

► One of Florida's previous Constitutional Revision Commission meetings. *Courtesy of Tampa Bay Times.*



Florida's 20-Year Quirk: The Upcoming Constitution Revision Commission

| Christopher Emmanuel

Among its many oddities, the Florida Constitution of 1968 has a provision that is as unique as the state it governs: the creation of a Constitutional Revision Commission (“CRC” or “the Commission”), to be held every 20 years, with the authority to propose revisions to

the state's Constitution. The only check on this extraordinary committee's work is the ballot box – there is no judicial review, executive veto or legislative remedy. In fact, there is not even a single subject requirement where the proposed measure must focus on only one topic to make it easier for voters

to understand and further clarify intent. This extraordinary committee, comprised of appointments from each of the three branches of government, has unexpected yet almost total power over the way our state is structured.

The history of the Constitutional Revision Commission is helpful to both its purpose and effectiveness. Perhaps as a sign of humility (or uncertainty in their work product), the authors of the 1968 Constitution had the CRC begin 10 years after the ratification of the Constitution, which gives us, the modern citizenry, only two data points to analyze the effectiveness of this unusual entity: the first Commission in 1977-78 and the second in 1997-98.

The first Commission was appointed by a single party (the Democrats) and operated under an abbreviated schedule. Not a single measure received the required simple majority of the voters. The second CRC, with the benefits of more time to plan and bipartisan nominators, saw the citizenry ultimately approve eight of the nine final proposals. The 1998 Commission benefited from the lessons and discussions of its predecessor in many ways. Notably, many of the proposals in the first Commission were adjusted, moderated, and ultimately successful proposals in the

second. Therefore, one should expect to see many of the discussions of the 1998 Commission repeated when the upcoming Commission begins in 2017.

Many organizations, including the Florida Chamber of Commerce and The James Madison Institute, have already begun the discussions on what this Committee means to Florida. As before, broad coalitions of Floridians will attempt to inform and bring policy research into the process. However, in the modern political arena, it is easier than ever before to message difficult policy decisions in 140-character tweets, television ads and Internet memes. One should be concerned about how the modern media landscape will affect the final product. And in the post-*Citizens United* era, the risks for unusual campaigns are greater than before.

Regrettably, bad ideas still exist and the policy ramifications for a poorly constructed constitution are immense. As much as the revision can be seen as an opportunity, it is important to realize that the ordinary checks and balances on power do not apply to this committee. What follows is a brief exploration of the history, structural basis, and efficacy of the Constitutional Revision Commission, along with potential strategies, opportunities, and risks for the upcoming Commission.

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A Brief History of the Constitutional Revision Commission

The CRC itself is an unusual creature of constitutional construction and is not within one of the traditional three branches of government. The “rules of the road” for the professionalized lobbying core, stakeholders, and, most importantly, the citizenry are unclear and likely to cause confusion. Very few Florida Statutes directly address the CRC. For example, it is unclear what, if any, sunshine law requirements are applicable – which could make backroom dealing possible. Perhaps the only law passed with the CRC specifically in mind is the requirement of a separate lobbyist registration.¹ Understanding the structure of the CRC is vital to effectively appreciate how this Committee can change the way Florida is governed.

The CRC is comprised of 37 members, which are appointed as follows: the Governor appoints 15, the Senate President appoints nine, the Speaker of the House appoints nine, the Chief Justice of the Florida Supreme Court appoints three, and the Attorney General (the honorable Pam Bondi, in the upcoming case) serves herself.² The Commission must be named within 30 days of the start of the 2017 regular session of the Legislature,³ which falls on Tuesday, March 7, 2017. In prior years, the applicants have numbered in the hundreds.

After the full Commission is named,

Article XI, Section 2(c) of the Florida Constitution grants the Commission its authority. It reads, in its entirety:

Each constitution revision commission shall convene at the call of its chair, adopt its rules of procedure, examine the constitution of the state, hold public hearings, and, not later than one hundred eighty days prior to the next general election, file with the custodian of state records its proposal, if any, of a revision of this constitution or any part of it.

The CRC is led by the Chair, who is appointed by the Governor.⁴ The most recent Chair relied on a “Steering Committee” comprised of gubernatorial appointments to iron out the logistics of the statewide meetings.⁵ By statute, the Chair of the Constitutional Revision Commission is able to hire staff and spend appropriations.⁶ (There

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was no money appropriated specifically for the Commission or a Steering Committee in the 2016-17 budget.) In the past, the Executive Office of the Governor has provided full time staff, including an Executive Director. After creation, the 1998 Commission held public hearings throughout the state.⁷ Once the proposals have been approved by the CRC, the proposals will be placed directly on the 2018 General Election ballot.

Per the Florida Constitution, the Commission must adopt its own rules of procedure.⁸ The Chair is responsible for setting the rules and the structure

for the Commission, making the Chair significantly more powerful than the rest of the members. If there is one thing that nearly every alumna of the Commission seems to agree on, it is that the internal rules the Commission adopts have a serious impact on the effectiveness of the CRC. As Robert Nabors, who served on the 1998 Commission said, “the rules govern how the process works. Once the public is heard – and the public has to be heard – there needs to be a way to filter out those proposals that have good merit and those that don’t.”

Unlike in the Legislature, the recommendations of the Commission do not have a single subject requirement. Because there is no such prohibition, the CRC has an unusual opportunity in Florida government – the ability to bundle non-germane options in the hopes of increasing the likelihood of passage. Robert Nabors summed it up nicely: “The genius of this process is that you’re not bound by that.”⁹ For example, the 1998 Commission tried to increase the term limits for legislators by “pairing it” with an independent panel handling reapportionment.¹⁰ That proposal lost by one vote of the Commission and therefore was not on the ballot.

Measured solely on the number of passing proposals, the first Constitutional Revision Commission was a failure, but it does show how important the planning and internal rules are to success. The Commission

itself was delayed by confusion over the start date, which required a Florida Supreme Court ruling.¹¹ With a shorter timeframe and no guidance from prior Commissions,



► 1997-1998 Florida Constitution Revision Commission. *Courtesy of the State Archives of Florida.*

the 1978 Commission spent much time on internal procedure, and eventually settled on a simple majority vote to place measures on the ballot.¹² Though seven proposals were approved by the Commissioners, the ballot box was less forgiving. The 1978 CRC was unsuccessful in placing a single measure in the Florida Constitution.¹⁴

According to one member of the 1998 Commission, the fact that the 1978 Commission had no measures adopted “was well noted” by the next body.¹⁴ As the 1978 CRC found, achieving a simple majority in a collegial body is easier than achieving a majority in the popular vote. Believing that the barrier was too low, the 1998 Commission required a supermajority



► Florida Constitution Revision Commission member Circuit Judge Hugh Taylor in Tallahassee. *Courtesy of the Florida Memory.*

vote to place a measure on the ballot. As former Attorney General Bob Butterworth said of the supermajority requirement, “Why spend all the time and have it not pass?”¹⁵ The 1998 Commission also created a committee structure with the hopes of creating a more polished product before full deliberation, but ultimately did not allow committees to “kill” proposals. Under the 1998 rules, any public proposal receiving 10 votes of the Commission had to be considered by the full Commission rather than being defeated at the committee level. As some CRC members recounted, dozens of doomed proposals had to be heard, rather than die in committee.¹⁶ To prevent a similar situation, former members of the CRC have suggested that a system could be designed to defeat proposals in smaller groups with an

opportunity to revisit later in the process.

The 1998 Constitutional Revision Commission had far more success at the ballot box, with eight of the nine finalized ballot proposals successfully adopted by the public. To show the breadth of what an effective CRC can accomplish, here are a few of the successful measures:

1. The creation of Fish and Wildlife Conservation Commission, which passed with 72 percent of the popular vote.¹⁷
2. Adjustments to the education system, which passed with 71 percent of the vote.¹⁸
3. The restructuring of the State Cabinet, which eliminated the elected Cabinet positions of the Secretary of State and Secretary of Education, and

merged the offices of Treasurer and Comptroller into the Chief Financial Officer. That measure passed with 56 percent.¹⁹

4. Increased ballot access, which (among other things) gave third party candidates easier access to the ballot, passed with 64 percent.²⁰
5. The creation of a local option for criminal history records check and waiting period for the purchase of firearms, which passed with 72 percent.²¹

Looking Ahead Toward the 2017-2018 Commission

The State of Florida has certainly changed in the decades since the first Constitutional Revision Commission met in 1977. Over the past 40 years, the population has increased from around more than 9 million to over 20 million.²² According to the Florida Chamber Foundation and the Florida Office of Economic and Demographic Research, Florida can expect to have up to 6 million more residents in 2030.²³ Last year, Florida welcomed 105 million tourists to the state.²⁴ The state has become significantly more globalized, with more connections to the world than ever before. Employers have become more flexible and the marketplace has become more competitive. Education has changed from a one-size-fits-all to a

marketplace of options. Each of these new innovations has brought with them their own opportunities and challenges to the state.

Despite changes, much has stayed the same. The issues that the first two Commissions discussed could have easily been pulled from current headlines – term limits being too short, redistricting being too difficult, and the distribution of power between the Governor and the Cabinet being too cumbersome. For decades, state officials have been concerned about the overreach of the federal government in environmental, energy and labor issues. The 1978 and 1998 Commissions worried about the strain of a growing population on water resources, roads and the environment. The decisions of the CRC did not eliminate these problems, but rather made structural adjustments to the way our state operates.

The 2018 Commission will face

several key structural differences that warrant discussion. In 2006, thanks to leadership from the Florida Chamber of Commerce, the Florida Constitution was amended to require 60 percent of the popular vote for adoption rather than a simple majority.²⁵ With the new threshold, three of the 1998 proposals would have failed.²⁶ Politically, this will be the first time that the appointing elected officials will all be Republicans. The

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▶ Alan Sundberg addressing the Florida Constitution Revision Commission in the Senate chamber (1997). *Courtesy of the Florida Memory.*

1978 Commission's appointing officers were Democrats. The 1997-98 appointing officers were a mix of Democrats and Republicans. Although far from the only reason for more successful proposals, the bipartisan makeup of the 1998 Commission may have helped the success of the amendments at the ballot box.

As for what the CRC might discuss, the possibilities are immense. One only has to look at the recent constitutional ballot initiatives to get an idea of how vast

the potential topics or proposed changes could be. Through the ballot initiatives, citizens of this state have placed into the constitution unusual policies such as restrictions on pregnant pigs and unclear bans on commercial fishing nets. Votes have come close to legalizing medical marijuana and initiatives have changed the taxing structure for utility companies. Some of the citizen proposals discussed by the 1998 CRC included an increase in minimum wages, the right of all employees to unionize, and – a crowd favorite among some – a ban on attorneys serving in the legislature. It is harder to imagine what

political issue of the past 50 years could not be up for discussion.

Perhaps the more popular proposals will be those that former members debated in years passed. Alumni of the CRC have been quick to suggest or resurrect specific proposals. Governor Buddy McKay suggested recalling elections for state officers.²⁷ In addition to compiling a list of proposed “housekeeping” changes, former Chair and Professor Talbot “Sandy” D’Alemberte

suggested penal reforms, lottery reforms, and criminal restitution for those wrongly incarcerated.²⁸ One suggestion that has been repeated frequently is the adoption of a citizen statutory amending process rather than the current constitutional system.²⁹ The current debate over whether or not the Secretary of Education should be a Cabinet officer will likely be revisited.

The most significant question that has not been answered is whether or not this unique system is a threat or an opportunity. For many, the dependability of the laws and the underlying Constitution have provided the stability for free enterprise and society. For others, the system might be seen as cumbersome or inefficient. However, when Florida modernized its Constitution a half-century ago, the authors created a Committee with the potential to solve political problems outside of the normal political system. Helped by the obscurity of this once-in-a-generation process, these 37 men and women have the ability to change the relationship Floridians have with their government. But unlike the legislative process, these decisions will not be made in Tallahassee by those that travel to Tallahassee. This Revision Commission will be comprised of appointees, working across the state, to make suggestions for the entire state. It requires attention and vigilance

from citizens throughout Florida.

Not all those seeking to influence the process agree on the vision of Florida's future. There is no doubt that plaintiff lawyers, extreme environmentalists, union officials and out-of-state billionaires will seek to use this process to accomplish what they cannot do through the legislative process. Much work has already been done by those that advocate for free market solutions and opportunity for all. As has been the case for the past two Constitutional Revision Commissions, many groups including the Florida Chamber of Commerce and The James Madison Institute will play a leadership role in shaping the future of our state's central document. Many other organizations including the Leroy Collins Center at Florida State University and Inns of Courts have already held informational events about the CRC.

Make no mistake – the accomplishments of those grounded in the principles that promote economic freedom are in jeopardy any time the Florida Constitution is changed. Citizens should get involved in this unique and important Commission in any way possible. More than any other political process in Florida, it is vital for the citizens to be informed, engaged and skeptical of what may seem like special interests seeking to further their gain through our state's Constitution.

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Endnotes

1. s. 112.3215 (1) (a), F.S.
2. Article XI, Section 2 (a), Florida Constitution
3. Ibid.
4. Article XI, Section 2 (b), Florida Constitution
5. Governor Chiles appointed a Steering Committee through an executive order on 6/26/1996, which resulted in proposed rules and budget.
6. s. 286.035, F.S.
7. Professor Mary Adkins, <https://mediasite.video.ufl.edu/Mediasite/Play/a9a6b3de15454218951c8ad1009b8ca81d>
8. Article XI, Section 2 (c), Florida Constitution
9. Bob Nabors, Remarks at Anticipating the 2017-18 Constitutional Revision Commission (Oct. 28, 2016) Available at <http://thefloridachannel.org/videos/102815-anticipating-the-2017-18-constitution-revision-commission-pt-1/>
10. Attorney General Bob Butterworth, Remarks at Anticipating the 2017-18 Constitutional Revision Commission (Oct. 28, 2016) Available at <http://thefloridachannel.org/videos/102815-anticipating-the-2017-18-constitution-revision-commission-pt-1/>
11. *In re Advisory Opinion of Governor Request of Nov. 19, 1976 (Constitutional Revision Commission)*, 343 So. 2d 17 (Fla. 1977)
12. Adkins, Mary. "Organizing Florida Next Constitutional Revision Commission: a Historical Prospective" available at https://facultyblogs.law.ufl.edu/210-2/#_ftn1
13. Interestingly, some of the suggestions made it into the Constitution or the statute, leading some members of the 1978 Commission to consider themselves simply ahead of the times.
14. Florida Constitution at 50 Years: Looking Ahead to the 2017 Revision Commission, presented by the Bob Graham Center at the University of Florida. (Oct. 8, 2015) Available at <https://mediasite.video.ufl.edu/Mediasite/Play/a9a6b3de15454218951c8ad1009b8ca81d>
15. Attorney General Bob Butterworth. Remarks at Anticipating the 2017-18 Constitutional Revision Commission (Oct. 28, 2016) Available at <http://thefloridachannel.org/videos/102815-anticipating-the-2017-18-constitution-revision-commission-pt-1/>
16. John Mills, Remarks at Florida Constitution at 50 Years: Looking Ahead to the 2017 Revision Commission, presented by the Bob Graham Center at the University of Florida. (Oct. 8, 2015) Available at <https://mediasite.video.ufl.edu/Mediasite/Play/a9a6b3de15454218951c8ad1009b8ca81d>
17. Original ballot language is available <http://archive.law.fsu.edu/crc/ballot.html#rev5>. The measure adjusted or created the following: Article II, Section 7(a); Article IV, Section 9; Article VII, Section 11; Article X, Section 18; and Article XII, Section 22.
18. Original ballot language is available at <http://archive.law.fsu.edu/crc/ballot.html#rev6>. The measure adjusted Article IX, Section 1.
19. Original ballot language is available at <http://archive.law.fsu.edu/crc/ballot.html#rev8>. The measure adjusted or created Article II, Section 8; Article III, Sections 8, 16, and 19; Article IV, Sections 3, 4, 7, and 8; Article VIII, Section 1; Article IX, Section 2; Article XI, Section 2, 3, 4, 5, and 6; Article XII, Sections 9 and 22.
20. Original ballot language is available at <http://archive.law.fsu.edu/crc/ballot.html#rev11>. The measure adjusted or created Article IV, Section 5(a); Article VI Subsections 1, 2, 5, and 7; and Article IX, Subsection 4 (a).
21. Original ballot language is available at <http://archive.law.fsu.edu/crc/ballot.html#rev12>. The measure created Article VII, Section 5 (b).
22. U.S. Census Bureau Population Estimates, State Totals, available at <https://www.census.gov/popest/data/state/totals/2015/index.html>
23. Dr. Jerry Parrish, Florida Chamber Foundation.
24. Visit Florida, 2015 Estimates of Visitors to Florida by Quarter, available at <http://www.visitflorida.org/resources/research/>
25. Article XI, Section 5, amended by Am. H.J.R. 1723, 2005; adopted 2006.
26. The three proposals with less than 60% of the vote were: Relating to Judicial Selection and Funding of State Courts (57%); Restructuring of the State Cabinet (56%); and Miscellaneous Matters and Technical Revisions (55%).
27. Governor Bob McKay, Remarks at Florida Constitution at 50 Years: Looking Ahead to the 2017 Revision Commission, presented by the Bob Graham Center at the University of Florida. (Oct. 8, 2015) Available at <https://mediasite.video.ufl.edu/Mediasite/Play/a9a6b3de15454218951c8ad1009b8ca81d>
28. Professor Talbot "Sandy" D'Alemberte, Remarks at Anticipating the 2017-18 Constitutional Revision Commission (Oct. 28, 2016). Available at <http://thefloridachannel.org/videos/102815-anticipating-the-2017-18-constitution-revision-commission-pt-1/> As Professor D'Alemberte noted, large portions of the Constitution are the effective dates of Constitutional Amendments. Because the underlying amendments are already in effect, these dates are no longer required. Other examples of technical revisions are more obvious – for example, the Commission of Education does not exist, but still can be found in the Florida Constitution.
29. California has adopted a similar system, which allows the citizens to propose statutory changes through a direct democracy mechanism. While this might prevent some of the absurdity in the Florida Constitution, California has shown that statutory direct democracy has constrained the Legislature from making the compromises necessary in good governance.