

STATE OF COLORADO

Colorado General Assembly

Mike Mauer, Director
Legislative Council Staff

Colorado Legislative Council
029 State Capitol Building
Denver, Colorado 80203-1784
Telephone (303) 866-3521
Facsimile (303) 866-3855
TDD (303) 866-3472
E-Mail: lcs.ga@state.co.us



Dan L. Cartin, Director
Office of Legislative Legal Services

Office of Legislative Legal Services
091 State Capitol Building
Denver, Colorado 80203-1782
Telephone (303) 866-2045
Facsimile (303) 866-4157
E-Mail: ols.ga@state.co.us

MEMORANDUM

October 2, 2014

TO: Natalie Menten and Mike Spalding

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2015-2016 #5, concerning Recall of Officers

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment to the Colorado constitution appear to be:

1. Repealing and reenacting article XXI of the Colorado constitution concerning recalling elected officials from office;

2. Specifying who is eligible for recall from office, who may file a recall request, and the appropriate entity to conduct a recall;
3. Outlining requirements for recall petitions and circulators, filing of petitions, the conduct of recall elections, and the filling of resulting vacancies; and
4. Specifying provisions for the enforcement of the article and complaint and appeal procedures concerning recall elections.

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. In section 2 (7) of the proposed initiative, the references to "subsections 2(2)-2(5)" should be written as "section 2 (2) to section 2 (5)".
2. The following is the standard drafting language used for creating a definition: "As used in this [article] [section] [subsection], unless the context otherwise requires, 'elective' means in an office subject to regular...".
3. In section 2 (6) of the proposed initiative, there appears to be an errant underline mark in the last sentence: "_resignation".

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. In Section 1(1):
 - a. Elective officers in "judicial office" are included among the officers eligible for recall. To what extent does the proposed initiative supersede or supplant the current system of judicial retention

elections? And, given the system of retention elections, why include judges in the proposed initiative?

- b. The stated purpose of the proposed initiative is "to increase public accountability of public officers." How will the proposed initiative achieve that goal?
3. Section 2 (1) of the proposed initiative sets forth procedures for initiating recalls and identifies the election officials responsible for conducting recall elections.
 - a. This provision of the proposed initiative requires "four registered electors in the recall area" to file "signed requests to recall eligible officers".
 - i. Is the term "recall area" synonymous with the term "political subdivision"?
 - ii. Does the recipient official have a duty to verify the eligibility of the signers or validate their signatures?
 - b. This section 2(1) allows "registered electors in the recall area [to] file at any time signed requests to recall eligible officers". Current law restricts the filing of recall elections during certain periods (for example, recall of a nonlegislative official is prohibited during the first six months of the official's term). Is it the proponents' intent to omit any durational minimum for recall to be attempted? What about officers whose terms are ending--should recall efforts be permitted if the election could not possibly be conducted prior to expiration of the term?
 - c. Section 2(1) requires statewide recalls to be "held by the secretary of state". Currently, the secretary of state supervises the conduct of certain elections, but does not actually run those elections. What constitutes "holding" an election? Is it the proponents' intent to make the secretary of state the designated election official for statewide recall elections? Could the secretary of state delegate the actual administration of such elections to county clerks and recorders?
 - d. Under section 2(1), local recalls are held by the election office of any county (or city and county) in the recall area. Who conducts the elections when a recall area traverses county lines?

- e. Section 2(1) requires the governor to "select another office or court in two days when an election or judicial officer is named for recall". Does this mean that, if a county clerk and recorder is named in a recall request, that the governor selects another office in that clerk's county to conduct the election? What is the reason for having the governor select a different court? What criteria should the governor use in making these selections?

4. Regarding section 2(2):

- a. This portion of the proposed initiative requires sample petition sections to feature the "affidavit required in 2006 for state initiatives". Are the proponents referring to the affidavit that must be executed by the circulator? Why use the 2006 form [i.e., what particular feature(s) of that affidavit are the proponents reviving]? If the affidavit requires the petition circulator to be registered to vote in Colorado, does this violate the First Amendment for the reasons set forth in *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999)? And, how does this provision relate to the statement in section 3(1) of the proposed initiative that "[a]ny adult citizen may circulate any petition"?
- b. Although current law does not specify any causes for which a public officer may be recalled, every recall petition must contain a brief statement setting forth the recall proponents' grounds for seeking recall.
 - i. Is it the intent of the proponents to continue to allow officers subject to recall under the proposed initiative to be recalled for any reason (and, by that rationale, for no reason at all)?
 - ii. Should grounds be specified on the recall petition to apprise voters of the reason(s) that the recall was initiated?
- c. This provision also bars government agents from detaining, stopping, citing, or arresting petition circulators or signers "for, while, or related to peaceably petitioning, but petition-based perjury, forgery, and other felony frauds shall be prosecuted".
 - i. Is this provision overly broad? For example, if a recall petition circulator is driving recklessly to the location at which he or she will be circulating the petition, is that person not engaging in activity *relating to* peaceably petitioning?

- ii. Is it the proponents' intent to deprive prosecutors of the discretion to bring charges against alleged offenders?
 - iii. Current law relating to elections offenses makes perjury a misdemeanor (section 1-13-104, Colorado Revised Statutes). Similarly, certain offenses relating to recall petitions are also misdemeanors (section 1-12-108, Colorado Revised Statutes). Do the proponents intend to increase penalties for extant offenses or to create new felonies? Would the proponents consider clarifying this provision?
- 5. In section 2(3), what is meant by this sentence: "Added entries shall be reviewed similarly."? (I.e., "similarly" to what?)
- 6. Section 2(4) sets forth the minimum number of active registered electors required for a petition entry to be valid.
 - a. As of what date does the relevant minimum number apply?
 - b. Is fifteen days sufficient time to individually review and verify each signer's signature?
 - c. What is a "varied" entry? Does the presumption of validity attach to all such entries, or only those that survive the individual review?
- 7. Section 2(5) requires the "election office" to "count, review, itemize, and report entries for validity" within fifteen days of filings. This section also appears to vest the state supreme court with original jurisdiction to hear protests related to petition sufficiency.
 - a. Does the twenty-day period for an election official to issue his or her "report" pertain to the original petition filing, or after a subsequent ("cured") filing?
 - b. Is the state supreme court the most appropriate venue to consider such disputes?
 - c. This provision states that "within five days of the report, only recall filers and the officer may each protest without fee to the supreme court for its new review of disputed entries". Does this mean that, outside five days, anyone may seek such review?
 - d. Does the mandate that the supreme court issue a determination within thirty days of the protest filing run counter to the court's constitutional authority to "make and promulgate rules governing the

administration of all courts and... practice and procedure in civil and criminal cases"? (See article VI, section 21 of the Colorado constitution.)

- e. The supreme court is required to issue a "report of... validity" on the disputed entries. What is meant by the term "report"? What is the legal effect of such a report?
8. Section 2(6) requires recall elections to be held "on a Tuesday within 60 days after final [petition] validation" for local elections, and "on the first November election date at least 60 days after" final petition validation for statewide recall elections.
 - a. For local elections, how is the actual date of the election determined, and by whom?
 - b. Section 2(7) requires successor candidates to file their nomination petitions "by 90 days before the election". Is this deadline compatible with the section 2(6) deadline for setting the election date? Or, could this result in a situation where a successor candidate is required to file his or her nomination petition before the petition to recall the candidate is verified or before the election date has been set?
 9. Section 2(6) also states that "[d]eath, resignation, or announced retirement shall stop recalls but not pending successor petitions or elections."
 - a. At what point in the process does this provision take effect (e.g., after the required number of valid petition signatures has been conclusively established)?
 - b. If recalls are intended to hold specific officials accountable, what is the purpose of requiring a successor election as opposed to deeming the office vacant and allowing it to be filled as prescribed by existing law (e.g., by appointment)?
 - c. What constitutes an "announced retirement", and how does that differ from resignation?
 10. Regarding section 2(8):
 - a. Is there any way for a recalled officer to contest the results of the election? Do existing recount laws apply to recall elections?

- b. What does it mean for "local successors" to be "elected similarly within 120 days" when no successor candidate was elected?
- c. Why prohibit runoff elections?
- d. Why insulate successor candidates from recall for two years? Is this compatible with the stated purpose of increasing public officer accountability? What if there are fewer than two years remaining in the term to which the candidate succeeds, and he or she is re-elected to that office; does the two-year period continue into the new term?

11. Under section 3(1), "any adult citizen may circulate any petition" and "circulator payments and recall donations shall never be identified, reported, or limited".

- a. Who qualifies as an "adult citizen"?
- b. Can petition circulators otherwise be regulated? Could the general assembly, for example, require all circulators to register or undergo training?
- c. What is a "recall donation"? Is it a contribution to a recall campaign?
- d. Would Article XXVII of the state constitution and the "Fair Campaign Practices Act", article 45 of title 1, Colorado Revised Statutes, apply to recall elections? To what extent would the proposed initiative supersede or supplant these existing requirements?

12. Section 3(1) prohibits the direct or indirect giving or receiving of "government funds, labor, or aid in any recall or successor campaign or to repay its costs."

- a. Can this provision be construed to apply to funding the costs of conducting the recall election?
- b. Is this provision intended to supersede or supplant legal restrictions on contributions by government entities to campaigns, including ballot campaigns (*see* section 1-45-117 (1) (a) (I) (D), Colorado Revised Statutes)?

13. Regarding section 3(2):

- a. "Recalled officers and those who resign or announce retirement during their recall process shall not be *any officer* for the next five

years." [Emphasis added.] Does the term "officer" here include nonelective positions? Does this provision unreasonably restrict a person's ability to run for office or pursue a livelihood?

- b. What is the rationale for limiting officers eligible for recall to one recall effort every four years? Hypothetically, if any officer is sought to be recalled in the first year of his or her term, survives that recall effort, and subsequently commits misfeasance or malfeasance, he or she would be ineligible for recall for another three years. Is this compatible with the stated purpose of increasing accountability?
- c. What does this sentence mean: "A recall election occurs on its last election date."?

14. Section 3(2) further requires the secretary of state to "always" list on his or her office's web site "all officers eligible for recall, and all persons ineligible for recall".

- a. Is the secretary of state the appropriate official to provide such information for those offices for which he or she is not the designated recall election official?
- b. Contrasted with the "officers" mentioned in the beginning of that provision, "*all persons* ineligible for recall" seems overly broad. Do the proponents mean all current holders of elective office who are ineligible for recall? If so, would the proponents consider clarifying this provision?

15. Section 3(3) allows any Colorado adult to file an action in district court to enforce reenacted Article XXI. Do the proponents intend to omit all traditional standing considerations from this provision? Under this construction, for example, could a person who resides in Moffat County file an action in the district court in Craig, Colorado, to enforce recall provisions against a member of the board of directors of the Alamosa Mosquito Control District?

16. Section 3(3) also prohibits "[a]dded recall requirements or any local recall laws". What constitutes "added requirements"? Is the proscription against added recall requirements intended to nullify existing, and foreclose future, laws related to recall? Or, could the General Assembly preserve or enact legislation to facilitate the operation of Article XXI, so long as "added requirements" are not included?