



PENNSYLVANIA

Budget and Policy Center

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To: Members of the General Assembly, editorial board writers and other interested parties

From: Marc Stier, Director, PA Budget and Policy Center

Re: HB1596

THE PRACTICE OF USING CONSTITUTIONAL AMENDMENTS TO ATTAIN LEGISLATIVE GOALS

We offer some comments on HB 1596 below. Before we get to them however, we want to make one general observation: many of the proposals in HB1596 should be offered as legislation not as constitutional amendments. A constitution is a sacred document that sets the framework for a regime by setting out the fundamental rights of the people and the institutions and structure of a government. It addresses basic issues about which our ideas generally change slowly over time and as a result of long experience. That is why the process of amending constitutions is often so difficult, as it is in Pennsylvania. Constitutional changes should not be made in response to transient concerns of the moment. They should not be made lightly or to deal with an immediate and transient problem. . And they should not be made on policy questions where there is a great deal of disagreement and some likelihood that the voters or their representatives may change their minds in response to new experiences under rapidly changing circumstances.

In Pennsylvania, as in many other states, the manner of conducting our election is a matter of serious concern and there have been many changes here and elsewhere in recent years in response to new social circumstances, new technology, and, of course, the COVID-19 pandemic. There are intense passions about the 2020 election, generated by former president Donald Trump's false claims and many of his supporters, that this presidential election was somehow illegitimate. It would be utterly irresponsible to make rash changes in our constitution in response to the passions created by these falsehoods. And even if that were not the context in which this and other amendments are being put forward, we are all reevaluating recent elections from many perspectives and are likely to learn more about alternatives and best practices in the next few elections. Thus, this is the worst possible time to be enshrining policy choices in our constitution on which voters and their representatives may soon come to different conclusions.

We should also be wary of using constitutional amendments to skirt the current structure of government and the separation of power and checks and balance built into it. That the General Assembly and the governor cannot reach an agreement does not mean that either should try to bypass the other's constitutional responsibility in the policy-making process. At times, we have challenged governors and presidents when they sought to inflate their executive power to avoid the need for legislation to attain some public purpose. We are equally concerned about the practice of the General Assembly seeking to legislate through constitutional amendments to avoid the governor's veto pen.

There are potential areas of agreement between the governor and the General Assembly on many of the issues that are the subject of the proposed constitutional amendments. The attempt to skirt the legislative process is not only wrong in itself but it is also discouraging the General Assembly from finding common ground with the governor.

We now turn to some of the proposed constitutional amendments in HB 1596.

THE VOTER ID AMENDMENT

The Voter ID amendment is both restrictive and troublingly vague.

The amendment requires voters to present a “valid government-issued identification” to vote in person and “proof of a valid government-issued identification” to vote as an absentee or by mail.

The lack of clarity in these provisions would inevitably lead to protracted litigation and chaos at the polling place. To begin with, it is unclear what “valid” means in this context. If a voter shows up at the polling place with a driver’s license that expired a week before Election Day, will they be permitted to cast a ballot? If a voter shows up at the polls with an ID that shows their old address will they be permitted to vote?

It is also unclear what counts as “government-issued identification.” Will cards for public benefits be considered government-issued identification? Will student IDs issued by public universities be considered government-issued identification? Is a social security card considered government-issued identification? Will a letter addressed to a voter from a government entity be considered government-issued identification?

The proposal to require signature matching is also deeply problematic.

Computerized signature-matching is inherently subjective, burdensome, and likely unconstitutional without a robust ballot cure process. Studies have shown that signature-matching leads to disproportionate ballot rejection among voters within marginalized groups, including younger voters and voters of color. Signature-matching would impose additional administrative costs on our already overburdened local election administrators.

And, without a strong cure process, signature-matching is likely unconstitutional. In 2020, a spate of litigation in federal courts in North Carolina, North Dakota, and Indiana all held that the failure to provide voters with notice and a meaningful opportunity to cure issues with their absentee ballots — such as a missing or mismatched signature—constitutes a deprivation of those voters’ rights to procedural due process under the Fourteenth Amendment.

Moving the voter registration deadline is bad for voters and forecloses opportunities to implement same-day registration.

We should be modernizing our election system to make registration and voting more accessible for voters. This amendment would move the registration deadline back two weeks for no good reason. Not only would this make it harder for voters to register in general, but it could also entirely eliminate the ability for voters to register and vote on the same day during the early voting period.

Half of all states allow voters to register and vote on the same day during the early voting period, on Election Day, or both. Pennsylvania is one of six states that allows voters to same-day register during at least part of the early voting period.

The changes to the qualifications of electors could be interpreted as repealing our constitutional right to vote.

Currently our constitution says that “every citizen” over a certain age is entitled to vote. The proposed amendment changes this text to read that “only citizens” over a certain age are entitled to vote. The words “every citizen” implies a floor—that at minimum every citizen who meets the qualifications in the constitution are permitted to exercise their right to vote. The words “only citizens” implies a ceiling—that at most, citizens who meet the constitutional qualifications have the privilege to vote.

This proposed change is especially troubling in light of some legislators' moves to undermine the will of Pennsylvania voters.

- More than 60 members—including leadership—called on our congressional delegation to object to the seating of our state's presidential electors.
- Some members of this legislature even aided the criminals attempting to commit a failed insurrection at our nation's capital on January 6th.
- The sham review taking place in the Senate right now continues to erode trust in our democratic system of government.

If this amendment becomes a part of our constitution, it will only be a matter of time until we start hearing arguments in court and in public discourse that Pennsylvanians are not guaranteed a right to vote.

THE PRIVATE DONATION AMENDMENT

We would prefer that all funding for election administration be provided by the state. The General Assembly has a very simple way to make that happen: provide every county with sufficient funds to run its elections smoothly and in a way that encourages people to vote. If the General Assembly were to do that, there would be no need for counties to rely on grant funding from private entities.

Until that happens, however, banning such funding will make it impossible for many counties to carry out elections fairly and efficiently. The failure to provide such funds is not only wrong but suspicious. It appears that the majority of the General Assembly does not actually want our elections to work well and we fear this is connected to the persistent doubts about the 2020 election that have been created by Republican leaders in Pennsylvania and beyond.

We also want to remind the General Assembly that governments at all levels—local, state, and federal—often receive corporate and grant funding to carry out core functions in the areas of health and human services and education among others. Indeed, among the proponent of the ban on grant funding are some of the strongest supporters of the EITC program which uses public dollars to give private corporations an incentive to contribute to private schools that carry out one of the core constitutional functions of government in Pennsylvania—to give our children a thorough and efficient education.

We often are troubled by this effort to replace public funding with private funding. Questions of fairness always arise when public funding is not sufficient to provide public goods and government entities rely on private grants. So, again, we would support legislation that would make such private funding unnecessary—and even to prohibit it—provided that sufficient public funds were available to carry out our elections fairly.

UNIFORMITY OF ELECTIONS

Our thoughts about the uniformity of elections parallel those about private funding of elections. In an ideal world, elections would follow uniform rules in every county. But again, complete uniformity in the administration of elections requires sufficient funding—and the funds necessary to carry out an election in one jurisdiction may not be the same, even on a per capita basis, as those necessary to carry out an election fairly in another jurisdiction. Until such time that the General Assembly guarantees each county sufficient funds to carry out elections fairly and uniformly, this amendment is premature. And once the General Assembly does provide such funds, this amendment would become unnecessary as uniform regulations on election funding and practices could be established by law.

ELECTION OF THE SECRETARY OF STATE

The secretary of state plays a central role in administering elections in the state. As such, it is important that the person who holds this position act, and be seen to act, in a nonpartisan manner. At present, the secretary of state is chosen by the governor with the advice and consent of the Senate. This manner of choosing the secretary of state affords two branches of government some influence in deciding who holds that position. On the other hand, electing the secretary of state would politicize the position and make the process an object of partisan division. We find it hard to understand how this would ensure that the secretary act, and be viewed as acting, in a nonpartisan manner.

We understand that members of the General Assembly have complaints about the actions of recent secretaries of state. We find some of those complaints legitimate, others not. But we understand them and are open to considering alternative methods of choosing the person who holds the position to ensure that he or she is as nonpartisan as possible. One alternative might be to have the governor choose the secretary of state from a slate of candidates vetted by an independent body chosen by both the governor and the leaders of the General Assembly.

There are reasonable alternatives to the present method of choosing the secretary of state. Having a partisan election for that position is not one of them.

In sum, HB 1596 would enshrine short-sighted, reactionary policies in our constitution. Not only is this bill bad policy, it proposes to make these measures a permanent part of our commonwealth's constitution.