



**Third Meeting
2004 Interim
December 16, 2004**

**LCR 1 & 2
State Capitol Building
Pierre, South Dakota**

The third meeting of the Constitutional Revision Commission was called to order by Chair Robert A. Miller at 9:00 a.m. (CT), December 16, 2004, in LCR 1 and 2 of the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members answering the roll call: Mr. Mark Barnett, Vice Chair Robert Burns, Mr. Steve Cutler, Vice Chair Donald Dahlin, Mr. Robert Drake, Dr. Sean Flynn, Mr. Gene Lebrun, Ms. Mary McClure Bibby, Chair Robert A. Miller, Mr. Ronald Olinger, Mr. Robert Roe, and Supreme Court Justice Steven Zinter. Mr. James Abbott, Lieutenant Governor Dennis Daugaard, Mr. James Hutmacher. Mr. Larry Lucas, Mr. Brent Wilbur were excused.

Staff members present included David L. Ortbahn, Principal Research Analyst; Reed Holwegner, Chief Fiscal Analyst; and Teri Retrum, Senior Legislative Secretary.

(**NOTE:** For sake of continuity, the following minutes are not necessarily in chronological order. Also, all referenced documents are on file with the Master Minutes.)

Approval of Minutes

DR. DAHLIN MOVED, SECONDED BY MR. LEBRUN, THAT THE MINUTES OF THE OCTOBER 20 AND 21, 2004, MEETING BE APPROVED. The motion prevailed unanimously on a voice vote.

Introductory Remarks

Chair Robert A. Miller reported on his appearance with Commissioners Zinter and Wilbur at the November 23, 2004, meeting of the Legislative Research Council's Executive Board to explain the Commission's response to the Board's request that the Commission include the study of the style and form veto and the line item veto in the scope of the Commission study. He reported to the Board that it was the Commission's opinion that the style and form veto and the line item veto do not come under the Commission's current authorization. Chair Miller said that the Board members were very attentive to the Commission's response. He reported that the Board had no questions regarding the response and took no further action at the meeting.

Also, Chair Miller said that he told the Board that the Commission would like to inform legislators and receive input from legislators concerning its deliberations and is requesting use of a meeting room in the Capitol sometime in the early days of the 2005 Legislative Session to schedule an open forum for such a purpose. He said that Executive Board Chair

Representative Orville B. Smidt expressed approval for such a forum and said that the Chairs of the Judiciary Committees should be contacted to find out whether some arrangement could be worked out regarding availability and times for a room.

Mr. David Ortbahn, LRC, discussed the following documents which were previously mailed to Commission members:

- Trends in State Legislatures;
- Model State Constitution and related commentary; and
- An Outline for Commission Discussion.

(The documents will be placed in the three-ring binder previously given to commission members—the binder is labeled Document #1 and will be periodically updated.)

My LRC Page Demonstration

Mr. Scott Darnall, LRC Webmaster, demonstrated how to set up a My LRC account on the legislative Web Site.

Mr. Gene Lebrun asked if a comment field could be added to My LRC.

Mr. Ortbahn distributed copies of Mr. Darnall's presentation **(Document #1—for this meeting)**.

Mr. Ortbahn distributed copies of supporting testimony from **Dr. Michael E. Libonati**, who discussed the legislative branch of government at the Commission's October 20 and 21, 2004, meeting **(Document #2)**, and Observations on Article III South Dakota State Constitution Legislative Department written by Mr. Hirsch in 1970 **(Document #3)**.

Commission Discussion

Chair Miller asked for Commission direction on how it wants to proceed regarding a Commission meeting with legislators.

Mr. Ronald Olinger said that he was concerned that the Commission might discuss issues that it has not been given the authority to consider by the Executive Board.

Mr. Lebrun said that to meet with legislators in January probably would be premature, because the Commission has nothing concrete to share.

Dr. Robert Burns said that a meeting most likely would benefit the Commission more than legislators, because the Commission might be able to learn the concerns of legislators.

Chair Miller asked if the Commission should ask for legislative input later in the session or if, perhaps, the Commission should send a letter to all legislators soliciting written comments.

Ms. Mary McClure Bibby said that, from her experience as a legislator, a letter might not be effective because legislators are very busy and sometimes have difficulty finding time to answer those types of requests. Ms. McClure Bibby said that she would prefer that the Commission meet with legislators in their respective caucuses.

Mr. Steve Cutler said that perhaps the Commission could meet in the afternoon during session. All interested legislators could be invited to make comments.

Dr. Donald Dahlin expressed approval with all of the ideas and said that the more ways that the Commission can involve the Legislature the better, since the Commission's goal is to strengthen the Legislative Branch of government.

Mr. Robert Drake said that the first weeks of session are not quite as busy as the later weeks, so a better time for a meeting would be during the first weeks. He expressed approval for meeting with legislators during their caucuses.

Ms. McClure Bibby said that the Lieutenant Governor would be a good person to act as a liaison between the Commission and the Legislature.

Mr. Olinger questioned whether the Commission should proceed without further direction from the Legislature.

Mr. Lebrun said that he did not think that much would be accomplished by the Commission if it conducted a regular meeting during session.

Mr. Olinger suggested that a questionnaire addressing the Commission's concerns be placed in each legislator's post office box. Chair Miller said that could also be discussed with legislative leaders.

Responding to Chair Miller, Mr. Ortbahn said that Commission members would be reimbursed for an informal meeting with legislators.

MR. OLINGER MOVED, SECONDED BY DR. DAHLIN, THAT THE COMMISSION AUTHORIZE CHAIR MILLER TO WORK WITH LIEUTENANT GOVERNOR DAUGAARD TO SET UP A MEETING WITH LEGISLATIVE LEADERS TO DISCUSS SOME OF THE CONCERNS AND IDEAS THAT THE COMMISSION IS HAVING REGARDING ITS STUDY AND TO RECEIVE LEGISLATIVE INPUT REGARDING THE DIRECTION OF THE COMMISSION'S STUDY. THE MOTION PREVAILED UNANIMOUSLY ON A VOICE VOTE.

Constitutional Provisions Regarding Legislative Procedure

In response to **Justice Steven Zinter** concerning what the South Dakota Supreme Court has done with rulings on legislative enactments, Mr. Ortbahn distributed copies of the Modified Journal Entry Rule (**Document #4**). Mr. Ortbahn said that the Court would look at an enrolled bill and a journal entry to see if a bill has been properly enacted. Under the Modified Journal Entry rule, which has been adopted by the Supreme Court, an enrolled bill is deemed

conclusive evidence of proper enactment except as to constitutionally mandated journal entries which may be specifically questioned. Mr. Ortbahn indicated that the Court under this rule would look at the journal entries required by sections 13, 14, 18, and 19 of Article III to see if a bill had been properly enacted. However, Mr. Ortbahn said that although it is a constitutional requirement that a bill has to be read twice, there is no requirement that these actions be noted in the journal so the Court would not look to the journals for evidence of compliance. Also, regarding time limitations in the Legislature, the Court said that it would not look to the journals because a time requirement is not required to be noted in the journal.

Justice Zinter said that he wanted the Commission to be aware of the consequences of the actions it takes.

Mr. Ortbahn distributed a rough draft of a Joint Resolution to revise certain obsolete constitutional provisions regarding the Legislature (**Document #5**). Mr. Ortbahn explained that the draft is to clean up obsolete provisions in Legislative Article III.

Dr. Burns said that, if the Commission can reach a consensus on what would be obsolete, perhaps it would be a good strategy to develop something on this issue because it would not be too controversial.

Chair Miller said that he thought the Legislature wanted the Commission to develop one package for introduction.

Dr. Burns said that he would not want the obsolete provisions to be caught up in some of the more controversial issues.

Mr. Lebrun commented that the proposed changes to § 23 in the draft Joint Resolution would weaken the Legislature.

Mr. Olinger said that he is in favor of allowing the Legislature more discretion. He said that the state has a citizen Legislature which should be able to do at least what it has been able to do in the past regarding legislation.

Mr. Drake said that he has some concerns with section 4 of the draft resolution and questioned whether someone who gets into legal trouble at a young age, but makes amends, should be barred forever from running for the Legislature.

Justice Zinter said that the Commission should be mindful that a recent decision of the Supreme Court regarding redistricting was based on some of the debate during the previous Constitutional Revision Commission.

Dr. Burns said that it would be proper to state the time for redistricting in the Constitution if the Supreme Court has ruled that redistricting should occur every ten years.

The Commission recessed at 10:30 a.m. and reconvened at 10:48 a.m.

Legislative Conflicts of Interest

Senator Al Kurtenbach testified on legislative conflicts of interest as stated in Article III, § 12. Senator Kurtenbach relayed his current situation regarding conflicts of interest. He said that it is his understanding that it is okay if a legislator does business with the state only if that legislator is not paid. However, Senator Kurtenbach said that it is not okay if a legislator does business with the state and receives payment. Senator Kurtenbach listed the following as two items of question:

- Interpretation of the word, contract, which also has been expanded to include employment contract; and
- Interpretation of the words, indirectly and directly, as they relate to a stockholder.

Senator Kurtenbach said that he decided not to run for reelection because it occurred to him that he might be considered to be in conflict of interest because he was involved with a company that might want to do business with the state.

Dr. Burns said that the conflict of interest issue has been put before the people four times, and every time it is defeated by a larger margin than before. He asked Senator Kurtenbach for ideas on how this situation could be remedied so that more citizens of South Dakota could run for the Legislature.

Senator Kurtenbach suggested that resolution of the conflict of interest issue begin with very small steps—perhaps first deal with the word, indirect, and keep the scope very narrow.

Ms. McClure Bibby said that it is her sense that there is no one serving in the Legislature who is not in conflict in some way.

Senator Kurtenbach agreed.

Mr. Mark Barnett said that § 12 of the Constitution prohibits a person from running for the Legislature if that person contracts with the state because he would have a vote on the state's budget. He said that this has prevented a long list of very distinguished individuals from being a legislator because that individual does business with state government or works for state government. Mr. Barnett said that the Supreme Court has decided many times that an employee contract is a contract—for practical purposes, the public does not see differences between contract services and someone physically sitting and working in a state office; if a person is being paid from the state treasury, that person has a contract with the state.

On the topic of a citizen legislature, Mr. Barnett said that if the Constitution is changed so that a Governor can hire his friends for the Legislature, then the Legislature actually no longer would be considered a citizen Legislature. Mr. Barnett said that a legislator who is a farmer and sits on the Agriculture and Natural Resources Committee or a legislator who is an attorney and sits on the Judiciary Committee is not considered to be in conflict because they are not in the employment of the state and do not have a service contract with the state. Mr. Barnett said that those legislators would be desirable on those committees because of their expertise in the subject matter.

Mr. Barnett said that in his opinion if an attempt is made to eliminate the word, indirect, from the Constitution regarding contracts with the state, it could defeat any proposal to revise the Constitution.

Mr. Barnett suggested that the following might be some ways that Article III, § 12, could be revised:

- Shorten the time that an exiting legislator cannot be involved in a state or county contract from the current one year to maybe six months;
- Remove the county contract from the mix; and
- Remove the appointment to commissions from the mix because it does not involve a salary or a state contract.

Mr. Lebrun said that, philosophically, he disagrees with everything that Mr. Barnett said. He said that if a person wants to run for the Legislature and fully discloses any and all interests in or with state government, that person should not be prohibited from running for a legislative seat. Mr. Lebrun said that the people can decide whether they want that person to serve as their legislator.

Mr. Barnett said that the Attorney General's Office does not prevent anyone from running for the Legislature; the Constitution does—strict constitutional language, not strict Attorney General Opinions disallows some individuals from serving in the Legislature.

Dr. Burns said that the probable reason that each time this issue has been defeated is because there has not been a concerted program developed to educate the public concerning the topic.

Dr. Dahlin said that he personally believes the Constitution is too strict in this regard. He said that it would be helpful to him to have comparative data from other states. Dr. Dahlin said that he understands that the state wants to be careful regarding conflicts of interest but said that he also is interested in a fair balance of the issue.

Mr. Ortbahn distributed copies of a National Conference of State Legislatures LEGISBRIEF entitled "A Legislator's Relationship with the Public Sector" (**Document #6**).

The commission recessed at 11:40 a.m. and reconvened at 1:10 p.m.

Commission Discussion

Dr. Dahlin said that in his opinion the commission needs to determine the final disposition of the draft to revise certain obsolete constitutional provisions regarding the Legislature. He said that the draft should not generate controversy since it merely eliminates obsolete provisions currently in Article III of the Constitution.

Chair Miller referred commission members to the outline for commission discussion provided by Mr. Ortbahn and suggested that the commission determine which of the items to discuss at the next meeting and to prioritize those determined items.

Mr. Lebrun suggested that the commission include the Legislative Process portion of the outline in its discussion at the next meeting. He said that this portion is relatively noncontroversial, so perhaps it could be drafted into a resolution for discussion purposes at the next meeting also.

Mr. Ortbahn said that he could draft a resolution similar to the one from 1974. Mr. Lebrun said that would be a good point from which to start.

Dr. Dahlin said that the Model Constitution is a somewhat brief document and that he would prefer that the South Dakota Constitution also be limited to a brief document. He asked staff to provide a comparison between the state's Constitution and the Model Constitution.

Chair Miller told the commission that he was also a member of the Legislature's Interim Committee on Criminal Code Revision and described a document provided to that committee in which the state's current Criminal Code was compared with the Model Criminal Code directly opposite each other so that the committee could easily view the differences. He commented that the document was very useful to the committee.

Mr. Robert Roe said that including existing related statutes in the document would be helpful.

Mr. Lebrun said that the Model Constitution is dated and asked whether anyone has updated that model.

Mr. Ortbahn replied that he was not aware of any such update.

Mr. Olinger said that in his opinion the commission should not get too far ahead of the electorate in its constitutional revision deliberations. He expressed support for beginning with the obsolete provisions of Article III in the commission's revision efforts.

MS. MC CLURE BIBBY MOVED, SECONDED BY MR. OLINGER, THAT ARTICLE III, §2, BE AMENDED AS FOLLOWS:

IN THE FIRST SENTENCE, DELETE "AFTER THE LEGISLATURE ELECTED FOR THE YEARS 1937 AND 1938".

DELETE THE SECOND SENTENCE, WHICH READS, "THE SESSIONS OF THE LEGISLATURE SHALL BE BIENNIAL EXCEPT AS OTHERWISE PROVIDED IN THIS CONSTITUTION."

Ms. McClure Bibby said that the membership of the Legislature will not be changed, and an annual Legislature is already addressed elsewhere in the Constitution.

THE MOTION PREVAILED UNANIMOUSLY ON A VOICE VOTE.

Dr. Burns said that Article III, § 5—Legislative reapportionment is important enough to warrant further discussion and possible action.

Mr. Lebrun said that discussion of length of legislative terms could be discussed in conjunction with term limits.

Ms. McClure Bibby said that the length of legislative sessions should remain status quo.

Mr. Olinger agreed with Ms. McClure Bibby's comment regarding the length of legislative session.

Dr. Dahlin said that he is intrigued by the Legislature being able to meet at various times of the year; however, he said that dealing with the obsolete provisions in the Legislative Article is probably as much as the public might be willing to accept, unless there is an extensive public education process.

Regarding balance of power, Mr. Lebrun said that perhaps discussion should be had on whether the Legislature should be responsible for making appointments to fill legislative vacancies rather than the Governor. He said that in some states legislative vacancies are not appointed by the Governor.

Mr. Olinger said that the commission also should review the strength of the Legislature through the appropriations process and requested information on how other states handle that process.

Mr. Lebrun said that the Appropriations Committee also has the power to meet during the legislative interim.

Mr. Drake said that the interim committee cannot do anything without going to the full Legislature.

Chair Miller said that he is uncomfortable with selecting only certain provisions in § 6. He said that they all should be discussed as a group or not at all.

MR. ROE MOVED, SECONDED BY MR. DRAKE, THAT THE COMMISSION DISREGARD DISCUSSION OF THE PROVISIONS IN ARTICLE III, § 6, AT THE COMMISSION'S NEXT MEETING. THE MOTION PREVAILED UNANIMOUSLY ON A VOICE VOTE.

Mr. Holwegner responded to commission questions concerning a biennial budget versus an annual budget. He said that states handle the budget process in different ways. For example, Mr. Holwegner said that in Arizona, legislative staff develops a budget. In South Dakota, Mr. Holwegner said that the Legislature, in Chapter 4-8A, has designated a special committee to deal with interim transfers and appropriations.

The commission discussed qualifications for legislative office. Dr. Burns said a person in South Dakota has to be 21 years of age before being eligible for a legislative seat. In his opinion, Dr. Burns said that age should be lowered to 18 years of age.

In discussing the referendum and initiative process, Mr. Lebrun suggested that the commission forego action on that issue because those two processes have been defeated by large margins in the past. By those defeats, Mr. Lebrun said that the electorate has clearly stated that it does not want to change the referendum and initiative process.

Ms. McClure Bibby said that she does not have a problem with the current referendum and initiative process. However, she said that she is concerned with using the processes to revise the constitution.

Mr. Lebrun asked if the commission should request input regarding term limits.

Mr. Olinger said that obviously term limits lessen legislative function; however, in his opinion, he said that to eliminate term limits would require an extensive public education program.

The commission decided to place the following items on its agenda for the next meeting:

- Discussion of the draft joint resolution to revise certain obsolete constitutional provisions regarding the Legislature;
- Discussion of the requested draft resolution to address legislative process issues; and
- Discussion with legislative leaders on how to proceed with legislative terms of office, legislative compensation, term limits, and length of legislative sessions.

Mr. Drake volunteered to meet with legislative leaders and report those discussions to the commission.

Ms. McClure Bibby suggested soliciting public testimony only on term limits for a portion of a meeting would be a good strategy.

Mr. Lebrun said that both political parties need to be kept apprised on term limits to avoid politicization of the issue. He said that he would contact the Democrat party to discuss it; likewise, he suggested that someone speak to the Republican party.

Mr. Ortbahn distributed copies of 1974 newspaper articles about the defeat of a proposed constitutional amendment to upgrade the South Dakota legislative process (**Document #7**).

Next Meeting Date and Adjournment

The Commission set Wednesday, April 20, beginning at 10:00 a.m., and Thursday, April 21, 2004, beginning at 8:00 a.m., as its next meeting dates.

MR. BARNETT MOVED, SECONDED BY MR. DRAKE, THAT THE COMMISSION BE ADJOURNED. THE MOTION PREVAILED UNANIMOUSLY ON A VOICE VOTE.

The commission adjourned at 2:10 p.m.



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