

Initiative and Referendum in Mississippi, Dead Again?

by Mark Garriga

Introduction

The Mississippi Legislature has enjoyed over the years a dominant role in our state's constitutional scheme. Never quite satisfied with its home in the legislative branch, the Legislature has even tried, on occasion, to occupy territory in the other two branches of government. However, in 1975 the Mississippi Supreme Court made it clear that it would regard the Legislature's attempts to prescribe rules of judicial procedure as "suggestions" only. *Newell v. State*, 308 So. 2d 71, 76 (Miss. 1975). The Court then was called upon to evict the Legislature from the executive branch in the 1983 decision of *Alexander v. State by and through Allain*, 441 So. 2d 1329 (1983). In both instances it took litigation and judicial action to reign the Legislature in. A similar dilemma and confrontation may be in the making.

The right of initiative and referendum (alternatively referred to as I&R in this paper) is a significant grant of power to the citizenry at large. Previously, only the Legislature could propose Constitutional changes. The enactment of an I&R amendment in 1992 changed that:

"The people reserve unto themselves the power to propose and enact constitutional amendments by initiative..." Miss. Const., Art. 15, Section 273.

After surviving the equivalent of a political near-death experience with the near passage of a 1995 term limits initiative there are undoubtedly those within the legislative branch who consider the I&R process a threat to legislative preeminence and want this power back. An earlier version of I&R was struck down by the Mississippi Supreme Court in 1922. The question now is whether a bill passed during the 1996 regular session, H.B. 472, will be allowed to kill it again.

I. I&R: A Tortured History

The present day initiative and referendum provision of the Mississippi Constitution found at Article 15, Section 273 is not Mississippi's first experiment in this form of democracy. In 1914 the Mississippi Legislature adopted an I&R petition procedure. Miss. Laws, Ch. 520 (1914). This earlier version was quite extensive. An initiative petition (for statutory or constitutional amendments) only required the signatures of 7,500 qualified electors to be placed on a statewide ballot. The law also provided that a referendum could be held on any legislative act if a petition bearing 6,000 signatures was filed within 90 days after the adjournment of the legislative session. This significant grant of people power was short lived.

The constitutional validity of the I&R amendment was upheld in the 1917 Mississippi Supreme Court decision of *Howie v. Brantley*, 113 Miss. 786, 74 So. 662, 666-67 (1917). Five years later a number of citizens filed an initiative petition seeking to reduce the \$40,000.00 annual salary of the State Revenue Agent. (See history given in *Moore v. Molpus*, 578 So. 2d 624, 629, (Miss. 1991)). In an attempt to defend his salary the Revenue Agent argued that the initiative itself must fail

because the original I&R amendment had been submitted to the voters in a form that offended Section 273 of the Mississippi Constitution which mandated that each separate provision of a constitutional amendment be submitted and voted upon separately by the people. *Id.* In a surprising about-face the Mississippi Supreme Court reversed its decision of five years previous and held the I&R amendment to be "unconstitutional and void." *Power v. Robertson*, 130 Miss. 188, 93 So. 769, 777 (1922). Two state legislators attempted to have the Mississippi Supreme Court revisit and overturn the *Power* decision in the 1991 case of *Moore v. Molpus*, 578 So. 2d 624 (Miss. 1991). The Court declined to do so. *Id.* at 644.

The power of initiative and referendum was not available again to the citizens of Mississippi until the successful passage of Senate Concurrent Resolution No. 516 during the 1992 regular session. Miss. Laws, Ch. 715 (1992). Initiative and referendum had been a widely discussed campaign issue in the 1991 fall elections. Its eventual passage in the 1992 regular session of the Legislature was widely hailed as a progressive reform of government. It was approved by an astounding 70% of the popular vote in the 1992 fall elections. (Supp. p. 3). The amendment reads in part:

"The Legislature may enact laws to carry out the provisions of this section, but *shall in no way restrict or impair* the provisions of this section or the powers herein reserved to the people." (emphasis added). Miss. Const. Art. 15, Section 273 (13). (supplement p. 1)

II. A Complicated Process.

The John C. Stennis Institute of Government recently published their second edition of a handbook on the initiative and referendum process entitled *Mississippi's Initiative and Referendum: A Primer*. In this publication the author, Don E. Slabach, observed that the Mississippi I&R procedure is a cumbersome process with: the second highest signature threshold in the country, a geographic distribution requirement of those signatures more difficult to meet than any other state, and a "super-majority" voting requirement unlike any other. The John C. Stennis Institute of Government, Miss. State University, *Mississippi Initiative and Referendum: A Primer*, p. 4 (1995). Between the amendment itself and the legislative enactment that prescribes the details of the initiative process there are at least 19 separate steps that must be observed before an initiative can make it to the referendum stage. A simplified diagram of these procedures was attempted by the Stennis Institute. As can be readily seen, a simple process it is not. (Supp. p. 4).

The 1992 amendment that eventually passed in the 1992 legislative session contains a number of major hurdles:

- The I&R process can only be used for constitutional amendments;
- Certain subjects are off limits: the Bill of Rights of the Mississippi Constitution, the Mississippi Public Employees' Retirement System, right to work laws, the initiative process itself;
- Signatures have to be gathered over a twelve month period;
- The petition must be signed by at least twelve percent (12%) of the votes for all candidates for Governor in the last gubernatorial election;

- The signatures in any one congressional district shall not exceed one-fifth of the total number of signatures required to qualify the initiative petition for placement on the ballot;
- The requirement of a majority vote (for the proposition) equal to at least forty percent (40%) of all votes cast in the election;
- All initiative measures must first be submitted to the Legislature.

Any one of these requirements would be considered a significant hurdle to overcome. In total, they make the Mississippi initiative process a difficult one. The signature requirement alone has become a significant factor for any initiative proponent to consider. A recent official opinion by the office of the Attorney General placed the new signature requirement at 98,336 signatures. Op. Atty. Gen. (March 15, 1996).

As can be readily seen, the initiative process in Mississippi is already a complicated and cumbersome process. With their passage of H.B. 472 in the 1996 regular session a majority of the Legislature must, apparently, be of the opinion that the process has not been rigorous enough.

III. H. B. 472, A Mississippi Mugging?

The Wall Street Journal in a recent editorial alleged that the Speaker of the House, Tim Ford, and the Mississippi Farm Bureau after narrowly defeating a 1995 term limits initiative conspired to make certain that such a measure would never make it to the ballot again. *Mississippi Mugging*, Wall St. J., March 28, 1996. (Supp. p. 8). The bill that was "concocted", H. B. 472, has been acknowledged by most editorial writers as rendering the use of the initiative process almost non-existent. *Id.* The editor of the Northside Sun drew the same conclusion:

"Tim Ford, Ronnie Musgrove and the state legislature were apparently terrified of how close the [term limit] referendum came to passing. The law threatened their political careers. They had to figure a way to stop it. They came up with an ingenious idea: while supporting the concept of a referendum, they passed a new law that makes it practically impossible to collect the requisite number of signatures." *Legislators Figure Out a Way to Kill Initiative*, The Northside Sun, Jackson, Mississippi, April 18, 1996 at 4A (supp. p. 13).

The Vicksburg Post observed that H.B. 472 "effectively takes that power [of initiative and referendum] away by adding incredible hoops and hurdles." *Lawmakers, Quite Simply, have one use for Voters*, The Vicksburg Post, March 31, 1996 at A4. (Supp. p 12). The Clarion-Ledger in a rare display of solidarity with the Governor analyzed H.B. 472's restrictions and observed: "although these provisions sound innocent enough, adding them is just an attempt to further whittle away at the people's right to speak". *Lawmaker Vote Hinders People Power*, The Clarion-Ledger, March 30, 1996 (Supp. p. 10). The Gulf Coast newspaper put it more succinctly, "If this isn't unconstitutional, it ought to be". *State Legislators punish voters for taking initiative*, The Sun Herald, March 31, 1996 (Supp. p. 11).

H.B. 472 further restricts the initiative process in a number of significant ways:

- Only qualified electors of the state (state residents) can circulate petitions to obtain signatures;
- Pay for signature gatherers cannot be based on the number of petitions circulated or the number of signatures obtained;
- Signatures cannot be solicited within 150 feet of any polling place on any election day.
- Makes it unlawful to intentionally mislead a signer of a petition "as to the substance or effect of the petition";
- An "initiative petition" should be refused by the Secretary of State for filing if "one or more signatures" on the petition are obtained in violation of the act.

H.B. 472 Reg. Sess., 1996 (Supp. p. 2).

Despite widespread popular and editorial page opposition, H.B. 472 was approved by the Legislature in the 1996 regular session and forwarded to the Governor for his signature. In keeping with his support for the initiative process, the Governor vetoed the bill on March 28, 1996.

In the Governor's veto message he referred to the overwhelming statewide support for I&R and reminded the Legislature of the wording of the constitutional amendment itself:

"The people reserve unto themselves the power to propose and enact constitutional amendments by initiative.... The Legislature...shall in no way restrict or impair the provisions of this section or the powers herein reserved to the people." On November 3, 1992, by an overwhelming majority of 70% the people of our great state adopted Section 273 to our state's Constitution and made these words the law of the land. Their mandate is clear: they have reserved unto themselves the power to change their Constitution and they have directed the Legislature to in no way restrict their ability to do so. For this reason I have vetoed House Bill No. 472." Governor's Veto Message for House Bill 472 of the 1996 regular session, (March 28, 1996). (emphasis added). (Supp. p. 7).

The Governor further argued that H.B. 472 was repugnant to the freedoms of speech guaranteed in the Mississippi Constitution and the U.S. Constitution.

"As we all know, freedom of speech is a concept originally guaranteed us by the First Amendment to our United States Constitution. Our own Mississippi Constitution is even more emphatic. In Section 13 it directs that freedom of speech 'shall be held *sacred*' by our government. It has long been recognized that the circulation of a petition concerning political change is the type of core political speech that is protected by constitutional free speech guarantees. Restrictions on this right should be subjected to exacting scrutiny. When subjected to intense review, I can only conclude that House Bill 472 would impair the people's right to initiative and free speech in ways that are probably unconstitutional and, at the least, violates of a principle that should be held sacred." *Id.*

Ignoring the Governor's pleas the House voted to override the Governor by a vote of 98 to 23. (Supp. p. 5). The Senate also gave the Governor's constitutional arguments short shrift and voted to override by a vote of 33 to 14. (Supp. p. 6). H.B. 472 of the 1996 regular session is now law.

IV. Meyer v. Grant, Deja Vu All Over Again?

If a constitutional challenge is made to H.B. 472 a likely starting place is the 1988 U.S. Supreme Court decision of *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988). In this decision the proponents of an initiative to amend the Colorado Constitution brought an action to challenge the constitutionality of Colorado's statutory prohibition against paying circulators of initiative petitions. In an unanimous opinion the U.S. Supreme Court held that the Colorado prohibition against paying circulators violated the First Amendment. *Id.*, at 428, 108 S. Ct. At 1895.

The Court's analysis of the Colorado statute begin with a finding that the circulation of initiative petitions is the type of political speech protected by the First Amendment that the Court on occasion has called "core political speech". *Id.*, at 421-422, 108 S. Ct. at 1892. The Fourteenth Amendment makes this protection of the right to freely engage in political discussions applicable to the states. *Id.*, at 420, 108 S. Ct. At 1891 (citing *Thornhill v. Alabama*, 310 U.S. 88, 95, 60 S. Ct. 736, 740, 84 L. Ed. 1093 (1940)).

The Court found that the refusal to allow petition gatherers to be paid restricts political expression in two significant ways. First, the Court noted that a limitation on paying petition circulators amounted to a limitation on the number of voices that would convey a political message, the hours they could speak, and would, in effect, limit the size of the audience that could be reached. *Meyer*, 486 U.S. at 422-423, 108 S. Ct. at 1892. One of the witnesses at the trial court gave voice to the obvious by testifying that the ability to pay workers resulted in more people being "able and willing" to work on a petition drive. *Id.*, at n. 6. Secondly, the Court found that the Colorado prohibition would make it less likely that petition gatherers would garner the number of signatures necessary to place an issue on the ballot, thus limiting their ability to make the matter under consideration the focus of a statewide discussion. *Id.*, at 423, 108 S. Ct. at 1892. The U.S. Supreme Court referred to a decision of Colorado's own Supreme Court for support. *Id.* In *Urevich v. Woodard*, 677 2d 760, 763 (1983), the Colorado court observed:

"We can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay."

Justice Stevens linked this observation of human nature to the Constitution's free speech guarantees:

"The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, at 424, 108 S. Ct. at 1893.

V. H.B. 472 as a Deprivation of Life, Liberty, and Property.

As shown previously, the Supreme Court in *Meyer* recognized that gathering signatures on a petition is a legitimate form of employment and work. H.B. 472 prohibits signature gatherers from receiving compensation based on the number of signatures obtained or the number of petition circulated. This limitation may also run afoul of a general line of cases in Mississippi that stand for the general proposition that governmental interference with an otherwise legal private contract of labor is unconstitutional.

In the recent decision of *White v. Hattiesburg Cable Company*, 590 So.2d 867 (Miss. 1991) the Mississippi Supreme Court had occasion to link the Equal Protection Clause of the Fourteenth Amendment to the value that we as a society place on our freedom to work. In this decision a chiropractic service was disallowed for compensation under the workers' compensation laws by an administrative law judge. In reversing this denial of benefits the Court made this statement:

"Neither should we overlook that a sensitive nerve of the Fourteenth Amendment's equal protection of law clause is struck when any statute hinders a man or a woman from earning a living at a task for which he or she is trained and educated." *Id.* at 870.

The same tone was struck by an earlier Supreme Court in the Mississippi decision of *Moore v. Grillis*, 205 Miss. 865, 39 So.2d 505 (1949). The legislative regulation in question in this case was one limiting the ability of persons other than certified public accountants to prepare income tax returns. The Mississippi Supreme Court struck down this statute as unconstitutional pursuant to the Fourteenth Amendment's Equal Protection Clause and the Mississippi Constitution's equivalent found in Article 3, Section 14, which provides that "no person shall be deprived of life, liberty, or property except by due process of law." Miss. Const. Art. 3, Section 14. The Court made the distinction between a reasonable regulation and a statute which, in essence, completely deprives a person of his or her ability to earn a living at the occupation regulated:

"Regulation, it seems to us, is one thing, but prohibition of doing a thing, thereby eliminating the practice to be regulated, is another thing entirely." *Id.* at 509.

"The Supreme Court of the United States [has] said: 'A state cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'" *Id.* at 510 (quoting *Liggett Company v. Baldrige*, 278 U.S. 105, 49 S. Ct. 57, 59, 73 L.Ed. 204 [1928]).

The Mississippi Supreme Court cited approvingly a decision of the Illinois Supreme Court involving a similar issue. The Illinois Court stated, "[T]he right to follow any of the common occupations of life is an inalienable right. It is one of the blessings of liberty." *Id.* at 511 (citing *Frazer v. Shelton*, 320 Ill. 253, 150 N.E. 696, 701 [1926]).

The right to work at an otherwise legal occupation is protected by both the United States and Mississippi constitutions. A legislative act which directly interferes with this right in such a way that the work is, in effect, prohibited may be a deprivation of life, liberty, or property without due process of law.

As the Supreme Court recognized in *Meyer*, petition gathering is a form of work. Especially under Mississippi's I&R law which requires such a large number of signatures over a relatively short period of time. It can certainly be argued that H.B. 472's prohibition on paying petition gatherers based on their performance is an arbitrary regulation that would have the effect of destroying this form of work. It is quite unlikely that a proposition proponent would be willing to pay petition gatherers by the hour, day, or week. Especially in light of the fact that H.B. 472 plainly states that the petition gatherers could not be rewarded (or compensated) based upon their proficiency during those working hours.

VI. Carpetbaggers, Freedom Riders, and Xenophobia.

It has probably not escaped the attention of most members of the Mississippi Legislature that the term limits movement is national in scope. A number of states, including Arkansas and Louisiana, have enacted various forms of term limits on legislative bodies. U.S. Term Limits, Inc. is a national organization that has often been given credit for helping to promote term limits initiatives around the country.

H.B. 472 aims to limit the participation of outsiders in the Mississippi political process by providing in part that: "Only a person who is a qualified elector of this state may circulate a petition or obtain signatures on a petition." H.B. 472, Section 1 (2), Reg. Sess., 1996. The legislative debate on the subject of this particular amendment suggests that a fear of outsiders and their ideas was a significant factor in the passage of H.B. 472.

Representative Billy McCoy (D-Rienzi) claimed that he had been stopped seven times outside of his hometown Wal-Mart by people from out-of-state who had tried to get him to sign the petitions they were circulating. He warned his colleagues of the dangers of "carpetbaggers", "vested interest outside our great state", and their "battalions [that they would place] outside our polling places and businesses." *Fordice veto overridden in House*, The Clarion-Ledger, March 30, 1996 (supp. p. 9). Representative Gregg Davis (I-Southaven) warned of even more dramatic consequences as a result of the work of "carpetbaggers and freedom riders". *Id.* During the course of the debate he asked and answered this rhetorical question:

"What is the difference in Eastern liberal special interest and their powerful money and the far right-wing conservative special interest and their powerful money? Absolutely nothing. They're both motivated by the same shameful priorities -- money, power, greed -- to conspire to manipulate our most sacred political and legal document for the purpose of their own selfish political gain." *Id.*

The question then becomes whether carpetbaggers, freedom riders, or those state residents simply not registered to vote can be kept from participating in the initiative process.

The broad language of the *Meyer v. Grant* decision equates the initiative process with First Amendment's protection of political speech. This unanimous decision of the U.S. Supreme Court directly equated I&R with "core political speech" *Meyer*, at 422, 108 S. Ct. at 1892. The Court specifically said that the right to truly engage in discussions concerning the need for political and social change is guarded by the First Amendment. *Id.*, at 421, 108 S. Ct. at 1891. While the states have broad power to regulate economic activity there is not a comparable right to prohibit peaceful political activity. *N.A.A.C.P v. Claiborne Hardware Company*, 458 U.S. 886, 912-914, 102 S. Ct. 3409, 3425, 73 L. Ed. 2d 1215 (1982).

It seems to follow that if states such as Mississippi are forbidden from prohibiting peaceful political activity and circulation of an initiative petition is core political activity there is little room left to argue that this protection should only be extended to registered voters. To prevent someone from engaging in such protected free speech simply because he or she is from outside the state or otherwise not a registered voter would render our "profound national commitment" to uninhibited,

robust and wide open debate on public issues illusory. (Quoted language is from *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct., 710, 720, 11 L.Ed. 2d 686 (1964)).

It is worth noting that even aliens are guaranteed a degree of constitutional protection. Equal protection guarantees have been given to aliens seeking admission to the state bar (*In Re Griffiths*, 413 U.S. 717, 93 S. Ct. 2851, 37 L. Ed. 2d 910 (1973)), holding positions in a state's competitive civil service (*Sugarman v. Dugall* 413 U.S. 634, 93 S. Ct. 2842, 37 L. Ed. 2d 853 (1973)), and engaging in the private practice of engineering (*Examining Board of Engineers v. De Otero*, 426 U.S. 572, 96 S. Ct. 2264, 49 L. Ed. 2d, 65 (1976)). Restrictions on out of state signature gatherers may even conceivably violate the U.S. Constitution's Commerce Clause. See *Radio WHKW, Inc. v. Yarber*, 838 F.2d, 1439 (5th Cir. 1988).

VII. Has I&R Been Restricted or Impaired?

Article 15, Section 273 of the Mississippi Constitution directs that the Legislature should keep its hands off the initiative process:

"The people reserve unto themselves the power to propose and enact constitutional amendments by initiative.... The Legislature may enact laws to carry out the provisions of this section, but shall in no way *restrict or impair* the provisions of this section or the powers herein reserved to the people." Miss. Const. Art. 15, Section 273 (3) (13).

What exactly does that mean?

A prominent rule of constitutional construction is the "plain meaning" rule. *Board of Supervisors of Lamar Co. v. Hattiesburg Coca-Cola Bottling Company*, 448 So. 2d 917, 922 (1984). Do the provisions of H.B. 472 restrict the right of initiative? Do the provisions of H.B. 472 impair the right of initiative? These are questions that should certainly be answered. Our Supreme Court has indicated that developments since the time of the enactment of the constitutional language in question may also be considered. *Frazer v. State By and Through Pittman*, 504 So. 2d 675, 697 (1987).

A commonly used definition of the word restrict is: to confine within bounds. Webster's New Collegiate Dictionary (1973). Something is impaired if it is made worse by diminishing it in some material respect. *Id.* The plain meaning of these words and the timing of this legislative enactment (coming on the heels of the failed 1995 term limits initiative), would seem to suggest that the provisions of H.B. 472 were intended to and do restrict and impair the initiative and referendum process.

The debate on the floor of the House of Representatives when H.B. 472 was under consideration provides insight into the Legislature's intentions and also serves as a later development to be considered in attempting to ascertain whether this legislative act restricts or impairs the initiative process. This and other reports certainly lend credence to the Wall Street Journal's editorial assertion that the Legislature's annoyance with the initiative process had a lot to do with their passage of H.B. 472. If a court is allowed to take such matters into consideration they would

certainly support the argument that this legislative enactment was an attempt by the Legislature to restrict or impair the I&R process.

Conclusion

Most would agree that it is important for a balance of power to be maintained among the three branches of state government. It may be even more important to preserve powers that are reserved to the people.

The citizens of Mississippi with the passage of the initiative and referendum amendment to the Mississippi Constitution in 1992 reserved for themselves the power to propose amendments to their constitution. This authority is shared with the Legislature. Recent events suggest that the Legislature, with the passage of H.B. 472, would like to make this power theirs exclusively once again.

Important constitutional guarantees of free speech and equal protection are wrapped up in the power of initiative and referendum. Once this right is given, it cannot be infringed upon without doing damage to the Constitution itself. Although interference from "carpetbaggers", "freedom riders", and other "outsiders" may have been given as the excuse for the passage of H.B. 472, the evidence suggests that what the Legislature actually fears is interference from the people who elected them.