

## **SOUTH DAKOTA TO VOTE ON PUTTING JUDGES ON TRIAL**

Statewide Initiative Would Allow Citizens to Sue Judges

BY RICHARD ACELLO

South Dakota voters will get a chance to decide whether their state will be the first to allow suits against judges for alleged misconduct.

The South Dakota Judicial Accountability Initiative Law is a ballot measure that would establish a process to allow litigants to sue judges for various kinds of misconduct. Supporters say they turned in about 48,600 signatures in support of JAIL to Secretary of State Chris Nelson—about 15,000 more signatures than are needed. And the state certified this first-of-its-kind ballot measure Dec. 26, 2005, for a statewide vote on Nov. 7.

JAIL is designed to make the judicial branch of state government "answerable and accountable to an entity other than itself," says a statement on the JAIL Web site. The proposed amendment to the state's constitution would create a special grand jury that would have the power to set aside a judge's judicial immunity and allow a petitioner to sue a judge for either civil or criminal misconduct.

JAIL is intended to address a laundry list of alleged judicial abuses, including eminent domain abuse, probate fraud, falsification of court records, and family court misconduct, says Gary Zerman, a Valencia, Calif., lawyer who is both a consultant and spokesman for JAIL.

The text of the amendment, posted on the Web site, says judges shall not have immunity for:

- Deliberate violations of the law, or of the state or federal constitutions.
- Fraud or conspiracy.
- Intentional violations of due process.
- Deliberate disregard of material facts.
- Judicial acts without jurisdiction.
- Acts that impede the lawful conclusion of a case, including unreasonable delay and willful rendering of an unlawful judgment or order.

"There's no mechanism to ensure accountability" in the judicial system, Zerman says. The judicial accountability movement started in the late '90s with a California judicial reform act that proved too costly to get on the ballot, Zerman says. "In California, you need more than a million signatures, so you have to pay for signature-gatherers," he says.

The movement found a patron in Bill Stegmeier, a businessman from Tea, S.D. With fewer than 800,000 residents, South Dakota is the 46th-most populous state. It has sent liberals such as George McGovern and Tom Daschle to the U.S. Senate, but it also voted for President Bush in 2004 and booted Senate Minority Leader Daschle out of office that year.

In most states, judges stand for election, though the procedures differ from state to state. In South Dakota, judges are appointed by the governor and stand for a retention election every eight years.

The state bar is resisting the temptation to dismiss the JAIL movement as a collection of Internet-powered gadflies. "We have to take this very seriously," says Thomas Barnett, executive director of the State Bar of South Dakota, which has about 2,600 members. "This doesn't have to do with South Dakota. The truth of the matter is they came to South Dakota because we don't require very many signatures [to get on the ballot]. Their hope is to start here, and if they're successful, move on to other states."

Critics of the movement say JAIL threatens the independence of the judiciary, which is essential to impartial justice. "The only way judges can be fair and impartial is to be free of pressure," says Doreen Dodson, a St. Louis attorney and co-chair of the ABA's Standing Committee on Judicial Independence. "Exposing judges to a grand jury every time a litigant may disagree with them is just an attempt to intimidate judges and improperly influence justice."

Zerman defines the initiative as "just a basic covenant that we require of every individual—that you're held accountable."

Zerman argues that "absolute immunity isn't so absolute." He cited a 1978 U.S. Supreme Court case, *Stump v. Sparkman*, 435 U.S. 349, in which judicial immunity prevailed, but not without dissent. Linda Kay Spittle Sparkman was attempting to sue Indiana Circuit Judge Harold D. Stump for approving her mother's request to have her sterilized at age 15 without a hearing and without her knowledge.

Her suit had alleged violation of her federal constitutional rights, including her 14th Amendment right to due process of law. Turning down her claim, the majority said the judge had jurisdiction to consider the petition by Sparkman's mother, entitling him to judicial immunity, even if his judicial acts were in error.

"You had an appellate court that was so disgusted with Justice Stump's conduct that they voted 3-0 to take [immunity] away from him," Zerman says. "The Supreme Court then reversed it 5 to 3, and there were three Supreme Court justices that were also repulsed by the conduct." Those justices were Potter Stewart, Thurgood Marshall and Lewis F. Powell.

Legal scholars say that, if passed, JAIL would waive immunity for state judges, but not for federal judges.

"My assumption is that the state could define or waive immunity of various types," says Jonathan Van Patten, a professor at the University of South Dakota School of Law. "But the best way of dealing with [judicial] mistakes is appellate review."

Van Patten points out that even the dissenters in *Stump* endorsed the concept of judicial immunity—but not in the particular case before the court. "The dissent said Stump was acting outside his jurisdiction, and therefore [the sterilization] wasn't a judicial act" that was protected by immunity, Van Patten explains.

Michael Ramsey, professor at the University of San Diego School of Law, also says the amendment would apply to state judges only. "If the judges in question are federal judges, then any state law or constitutional amendment is going to be trumped by federal statutory pre-emption," he says.

Though JAIL would affect only South Dakota judges, the debate over it has expanded to the role of the judiciary in general.

For example, Dodson says the appointment of federal judges to lifetime terms frees them from political pressure, but Zerman says the system has created judges with too much power. "They're appointing [Chief Justice John] Roberts for a term of 30 years. He's like a new king," Zerman exclaims. "We didn't throw off the yoke of the king of England to get these new kings—Supreme Court justices."

It's an argument with a historical ring, Ramsey says. "The Jeffersonian Republicans in the late 18th century thought judges were a bunch of aristocrats without regard for the people," he explains. "I'm nervous about this [amendment] as a solution, but the idea of judicial accountability is something people should think about."

While JAIL has sparked a sharp debate, the two sides agree that judges have become lightning rods for controversial decisions.

"In the past, judges were above the fray," Barnett says. "Now they're not. People tend these days to play the blame game. They blame the U.S. Supreme Court for the *Kelo v. New London* [eminent domain] case when actually blame belongs with the Connecticut legislature that empowered municipalities to condemn for private economic interests."

Zerman says the blame is justified. "There's no one else to blame," he says. "Judges were placed third in the U.S. Constitution with good reason. Now they've leapfrogged over the other two branches, so everything winds up in the courts, and they've made a mess of it."

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