

The Past, Present and Future of the Arizona Initiative

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The ballot initiative process was viewed by the framers of the Arizona Constitution as an essential tool to a truly functioning democracy. They saw giving citizens this right to directly make their own laws or state constitution amendments, by voting them up or down at election time, as a foundation stone in the “people’s constitution” they were building in 1910 en route to Arizona statehood.

To the founders, the initiative system was not intended to be the primary means by which the state would make laws but a way of getting around legislative inaction. They too expected it to be a “gun behind the door,” a way of encouraging lawmakers to take action acceptable to the voters in the first place. All of this, they felt, was a good thing for democracy.

The initiative, however, along other instruments of direct democracy including the referendum and recall, has had its critics over the years – and still today. The 2017 legislative session included the introduction of several proposals to make it more difficult to use the initiative process and to reduce the significance of using the process.

The Legislature had been considering many of these measures for several years and some were included in a comprehensive election reform message passed in 2013, but was rescinded in 2014 after a group was able to gather enough signatures to put the measure on the ballot that year for popular approval or rejection. The renewed drive for taking action gained momentum in 2017 when the Arizona Chamber of Commerce and other business groups added their support. They reportedly were spurred into action, hoping to rein in the initiative process, following their failure to defeat a minimum-wage proposition in the November 2016 general election.¹

Two initiative-related measures were passed in the 2017 session: One banned the practice of paying petition circulators on a per-signature basis and the other required that citizen initiatives be in strict compliance with the law rather than substantial compliance. The two successful measures passed the Legislature on party vote, with nearly all Republicans in support and all Democrats in opposition. Passage of these laws provoked threats of legal action against them and a movement to postpone on their implementation until the voters have an opportunity to accept or reject them in the November 2018 election. If history is a guide, many initiative-related measures that did not make it this year will be reintroduced in future legislative sessions

This report takes a look at the overall operation of the initiative process, the likely consequences of and the challenges to the measures adopted, as well as what further changes are likely or might be on the horizon.²

The Process

To put an ordinary law or statute on the ballot through the initiative process, gatherers must collect a number of petition signatures equal to at least 10 percent of the voters who participated in the last gubernatorial election. For a constitutional initiative, the required percentage rises to 15 percent. Those using the initiative system, however, normally must collect many more signatures than legally required because on average, state and county election officials can be expected to reject around a third of the signatures collected. Organizers are generally advised to collect 40 percent or more signatures above the requirement to feel secure in obtaining ballot status.

To qualify for the 2018 ballot, for example, the number of valid signatures needed to put a proposed law on the ballot is 150,642. The figure for a constitutional amendment is 225,963. But given the high rate of signature rejection, sponsors are likely to need well over 200,000 for a law and 300,000 for a constitutional amendment to feel fairly safe in the number of valid signatures collected.³ Such numbers, however, are almost impossible to reach without at least partial use of paid signature gatherers.

There are other obstacles, as well. Those who hope to use the initiative system also have to worry about the high costs of conducting a campaign and fighting off opponents who throw up as many roadblocks as possible, commonly including lawsuits that, in addition to taking up funds, discourage petition workers and potential financial contributors.

But for many groups the chief and more expensive burden has been gathering signatures. Signatures collected by petition circulators are subject to a great deal of scrutiny. Election officials invalidate signatures for a variety of reasons. The most common of these is a finding that a signer was not a registered voter. Officials also may toss signatures because the signer did not provide full and accurate information concerning his or her address or the date on which he or she signed the petition. In fact, there are more than 20 reasons why entire petition sheets with up to 15 names each may be thrown out, even though many – if not all – of the signatures are from genuine qualified signers.

Signature policing has been so by the book and vigorous in some counties, especially Maricopa County, that citizens have little reason to worry about fraudulent signatures being counted as valid. However, there is considerable reason by organizers to worry that the signatures of those who are indeed qualified to sign will be thrown out for very technical or even trivial reasons.⁴

At any rate, much if not nearly all of limited fraudulent activity takes place in the collection of signatures, such as making up names. It seems likely any such fraud would be caught somewhere down the line under the existing system – by the sponsors of the measures, the petition gathering companies they hire, state and local election officials, and the courts – so that few if any illegal

signatures are actually counted toward getting measures on the ballot. In this sense, “fraud” is not as much of a problem as it might first appear.

Pay per Signature

Supporters of the ban on pay per signature, House Bill 2404, argued that the monetary incentive provided to gatherers – the more signatures they collect, the more money they make – increases the likelihood to misrepresent the contents of a petition, forge signatures and engage in other forms of fraud and dishonesty. Intuitively this makes a lot of sense, but it is unclear just how much fraudulent activity there is in the collection of signatures or how this varies with how gatherers are paid or not paid. The question of whether, in fact, the pay-per-signature ban actually will lower the level of fraud and related abuses in the signature gathering process is debatable. Research cited in some court cases suggests that circulators paid by the signature do not have higher rates of fraud than those who are paid by the hour or those who are volunteers.⁵ The level of fraud in Arizona, whatever that might be, may have little if anything to do with how gatherers are paid, how much they are paid or whether they are paid at all.

What we do know is that paying per signature is a cost-effective way of gathering signatures, far more cost-effective than the likely alternatives that will have to be used of paying by the hour or a flat rate. Because of this the ban is likely to drive up the cost of conducting petition drives and make it more difficult to utilize the process. This will be more of a problem for some than others. Wealthy individuals and corporations, in state or out of state, will be able to stay in the process, but participation will be much more difficult for grassroots groups with limited financial resources. Groups that are able to rely on large numbers of volunteer signature gatherers will be less affected than those who have to heavily rely on paid circulators.

Strict Compliance

Many issues involving the validity of signatures and petitions wind up in court. Initiatives in Arizona are subject to a great many laws in regard who can collect signatures, how they must do it, what has to be on the petition and even details such as the type size to be used on the petitions and charges frequently surface in court that various laws have been violated.

When it comes to such issues involving the initiative process, judges in Arizona have historically looked beyond the question of whether a law or constitutional provision have been violated but whether the violation is serious enough to merit keeping an initiative off the ballot. Arizona courts, like courts in several other states, have often found that the errors complained about did no real damage. As a result, minor errors that did not deceive voters or the signers of the petition often are deemed to substantially comply with existing laws and therefore allowed to go on the ballot. Judicial application of the substantial compliance rule has made it possible for voters to consider several matters, including making a 1-cent boost on the sales tax permanent and allowing recreational marijuana.

Recently adopted legislation, HB2244, rejects judicial use of the substantial compliance rule and requires strict compliance with each and every law and constitutional provision applicable to the

initiative process. According to its sponsors, it is intended to protect the integrity of the initiative process. Be that as it may, it also increases the likelihood that initiatives will be thrown out for minor paper work or language errors in the petitions circulated or errors in the signature-gathering process.

Arizona courts since the early 1980s have required strict compliance with all constitutional and statutory requirements in referenda cases, rather than settling for the less-severe substantial compliance standard. The new law does bring parity to the two processes so that both employ the same legal standard. On the other hand, a case could be made that the better course of action toward parity would have been to apply the substantial-compliance standard to cases involving the referendum. As one authority put it in regard to the referendum:

“This great power, granted to the electorate by the Arizona Constitution, should not be undermined by a technical failure. And that is what strict compliance does: It defeats referendum petitions not because there are not enough signatures, not because signatures are fraudulent, and not because the signatures were not collected in a timely fashion. Rather, strict compliance defeats otherwise valid referendum petitions because the petition says ‘qualified electors of Arizona’ instead of ‘qualified electors of Scottsdale.’”⁶

The new law attempts to ward off some technical violations with a provision requiring that a sample initiative form be prepared by the Secretary of State, which, if used by circulators, would give them some immunity from challenges under strict compliance as to the required type size or margins on petition sheets. Still, by eliminating judicial discretion, the new measure greatly increases the possibility petitions being voided by technical and minor violations and makes the initiative process more difficult to use.

Looking Ahead

Among the measures relating to petition activity that have thus far failed, but which may well resurface, are proposals to: require initiative signature-gathering companies post bonds for paid gatherers; make sponsors of initiatives responsible for a fine of \$1,000 for each of the law violations committed by petition circulators or anyone else they hire; and require a geographic-distribution requirement for the collection of signatures, as proposed last session, that requires initiative petition gatherers to collect signatures in all the state’s 30 legislative districts. These proposals would make the process more expensive and more difficult and, when it comes to liability, more frightening to use.

Over the last several years there have been numerous proposals in the Legislature to make the initiative process less meaningful or, as many lawmakers see it, less dangerous, by repealing the Voter Protection Act. The act was adopted by voters in 1998 through the ballot initiative process as a constitutional amendment, which makes it difficult for the Legislature to modify or repeal it. Legislative action of this nature requires a three-fourths vote of both houses and any change must further the purpose of an effected measure as originally adopted. Legislators thus far have been

reluctant to go to the voters asking for a repeal of this measure, being deterred by what appears to be public support for the act.⁷

There has been some consideration in the Legislature of asking voters to at least approve a change in the act that would allow lawmakers to freely repeal or modify voter-approved measures that were submitted to voters by the Legislature through the referendum process. Also likely to resurface is a proposal to add a warning on the ballot, state information pamphlets and other election materials about how the Voter Protection Act restricts the ability of the Legislature to modify the measure should it be approved.

Another possible change of a more positive nature, though thus far not having much support in the Legislature, would be to eliminate the current requirement that signatures for initiative petitions be collected only in person and allow some or all of the required number of signatures to be collected electronically. Arizona has been a national leader in using the internet in voting-related matters. Arizona was first in the country to have online voter registration – a practice since followed by several states – which has made millions of transactions without a hitch since its 2002 origin.

In 2012 the state began a two-year pilot program called E-QUAL, which initially allowed candidates for statewide office and the Legislature to gather half of the signatures they need on nominating petitions through an online registration system. The program is now a permanent one administered out of the Secretary of State's Office and allows candidates to collect all the signatures they need online. It is scheduled to also apply to candidates for local and congressional offices, as well as state offices. E-QUAL, being linked to the voter registration data base, has a built-in validation system.⁸

Allowing registered voters to use their computers to sign initiative petitions online could be an effective way of getting beyond concerns over the high number of signatures required, paid workers versus volunteer workers, fraud committed by gatherers and debates over signature distributions. Using e-signatures could greatly reduce costs since there would be no more need to pay petition circulators, thereby leveling the playing field for those groups with limited budgets.

Using the internet would be more convenient for registered voters and give them more time to gather information according to their own individual schedules. Presently, the registered voter encounters a petition gatherer, usually a stranger, who is going door to door or standing outside a library, grocery store or some other building, hoping to get a signature in as little time as possible.

Some opponents of this proposal have expressed fear that the e-signature system would make gathering signatures so easy that voters would find themselves deluged in a flood of ballot measures at each election. Proponents counter that should this prove to be an actual problem, necessary adjustments could be made, for example, by limiting the number of initiatives that could appear on one election ballot.⁹

An Arduous Process

Since statehood in 1912, Arizona has been among the nation's leaders in using the initiative process to either adopt a statute or amend the state constitution by placing a measure on the ballot. But such efforts have been anything but easy or automatic. In fact, organizers have found it to be an expensive, time-consuming and exhausting process – and one that is unlikely to end successfully. A study a few years ago found that only about 16 percent of the initiative petitions taken out in Arizona are likely to make it to the ballot and less than half of these petitions are likely to wind up being approved by Arizona voters, making for an overall success rate – from petition to passage – of just 8 percent.¹⁰

One could argue that groups in Arizona and elsewhere have been able to successfully use the initiative process only on those occasions when lawmakers were unwilling or unable to address genuine citizen policy concerns in an efficient and effective manner.¹¹ The use of the initiative process also has been politically neutral. It has been employed by all kinds of groups for all kinds of causes. It has been used by those in favor of increased spending and by those who hope to curtail spending, by people in favor of medical marijuana and people opposed to affirmative action.

Currently though there are legitimate fears in Arizona that the initiative system, historically viewed as a valued resource to be used when the Legislature fails to act in accordance with public concerns and as a “gun behind the door” needed to keep legislators responsive to those concerns, may be dying slowly via a series of small increments.

In pursuing the present course of action legislators have opened up themselves to charges of inconsistency. Most of the bans on signature gathering proposed or adopted in recent years in regard to ballot measures have not applied to the petition-gathering activities of candidates running for various political offices. This has given critics an opportunity to argue that if indeed the pay-per-signature system leads to fraud and a variety of other abuses, the ban also should apply to the gathering of signatures for candidates for political office, including the Legislature and governor. They argue that the fact that it doesn't suggests less of an interest in combating fraud than in making the signature-gathering process more difficult for those who would use the initiative. The same argument could be made in regard to employment of a strict compliance test instead of the substantial compliance rule.

Critics could further argue, as in the case of the E-QUAL system, that while legislators have been willing to experiment with a process that would make petition gathering easier and less expensive for themselves and other elected officials, they have shown little interest in doing the same for those who would use the initiative process.

Challenges to 2017 Initiative Changes

As noted earlier in this paper, two measures were passed in the 2017 legislative session that will change Arizona's initiative process if they withstand challenge. HB 2404 bans the practice of

paying petition circulators on a per-signature basis, and HB 2244 requires that citizen initiatives be in strict compliance with the law rather than substantial compliance.

The “strict compliance” change to the initiative process is being challenged in Maricopa County Superior Court, with opponents of the new law seeking an injunction blocking the measure from taking effect Aug. 9, 2017, as scheduled.¹²

The group called Voters of Arizona,¹³ led by former Arizona Attorney General Grant Woods and former Phoenix Mayor Paul Johnson, also has filed paperwork to launch two separate petition drives – one to give voters the final say on the “strict compliance” change and the other to void the new law prohibiting pay-per-signature activity.

The nonpartisan group must submit at least 75,321 valid signatures by end of day Aug. 8, 2017, in order to put the two laws on hold until voters have the final say via ballot initiatives in the November 2018 general election.

Notes

¹ See for example: Howard Fischer, Capitol Media Services, “Ducey inks ‘strict compliance’ initiative law,” *Arizona Daily Star*, April 15, 2017; Bob Christie, “Arizona Gov. Ducey signs Chamber-backed initiative proposal,” *Associated Press State Wire: Arizona*, April 14, 2017; Mary Jo Pitzl, “GOP on initiative restrictions: ‘They just protect the process,’” *The Arizona Republic*, April 14, 2017.

² This report draws upon the authors’ earlier work in: *The Future of ‘Direct Democracy’ in Arizona: Petition Circulators, Election Officials and the Law* (Phoenix, Morrison Institute for Public Policy, Arizona State University, 2014); and *Initiative Reform in Arizona: Exploring Some Ideas* (Phoenix, Morrison Institute for Public Policy, Arizona State University, 2013).

³ Under the system long used in Arizona, the number of valid ballot signatures are determined by checking a random sample of 5 percent of the signatures collected in each county. For many years election officials used what was known as the 95-100 rule to adjust for the chance that the samples examined were not representative of all the signatures collected. Application of the rule made it possible for initiatives with only an estimated 95 percent of the required valid signatures to reach the ballot. The Legislature in 2011 changed the law, making it more difficult for initiative proposals to reach the ballot, by requiring that the number of estimated valid signatures equal 100 percent of the minimum required. For background on the issue see: Jeremy Duda, “Elimination of ‘95-105 rule’ seen as a new obstacle to ballot initiatives,” *Arizona Capitol Times*, September 21, 2012.

⁴ Berman, *The Future of ‘Direct Democracy’*.

⁵ For background research: Todd Donovan and Daniel A. Smith “Identifying and Preventing Signature Fraud on Ballot Measure Petitions”; Michael Alvarez, Thad E. Hall and Susan D. Hyde, eds., *Election Fraud: Detecting and Deterring Electoral Manipulation*. Washington, D.C.: Brookings, 2008. See also comments by University of Florida Professor Daniel Smith in Vincent Carroll, “Carroll: Heaping burdens on petitions.” *Denver Post*, May, 19, 2010.

⁶ David Potts, “Strict Compliance, Substantial Compliance, and Referendum Petitions in Arizona,” *Arizona Law Review*, Vol. 54, Spring 2012, 329.

⁷ Hank Stephenson, "House approves crackdown on citizen initiatives," *Arizona Capitol Times*, February 24, 2017.

⁸ According to the Secretary of State's Office, since February 2012 there have been 14,581 individual signers and a total of 32,769 petitions signed. Though the program has been widely applauded, public awareness of its availability seems low and candidates for one reason or another have been slow to encourage its use. Use of such a system for initiatives also may take some time to get off the ground.

⁹ Jessica A. Levinson, "Taking the Initiative: How to Save Direct Democracy," 18 *Lewis & Clark L. Rev.*, (2014) 1019.

¹⁰ Berman, *Initiative Reform in Arizona*.

¹¹ See discussion by William D. Hicks, "Initiatives within Representative Government: Political Competition and Initiative Use in the American States," *State Politics & Policy Quarterly* Vol. 13, No. 4 (December 2013), pp. 471-494.

¹² Howard Fischer, Capitol Media Services, "New groups files lawsuit against changes to Arizona initiative laws," *Arizona Daily Star*, May 11, 2017.

¹³ Voters of Arizona. <https://www.votersofarizona.com/>

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