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MEMORANDUM

April 1, 2014

TO: Peter Coulter and Dennis O'Connor

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2013-2014 #132, concerning death penalty clemency

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 appear to be to prohibit an acting governor from postponing, delaying, terminating, or giving clemency to any execution of the death penalty unless majority written consent has been provided by both the House of Representatives and the Senate.

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. Pursuant to article V, section 1 (2), proposed initiatives must amend either the Colorado constitution or state law (i.e., the Colorado Revised Statutes). The proposed initiative should be revised to indicate whether it amends the Colorado constitution or the Colorado Revised Statutes and to show where in the constitution or statutes its provisions should be inserted.
2. It is standard drafting practice to use an amending clause to show how the Colorado constitution or Colorado Revised Statutes will be changed by an initiative or bill. For example, if the proponents would like to add a new section to the Colorado constitution with their initiative, the amending clause would appear as follows:

"SECTION 1. In the constitution of the state of Colorado, **add** article XXX as follows:".

If the proponents would like to add a new section or article to the Colorado Revised Statutes, the amending clause would be similar, but name the Colorado Revised Statutes rather than the constitution.

3. It is standard drafting practice to show language being added to the constitution or statutes in SMALL CAPITAL LETTERS.

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. Article IV, section 7 of the Colorado constitution gives the governor the power to grant reprieves, commutations, and pardons after conviction. The proposed initiative limits the governor's authority to grant reprieves, commutations, and pardons. Do the proponents see a conflict between the proposed initiative and article IV, section 7?

3. The proposed initiative requires the approval of both the House of Representatives and Senate before the governor may postpone, delay, terminate, or give clemency to the execution of the death penalty. Article IV, section 7 of the Colorado constitution gives the governor the sole power to grant reprieves, commutations, and pardons after conviction. By providing the House of Representatives and Senate the ability to block the governor's authority, it appears that the proposed initiative may violate article III of the Colorado constitution regarding the distribution of powers between the legislative, executive, and judicial branches. Do the proponents see a conflict between the proposed initiative and article III?
4. The proposed initiative states "expressed written majority consent has been provided by both the house of representatives and the senate". What suffices as "expressed written majority consent"? Does a majority vote on a resolution suffice or do a majority of the members individually need to provide express written consent?
5. The proposed initiative prohibits the governor from postponing, delaying, terminating, or giving clemency to the execution of the death penalty without the expressed majority consent of the House of Representatives and the Senate. The General Assembly only meets for 120 days a year. What happens if the governor needs to delay the execution of the death penalty when the General Assembly is not in session? Can the governor receive consent without the General Assembly being in session or would the governor need to call a special session?
6. Do the proponents anticipate that it will be necessary to establish timelines by which certain actions must take place? That is, will the governor need to provide notice of his or her intentions a certain amount of time prior to an execution, and will the General Assembly then be required to respond to such notice by a certain time?
7. Do the proponents anticipate a process that the General Assembly will follow in determining whether to consent to a decision by the governor? That is, will the governor be required to submit any information regarding his or her decision, or will the General Assembly be required to take public testimony and/or review the circumstances of the case?