

MINUTES

Initiative and Referendum Task Force



Dr. Emily Wanless, Chair
Representative Don Haggar, Vice Chair

First Meeting, 2017 Interim
June 20-21, 2017

Room 413 – State Capitol
Pierre, SD

Tuesday, June 20, 2017

The first meeting of the Initiative and Referendum Task Force for the 2017 Interim was called to order by Doctor Emily Wanless on Tuesday, June 20, 2017, at 9:00 AM in room 413 of the State Capitol. A quorum was determined with the following members answering roll call: Senator Jim Bolin, Pam Lynde, Will Mortenson, Senator Reynold Nesiba, Senator Ernie Otten, Representative Tim Reed, Representative Karen Soli, Duane Sutton, Yvonne Taylor, Linda Lea Viken, Attorney General Marty Jackley (Ex-Officio), Secretary of State Shantel Krebs (Ex-Officio), Representative Don Haggar, Vice Chair (via telephone), and Doctor Emily Wanless, Chair. Excused: James Abbott.

Staff members present include Wenzel Cummings, Legislative Attorney; Fred Baatz, Principal Research Analyst; Jason Simmons, Principal Fiscal Analyst; David Ortbahn, Chief Research Analyst; and Cindy Tryon, Senior Secretary.

NOTE: For purpose of continuity, the following minutes are not necessarily in chronological order. Also, all referenced documents distributed at the meeting are attached to the original minutes on file in the Legislative Research Council office. This meeting was web cast live. The archived web cast is available at the LRC web site at <http://sdlegislature.gov>.

Chair's Opening Remarks and Introduction of Task Force Members

Dr. Emily Wanless, Chair, said the net result of this task force should be a thorough review of the initiative and referendum process including voter fatigue and confusion based on large number of ballot measures, and out-of-state money financing the ballot measures' campaigns. The committee members each introduced themselves, concluding with **Representative Don Haggar, Vice Chair**, who said the task force should explore the history and evolution of the process and investigate how to enhance the process without restricting it.

History of South Dakota Process and 2017 Legislative Enactments

Mr. Wenzel Cummings, Legislative Attorney, gave a PowerPoint presentation, "*The Initiative and Referendum in South Dakota*" ([Document #1](#)). Article III, section 1, of the South Dakota Constitution was enacted in 1898 and allows for the initiative and referendum process. This process was developed to negate the power structure that was developing in the state. South Dakota was the first state to allow for this process but not the first to use it.

Article XXIII, section 1, of the South Dakota Constitution was enacted in 1898 and allows for amending the state constitution, and then the process had to start with the legislature. In 1972, Article XXIII, section 1, was changed to allow the people to propose amendments to the Constitution. The section details how the South Dakota Constitution can be amended, including petitions needing to be signed by at least 10% of those voting in the last gubernatorial election. Other initiative petitions require signatures from at least 5% of those voting in the last gubernatorial election.

In 1994, the legislature passed the requirement to submit ballot measure language to the Legislative Research Council (LRC) for review prior to petition circulation. In 2007, the ballot measure sponsors were allowed to but not required to comply with LRC's revisions. It was also in 2007 when petition circulators were given the right to be compensated for collecting signatures.

Senator Jim Bolin asked that research be done on the history of the earlier law that barred compensation for people collecting signatures on petitions for constitutional amendment ballot measures.

Senator Reynold Nesiba asked how South Dakota defines a petition circulator.

Ms. Shantel Krebs, Secretary of State, explained that petition circulation must be done by a South Dakota resident and residency is loosely defined in statute, basically stating that residency is a place where a person intends to return. Secretary Krebs said the legislature could more clearly define residency but if the definition is specific to petition circulation there would most likely be a constitutional challenge.

In response to a question from Senator Bolin, Mr. Cummings said the legislature does have full authority to repeal initiated measures, as initiated measures cannot tie the hands of future legislatures.

Mr. Cummings said the Attorney General's office was required in 2009 to write statements on initiated measures similar to what the office was already writing for constitutional amendment ballot measures. Senator Nesiba asked if any of the Attorney General statements have been challenged.

Mr. Marty Jackley, Attorney General, said there have been a few challenges to the ballot statements but none of the statements written by the Attorney General's Office since 2009 have been overturned.

Legislative Research Information

Mr. David Ortbahn, Chief Research Analyst, explained the procedure followed by LRC when receiving a proposed ballot measure. The LRC has 15 days from the date of receipt to return the suggested edits to the sponsor. The 15-day turnaround time can be a challenge depending on the length of the measure, the subject, and the time of year it is submitted. In the current cycle, one of the proposed measures is 95 sections in length. Meeting the deadline can also be a challenge when the measure is submitted just prior to or during the legislative session.

Ms. Linda Lea Viken asked if setting the deadline to 15 working days, rather than 15 calendar days, would remove some of the pressure in meeting the deadline. Mr. Ortbahn said such a change would be helpful.

Representative Haggar asked about the issue with proposed measures submitted during session. Mr. Ortbahn said there are periods of time during session, especially during the bill deadlines, when the LRC staff is very busy and having to do research on an initiated measure during that time can be a challenge. There were two ballot measures submitted during the 2017 legislative session.

Mr. Ortbahn said the LRC staff is also responsible for writing the prison impact estimates, but there is a 60-day deadline for that research and written statement.

Mr. Will Mortenson asked at what point do the draft measures become public. Mr. Ortbahn said the proposals are kept confidential until the LRC sends the response to the sponsor. At that time, copies of the proposed measure and the LRC response is also sent to the Secretary of State and the Attorney General. The Secretary of State's office then posts the proposal and the LRC response on their website and that is when the measure is considered public.

Mr. Jason Hancock, LRC Director, talked to the task force via telephone. Mr. Hancock said the LRC edits are regarding style and form; the LRC review does not comment on the idea itself unless there is an existing problem. The sponsors are not required to follow the suggested LRC edits; however, the legislature does have the ability to fix form and style issues for initiated measures and referred laws. The sponsors are also not required to follow the

LRC advice when it comes to proposed constitutional amendments, and those form and style issues are not so easily corrected. The task force may want to consider some type of mechanism to fix style and form problems before something goes into the constitution.

Mr. Hancock said the task force may also want to consider requiring electronic submission of the ballot measure proposals in a prescribed format, which would make it easier to edit the proposals.

Representative Karen Soli asked if it would be better for the LRC to offer an efficacy review of these proposals. Mr. Hancock explained an efficacy review is used when working with legislators in drafting legislation. The LRC staff works with the legislator in finding the best way to achieve his or her goal. Every piece of legislation is written in the best way possible with the assumption that it will become law. Proposed measure reviews are more broad. Mr. Hancock said the proposed constitutional amendments would best be served with an efficacy review, as the legislature has no ability to fix style and form problems when these proposals pass; more time than the current 15-day deadline would most likely be needed for an efficacy review.

Office of the Attorney General Information

Mr. Marty Jackley, Attorney General, explained the process the Attorney General's (AG) office follows regarding the ballot measure proposals. Attorney General Jackley said the statutory instructions can be found in SDCL 12-13-25.1 and part of that statute reads as follows: "The attorney general shall prepare an attorney general's statement which consists of a title and explanation. The title shall be a concise statement of the subject of the proposed initiative or initiated amendment to the Constitution. The explanation shall be an objective, clear, and simple summary to educate the voters of the purpose and effect of the proposed initiated measure or initiated amendment to the Constitution."

The AG's office has 60 days to prepare the ballot measure's explanation and approaches the preparation of the explanation from a committee standpoint. Ms. Pat Archer heads up the committee which also includes two senior lawyers who specialize in the subject area, and two junior lawyers who bring a new perspective to the topic. The committee prepares draft explanations and presents them to the Attorney General for his direction. The explanation is limited to 200 words or less. The process works well because of LRC's partnership, the 60-day timeframe, and the ability for the sponsors to challenge the AG's statement. There have been a few challenges over the years but with each challenge the courts have sided with the AG's office.

Senator Bolin asked if the AG's office is convinced a proposed measure is unconstitutional, do you state that belief. Attorney General Jackley said the statement may say that the proposed measure may be unconstitutional, but not that it is unconstitutional. The decision of a measure being unconstitutional is left to the courts.

Mr. Mortenson asked if there is a problem with the 200-word limit for the ballot initiative explanation. Attorney General Jackley said it is his understanding that the word limit went from 400 to 200 because of voter fatigue. At this time, the Attorney General does not request larger word limit, but if there continues to be ballot measures that are 95 sections long, there may be a need to request a longer word limit.

Representative Tim Reed asked if the word limit could be tied to the number of sections in the proposed ballot measure. Attorney General Jackley said he would prefer it be tied to the total number of words in the proposal rather than the number of sections.

Attorney General Jackley said his office is responsible for three parts of the ballot initiative: the title, the explanation, and the yes or no recitation which explains what a yes vote does and what a no vote does. In preparing these three things, the AG's office is always concerned with voter fatigue.

Secretary of State Information

Ms. Shantel Krebs, Secretary of State, explained the process the Secretary of State's (SOS) office follows regarding proposed ballot measures. There is a great deal of information regarding the initiative and referendum process on the SOS website sdsos.gov. As of today, there are 18 proposed ballot measures for the 2018 ballot, and measures continue to be submitted.

Secretary Krebs distributed copies of the information sheet, "*How to Submit and Circulate a 2018 Statewide Ballot Question Petition*" that upon request is sent to interested sponsors of ballot measures ([Document #2](#)).

Secretary Krebs said in 2016 the petitions submitted included over 25,000 sheets of paper and each page is entered into the system. The petition is reviewed prior to circulation by the SOS office and nothing can be circulated until the Secretary of State has given final approval.

Once the SOS office receives the title and explanation from the AG's office, that information is copied to the petition by the sponsors. The SOS staff makes sure every word is correct, punctuation is in the proper place, and all information is included. The petition must be a self-contained sheet of paper, front and back, with no staples, to assure the signer sees the full proposal before signing the petition. One petition that has been approved for circulation this year contains such a long ballot measure that the petition sheet dimensions are three foot by three and a half foot.

Representative Soli asked if regulating the dimensions of the petitions is something the legislature should be considering. Secretary Krebs said it would be helpful to have some type of guidelines but said she is not sure how that could be done through statute. Ms. Viken asked if the Election Board has the authority to determine the size of the petition sheets. Secretary Krebs said the Election Board could give guidance and put something in administrative rule regarding this issue.

Secretary Krebs continued by explaining the procedure used upon receipt of the signed petitions. Each sheet is scanned, numbered, and received stamped and then placed in secured storage. The sampling of the petitions is calculated by a spreadsheet and is conducted in a precise manner. It took four months to random sample all ballot questions on the 2016 ballot. During that time, three temporary staff were hired and that was an extra \$12,000 in staff costs.

Secretary Krebs said the ballot measures, including the title and explanation are printed on the ballot, and having to change the size of the ballot can be quite costly to the taxpayers. The counties are responsible for the cost of the ballots. The full text of each ballot measure must be printed in the newspapers prior to the election. The cost to the taxpayers last year was over \$200,000 to publish the full text of all ballot measures in the newspapers.

Comparative Analysis: South Dakota with other States

Dr. Wanless gave a PowerPoint presentation, "*Initiatives & Referenda in the 50 States*" ([Document #3](#)). Dr. Wanless said 24 states use initiatives, 24 states use referenda, and all states have constitutional amendments of which 18 states use initiated constitutional amendments, all are used in South Dakota.

It is illegal to require the petition circulators be registered voters, so most states use the residency requirement. Some states do allow payment per signature. Almost every state has more stringent restrictions than South Dakota for signature collection on constitutional amendment petitions. South Dakota's requirement for constitutional amendment petition signatures is 10% of the registered voters who voted in the previous gubernatorial election.

There are two states that limit the number of ballot measures per electing cycle. Illinois limits it to three measures per ballot and Mississippi limits it to five. Once that number of initiatives is reached, no more can be submitted for that ballot year. There are five states that require a deposit just to propose an initiated measure.

Dr. Wanless said five states require hearings on the ballot measures so the public has the opportunity to hear both sides of the initiatives. Thirteen states, including South Dakota, require pro and con statements on the ballot measures. According to an NCSL report that includes an index of qualification difficulty and initiative use, South Dakota is in the top nine states for being the easiest to get initiatives on the ballot. Dr. Wanless said as the number of ballot initiatives increases the success rate of those ballot measures decreases, demonstrating that making the initiative process simpler does not mean more initiatives are successful.

Questions of Task Force Members/Staff Direction

Task force members discussed several issues related to the initiative and referendum process in South Dakota and from that discussion, a list of research requests was compiled ([Document #4](#)). As this research is completed, the information is posted on the LRC Website on the [committee documents page](#).

The task force discussion also led to several requests for bill drafts and a list of those requests was compiled ([Document #5](#)). The bill drafts will be distributed at future task force meetings.

Public Testimony

Ms. Dorothy Brewick, Democracy in Action, Rapid City, said oftentimes the only recourse available to the public to influence the way we are governed is through the initiated measure. Ms. Brewick said she is concerned the task force is going down the road to do away with the public's right to bring initiated measures and she asked that the task force remember there are people in South Dakota who are not represented in the State Legislature and who need a voice.

Ms. Susan Nolan, Democracy in Action, Rapid City, said she realizes this is a study session and the taskforce is educating themselves through the presentations. Ms. Nolan said democracy is messy and can be very costly but it is the public's right to have this voice and this vote. Ms. Nolan said she is very upset that the legislature overruled the vote of the people on IM22.

Mr. Doug Kronaizl, Represent SD, Vermillion, said he would like more research on measures regarding requiring a supermajority vote on initiatives and by what threshold they passed.

Recessed at 2:30 PM.

Wednesday, June 21, 2017

The second day of the first meeting of the Initiative and Referendum Task Force was called to order by Doctor Emily Wanless, Chair, on Wednesday, June 21, 2017, at 9:00 AM in room 413 of the State Capitol. A quorum was determined with the following members answering roll call: James Abbott (via telephone), Senator Jim Bolin, Pam Lynde, Will Mortenson, Senator Reynold Nesiba, Senator Ernie Otten, Representative Tim Reed, Representative Karen Soli, Duane Sutton, Yvonne Taylor, Linda Lea Viken, Attorney Marty Jackley (Ex-Officio), Secretary of State Shantel Krebs (Ex-Officio), Representative Don Hagggar, Vice Chair (via telephone), and Doctor Emily Wanless, Chair.

Staff members present include Wenzel Cummings, Legislative Attorney; Fred Baatz, Principal Research Analyst; Jason Simmons, Principal Fiscal Analyst; and Cindy Tryon, Senior Secretary.

Mr. Cummings distributed two lists of information to the task force members: [Research Requests](#) and [Bill Draft Requests](#). Mr. Cummings will continue to work on these lists of requests from the task force members and keep the task force members apprised as each request is resolved, with much of the information being posted to the [LRC website](#).

Public Testimony

The following are excerpts from the testimony given on June 21. To hear the full testimony, go to the [LRC website](#).

Ms. Karla Hofhenke, Executive Director, SD Farmers Union, Huron, testified that South Dakota was the first state to enact the initiative and referendum process to allow every person to be heard; and her membership believes if it's not broken don't fix it. Ms. Hofhenke said collecting petition signatures is a difficult undertaking and mandating that a certain number of signatures must come from each county would be unworkable.

Senator Bolin said he is surprised the Farmers Union is not interested in seeing more rural people be included when sponsors are collecting petition signatures, so that the signatures come from areas other than just Sioux Falls and Pennington County. Ms. Hofhenke replied that the members of the Farmers Union prefer the process be left as is.

Mr. Tom Harmon, Pierre, said the option of allowing contrary groups to submit petitions to stop a constitutional amendment from being placed on the ballot could be considered, as changing the constitution is a solemn matter. Ms. Viken asked if it would be fair for petitions with fewer signatures being able to stop an amendment from being placed on the ballot if the petitions for placing the amendment on the ballot have more signatures. Mr. Harmon said the mechanics of this option would have to be developed most likely by the Secretary of State's office.

Mr. Harmon said the press loves the initiatives and referenda because the campaigns spend a lot of money on advertising.

Mr. Rob Timm, Chiesman Center for Democracy, Rapid City, said direct democracy does affect voters as they feel they have a say in their government. 2004 research showed ballot initiatives increase the education of voters and 7% - 9% more voters turn out for elections that include ballot initiatives. The non-profit groups and the media have not done a good job informing the public on the candidates and the ballot measures in a nonpartisan manner. Citizens need more information before voting and perhaps the information pamphlets prepared by the Secretary of State's office should be mailed to every household in the state.

Mr. Timm said South Dakota may want to consider an independent citizen review board that hears testimony on the ballot measures and then writes a paper regarding the measures based on that testimony. That information is included on the voter guide. There are several states that use this process mainly for constitutional amendments.

Mr. Mortenson asked if Mr. Timm finds it concerning that this process was developed to protect the citizens from big money coming from the east coast and taking over our government and now it is out-of-state big business money that pays for about 80% of the ballot measure campaign expenses. Mr. Timm replied that the voters need to be informed and if the information is not out there, the campaigns fill that gap. An unbiased source for providing the information needs to be found.

Representative Haggar asked Mr. Timm for his thoughts on the Legislature's Executive Board establishing a quasi-committee to conduct public hearings on the ballot measures. Mr. Timm said the public can be leery of information coming from a legislative board, but there needs to be a process established by which the people can weigh in on ballot measures.

Senator Nesiba requested legislation be drafted regarding a citizen review panel.

Ms. Sharon Gray, Vermillion, said Article III of the SD Constitution should be amended to allow all laws to be referred other than the annual budget. Ms. Gray said North Dakota allows laws with an emergency clause to be referred to the ballot and South Dakota should do the same.

Ms. Gray said the legislature being able to change the initiative process is quite troubling, and the IM22 results showed the voters can be ignored. She added that requiring petition signatures from several different locations would be very difficult, and would put additional strain on the sponsors.

Mr. John Dale, Cannabis Consumers for Liberty, Spearfish, said he is using the initiative process to educate the public on cannabis and remove it from the dark drug culture. Mr. Dale said barriers should not be put in place to the initiative process that he considers sacrosanct.

Mr. Jim Ackerman, Pierre, said he has been a petition circulator since the early 1980's. Mr. Ackerman said the backlash on IM22 was nasty, and several states have almost identical initiatives because of the Koch brothers. Mr. Ackerman said he would like the number of signatures required on petitions to stay the same. He added that out-of-state money for campaigns could be eliminated if there was a limit on the amount that can be spent by in-state businesses, organizations, and people.

Mr. Jay Davis, Rapid City, said there have been 55 ballot issues since 2000 and only 2 of those were malicious; the "jail for judges" amendment in 2006 and one of the 2016 payday loans initiatives. In every case but those two, regardless of where the money came from, there was a legitimate grass roots effort. Mr. Davis said there is not a crisis with the ballot initiative process. The Koch brothers cannot be stopped from spending money, but there needs to be more transparency regarding the sources for campaign funding.

Mr. Davis said he advises those gathering signatures to get them from as many different areas as possible, but no proposed ballot measure should fail because it did not meet a requirement to gather signatures from enough different areas.

Mr. Cory Allen Heidelberg, Aberdeen, said the system seems to rectify its own errors and that we can trust the voters. Mr. Heidelberg said there have been comments made that it is too easy to put initiatives on the ballot and that is not true. It is easier to put a candidate on the ballot than an initiative. It takes 14,000 signatures to get a referendum on the ballot and 28,000 signatures to place a constitutional amendment on the ballot; but only about 700 signatures to place a gubernatorial candidate on the ballot. And it can take up to 75 days to place an initiative or referendum on the ballot but not the candidate. Mr. Heidelberg said this demonstrates how difficult it is to put a measure on the ballot, and the system is already properly balanced.

Senator Nesiba asked if the signature requirements to run for office should be increased. Mr. Heidelberg said no, it should not become more difficult for people to take part in government.

Mr. Curt Pochardt, Rapid City, said the changes that were made to the process this past session should be in effect for at least a year before reviewing again. Mr. Pochardt asked that the petition signature collection process not be made more difficult, but does agree with Senator Bolin that the State Constitution needs to be protected.

Mr. Pochardt said IM22 was handled recklessly by the legislature and that the legislature needs to be more respectful of the voters, the legislature should have waited for the courts to complete the review of the initiative before addressing it.

In response to questions, Mr. Pochardt said he would have no problem with minor tweaks to the petition process, such as allowing the LRC 15 working days to respond, and if a proposed measure is submitted to the LRC during the Legislative Session the deadline for response could be extended to 30 days.

Mr. Mark Lee, Sioux Falls Chamber, Sioux Falls, said the Sioux Falls Chamber evaluates every ballot measure and is significantly involved in the process. Mr. Lee said that while others have testified with the adage, if it isn't broke don't fix it; but the chamber subscribes to the theory that sometimes preventative maintenance is necessary. Mr. Lee said he does not believe it is easy to put something on the ballot, but in comparison to other states, the process is easier in South Dakota; and the process for amending the State Constitution does need review. Mr. Lee added that although 28% of South Dakota's voters are located in Minnehaha County, collecting all petition signatures in that one area is not good policy.

Mr. Doug Kronaizl, Represent SD, Vermillion, said gathering signatures on petitions is already difficult logistically and requiring signatures from several different counties would make it even more difficult. Each petition can have signatures from voters in one county, so a different petition must be used in each of the counties. Mr. Kronaizl said he is against limiting the number of initiatives and referenda that can be placed on a ballot.

Ms. Wanless said Minnesota elections count non-votes on Constitutional Amendments as no votes. Mr. Kronaizl said he is opposed to that as the assumption of a non-vote meaning no should not be made when counting votes.

In response to questions from the task force members, Mr. Kronaizl said the LRC staff is very helpful and their comments are informative, but it was difficult to find the information that the sponsors need to contact LRC as a first step. Senator Nesiba suggested sponsors contact the Secretary of State's office first and staff will explain the process.

Ms. Roxanne Weber, Voter Initiative Protection, Pierre, said the constitution, statutes and the Capitol belong to the people; if the elected officials do not do the public's bidding, then action can be taken through the initiatives. If the people are not encouraged to be participants in the process, big business will come in and make the decisions for us.

Ms. Weber said the LRC, especially Director Hancock, were wonderful to work with in writing the Voter Initiative Protection's initiated constitutional amendment. Ms. Weber said they submitted three different versions to the LRC to make sure the final document does what the group intends in the best form, adding that things must be done quickly to allow for time to collect signatures.

Ms. Karen Hall, Rapid City, said she is opposed to the idea of limiting the number of initiatives and referenda on the ballot. Ms. Hall said she has served as a poll watcher and is very impressed with the voters; South Dakota voters take their responsibilities very seriously.

Mr. John Schmidt, Woonsocket, said South Dakota needs strong election finance limits and IM22 would have led to a better educated electorate and could have controlled the big out-of-state money being used in elections.

Mr. David Owen, SD Chamber of Commerce and Industry, Pierre, said the State Chamber has been involved in the initiative process for the past seven elections, and the general trend is that voter fall off does not occur because of a large number of ballot measures. Mr. Owen said the Attorney General should have a comment period when preparing his explanation to obtain more public input. Mr. Owen added that constitutional amendments do deserve a higher threshold for consideration; any proposed changes must be defensible.

Mr. Owen said a pac-like structure for addressing ballot measures should be created. The State Chamber does keep its own records when involved in a ballot measure campaign, and he suggested adding a layer to better the

process for organizations to address ballot measures. Mr. Owen asked that no changes be made that will inhibit the process.

Mr. Shawn Lyons, SD Retailers Association, Pierre, said his organization represents 4,000 retailers and small businesses from across South Dakota. The Retailers Association has been involved in several ballot measures throughout the years and does not oppose the current process. Mr. Lyons said several topics included in one ballot measure causes issues, and can create voter frustration.

Mr. Lyons said he agrees democracy can be messy, and the far-reaching impact of a constitutional amendment needs to be considered before placing it on the ballot. Mr. Lyons said he appreciates the new change to the process that now requires a fiscal note so that the voters can see what a ballot measure will cost them.

Ms. Rebecca Terk, Dakota Rural Action, Brookings, said that because someone doesn't sign a petition does not mean that person does not support the process, and it is not necessary to require petitions be circulated in rural areas. Ms. Terk said her organization does not want to see a limit on the number of measures that can be placed on the ballot, and that multiple ballot measures actually increases voter engagement and participation.

Future Meeting Dates

The Initiative and Referendum Task Force will meet on July 19, 2017, starting at 10 AM in room 413 of the State Capitol, Pierre. Public testimony will be heard that afternoon.

Adjourn

A MOTION WAS MADE BY DUANE SUTTON, SECONDED BY REPRESENTATIVE TIM REED, THAT THE INITIATIVE AND REFERENDUM TASK FORCE MEETING BE ADJOURNED. The motion prevailed on a voice vote.

The task force adjourned at 12:05 PM.