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MEMORANDUM

April 3, 2012

TO: D'Arcy Straub and Gene Straub

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #79, concerning election of members to congress

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.

An earlier version of this proposed initiative, proposed initiative 2011-2012 #66, was the subject of a memorandum dated March 19, 2012. Proposed initiative 2011-2012 #66 was discussed at a public meeting on March 21, 2012. The comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendments to the Colorado constitution and Colorado Revised Statutes appear to be:

1. To amend the Colorado constitution to require the election of at least one United States representative and one United States senator employing a process involving lot to ensure that no political party seats a majority of representatives or two senators from the state. This requirement takes effect January 1, 2013; except that the requirement that one senator be elected through a process involving lot shall not apply to the 2014 and 2016 general elections. The proposed initiative also provides for the repeal of this requirement, on March 1, 2017, if the governor determines that no other state has adopted a similar process for electing representatives and senators to congress.
2. To add a new article to the Colorado Revised Statutes creating a process for selecting candidates to represent congressional districts in the state. The proposed initiative calls for a first pool of initial potential candidates to be created according to a process involving lot, which is defined as a process that "employs the random selection of individuals through a process involving chance". A person eligible to serve in congress may register for the first pool of candidates in a congressional district where the person does not reside, but a person may not participate in the election process in more than one district. A second pool of candidates is to be created from the first pool of potential candidates who are qualified and willing to serve in congress by a process involving a primary or caucus. Finally, a slate of six or seven candidates shall be created from the second pool of potential candidates by a process involving lot. The proposed initiative sets forth certain requirements related to demographic representation and political party affiliation of the candidates in a congressional district so that larger political parties are represented by one or two candidates and smaller political parties are represented by no more than one candidate. For purposes of the proposed initiative, unaffiliated voters and candidates constitute a distinct political party.
3. To require the state of Colorado to provide financial resources equitably among the candidates.
4. To employ, if fewer than 83 representatives are to be elected to congress from other states through a process involving lot, the following process for electing United States representatives from the state:
 - a. By ranking the percentages of the vote received among the winning candidates in each congressional district, the measure establishes a process for selecting six of the state's seven representatives so that no political party is represented by more than two of the six representatives. Winning candidates may be deemed ineligible if more than two of them are affiliated with the same political party.
 - b. For the seventh seat, the winning candidate with the lowest percentage of votes among the seven congressional districts does not become the representative. Instead, the governor is to select the representative from a slate of candidates comprising

United States armed forces personnel and veterans created by a process involving lot.

5. To employ, if at least 83 representatives are to be elected to congress from other states through a process involving lot, the following process for electing United States representatives from the state:
 - a. Four congressional districts elect a representative under the provisions of the proposed initiative, and three congressional districts elect a representative pursuant to procedures currently codified in the Colorado Revised Statutes. The congressional districts will change their method of electing representatives according to a rotation schedule created by the secretary of state. For the congressional districts using the existing nominating procedures, the secretary of state must designate the districts as competitive or noncompetitive and must evenly distribute such districts over the rotation schedule so that two noncompetitive districts associated with the same political party will not elect a representative in the same general election.
 - b. During redistricting, the new boundaries of congressional districts are not drawn to create a contest in the subsequent general election between two incumbent members of congress.
 - c. The proposed initiative sets forth procedures for selecting and disqualifying certain candidates based on the percentages of the vote received among the winning candidates and their political party affiliation to ensure that no political party is represented by more than two representatives. In some cases, one of the representatives would be determined pursuant to an interstate compact with at least one other state.
6. To require, in the case of a congressional vacancy, the creation of a slate of five candidates with the same political party affiliation as the vacating representative from a process involving lot that uses the second pool of candidates produced for the congressional district. The winning candidate in a special election is seated as the representative.
7. To require the state of Colorado, by January 1, 2016, to enter into an interstate compact with at least one other state to elect senators through a process involving lot that prevents the state of Colorado from seating two senators belonging to the same political party. If possible, the state of Colorado shall enter into an interstate compact with two other states to ensure the election of three senators who are affiliated with three different political parties.
8. To place constraints on the general assembly's ability to amend the provisions of the proposed initiative, to require the general assembly and governor to take steps to fulfill the operation of the proposed initiative for the 2014 general election, and to provide for the repeal of the proposed initiative on March 1, 2017, if the governor determines that no other state has adopted a similar process of electing representatives and senators to congress.

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. The amending clauses should be indented. Additionally, in the amending clause for section 1 of the proposed initiative, the proper format is: "In the constitution of the state of Colorado . . ."
2. Consider rephrasing section 44 (3) (a) of article V of the proposed initiative as follows: ". . . TAKE EFFECT ON JANUARY 1, 2013; EXCEPT THAT THE REQUIREMENT IN . . ."
3. It is standard drafting practice to use the present tense whenever appropriate. In section 44 (3) (a) of article V of the proposed initiative, rephrase "SHALL NOT APPLY" as "DOES NOT APPLY".
4. It is standard drafting practice for quotation marks to precede other punctuation. Please consider modifying the punctuation in section 1-18-101 (1) of the proposed initiative accordingly.
5. Standard drafting practice is to use the term "shall not" or "may not" to prohibit certain action. Please consider changing the term "cannot" in section 1-18-202 (2) of the proposed initiative.
6. Standard drafting practice is to minimize the use of hyphens as much as possible. For example, in section 1-18-502 of the proposed initiative, consider changing "non-competitive" to "noncompetitive".
7. Paragraphs are designated using a lowercase letter. In section 1-18-503 (3) (b) of the proposed initiative, "PARAGRAPH (A)" should be changed to "PARAGRAPH (a)".
8. In section 1-18-601 of the proposed initiative, insert the word "SECTION" before "1-18-203".
9. In section 1-18-701 of the proposed initiative, please make the following changes in punctuation: "THE STATE OF COLORADO, BY JANUARY 1, 2016, SHALL ENTER . . ."
10. In section 1-18-803 of the proposed initiative, place a comma after "2017".

Substantive Comments and Questions

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

1. The proposed initiative adds subsection (2) to section 44, article V, of the state constitution, which will require at least one congressional representative and senator from Colorado

selected through a process involving lot. Article V, section 44, subsection (3) (b) repeals that requirement if Colorado's governor determines that no other state has adopted a process to elect congressional representatives and senators by lot.

- a. Subsection (2) appears to state that one congressional representative and one senator must be elected by lot but does not overtly require such process. Would you consider rephrasing subsection (2) to clarify this requirement?
 - b. Does designating the governor, an elected official likely to be affiliated with a political party, as the person who determines whether the (3) (b) repeal is triggered create the potential for an actual or ostensible conflict-of-interest? Inasmuch as the proposed initiative seeks to redress wrongs purportedly caused by political parties wielding an inordinate amount of influence, is the governor the most appropriate decision maker here? (These questions also apply to the statutory repeal contained in proposed section 1-18-803.)
 - c. Regarding the determination made by the governor, is any state election scheme purporting to involve "lot" sufficient for the purposes of this subsection? Hypothetically, another state could enact a "lot" process that does not ensure nonmajority representation of particular political parties or otherwise take partisan considerations into account. In such case, does the governor have discretion to discount such state's process? On this point, is the description of "lot" under proposed section 1-18-201 dispositive or illuminating (i.e., "lot" entails any scheme that randomly selects individuals through mechanisms employing chance)?
 - d. The repeal, if triggered, will occur after the lot system has been used for several years for the selection of congressional representatives. Is this your intent?
2. How is the initial pool of potential candidates created under proposed section 1-18-202 (1)? That is, are persons eligible to serve in Congress required to register with the administering governmental official, or is it incumbent on such official to generate the pool? If the former, are there penalties associated with failing to register? How will the administrator(s) of the various pools know if a person has elected to join the pool of a district in which he or she does not reside?
 3. Section 1-18-803 of the proposed initiative repeals the article created by the proposal on March 1, 2017, while also repealing that section on July 1, 2017, making the second repealer irrelevant. You may wish to make an exception from the article repealer for 1-18-803, or remove the section repealer.
 4. Section 1-18-204 of the proposed initiative states: "A process involving lot as prescribed by law creates from the second pool of potential candidates a slate of six or seven candidates for the general election." You may wish to clarify that there is a slate of six or seven candidates per district, as this is not explicitly stated.
 5. Under the proposed initiative, candidates for congress may be selected by lot to represent

political parties based upon their political affiliation, as identified by voter registration statistics (Section 1-18-402 of the proposed initiative). Under the current system, political parties select their candidates, establish their political platforms, etc., from within. The system proposed in the initiative may result in a slate of candidates that do not hold any of the positions of the parties they purport to represent, thus effectively eliminating the ability of political parties to set their own platforms and agendas. Candidates may even attempt to undermine political parties by intentionally affiliating with political parties with which they do not share common interests. Such an arrangement may bring up concerns about freedom of association under the first and fourteenth amendments to the United States constitution. Is this the intent of the proponents?

6. What would be the effect on the proposal of one or more selected candidates changing their political affiliations prior to the general election, thus altering the party representation allowed under the proposed initiative?