill commented the committee has been talking about this issue before Issue 2 was ever on anyone's mind and so he does not want it to affect the conversation about streamlining the statutory initiative process. He said it is unclear how or whether Issue 2 will be an impediment to the constitutional initiative process, and whether it will encourage the statutory route. He added Issue 2 is not a firm prohibition, simply a multi-step process for getting a monopoly approved.

Chair Mulvihill wondered whether the committee should draft some language to consider, whether in conjunction with a safe harbor provision, or separately, or not at all.

Mr. Readler said a safe harbor, if it is enacted, addresses whether there is a limitation on the legislature in changing it.

Chair Mulvihill said, in some way, there could be a restriction requiring two-thirds, or supermajority, vote to overrule an initiated statute, or possibly restricting the General Assembly from acting within a certain, maybe five-year, time period.

Mr. Steinglass said six or seven states have safe harbor provisions. He said this is a period in which it is not possible to change an initiated statute without a super majority vote. He said, on the other hand, if there is a glaring error, there could be a change if there is a supermajority vote. He said the safe harbor is a limitation on the power of the General Assembly, and there could be pushback on that.

Mr. Readler said his view is that he does not like the trend of using the constitution for special interests. He said he is still an advocate of making some changes to the constitutional amendment process. He said he supported Issue 2, which passed by fifty-one percent. He said the bar should be higher. He said he could see making the signature requirement five percent, as suggested by Mr. Beckett. He said he advocates a four-to-five year period during which the statute would be difficult to change, but that if two thirds of the legislature agrees there should be some ability to make minor changes, suggesting there be a "safe harbor to the safe harbor." He said this would make the statutory initiative more attractive and help preserve the constitution.

Committee member Larry Macon said he agrees with Mr. Readler.

Represenative Emilia Sykes said she also agrees with Mr. Readler. She mentioned her previous legal experience in Florida, saying Florida's constitution is full of special interests. She commented that in Florida a proponent must have 60 percent approval at the polls to pass an initiative, but that still is not enough to keep special interests out of the constitution. She said the balance is in allowing the citizens access to the ability to change the law when the legislature is not responsive, without muddying up the constitution with parcel numbers and other items that do not belong there.

Chair Mulvihill suggested to Executive Director Steven C. Hollon that staff try to draft some language that would be a redraft of Article II, Section 1b, eliminating the supplemental petition requirement, keeping the statutory initiative procedure, and indicating that, if the General Assembly passes something different or refuses to act, the proponents can go directly to the people. He added a draft should have a safe harbor provision preventing the General Assembly from acting for five years absent a two-thirds vote for the first five years, and moving from a signature requirement of three percent to five percent in terms of signatures to get the initiated statute to the people.

Mr. Kurfess asked, regarding counties, what two counties are the median in terms of population. Mr. Steinglass said he did not know, but that this information should be available on the secretary of state's website. Mr. Kurfess said the reason he asked is because if the requirement is to get signatures from half the counties, it is a little easier in larger counties, and so it would be helpful to know what half of the counties are above that median.

Chair Mulvihill commented that the committee might want to consider whether to modernize the signature-gathering process, noting that technological advances might impact how that process could be improved. He wondered if the geographic requirement still makes sense.

Mr. Steinglass added that the committee might talk about the role of the attorney general. He added the committee could look at the role of the ballot board, or consider an overall organization of the article. He said that the assigned task of drafting a change to the statutory initiative process will require some research and the question is whether the research should go into a memorandum or directly into the report and recommendation. He said a lot of the research has already been done, and that the Legislative Service Commission has provided some draft language dealing with strengthening the statutory initiative.

Chair Mulvihill thanked Mr. Steinglass for his hard work on this topic.

Next Steps:

Mr. Hollon pointed out the planning documents in the back of the booklet, indicating these documents are intended to assist the committee in its work, asking the committee to consider these provisions in order to give guidance to staff for future research needs.

Mr. Steinglass added that the committee has not talked about the referendum, or municipalities' powers of direct democracy. He said when the Commission was created, the only explicit guidance was a specific charge to have this committee look at the procedure for changing the constitution, for example how the constitutional convention process works.

Chair Mulvihill said that these topics would be addressed in the future.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:10 p.m.

Approval:

The minutes of the November 12, 2015 meeting of the Constitutional Revision and Updating Committee were approved at the January 14, 2016 meeting of the committee.

/s/ Dennis P. Mulvihill

Dennis P. Mulvihill, Chair

/s/ Charles F. Kurfess

Charles F. Kurfess, Vice-chair