OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
CONSTITUTIONAL REVISION AND UPDATING COMMITTEE

FOR THE MEETING HELD
THURSDAY, JANUARY 12, 2017

Call to Order:

Chair Dennis Mulvihill called the meeting of the Constitutional Revision and Updating Committee to order at 1:43 p.m.

Members Present:

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

Approval of Minutes:

The minutes of the December 15, 2016 meetings of the committee were approved.

Presentations and Discussion:

Chair Mulvihill announced the committee would be continuing its consideration of the initiative and referendum sections of Article II. He said additional edits to the draft resulting from last month's presentations and discussion were prepared and would be described by Senior Policy Advisor Steven H. Steinglass and Executive Director Steven C. Hollon. He added that Attorney Don McTigue also had ideas for improving the draft and was present to assist in the committee's ongoing review.

Chair Mulvihill first recognized Mr. Steinglass, who described the changes to the draft that had circulated at the last committee meeting.

Mr. Steinglass said the revisions were designed to accomplish several goals. First, the new draft places a constitutional foundation under the statutory requirement that initial petitions with 1,000 signatures be filed with the attorney general for proposed amendments and proposed statutes so that the attorney general can determine whether the summary is a "fair and truthful" statement of the proposal. He said the draft also makes explicit that the statutory one amendment/separate vote

requirement applies to proposed constitutional amendments. Mr. Steinglass said the new draft continues the current policy of allowing the ballot board to determine the one amendment/separate vote issue at the beginning of the process, but moves to the beginning of the process the ballot board's determination of whether the proposal creates a monopoly, determines a tax rate, or confers a special benefit. Mr. Steinglass said, currently, this determination takes place after the petition signatures are verified.

Mr. Steinglass continued that the new draft requires proponents to include in their initial petition a proposed title and explanation, and requires the ballot board to review the proposed ballot title and proposed explanation at the start of the process. He said the new draft expressly gives the Ohio Supreme Court exclusive original jurisdiction over determinations concerning the fair and truthful summary, the one amendment/separate vote requirement, the monopoly determination, and the validity of the title and explanation. He said the draft indicates that the secretary of state's verification of petitions and signatures includes not only their sufficiency but also their validity, invalidity, and insufficiency, and that Ohio Supreme Court review reaches all these determinations. He said the new draft additionally applies the new requirements for the constitutional initiative petition to the statutory initiative process.

Underscoring these points, Mr. Steinglass said there is currently an initial petition requirement that has been in the statutes since the 1920s but does not have any explicit constitutional authorization. He said if the new draft is to front load the ballot board determination, it becomes more important to give the initial part of the process a constitutional foundation. He added that the draft now takes the one amendment/separate vote requirement that is currently in Article XVI, and makes it applicable to citizen initiated amendments. He noted that the revised code makes the requirement applicable to initiated amendments, and there is language in the constitution that arguably bootstraps it in, but the new draft includes it in the constitution.

Chair Mulvihill asked the committee for its thoughts on the new draft.

Representative Bob Cupp asked if the statutory requirement of submitting to the attorney general an initial petition along with 1,000 signatures is still in effect in the latest version. Mr. Steinglass agreed that this is still the case, adding that the edit is designed to put that requirement in the constitution, and not to change anything about that procedure.

Donald J. McTigue, Attorney
McTigue & Colombo LLC

Chair Mulvihill introduced Mr. McTigue, an attorney with McTigue & Colombo LLC, who was present to offer some proposed revisions to the draft and to describe his suggestions.

Mr. McTigue said that, since his appearance at the December 2016 committee meeting, he had given more thought to the issue of frontloading the ballot board review process. He said he made redline changes to the draft he submitted previously. Comparing his edits with those undertaken by staff, he said the drafts are essentially the same in terms of moving the review process up front, but that he wanted to clarify some of the terms that are being used. He said there are four different

terms describing different written documents: the summary, the ballot title, the ballot language, and the explanation.

He described the ballot language as being what voters see when they go into the voting booth, and that the ballot title is the heading that appears above the ballot language. He said the ballot language and ballot title are not on the petition, and that, by statute, the secretary of state decides the title. He said, by constitutional provision, the ballot board decides the ballot language.

Mr. McTigue said the summary is a statutory creature, and is connected with the requirement of getting 1,000 signatures. He said, by statute, proponents must have a summary to submit to the attorney general, who then determines whether the summary is fair and truthful. If that requirement is met, the proponents have to print on the face of the petition that it includes certification by the attorney general. He said there is a statutory process for challenging that in the Supreme Court. He said if the ballot language and title is to be moved to the front of the process, he suggests that the ballot language and title can essentially take the place of the summary. He said the proponents still would have to get 1,000 signatures, but instead of a summary they would be proposing the ballot tile and the ballot language, and submitting them to the ballot board, rather than to the attorney general. He said the ballot board can disregard the summary if it wishes. He said there are standards the Supreme Court has developed for what makes ballot language fair and accurate, adding if there is to be a summary up front, make it the ballot language and title, and say that is what has to be proposed by the proponents with 1,000 signatures before circulating the main petition. He said he proposes that there then be a short period where it could be challenged if someone does not like it, the court then makes a decision, and that is what gets printed on the face of the petition. He said his draft replaces the summary with the ballot language, and adds the date of certification. He said that is the primary difference between the current draft and what he did.

Commenting on the staff edits to the draft, Mr. McTigue said he sees no reason to go to the attorney general. He said there is also no need for a 300 word argument or explanation. He said he would recommend getting rid of the summary requirement and require submission of proposed ballot language instead. He said he would recommend keeping the requirement that the ballot board prescribe the ballot language. He also suggested adding some tight time frames for filing a challenge with the Ohio Supreme Court. He said the one subject/separate vote requirement is purely statutory, and because that determination is made up front by statute, it should be rolled into that same process.

Mr. McTigue said the draft should reinstate a ten-day cure period in the situation in which the initial petition as certified by the secretary of state has insufficient signatures. He said his draft builds that cure period into the process, for use where the secretary of state's initial determination is that proponents do not meet one of those thresholds. He said he believes this change works with the overall timelines but said he would double check that. He said the constitution currently allows ten days if the signatures fall below initially, or if the Supreme Court knocks out some of the signatures. He said the initial staff version of the proposal eliminated that provision, so he put it back in.

Chair Mulvihill thanked Mr. McTigue for his work and asked, as a practical matter, where in the process the constitutional provision is actually drafted, and by whom. Mr. McTigue said that

would be the full text of the proposed amendment that is drafted by the proponents and submitted with 1,000 signatures. Chair Mulvihill asked whether the ballot board plays a role regarding the text that is going into the constitution. Mr. McTigue said the ballot board has no authority to do that.

Mr. Hollon asked whether there should be a process for the ballot board to work with the proponents to suggest changes, so there is constitutional consistency. Mr. McTigue said there are a couple of ways to deal with that, noting many city charters provide that amendment proponents should submit proposed language to the city law director and get feedback. He said the General Assembly could enact legislation to require the attorney general's office to review the language, and the constitution could require that legislation to be enacted. He said the ballot board could be the entity charged with that task. He said, right now, the analogous situation is that the attorney general reviews the summary, and may reject it if it is not fair and truthful. At that point, the proponents can either challenge that decision in court, or they can get another 1,000 signatures and start over. Something like that could happen as well when substituting ballot language instead of a summary.

Mr. Steinglass asked whether the 300 word limitation applies only to arguments or whether it also applies to the explanation. Mr. McTigue said in the past it has been a 300 word limit for each, but the preference is to provide fewer words.

Mr. Steinglass noted that the full text of the constitutional language is in the initial petition and in the publication. He asked whether the text of the summary drafted for the attorney general is also included in the publication. He wondered about the function of the summary that goes to the attorney general.

Mr. McTigue said it is purely a statutory requirement that was enacted because people do not read the full text. He said the expectation is that the voters would read the summary on the front of the petition because they would not read the entire proposed amendment or law. Mr. McTigue said the summary has tended to get longer over the years because the attorney general may reject the summary for leaving out information.

Mr. Steinglass noted that if the summary that goes to the attorney general is also the explanation that goes on the ballot, there might be tension in terms of the number of words. Mr. McTigue said if the ballot language is moved to the front of the process, the ballot language is what voters will see both on the petition and in the voting booth. So, he said, the question becomes whether there is a need for the summary at all. He added there may not be a need for 300 word arguments printed in newspapers, since many people do not read the arguments.

Mr. Steinglass wondered if there is a way to avoid petitions being sent back multiple times. Mr. McTigue said this does not happen most of the time, but in one instance it was because the proponents were not told all the objections at the beginning. He said the more common problem with petitions is that the proponents leave information out, or that the summary describes what the provision will do, which is really an argument and not a summary.

Chair Mulvihill asked whether Mr. McTigue's draft removes the attorney general from the process altogether. Mr. Mctigue answered affirmatively, but said the attorney general will defend the ballot board if the ballot board is sued.

Rep. Cupp noted the draft's requirement that the attorney general examine the summary, wondering if that summary must be included with 1,000 signatures or whether the summary goes to the ballot board before those signatures are obtained. He also wondered if there is an opportunity for someone other than the proponents to challenge the determinations of the attorney general or ballot board in the Ohio Supreme Court.

Noting his proposed language is different from that provided by staff, Mr. McTigue said if the provision does not indicate who may file a challenge, the Supreme Court will allow any elector of the state of Ohio to do so. He said, as a general rule, the Court has held if someone is a qualified elector who would be entitled to vote on the issue, that is sufficient to provide standing. He said that he did not specify who could file a challenge in his draft. Rep. Cupp suggested that there should be language allowing parties who may be against a proposal to object.

Mr. Kurfess, noting the three decisions that are to be made by the ballot board in subdivision (B)(2) of the draft, said each of these determinations should be phrased so that the answers are consistent – either three "yes" answers or three "no" answers. Mr. Kurfess said a second point is that an amendment, to be fully implemented, might require changing two or three different sections of the constitution. He noted that this does not necessarily mean the amendment violates the one amendment rule because there is still only one goal being accomplished.

Mr. McTigue commented that the ballot board and the Supreme Court both have said that on the one subject requirement that they apply the same standards that are applied to the legislation in the one subject rule. As long as the sections are cohesively interrelated it should be okay to amend them simultaneously.

Chair Mulvihill asked whether committee members have concerns about removing the attorney general as the first repository and giving it straight to the ballot board.

Mr. Readler said he is not sure he understands the justification for that, wondering if the reason is to streamline the process.

Mr. McTigue said the goal of the revision was to move up front the challenges to the ballot language. He said one could keep challenges to ballot language where it is right now, but all that does is create pressure on election officials to get ballot language decided in time to print ballots. But if there is agreement to move that review to the front, the ballot language should just replace the summary requirement because the ballot language is a summary. Right now there is a summary process at beginning and another, called ballot language, at the end. His suggestion would streamline the petition process. Mr. McTigue said the attorney general is only a part of the process as a matter of statute, and only with regard to the 1,000 signature, summary petition requirement. He said the ballot board could do that too. Or, he said, the attorney general could be the one to approve the ballot language.

Mr. Readler said the change takes the attorney general out of the process when the legislature has said the attorney general should be involved. He said he is anxious about changing that requirement.

Mr. McTigue explained that the attorney general comes out because his draft eliminates the summary requirement. Mr. McTigue said the attorney general is legal counsel to the Ohio ballot board; the attorney general's office could send an assistant attorney general to give legal advice on whether proposed language meets constitutional standards. Mr. McTigue said the attorney general may not mind being taken out of the process as this is not one of that office's core functions.

Chair Mulvihill explained that if the ballot language is to be approved at the beginning, there would be no need to duplicate the efforts and require a summary, which is essentially the same thing.

Mr. Readler said he appreciates the concern about the ballot board considering the ballot language at the end of the process, but noted that there might be some value to the current procedure, in which, during the time between the initial petition and the final review by the ballot board, there is development of issues, and public attention drawn to the topic, allowing public officials to refine their views and weigh in on the matter.

Mr. McTigue said the attorney general's office is legal counsel to the ballot board, and, if the committee would like, the draft could be revised to require the attorney general to provide legal counsel to assist the ballot board on the front end.

Mr. Kurfess asked if there has been an occasion when the attorney general and ballot board were taking inconsistent approaches in the language they are applying. Mr. McTigue said not that he is aware of. Mr. Kurfess then asked if there has been exit polling which included the question of whether voters had to read the language of the issue before they voted. McTigue said he is not aware of such polling.

Rep. Cupp suggested it would be helpful to the committee to have before it examples of a summary and ballot language at the next meeting. Chair Mulvihill agreed and suggested those items could be provided from the ballot issues on the November 2015 ballot.

Chair Mulvihill thanked Mr. McTigue and staff for their work on the issue, and indicated the committee would continue to consider and discuss this topic at the next meeting.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 2:46 p.m.

Approval:

The minutes of the January 12, 2017 meeting of the Constitutional Revision and Updating Committee were approved at the March 9, 2017 meeting of the committee.

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

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