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JUSTIN  
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# Residency Requirements for Voting

## Issue Memorandum

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SOUTH DAKOTA  
**LEGISLATURE**  
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### Introduction

This issue memorandum reviews the history of voter residency requirements in South Dakota and compares the voter residency requirements for federal, state, and local elections in light of the 1970 Amendments to the Voting Rights Act of 1965 and subsequent decisions of the United States Supreme Court.

### Voter Residency Requirements in South Dakota - History to 1974

Article VII, § 1 of the South Dakota Constitution, as adopted in 1889, established the first qualifications for eligibility to vote in the state of South Dakota:

Every male person resident of this state who shall be of the age of twenty-one years and upwards, not otherwise disqualified, belonging to either of the following classes, who shall be a qualified elector under the laws of the Territory of Dakota at the date of the ratification of this constitution by the people, or who shall have resided in the United States one year, in this state six months, in the county thirty days, and in the election precinct where he offers his vote ten days next preceding any election, shall be deemed a qualified elector at such election:

First. Citizens of the United States.

Second. Persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States upon subject of naturalization.

As stated above, there were two paths that a man could take to qualify as a voter. First, a man was eligible to vote if he was a qualified voter under the laws of Dakota Territory. Under the 1861 Organic Act establishing the Dakota Territory, Congress provided that men who were at least twenty-one years old, had at least "legally declared their intention to become citizens," and were "actual residents" of the territory were eligible to vote in the first election held in the territory. For subsequent elections, Congress authorized the territorial Legislature to set the qualifications to be an eligible voter in addition to the requirements that Congress listed in the section. Pursuant to this authority, the Legislature of Dakota Territory established the following requirements:

Every male person above the age of twenty-one years, who shall have been a resident of the territory ninety days, sixty days in the county, and twenty days in the precinct next preceding the election, who is a citizen of the United States, or who has declared upon his oath his intention to become such, and shall have taken an oath to support the constitution of the United States, and persons who have been declared by law to be citizens of the territory, and shall have complied with the provisions of any law which is now or may in future be in force relating to the registration of voters, shall be entitled to vote . . .<sup>1</sup>

In both cases, the ability to vote was limited to a man who was at least twenty-one years old, who was either a citizen or who had sworn under oath that he intended to become a citizen, and who was a resident of the territory at the time of the election. Once the territorial Legislature was elected and seated, the Legislature added the first residency requirements for all subsequent elections that would occur in the territory, stipulating that the man must have been in the territory for ninety days, in the county for sixty days, and in the precinct for twenty days.

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<sup>1</sup> *The Compiled Laws of Dakota Territory* § 1486.

If a man did not meet the qualifications to be a voter under the laws of Dakota Territory, the South Dakota Constitution, as it was ratified in 1889, provided for a second pathway to qualify to vote in South Dakota. Like the requirements established in Dakota Territory, the ability to vote in an election in the state of South Dakota was limited to men who were at least twenty-one years old, and who were either citizens or had stated that they intended to become citizens of the United States. In addition, the constitution required that a man be a resident of the United States for at least one year before being eligible to vote, citizen or not. At the same time, the constitution increased the amount of time a man was required to live in the state, often referred to as a durational residency requirement, from ninety days to six months, but decreased the amount of time that a man had to reside in the county from sixty to thirty days, and in the precinct from twenty to ten days.

In 1918, voters approved a constitutional amendment that modified voter qualifications and increased the required period of residency from one year to five years in the United States, six months to twelve months in the state, thirty days to ninety days in the county, and ten days to thirty days in the precinct. The amendment also broadened the elective franchise to women and required an individual "of foreign birth" to have completed the naturalization process and become a citizen before being eligible to vote. Merely swearing an intention to become a naturalized citizen was no longer sufficient.<sup>2</sup>

In 1958, voters approved another constitutional amendment to clarify residency status when an individual moved from one precinct or county to another precinct or county within the state. The amendment provided that every resident in this state "shall be a qualified elector at such election provided . . . no elector in the state by reason of having changed his residence from one county or precinct to another shall be deemed to have lost his right to vote at any election in the precinct from which he has removed until he shall have acquired a new voting residence in the county or precinct to which he was removed."<sup>3</sup> While the amendment did not change the residency requirements to initially become a voter within the state, it allowed an individual who was already a qualified voter and had moved within the state, with insufficient time to become a registered voter in the new location, to retain the ability to vote in the location from which the individual moved.

During the ensuing sixteen years, there was a gradual loosening of the residency periods required before an individual was qualified to vote in the state. In 1970, the voters approved two constitutional amendments. The first reduced the amount of time an individual had to be a resident of the state from one year to one hundred and eighty days.<sup>4</sup> The second created the framework by which an individual who would be otherwise disqualified from voting in an election could vote in the presidential election. The provision was applied only during the 1972 presidential election.<sup>5</sup>

In 1974, the Legislature proposed another amendment in which many of the provisions governing the administration of elections were entrusted to the Legislature. The residency requirements that had been included in S.D. Const., Art. VII, § 2, in some form or another since 1889, were removed altogether. The new language stated:

Every United States Citizen eighteen years of age or older who has met all residency and registration requirements shall be entitled to vote in all elections and upon all questions submitted to the voters of the state unless disqualified by law for mental incompetence or the conviction of a felony. The Legislature may by law establish reasonable requirements to insure the integrity of the vote.

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<sup>2</sup> 1918 Session Laws, chapter 31.

<sup>3</sup> 1957 Session Laws, chapter 304.

<sup>4</sup> 1969 Session Laws, chapter 241.

<sup>5</sup> 1970 Session Laws, chapter 4.



Each elector who qualified to vote within a precinct shall be entitled to vote in that precinct until he establishes another voting residence. An elector shall never lose his residency for voting solely by reason of this absence from the state.<sup>6</sup>

This section, together with the language of S.D. Const., Art. VII, § 3, which authorized the Legislature to define residence for voting purposes, moved residency requirements out of the South Dakota Constitution and into the South Dakota Codified Laws.

In 1973, the Legislature provided the following definition of residence:

For the purposes of this title, "residence" shall be the place in which a person has fixed his habitation and to which, whenever he is absent, he has the intention of returning.

A person who has left his home and gone into another state or territory or county of this state for a temporary purpose only shall not be considered to have lost his residence.

A person shall be considered to have gained a residence in any county or city of this state in which he actually lives, providing such a person has no present intention to remove himself therefrom.

If a person moves to another state, or to any of the other territories with the intention of making it his permanent home, he shall be considered to have lost his residence in this state.<sup>7</sup>

### Voter Residency - Federal Requirements

In 1965, during the height of the civil rights movement, President Lyndon Johnson signed the Voting Rights Act - a landmark piece of legislation that enforced provisions set forth in the Fifteenth Amendment to the United States Constitution by prohibiting certain practices, like literacy tests, that were designed to disenfranchise racial minorities. The 1970 amendments to the Voting Rights Act abolished any residency requirement as a condition to qualify to vote for the offices of president and vice president of the United States. Specifically, the legislation:

- Prohibited the imposition of a durational residency requirement as a qualification to vote in a presidential election;
- Prohibited states with a voter registration deadline from setting the deadline more than thirty days before a presidential election; and
- Allowed a voter who moved to a new state after that state's voter registration deadline to vote in the presidential election held in the state from where the voter had moved.<sup>8</sup>

These provisions were challenged in court by the states of Oregon, Arizona, Idaho, and Texas. The United States Supreme Court, in *Oregon v. Mitchell*, affirmed Congress' authority to prohibit any required period of residency before an individual qualifies to vote for the office of president and vice president of the United States. Justice Hugo Black said, "Acting under its broad authority to create and maintain a national government, Congress unquestionably has power under the Constitution to regulate federal elections."<sup>9</sup>

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<sup>6</sup> 1974 Session Laws, chapter 2.

<sup>7</sup> 1973 Session Laws, chapter 67.

<sup>8</sup> 52 U.S.C. § 10502

<sup>9</sup> *Oregon v. Mitchell*, 400 U.S. 112, at 134 (1970).



Justice Black went on to say that while Congress has the authority to regulate elections for federal office, the states also retain the authority to regulate state and local elections:

The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualification of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of congressional districts. . . . On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution commands otherwise.<sup>10</sup>

Because of tension between the roles of Congress and state legislatures in regulating elections held within a state's boundaries, the Supreme Court not only upheld prohibition on residency requirements in presidential elections, but it also struck down Congress' attempt to lower the voting age in all elections.<sup>11</sup>

In *Oregon v. Mitchell*, the United States Supreme Court dealt only with the issue of durational residency requirements as applied to presidential elections. Two years later, in *Dunn v. Blumstein*,<sup>12</sup> the court took up the issue of durational residency requirements for voting. James Blumstein, a university professor who had recently moved to Tennessee, filed suit to challenge a Tennessee law that required one year of residence in the state and three months of residence in the county before being eligible to vote. The Supreme Court affirmed the decision of a lower court to invalidate the residency requirements imposed by the State of Tennessee:

It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," . . . and must be "tailored" to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means."<sup>13</sup>

The constitutionally protected activity to which the court pointed was the right to travel. The court stated "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest is unconstitutional."<sup>14</sup>

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<sup>10</sup> *Oregon v. Mitchell*, 400 U.S. 112, at 121 (1970).

<sup>11</sup> Following the court's ruling in *Oregon*, the ratification of the amendment proposed in HJR 513 (1970 Session Laws, chapter 4) prompted the Legislature to pass SB 13 in 1971 (1971 Session Laws, chapter 83) codifying the concepts of the "national voter" and the "presidential voter" and the means by which both were to be admitted as voters in chapter 12-19A. A national voter was a person who was older than eighteen but younger than twenty-one and otherwise met all of the other requirements, including the duration as a resident of the state, that would allow the person to register to vote in elections for presidential electors, United States Senate, and the United States House of Representatives. A presidential voter was a person who was at least eighteen and met all of the other requirements to register to vote except for the durational residency requirements found in the South Dakota Constitution. After the ratification of the Twenty-Sixth Amendment to the United States Constitution in 1971, the Legislature passed HB 523 (1972 Session Laws, chapter 76) to bring South Dakota election law into conformity with the amendment. In doing so, the Legislature removed the concept of the national voter from statute. The category of presidential voter was repealed with HB 629 in 1975 (1975 Session Laws, chapter 119) after the voters of the state approved repealing voter residency requirements with the revision to Article VII of the South Dakota Constitution in 1974.

<sup>12</sup> *Dunn v. Blumstein*, 405 U.S. 330 (1972).

<sup>13</sup> *Dunn v. Blumstein*, 405 U.S. 330, at 343 (1972).

<sup>14</sup> *Dunn v. Blumstein*, 405 U.S. 330, at 339 (1972).



In *Dunn*, the court conceded that states have the power to restrict the ability to vote to individuals who are bona fide residents. However, the court highlighted the distinction between bona fide residency and durational residency requirements, noting that it is problematic when the state attempts to require a person who is a bona fide resident to be a resident for a period of time before being eligible to vote:

We emphasize again the difference between bona fide residence requirements and durational residence requirements. We have in the past noted approvingly that the States have the power to require that voters be bona fide residents of the relevant political subdivision. . . . An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny. But durational residence requirements, representing a separate voting qualification imposed on bona fide residents, must be separately tested by the stringent standard.<sup>15</sup>

The court suggested that the imposition of a durational residency requirement was not the least burdensome means by which the state furthered a sufficiently substantial state interest. The court pointed to the 1970 amendments to the Voting Rights Act of 1965 and stated: ". . . Congress outlawed state durational residence requirements for presidential and vice-presidential elections, and prohibited the States from closing registration more than 30 days before such elections."<sup>16</sup> The court said Congress found that residence requirements and restrictive registration practices did "not bear a reasonable relationship to any compelling state interest in the conduct of presidential elections."<sup>17</sup>

In presidential elections, Congress prohibited the imposition of durational residency requirements, but allowed the states to impose a deadline by which voter registrations must be received. At the same time, in order to protect an individual's right to travel, Congress made a specific provision for an individual who moved from the state in which the individual was a qualified voter to another state, after the new state's voter registration deadline, to vote in the presidential election in the individual's former state of residence.<sup>18</sup>

The court recognized the protection of state ballot rolls from voter fraud as a legitimate and substantial state interest and concluded that the voter registration deadline imposes less of a burden on voters than a durational residency requirement. The court stated: "Durational residence laws may once have been necessary to prevent a fraudulent evasion of state voter standards, but today . . . this purpose is served by a system of voter registration."<sup>19</sup> This is especially true if the only requirement to "demonstrate" residency when registering to vote is for the person to attest under oath that the person is a resident.

Since false swearing is no obstacle to one intent on fraud, the existence of burdensome voting qualifications like durational residence requirements cannot prevent corrupt nonresidents from fraudulently registering and voting. As long as the State relies on the oath-swearing system to establish qualifications, a durational residence requirement adds nothing to a simple residence requirement in the effort to stop fraud.<sup>20</sup>

If the state's goal is to ensure its voter rolls do not contain individuals who registered fraudulently, the state must require more than just the certification on the voter registration form. As the court pointed out, "[o]bjective

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<sup>15</sup> *Dunn v. Blumstein*, 405 U.S. 330, at 343-344 (1972).

<sup>16</sup> *Dunn v. Blumstein*, 405 U.S. 330, at 344 (1972).

<sup>17</sup> *Dunn v. Blumstein*, 405 U.S. 330, at 344 (1972).

<sup>18</sup> 52 U.S.C. § 10502(e).

<sup>19</sup> *Dunn v. Blumstein*, 405 U.S. 330, at 346 (1972).

<sup>20</sup> *Dunn v. Blumstein*, 405 U.S. 330, at 346 (1972).



days immediately prior to the day the person registers to vote. . . is entitled to be registered to vote. . ." This language was amended to read: "Every person who maintains residence, as provided in § 12-1-4, within the state for at least thirty days in the year prior to submitting the registration form. . . is entitled to be registered to vote. . ." The language was further amended to remove the phrase "in the year" from the residency requirement.

Prior to the beginning of the 2024 session, the secretary of state requested the introduction of SB 17 to clarify the time frame for counting the thirty days of the residency requirement. The bill included the following language: "A person who maintains residence, as provided in § 12-1-4, within the state for at least thirty days *in the three hundred and sixty-five days immediately* prior to submitting the registration form. . ." The bill also proposed to make the section apply retroactively to those persons who had registered to vote after SB 139 took effect on July 1, 2023. However, the bill was amended when it was heard in the Senate State Affairs Committee. Citing concerns about the enforceability and overall legality of the residency requirement, the amendment proposed to strike the thirty-day residency requirement from SDCL 12-4-1, with a corresponding change to the certification required when registering to vote. The Senate passed the amended version of the bill, but it was ultimately tabled in the House of Representatives.

The House of Representatives made a second attempt at amending the voter residency requirements with SB 123. As amended, SB 123 proposed to move the durational residency requirement out of SDCL § 12-4-1 and place it in the definition of "resident" as was also proposed by amendments to SDCL § 12-1-4. The argument for making this switch was based on the distinction between limiting the right to vote in a state to bona fide residents, which the Supreme Court encourages, and requiring a bona fide resident to maintain a residence for a specific duration before being eligible to register to vote, which the Supreme Court has struck down.

The residency requirement, as passed in 2023's SB 139, is a durational residency requirement imposed on a bona fide resident, i.e., an individual who met the requirements of residency as defined by SDCL § 12-1-4, whereas the change proposed in the amendment to 2024's SB 123 would have amended the definition of a resident so that an individual did not become a bona fide resident, and therefore a person eligible to register to vote, until the individual had lived or planned to live in the state for thirty days.

Like SB 17 before it, the amended version of the SB 123 was ultimately tabled. The legislative session ended without the Legislature passing any changes either clarifying, repealing, or otherwise amending the voter residency requirement for state and county elections.

### **Residency Requirements in Local Elections in South Dakota**

The residency requirement found in SDCL § 12-4-1 applies to all state and county elections. The provisions that apply to municipal and school district elections are found in SDCL chapters 9-13 and 13-7, respectively. SDCL § 9-13-4.1 limits the ability to vote to an individual who is registered to vote and who "resides in the municipality at the time of the election." The section provides:

For the purposes of this section, a person resides in the municipality if the person actually lives in the municipality for at least thirty days each year, is a full-time postsecondary education student who resided in the municipality immediately prior to leaving for the postsecondary education, or is on active duty as a member of the armed forces whose home of record is within the municipality.

SDCL § 13-7-4.2 uses the same language when listing the qualifications to be a voter in a school district election.

While these statutes require an individual to live in the jurisdiction for a period of thirty days before being qualified to vote, as noted above, the distinction is that, unless the individual is a student going to a postsecondary



educational institution for school or an active duty member in the armed forces, an individual must live in the municipality or school district for a period of thirty days each year before the individual is considered to "reside" in the municipality or school district. The definition of "residence" in SDCL § 12-1-4 does not have the same requirement before an individual is considered a resident of the state.

The sections that define a resident of a municipality or school district, for the purposes of municipal or school district elections, provide a process by which an individual's status as a resident may be challenged. This basis to challenge a prospective voter is unique to the municipal and school district election process, and nothing comparable is found for state elections. As stated in SDCL 12-18-10, an individual's vote may only be challenged if:

- There is a question concerning the identity of the individual attempting to vote;
- The individual had been declared mentally incompetent; or
- The individual had been convicted of a felony.

### Voter Registration

Throughout the state's history, the voter registration process has been the primary mechanism for determining an individual's eligibility to vote. Dakota Territory provided for a registration board to meet two weeks before the general election to compile the list of qualified voters in the jurisdiction.<sup>35</sup> Beginning in 1899, the Legislature required the county assessor to carry a copy of the voter registration list and update the list as he went about his duty. This method of voter registration continued until 1961.

At that time, the Legislature enacted HB 501. This bill changed the process of voter registration to one substantially similar to that which is in operation today. The process required an individual register to vote with the auditor of the county in which the individual resided. Regardless of the method of voter registration, however, the individual was not required to demonstrate that the individual was a resident of the state, but only had to attest under the penalty of perjury that: ". . . I have resided in the United States 5 years, the State of South Dakota 1 year, . . . County 90 days, and the. . . Ward and. . . Precinct and. . . Independent School District 30 days and am legally qualified to vote."<sup>36</sup>

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<sup>35</sup> *The Compiled Laws of the Dakota Territory* § 1525.

<sup>36</sup> 1961 Session Laws, chapter 92, § 7.



## Conclusion

Determining who is eligible, and therefore entitled, to vote requires a balance between the state's right to ensure that only individuals who are bona fide residents of the jurisdiction holding the election are eligible to vote and an individual's right to travel and vote. Congress has prohibited the use of durational residency requirements for presidential elections, and the United States Supreme Court remains unconvinced that the durational residency requirement for other elections strikes the correct balance. Regardless of what the solution to the question of voter eligibility is, it will need to account for innumerable subtleties and nuances.

Articulating residency requirements for the purposes of establishing who is eligible to vote has been a multi-decade effort, in part because of the parameters set by Congress and the United States Supreme Court. It has been made more challenging because residency requirements are not limited to the electoral process, but are also considered when determining tuition rates, divorce proceedings, professional licenses, driver licenses, vehicle registration, and hunting and fishing licenses. Because residency is considered in a variety of issues, and because each of the issues where residency is a consideration is not held to the same constitutional standard, or subject to the same degree of judicial scrutiny, a requirement that is appropriate in one instance may not be appropriate in another instance.

The Legislative Research Council provides nonpartisan legislative services to the South Dakota Legislature, including research, legal, fiscal, and information technology services. This issue memorandum is intended to provide background information on the subject. For more information, please contact Jacob Carlson, Research Analyst.

