



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE CONSTITUTIONAL REVISION AND UPDATING COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 9, 2017

Call to Order:

Chair Dennis Mulvihill called the meeting of the Constitutional Revision and Updating Committee to order at 11:05 a.m.

Members Present:

A quorum was present with Chair Mulvihill, Vice-chair Kurfess, and committee members Abaray, Beckett, and Jordan. At the invitation of the chair, Senator Vernon Sykes participated as an ex officio non-voting member of the committee.

Approval of Minutes:

The minutes of the January 12, 2017 meetings of the committee were approved.

Discussion:

Chair Mulvihill began the meeting by thanking staff for the new draft, titled "V7," that was before the committee for review. He said the committee's goal has been to make the initiative and referendum sections of Article II more user-friendly and understandable, noting that, in the current sections, sentences go on for paragraphs without punctuation. He said the committee has succeeded in this goal, and has benefited from input from the League of Women Voters and other interested groups and individuals who have suggested ways to structure the process to make it more modern. He said this has been done through allowing the General Assembly to enact law allowing the signature-gathering process to be conducted electronically. He added that a structural improvement has been to remove the supplemental petition requirement in the statutory initiative process.

Chair Mulvihill continued that the committee has recognized that the statutory initiative has been underused, and the constitutional initiative has been overused. He said the committee has sought a way to discourage people from dropping their business plans into the constitution. He

summarized some of the changes as being that the committee has removed the supplemental petition in order to streamline the statutory initiative, to drop the signature requirement from six to five percent, and to create a “safe harbor” provision protecting an initiated statute from changes by the legislature for a certain period of time. He said there is not much history in Ohio of enacted statutory initiatives, with the process being used only three times in a little over one hundred years.

Referencing the constitutional initiative process, Chair Mulvihill said the committee’s changes have been to require a 55 percent voter approval rate, making it slightly more difficult to pass a constitutional initiative amendment. He said the committee also cleaned up the timing issues, widening the time frame for collection of signatures, and requiring initiated constitutional amendments to be placed on the ballot in even years. He said there is a vast difference in the number of voters in odd-year elections versus even-year elections, and the committee considered it important to have the maximum number of voters weigh in on whether to amend the state constitution.

He said the committee wanted to encourage the statutory route, making it easier to amend the Revised Code by initiative. He said there was wide consensus within the committee for the elements of the draft.

Committee member Janet Abaray commented that there is an additional conceptual issue she had raised that she would like to see included in the draft. She described it as a need to prevent proponents from creating amendment language that would state the amendment supersedes every other part of the constitution. She noted that a speaker who had appeared before the committee had described this type of language as being a way for proponents to protect their amendment from ever being challenged or repealed. Ms. Abaray said she suggested language that would prohibit an initiative from containing a provision purporting to give it precedence over any other statute or constitutional provision.

Addressing Ms. Abaray’s suggestion, Senator Kris Jordan noted that constitutional amendments would always have precedence over the Revised Code, questioning whether it would be possible to prohibit the problem Ms. Abaray was describing.

Ms. Abaray agreed with that premise, but said that occurs by operation of law. She said her concern is that proponents of an initiative should not be able to use language that will tie the hands of the court.

Chair Mulvihill said the committee did discuss this at a previous meeting and agreed it is an important point. However, he said it would be difficult to find language to prevent proponents from trying this tactic because every initiated constitutional amendment or statute changes something. He suggested the committee could revisit the issue after considering the new version of the draft.

Chair Mulvihill then directed the committee to the V7 draft. He described changes he would like to see to V7. First, he indicated that the draft refer to “electors,” without calling them “qualified electors.” He noted additional revisions, including allowing proponents to submit at their discretion a suggested title, explanation, and ballot language, and a clarification that a proposed amendment must be approved by at least 55 percent of the electors.

Concluding his review of the changes to V7, Chair Mulvihill complimented the committee, saying it has worked in a nonpartisan manner to make the language better for everyone.

Vice-chair Charles Kurfess, noting the draft's requirement that an initiated amendment or statute go into effect 30 days after it is approved, asked what date constitutes the date of approval. He asked what would be the effective date in the case of a recount.

Chair Mulvihill said the approval date would be when the secretary of state certifies the election results.

Mr. Kurfess noted that certification does not occur until at least ten days after the election, wondering if there should be some process by which the secretary of state takes some action, or by litigation is precluded from taking some action, to certify the results.

Chair Mulvihill agreed that is a good question. Ms. Abaray suggested that it would be better to keep the 30-day requirement, as it is language that is in the current sections. She said if the committee changes that, it may be adding problems that do not currently exist.

Chair Mulvihill agreed, noting that the committee is running out of time to complete its work. Mr. Kurfess suggested the committee might wish to consult with the secretary of state so that question could be answered if it comes up.

Senior Policy Advisor Steven H. Steinglass noted he has never seen a problem with the effective date for initiated amendments. He said legislatively-initiated amendments become effective when approved, unless they say otherwise.

Senator Vernon Sykes noted that, even with a recount, there is a prescribed time period for taking action before the secretary of state certifies the results.

Having concluded his description of changes to the circulating draft, Chair Mulvihill said he would like to work with Committee member Roger Beckett, Commission Counsel Shari O'Neill, and Mr. Steinglass in finalizing the draft. He said the committee has spent four years on the project, and could spend another four years, but there is a benefit to finality. He said the redraft has been a good effort on the part of the committee.

Ms. Abaray agreed that the committee had done an excellent job on the draft, but said she would like to formally move that the committee consider a way to prevent the "trump card" language about which she expressed concern. She said she worries that someone will introduce a provision that would overcome the balancing that normally is done through the judicial review process.

Chair Mulvihill said, while he understands the concern, he worries about the execution of a plan to prevent it in terms of potentially obliterating the initiative process altogether.

Mr. Beckett said the concern is that such a provision would essentially limit someone's ability to amend the constitution.

Mr. Steinglass agreed with Ms. Abaray that proponent language such as she described is part of the arsenal of those who are professionally involved in the initiative industry. He said it involves using superseding clauses to resolve potential conflicts at the beginning, instead of letting the courts sort it out. He said it is hard to get a handle on the problem, which does not occur when a constitutional provision conflicts with a statute, but rather only applies when conflicting potential provisions are concerns. He said the only way he could see to address it would be to place a limitation on what goes on the ballot.

Chair Mulvihill suggested that if the committee agrees on its latest version, it can send a cover letter to the General Assembly describing this concern. Then, he said, the General Assembly can look into it and would have more time to do so. If the legislature finds it is a problem, a solution could be placed on the ballot quickly.

Sen. Sykes said he basically agrees, but thinks the people are the final arbiters and would record their views at the polls. He said having a provision to try to fix that problem would result in prohibiting an issue for voters to even consider. He said he is not sure how to solve the problem without taking away the citizens' initiative right.

Chair Mulvihill added he worries about the potential message that the public's initiative rights are being taken away.

Mr. Kurfess asked whether the sense of the committee is that it had met its goal of encouraging people to use the statutory initiative as opposed to the constitutional initiative. Chair Mulvihill said only time will tell whether that goal has been met.

Mr. Beckett said the calibration has been significant, noting that, by requiring even-year elections and increasing the percentage, the committee has cleaned up the process, reduced the statutory initiative procedure to one round of petitions, and put in a safe harbor. He said he does not think anything stronger could be done on the initiated statute side, noting that, for example, increasing the approval rate to 60 percent would create a barrier that would be opposed by the public.

Ms. Abaray asked how the committee should present its conclusions, wondering whether there is a rationale that could be expressed that, based on prior constitutional amendments, the committee wanted to increase the threshold to encourage people to consider the statutory initiative. She wondered if the committee should explain why it picked the percentage as 55 percent.

Chair Mulvihill said the committee spent time talking about what the number should be, saying members had a gut feeling 60 percent would be too far. Instead, he said, the consensus was that 55 percent seemed like it was more difficult but not too difficult.

Mr. Beckett said the strongest argument relates to the number of people who vote in off-year general elections. He said if the Ohio Constitution is to be changed, it should not be in elections where fewer people are going to show. He said the even-year election criterion is the real key.

Ms. Abaray said the committee's rationale should be to encourage the maximum number of voters, and to encourage that there be a strong majority, but not an insurmountable goal. She

said this number seemed to be one that comfortably would have included all the prior amendments. She said the committee should reference that data.

Chair Mulvihill agreed, saying this would be in the report. He said the committee would get a final version emailed in the next few days, and that this would be the committee's final draft.

Sen. Sykes said he is sensitive to Ms. Abaray's issue. He said ballot initiatives are difficult; it only takes a little to be unsuccessful. He said an attempt to supersede other issues would be difficult to get through. Chair Mulvihill noted that the ballot board will write the language, so perhaps there is a built-in buffer.

Chair Mulvihill said he would like to have a report and recommendation for the April meeting, and that he would provide a new draft incorporating the changes discussed.

Mr. Steinglass said if committee members have additional suggestions, they could be emailed to Chair Mulvihill for incorporation into the final draft and report.

Chair Mulvihill requested that committee members reach out to fellow Commission members to explain the committee's position and describe how it has sought to achieve its goals. He said he thinks it is important to take the pulse of the members to see what they may be thinking.

Sen. Jordan asked if a one-page description of the changes could be provided to allow committee members to be able to quickly describe what is being recommended. Mr. Beckett said he had put together such a document and would share it with the committee.

Chair Mulvihill thanked members of the League of Women Voters, who were present in the audience, for their participation in the process.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:07 p.m.

Approval:

The minutes of the March 9, 2017 meeting of the Constitutional Revision and Updating Committee were approved at the April 13, 2017 meeting of the committee.

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

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