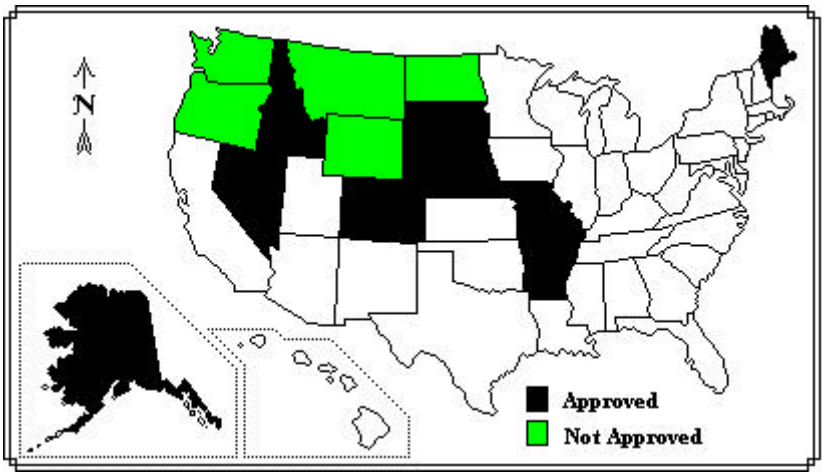
South Dakota Legislative Research Council

Issue Memorandum 97-23

Scarlet Letter Laws

Introduction

In 1995, the United States Supreme Court ruled that state measures on congressional term limits were unconstitutional. Despite this ruling, there continues to be much activity by those seeking to impose term limits on congressional members. Those in favor of term limits employed a new approach on the ballot in 1996, scarlet letter laws. In the term limit discussion, a scarlet letter law refers to the designation on the ballot beside the candidate's name indicating the candidate has failed to sign a pledge or otherwise support congressional term limits. These are also referred to as "inform and instruct" provisions. In last November's elections, citizens in fourteen states, including South Dakota, voted on some aspect of term limits for congressional members. Each of these measures contained an inform and instruct provision. The measure was approved in South Dakota and eight other states: Alaska, Arkansas, Colorado, Idaho, Maine, Missouri, Nebraska, and Nevada. The remaining five states, where these measures failed, were Montana, North Dakota, Oregon, Washington, and Wyoming.



The focus of this memorandum is the history and development of the issue of the scarlet letter law in South Dakota. The effort to impose scarlet letter requirements began as an initiated measure, and it was subsequently approved by the voters and codified in the South Dakota Codified Laws. Although the scarlet letter law was repealed last session, a referendum on the issue will appear on the ballot in 1998. Therefore, since the repeal

was referred and thus suspended until the 1998 election, the scarlet letter measure is currently in effect and will be enforced in the 1998 congressional elections. Before examining the history of the scarlet letter law in South Dakota, it is important to understand the distinction between an initiative and a referendum.

Initiative vs. Referendum

An initiative is a legislative measure proposed by the people rather than the legislative body. It must be presented by petition, and the petition must contain five percent of the qualified voters of the state. The number of necessary signatures is determined by the number of votes cast for Governor at the last gubernatorial election. An initiative must be filed with the secretary of state by the first Tuesday in May of a general election year for submission to the voters at the next general election. An initiated constitutional amendment, on the other hand, must be filed at least one year before the next general election or no later than one year after filing the full text with the secretary of state. Once an initiative becomes law, it may be amended or repealed by the Legislature.

A referendum is the submission of a law passed by the legislative body to a popular vote. Any law, except those which are necessary for the immediate preservation of the public peace, health, or safety, or necessary for the support of state government and its existing public institutions, may be submitted to the electors of the state at the next general election after its enactment. The petition must be submitted to the secretary of state within ninety days after adjournment of the Legislature that passed the law being referred. Like an initiative, the petition for the referendum must contain at least five percent of the qualified electors of the state. Referred measures do not take effect until they are voted on at the next general election.

The Scarlet Letter in South Dakota

On November 5, 1996, the voters of South Dakota, by a margin of sixty-eight percent to thirty-two percent, approved Initiated Measure No. 1, which required that the ballot reflect a candidate's nonsupport of congressional term limits. Initiated measures that have been approved by a majority of all voters become effective the day after the completion of the official canvass. This measure, which became effective November 16, 1997, required South Dakota's congressional senators and representative to support a term limits amendment to the United States Constitution. The proposed limits were three two-year terms in the United States House of Representatives and two six-year terms in the Senate. If any incumbent failed to support the amendment as prescribed, the secretary of state would place a label adjacent to the candidate's name which stated "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" the next time the candidate's name appeared on the ballot. Any nonincumbent would be asked to sign a pledge to support term limits. If the nonincumbent did not sign such a pledge, the statement, "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS," would be placed adjacent to the candidate's name.

During the following legislative session after the measure became effective, the Legislature considered two bills regarding this measure. One was introduced by the House Committee on Local Government at the request of the State Board of Elections. The bill, House Bill 1017, revised the

requirements concerning a candidate's support of congressional term limits and provided the Board of Elections with rule-making authority for implementing the measure. The measure required the secretary of state to "make an accurate determination as to whether the information 'DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS' or 'DECLINED TO PLEDGE TO SUPPORT TERM LIMITS' is placed adjacent to a candidate's name." House Bill 1017 revised that provision requiring any candidate complying with the requirements of the measure to file an affidavit acknowledging the compliance. The bill permitted the secretary of state to base the determination exclusively on the affidavit or pledge filed by the candidate. In addition, the bill provided rule-making authority to adopt forms, deadlines, and procedures for the administration of the measure. This bill died in committee on February 26, 1997, the day after the other bill regarding this measure, House Bill 1188, passed the Senate. House Bill 1188, which had bipartisan sponsorship, repealed the provisions concerning a candidate's support of term limits. It passed the House by a vote of fifty-four to fifteen and passed the Senate, after reconsideration, by a vote of twenty to thirteen. House Bill 1188 was subsequently signed by the Governor and would have become law on July 1, 1997.

A group known as South Dakotans for Term Limits filed sufficient petition signatures with the secretary of state to refer House Bill 1188 to the voters and thus keep it from going into effect on July 1, 1997. It will appear as Referred Law No. 1 on the ballot next November. A vote in favor of the referendum would uphold the Legislature's action and repeal the measure. A vote against the referendum would reverse the action of the Legislature which repealed the scarlet letter measure and thus retain the measure as law.

The same group has since prepared an initiated constitutional amendment for the ballot that would place another type of ballot labeling provision in the South Dakota Constitution. The placement within the constitution is significant in that it would require another constitutional amendment to amend or repeal it. The other significant distinction is that rather than charging the secretary of state with the responsibility of placing the label on the ballot in appropriate circumstances, the member of Congress or candidate for Congress would be required to take a pledge not to serve more than the permitted time. If the member did run for more terms, a label would be placed next to the candidate's name indicating the candidate broke the pledge.

The measure was filed with the Legislative Research Council pursuant to SDCL 12-13-24 to 12-13-26, inclusive. Pursuant to SDCL 12-13-25, the LRC is required to review each initiated law or initiated amendment to the South Dakota Constitution. Further, the LRC is required by SDCL 12-13-24 to determine if each initiative or initiated constitutional amendment is "written in a clear and coherent manner in the style and form of other legislation" and that it is "worded so that the effect of the measure is not misleading or likely to cause confusion among voters." Whether or not the suggestions are incorporated, the letter from the Legislative Research Council constitutes neither an endorsement of the initiated measure nor a guarantee of its statutory sufficiency. However, the secretary of state may not accept an initiative unless it has first been filed with the Legislative Research Council.

The full text of any initiative petition, referred law petition, or initiated constitutional amendment with the names and addresses of the petition sponsors must be filed with the secretary of state before it can be circulated for signatures. The petition signatures must be filed at least one year before the next general election to appear on that general election ballot. The deadline for filing constitutional amendments with the secretary of state for the 1998 general election was November 3, 1997. This measure was not filed by this deadline. However, signatures may be collected for one year from the filing of the full text. Therefore, the deadline for this particular initiated constitutional amendment is July 10, 1998. If the required signatures are filed with the secretary of state by that date, the initiated constitutional amendment will appear on the ballot of 2000.

Challenges to Scarlet Letter Laws

In the nation's first challenge to an inform and instruct measure, the Arkansas Supreme Court ruled that state's initiative unconstitutional. The suit was filed in Arkansas to enjoin the secretary of state from placing a proposed inform and instruct amendment to the Arkansas Constitution on the general election ballot. Because the measure sought to amend the United States Constitution, the Arkansas Supreme Court in October of 1996 struck it down as violative of the requirement of the United States Constitution that all proposed amendments come from either Congress or the state legislatures and found that it was an impermissible use of the initiative power. In February of 1997, the United States Supreme Court let the Arkansas court's ruling stand without comment, leaving in question the constitutionality of all such measures. That was the same month that the South Dakota Legislature repealed the state's inform and instruct measure.

A federal district court in Nebraska temporarily halted that state's inform and instruct law in May. Also in May, the United States District Court for the District of Maine found that Maine's inform and instruct law effectively coerces Maine's public officials in violation of Article V of the United States Constitution and enjoined the implementation of the entire act.

In Idaho after the voters approved an inform and instruct law in November of 1996, ten members of the Idaho legislature sought a writ of prohibition against the secretary of state barring the measure's implementation and a declaratory ruling that the measure was unconstitutional. In August of 1997, the Idaho Supreme Court found that the sections requiring a legend be printed on the ballot for the Idaho members of Congress and the Idaho legislators who did not support congressional term limits was unconstitutional because it violated the speech and debate clauses of the Idaho and United States Constitutions. Further, the pledge portion of the measure violated a nonincumbent's right to free speech. However, the court did not find the instruction portion to be unconstitutional, but rather a non-binding, advisory initiative. The Idaho Constitution gives the people the right to instruct their representatives and to petition the legislature for redress of grievances.

Summary

As the initiatives and challenges continue in other states, the citizens of South Dakota also continue to wrestle with the issue. The bill which repealed the inform and instruct measure was referred and will appear as Referred Law No. 1 on the 1998 ballot. In addition, supporters of term limits have

proposed another tactic. They are circulating petitions for a constitutional amendment. This constitutional amendment proposal missed the November 3, 1997, deadline to be placed on the 1998 ballot. Supporters of this measure have until July 10, 1998, to file their petitions with the secretary of state for placement on the ballot in the year 2000. In addition, there is the possibility of litigation on this matter of scarlet letter provisions.

This issue memorandum was written by Jacquelyn Storm, Senior Legislative Attorney for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.