Initiatives and Referenda

SOUTH DAKOTA LEGISLATURE
LEGISLATIVE RESEARCH COUNCIL

ISSUE MEMORANDUM 2017-08

Introduction

As adopted in 1889, when South Dakota became a state, the state constitution did not include any provision for the submission of voter initiatives or voter referred laws (commonly called "referendums" or "referenda"). The process for placing voter initiatives and referenda on the ballot was adopted in 1898 when voters approved an amendment that added the process to the state constitution.[1] South Dakota famously was the first state in the nation to adopt voter-initiated measures and referenda. While the original state constitution did provide for voter ratification of constitutional amendments that were proposed by the Legislature, voters themselves were not able to propose constitutional amendments until 1972.[2]

The law controlling the process for placing on the ballot voter initiatives, referenda, and voter-initiated amendments to the constitution, collectively "ballot measures," is contained both in the state constitution and in the South Dakota Codified Laws. Following is a brief history and overview of this process and how it has evolved during the past 120 years. The first part discusses the constitutional provisions regarding both the voter initiative and referendum process and then the voter-initiated constitutional amendment process. The second part discusses the statutory process. The memorandum includes the Legislature's recently-enacted changes to the ballot measure process effective on July 1, 2017.

Constitutional Provisions for Initiatives and Referenda in South Dakota

The constitutional initiative and referendum process as provided in Article III, § 1, has remained largely unchanged since its adoption in 1898, with one notable exception. Originally, the process in South Dakota for placing voter initiatives on the ballot was *indirect*, meaning that any measure proposed by the people first went to the Legislature. The Legislature was then required to "enact and submit to a vote of the electors of the state" each proposal. This process became *direct*, however, in 1988 when the voters adopted a constitutional amendment that removed the Legislature from the ballot measure process.[3]

The original ballot measure process also included referenda, whereby the people reserved "the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect." This process has always excluded from potential referral any law that would be "necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions."[4]

The Constitution provides that "not more than five percent of the qualified electors of the state shall be required to invoke either the initiative or the referendum." The term "qualified elector" was originally defined in South

[1] *See* 1897 S.D. Sess. Laws 88 (ch. 39). The initiative and referendum process was borne of the populism movement in the late nineteenth century, viewed by many as a way to control the political power of railroads and eastern monopolies and to control outside restraints on harvest earnings. *See* Patrick M. Garry, *The Rising Role of State Constitutional Law: An Introduction to a Series of Articles on the South Dakota Constitution*, 59 S.D. L. REV. 4, 5-6 (2014). In the roughly 120 years since the inception of the initiative and referendum process in South Dakota, the process has been used in varying degrees of frequency. The largest number of initiated measures to appear on one ballot (6) occurred in 2006, while the second largest (5) occurred in 1922. Voters saw more referred laws prior to 1934 (24 total) than have appeared since that year. Additionally, voters have rejected most ballot measures. Of the 56 total initiated measures to appear on the ballot in South Dakota, only 32% were approved. Of the 47 total referred laws to appear, only 26% passed, thereby leaving most of the legislature's enacted legislation in place. *See* "Past South Dakota ballot question titles and election returns from 1980-2014" *available at* South Dakota Secretary of State's website (http://sdsos.gov/elections-voting/assets/BallotQuestions.pdf).

[2] *See* 1972 S.D. Sess. Laws 22-3 (ch. 4).

[3] *See* 1987 S.D. Sess. Laws 27 (ch. 1).

[4] Since 1915, the South Dakota Supreme Court has found that any law in which the Legislature includes an emergency clause, as provided under Article III, § 22, of the Constitution, must cite for its justification to the same exceptions provided under Article III, § 1, regarding referred laws. *See* State ex rel. Richard et al. v. Whisman, 154 N.W. 707 (1915). As a result, any law that is passed by the Legislature with an emergency clause is by definition prohibited from being referred by the people. A law passed by the Legislature without an emergency clause, however, still may not be referred by the people if the law declares one of the exceptions enunciated in Article III, § 1. *See, e.g.*, Baker v. Jackson, 372 N.W.2d 142, 146 (1985).

Dakota's Constitution—albeit somewhat obscurely—in Article VII, § 1, but that definition was removed over time through various amendments. Nonetheless, the South Dakota Supreme Court has determined that a "qualified elector" for purposes of the Constitution's petition signature requirement is a person who "has registered to vote in some precinct."[5]

"Measures referred to a vote of the people" under Article III, § 1, are not subject to the Governor's veto.[6] Additionally, the Constitution allows for the ballot measure process—including both voter initiatives and referenda—to apply to municipalities in the state, meaning voters would be able to initiate and refer laws in municipalities.[7]

In its original form, the constitutional amendment process in Article XXIII, § 1, provided that an amendment that was first proposed "in either house of the legislature" and was approved by a majority of both houses, must then be submitted "to the vote of the people at the next general election." Article XXIII, § 2, provided for a process by which two-thirds of each house of the Legislature may call for a constitutional convention. This process expanded in 1972 when South Dakota adopted an amendment that allowed voters themselves to propose "by initiative" amendments to the Constitution.[8]

The constitutional requirements for voter-initiated constitutional amendments differ slightly from the process for initiatives and referenda. For instance, rather than "not more than *five* percent of the qualified electors of the state," as required to place an initiative or referendum on the ballot, Article XXIII, § 1, requires "a petition signed by qualified voters equal in number to at least *ten* percent of the total votes cast for Governor in the last gubernatorial election." The Constitution also requires petition sponsors to file "the text of the proposed amendment and the names and addresses of the sponsors" at least "one year before the next general election at which the proposed amendment is submitted to the voters." Additionally, Article XXIII, § 2, was altered to raise the number from two-thirds to three-fourths of all members of each house of the Legislature to call a convention; and the new process allowed voters to initiate and submit a constitutional convention "in the same manner as an amendment."

Statutory Provisions for Initiatives and Referenda in South Dakota

The final sentence of Article III, § 1, of the state constitution, as amended in 1898, requires the Legislature to "make suitable provisions for carrying into effect" the section's provisions. The Legislature adopted its first statutory regulatory scheme for ballot measures the following year.[9]

Most of the statutory provisions regarding voter initiatives and referenda now apply also to voter-initiated amendments to the Constitution, even though voter-initiated amendments were not allowed until almost 75 years following the initiative and referendum process. Any significant differences are noted below.

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[5] *See* Bjornson v. City of Aberdeen, 296 N.W.2d 896, 902 (1980).

[6] The phrasing of this clause has never been interpreted by the South Dakota Supreme Court to determine whether it applies to initiatives, referenda, or to both, however given the more general and inclusive term "measure" the clause would appear to apply to both, thereby prohibiting either an initiative or a referendum from being vetoed by the Governor. The presumed effect of initiatives and referenda for a time caused confusion for the South Dakota Supreme Court, which originally determined that only referenda, not initiatives, may be used to repeal an existing law since it was "not an exercise of delegated legislative power" but "in effect the exercise of the veto power." *See* State v. Summers, 144 N.W. 730, 732 (1913). This interpretation, however, caused confusion between the effect of initiatives and referenda in which initiatives were viewed only to be allowed to add new laws while referenda only would be allowed to repeal existing laws. In truth, however, initiatives often need to repeal certain statutes while adding new ones in order to effectuate their policy objective. Referenda can only "repeal" enacted legislation that has not yet taken effect. Recognizing the inherent difficulty with the false dychotomy they had created, the Court readdressed the issue in a later decision and eliminated the bright-line distinction between the two measures, stating that "[t]he initiative allows the people to propose new laws and to repeal current laws that after the passage of time are reviewed as undesirable or unnecessary." *See* Brendtro v. Nelson, 720 N.W.2d 670, 682 (2006).

[7] In 1975, the Legislature also granted, by virtue of its plenary authority over counties, the ability for the people of a county to initiate ordinances in counties as well. *See* 1975 S.D. Sess. Laws 131-6 (ch. 82). The percentage of qualified voters required to initiate county ordinances was originally "at least ten per cent of the total votes cast for Governor in the county in the last gubernatorial election," but that number was changed to "five percent of the registered voters in the county, based upon the total number of registered voters at the last preceding general election." *See* 1987 S.D. Sess. Laws 189 (ch. 67).

[8] *See* 1972 S.D. Sess. Laws 23 (ch. 4).

[9] *See* 1899 S.D. Sess. Laws 121 (ch. 93).

The initiative and referendum procedure adopted by the Legislature, currently codifed in SDCL chapters 2-1 and 12-13, required all measures to be presented by petition. While the Constitution provided that "not *more* than five percent" of the qualified electors of the state would be required to "invoke" a ballot measure, the Legislature required that "not *less* than five percent" of the qualified electors of the state would need to *sign a petition*. For purposes of the statutory petition signature requirements, this five percent was to be determined based on the total votes cast for Governor in the last preceding general election.[10]

Because the constitutional process was changed from indirect to direct, several statutory changes have occurred to reflect this change. Originally, each ballot measure was filed with the secretary of state, who then forwarded the measure to the Legislature upon their next convening. The Legislature then was required to enact and submit all proposed measures to a vote of the people at the next general election.

After the Constitution was amended in 1988 to make it a direct process, the Legislature made several significant changes to the statutory procedure. Instead of requiring the secretary of state to forward a copy of each ballot measure to the Legislature, the law required the secretary of state to place each ballot measure directly on the ballot. The full text of any ballot measure, along with information regarding the petition sponsors, was to be filed with the secretary of state prior to obtaining any signatures on a petition. In 2012, the Legislature began to require more specific information to be filed with the secretary of state prior to a petition's circulation.[11] Such information includes the ballot measure's title and the date of the general election on which the law is to be submitted, along with various signed and sworn statements to be made by petition sponsors.

Beginning in 1994, prior to a petition being circulated for signatures, proponents of ballot measures were required to submit the language of the ballot measure to the director of the Legislative Research Council for "review and comment."[12] This requirement was part of an Act to ensure that each ballot measure would be "written in a clear and coherent manner in the style and form of other legislation." The director of the Legislative Research Council was charged, therefore, with providing written recommendations to ballot measure proponents. Under the statute as it was originally worded, ballot measure proponents were effectively required to take the director's recommendations. In 2007, however, the Legislature added language to the law explicitly stating that sponsors "may, but are not required to, amend the [ballot measure] to comply with the director's comments."[13]

In 2009 the Legislature added another layer to the pre-circulation process for voter initiatives by requiring the sponsors to submit the initiative in its final form to the attorney general.[14] The attorney general was required to prepare a statement that "consists of a title and explanation." This explanation would be an "objective, clear, and simple summary to educate the voters of the purpose and effect of the proposed [ballot measure]." The explanation may not exceed 200 words. Petition circulators were required from that point forward to provide the attorney general's statement to anyone who would sign a petition.[15] The secretary of state is also required to provide "to any person upon request" the attorney general's statement.

The statement prepared by the attorney general for voter initiatives is closely similar to the statements prepared for proposed amendments to the constitution and referred laws.[16] The attorney general has been providing statements for proposed amendments and referred laws since 1915.[17] Petition sponsors who believe that the attorney general's statement does not meet statutory requirements may challenge the statement in circuit court with an expedited review and appeal process to the South Dakota Supreme Court.[18]

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[10] *See* SDCL § 2-1-5.
[11] *See* 2012 S.D. Sess. Laws 52 (ch. 18).
[12] *See* 1994 S.D. Sess. Laws 158 (ch. 109).
[13] *See* 2007 S.D. Sess. Laws 34 (ch. 14).
[14] *See* 2009 S.D. Sess. Laws 173 (ch. 64).
[15] Petition circulators are defined in SDCL § 2-1-1.3 as "any resident of the State of South Dakota who is at least eighteen years of age and who circulates a nominating petition for the purpose of placing a candidate or issue on any election ballot."
[16] *Compare* SDCL § 12-13-9 *with* SDCL § 12-13-25.1.
[17] *See* 1915 S.D. Sess. Laws 365-6 (ch. 181). The original length of the attorney general's statement was 400 words, but it was reduced to 200 words in 1974.
[18] *See* SDCL § 12-13-9.2.

When the Legislature required fiscal impact statements (later renamed "prison or jail population cost estimates"[19]) to be attached to its own bills starting in 2013, they extended this requirement also to include ballot measures.[20] These statements would provide information about how a ballot measure would impact state prison or county jail populations. The ballot measure sponsor would need to request a fiscal impact statement from the director of the Legislative Research Council, and then would attach the impact statement to the attorney general's statement when filing the petition with the secretary of state. In 2017, this process was altered so that the director of the Legislative Research Council must include a potential fiscal impact in the review and comment conducted for each ballot measure, thereby notifying the petition sponsor to submit a formal request for a fiscal note to be written for inclusion with the ballot measure when it is filed with the secretary of state.[21]

Until 1988, petition circulators were not allowed to be compensated for anything related to the circulation of petitions. During that year, however, the Legislature authorized petition circulators to be paid, but only for "meals, travel and lodging" incident to the circulation of petitions. In 2007, the Legislature allowed petition circulators to be compensated as petition circulators, and starting in 2016 they must also disclose the amount of their compensation to anyone who would sign the petition.[22]

Petition circulators have always been responsible for verifying that anyone who signs a ballot measure petition is qualified to be a signer. In 2007, the Legislature began to require more specific affirmations from petition circulators on the verification forms they file with the secretary of state.[23] During that same year, the Legislature added new provisions that require the secretary of state to examine petition signatures and verify them through a random sampling of five percent of the total signatures received.[24] In 2017, the Legislature changed this percentage to "a number of signatures that is statistically correlative to not less than ninety-five percent level of confidence with a margin of error equal to not more than three and sixty-two one-hundredths percent."[25]

At least twelve weeks prior to a general election, the secretary of state is required to forward to each county auditor a "certified copy of each [ballot measure] to be voted at the election," along with the attorney general's statement. Each county auditor is then required to publish in an official newspaper of the county a copy of the ballot measure and its attached statement. Newspapers must publish this information "not more than two nor less than four weeks" before the general election. In addition to newspaper publication, brochures that are prepared by the secretary of state are to include statements in support of and in opposition to each ballot measure.[26] In 2017, the Legislature required that the brochures shall include the attorney general's statement and explanation, the number of pages and sections of each proposed ballot measure, and any prison or jail cost estimate or fiscal note.[27]

From the very beginning of the voter initiative process, the Legislature has never required the full text of any ballot measure to appear on the ballot. Instead, only the title, explanation, and the attorney general statement appear in lieu of the actual ballot measure text. Until 2017, all ballot measures took effect on the day following the completion of the official canvass conducted by the State Canvassing Board.[28] In 2017, this date was changed to the first day of July following completion of the official canvass by the State Canvassing Board.[29]

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[19] *See* 2015 S.D. Sess. Laws 35-6 (ch. 15).
[20] *See* 2013 S.D. Sess. Laws 233-4 (ch. 101).
[21] *See* 2017 S.D. Sess. Laws 42-5 (ch. 16).
[22] *See* 2007 S.D. Sess. Laws 35 (ch. 78); 2016 S.D. Sess. Laws 52 (ch. 23).
[23] *See* 2007 S.D. Sess. Laws 35 (ch. 15).
[24] *See* 2007 S.D. Sess. Laws 35-6 (ch. 16).
[25] *See* 2017 S.D. Sess. Laws 36-9 (ch. 12).
[26] *See* SDCL § 12-13-23.
[27] *See* 2017 S.D. Sess. Laws 18-22 (ch. 2).
[28] *See* SDCL § 2-1-12.
[29] *See* 2017 S.D. Sess. Laws 35-6 (ch. 11).

In 2007, when South Dakota enacted Campaign Finance Reform, currently codified in SDCL chapter 12-27, ballot question committees were subject to these regulations.[30] In 2012, the Legislature started to require certain financial disclosures and statements of organization to be filed, subject to a Class 2 misdemeanor for a violation of the filing requirements.[31] This violation was altered in 2017 to provide for a first offense as a Class 2 misdemeanor but any subsequent offense would be enhanced to a Class 1 misdemeanor.[32]

Conclusion

South Dakota has revised, altered, tweaked, expanded, or limited its initiative and referendum process multiple times since 1898. The dynamic between the two seats of legislative power under the state constitution—the Legislature and the people—continues to evolve, with more potential changes in the near future. During the 2017 Legislative Session, House Bill 1141 created an Initiative and Referendum Task Force, which conducted a comprehensive review of the ballot measure process in South Dakota during the interim of 2017. The task force's work will culminate with many potential recommendations for the Legislature to consider during the 2018 Legislative Session.[33]

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[30] *See* 2007 S.D. Sess. Laws 132-45 (ch. 80). A ballot question committee is defined as "a person or organization that raises, collects, or disburses contributions solicited for the placement of a ballot question on the ballot or the adoption or defeat of any ballot question."
[31] *See* 2012 S.D. Sess. Laws 52-5 (ch. 18).
[32] *See* 2017 S.D. Sess. Laws 169 (ch. 71).
[33] The complete work of the Initiative and Referendum Task Force, including minutes from each meeting, research requests, and any legislation considered for recommendation by the task force is available on the Legislative Research Council website.

This issue memorandum was written by Wenzel J. Cummings, Legislative Attorney, on August 18, 2017, for the Legislative Research Council to supply background information on the subject of initiatives and referenda in South Dakota. This issue memorandum is not a policy statement made by the Legislative Research Council.