



South Dakota Legislative Research Council

Issue Memorandum 98-15

CONSTITUTIONAL AMENDMENT C Legislative Conflicts of Interest

Constitutional Amendment C would amend Article III, section 12, of the Constitution by revising certain restrictions placed on the activities of legislators. Constitutional Amendment C is the result of a recommendation from the 1996 Legislative Article Review Commission. This memorandum will review the history that led up to this proposed amendment, discuss what the proposed amendment would do, and consider the possible arguments for and against the proposed amendment.

History

Section 12 of Article III is part of the state's original Constitution and restricts the offices and contracts in which a legislator may be involved. The section specifically prohibits a legislator from holding any other civil office in the state subject to appointment by the Governor or by the Legislature and from having any interests in any contract with the state or with any county during the legislator's term of office and for one year thereafter. The intent of the authors of this section was probably to avoid any appearance of impropriety by a legislator by preventing a person from using undue political influence as a legislator to secure such an office or appointment or to receive a state or county contract. However, in the opinion of some people, the consistently very strict interpretation of this section by the South Dakota Supreme Court and

various attorneys general has made the section a restriction which unnecessarily limits the number of persons qualified to be a legislator. A review of the court cases and the Attorney General's opinions which have strictly interpreted this section and the laws adopted pursuant to this section can be found in *Issue Memorandum 91-5, Legislator Interest in State Contracts*, and in *Issue Memorandum 98-11, Vacancies, Qualifications, and Conflicts of Interest*.

There have been recent attempts to remove this section or to change it. In 1974 and again in 1976, the voters overwhelmingly rejected a recommendation of the Constitutional Revision Commission that would have omitted the substance of section 12 from the Constitution. Also in 1990 a proposed amendment, which would have allowed a legislator to enter into a contract with the state or a county if the contract was awarded as a result of competitive bids, was placed before the voters by the Legislature. The voters rejected that amendment, too, by nearly a two-thirds majority.

The Legislative Article Review Commission in 1996 once again addressed section 12 of the Constitution and heard concerns that the section was too restrictive and as a result many citizens of the state were being denied the opportunity to serve as legislators. After discussing the provisions of section 12 at three of its meetings, the commission

eventually recommended that section 12 be revised. The commission's recommendations were embodied in House Joint Resolution (HJR) No. 1004 in the 1997 Legislative Session. HJR 1004, with slight modifications, was passed by the House of Representatives with only four dissenting votes and approved by the Senate with only one dissenting vote. Constitutional Amendment C is the result of the passage of HJR 1004.

The Proposed Changes

Constitutional Amendment C would amend section 12 of Article III of the South Dakota Constitution as follows:

§ 12. No member of the Legislature shall, during the term for which ~~he was~~ elected or appointed, be appointed or elected to any civil office in the state which shall have been created, ~~or the emoluments of which shall have been increased~~ during the term for which ~~he was~~ elected or appointed, nor shall any member receive any paid civil appointment from the Governor, the Governor and senate, or from the Legislature during the term for which ~~he shall have been~~ elected or appointed, and all such appointments and all votes given for any such members for any such office or appointment shall be void; nor shall any member of the Legislature during the term for which ~~he shall have been~~ elected or appointed, or within one year thereafter, be interested, directly ~~or indirectly~~, in any contract with the state ~~or any county~~

~~thereof~~, authorized by any law passed during the term for which ~~he shall have been~~ elected or appointed.

This proposed amendment would make five substantive changes to this section of the Constitution.

First, the proposed amendment adds appointed legislators to this section so that it is clear that the restrictions apply to all legislators regardless if they are appointed or elected. This change was not part of the recommendation by the Legislative Article Review Commission but was added to HJR 1004 by the House State Affairs Committee.

Second, the phrase "or the emoluments of which shall have been increased" is removed by the proposal. The removal of this phrase was recommended by the Legislative Article Review Commission because this phrase could be interpreted, for instance, to prohibit any legislator who voted to increase the salary of the Governor or any other constitutional officer from later being able to seek that office. The commission felt this was not the intent of the authors of section 12 and the removal of this phrase would not weaken the protections to the public provided by this section.

Third, the word "paid" is added before "civil appointments" in the revised section. Currently, a legislator is prohibited by section 12 from receiving any civil appointment from the Governor or the Legislature during the legislator's term of office. This prohibits, for instance, a person serving as a legislator and also serving as a state department head. Strictly interpreted, this could also prohibit a legislator from being appointed by the Governor or Legislature to any board, commission, council, or task force. Legislators in the past

have received such appointments and the appointments have not been challenged. The proposed change would allow civil appointments of legislators as long as they are not going to receive any payment for serving the appointment.

Fourth, the proposed change to section 12 removes the prohibition against a legislator having an interest in a contract with a county. Currently, a business person who is unwilling or unable to forego doing business with a county is prevented from being a legislator while a person who has a contract with a city can be a legislator. The commission felt this prohibition was inconsistent and that the laws requiring competitive bids made the prohibition unnecessary.

Finally, the proposal removes from section 12 the phrase "or indirectly" and thus the prohibition against a legislator having an indirect interest in a contract with the state. The word "indirectly" is the reason the South Dakota Supreme Court has held that section 12 prohibits a legislator from having *any* interest in any contract with the state or any county. By removing this word, the intent is to make it less restrictive for persons to serve in the Legislature. For example, a person who has a spouse who has a contract with the state or a person who owns shares in a corporation which has a contract with the state could become a legislator if the proposal is enacted.

The Legislative Article Review Commission also recommended that a new sentence be added to section 12 which would read: "The Legislature shall enact laws governing conflicts of interest for its members." The House State Affairs Committee felt this sentence was unnecessary and removed the sentence when the committee had HJR 1004 under its consideration.

Pros and Cons

Proponents of Constitutional Amendment C can argue that this change to the Constitution will allow more South Dakotans the opportunity to serve as a legislator. They can contend that the current language of section 12 and the way it has been strictly interpreted in the past, by the court and various attorneys general, have prevented a large number of otherwise qualified persons from seeking a position in the Legislature. The proponents can advocate that although the proposed change is less restrictive, the public continues to be adequately protected. The section still prohibits legislators from having a direct interest in a state contract and the laws requiring competitive bids and the awarding of contracts to the lowest responsible bidders prevent legislators from using undue influence regarding contracts with which they may have an indirect interest. Also, the proponents can claim that the change makes it clear that legislators can serve in other civil appointments where they would not benefit from the appointment financially but can bring vast knowledge and experience to the appointed position.

Opponents of Constitutional Amendment C can argue that the present language in section 12 has served the state well since statehood and should not be changed. They can contend that section 12 and the strict interpretation of that section have helped members of the Legislature avoid any appearance of impropriety. By allowing legislators to have an indirect interest in state contracts and to receive unpaid civil appointments, the public might assume, whether justified or not, that a legislator used undue influence to gain the appointment or to influence the awarding of a state contract. Therefore, opponents could assert that the proposed changes may cause suspicions detrimental to the Legislature

which would outweigh the benefit of allowing more citizens to be legislators.

Summary

Constitutional Amendment C, which is the result of recommendations by the 1996 Legislative Article Review Commission, makes limited changes to Article III, section 12, of the South Dakota Constitution regarding legislative conflicts of interest. The primary changes in Amendment C would allow legislators to hold other civil appointments made by the Governor or the Legislature as long as those appointments were unpaid and would allow legislators to

have an "indirect" interest in a contract with the state and to have any interest in a contract with a county. The intent of the changes is to make section 12 less restrictive and thus give more persons the opportunity to become a legislator without compromising the public protections provided by that section. Three proposals to eliminate or revise this section of the constitution have failed within the last twenty-five years. Constitutional Amendment C offers to the voters a less comprehensive alternative to the status quo than did these previous attempts to revise the constitution.

This issue memorandum was written by David L. Ortbahn, Principal Research Analyst 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.
