OPINION
65-144

August 16, 1965 (OPINION)

The Honorable William L. Guy

Governor

RE: Legislature - Reapportionment - Status of Legislature

This is in response to your letter in which you take note of the recent decision of the Federal Court comprised of three judges which ruled that House Bill No. 566, as passed by the 39th Legislative Assembly, was unconstitutional and reapportioned the State with a plan closely resembling that which was submitted to the Legislature by the Legislative Research Committee. You then ask for an opinion on the following questions:

1. Does the term of the present de facto legislator terminate as of the date of the court's ruling, or does his term extend to the time of election and qualification of his successor?

2. Is the present de facto legislature capable of being called into special session if an emergency should arise?

3. Will it be necessary to hold an election for representatives from the new legislative districts at the time of the statewide election on September 21, 1965, or any other election date prior to the regular primary and fall election of 1966?

4. Are members of the de facto legislature now qualified to receive appointments to State offices or does their term extend even though their legislative district has now been abolished?"

You further state, "If these questions lead you into other questions, please feel free to amplify on the above."

In answering the first question, it is necessary to take into consideration some of the developments that took place bringing about the current situation. Rather than recite chronologically all of the events that took place, we will limit this to the decision of the same Court issued on July 17, 1964.

As is material here, the Court in Paulson et al v. Ben Meier, 232 Fed. Supp. at Page No. 190, said:

> We hold that the Thirty-ninth Legislative Assembly (1965) of North Dakota, consisting of members elected under existing law, will have a de facto status; that at such regular session it should promptly devise and pass legislation creating and

> establishing a system of legislative districting and apportionment consistent with federal constitutional standards; that the effective date of this Order and Decree will be stayed until after the 1964 general elections have been held and for a reasonable time after the commencement of the 1965 Legislative Assembly in order to afford such Assembly a reasonable and adequate opportunity to enact such apportionment legislation. * * * We retain and reserve jurisdiction herein for such further relief and orders, if any, as may hereafter be deemed proper."

After enactment of House Bill No. 566, a motion was made to dismiss the action and to clarify that provision of the Order quoted above. In the presentation to the Court, orally and in the brief, we, as representing the Defendant, stated that we would presume that the present members of the Legislature would continue as a de facto body until their successors are duly elected and qualified unless the Court indicated to the contrary.

As to the motion for clarification, the Court (in the case of Paulson et al v. Ben Meier, Civil No. 618) on August 10, 1965, after quoting other authority, said:

> That portion of Defendant's motion which requests clarification of our previous decision seeks relief which exceeds our authority to grant, and is therefore denied."

Had the Court been able to consider the motion for clarification or had the Court on its own advised as to the effects of its present ruling on the status of the members of the Legislature, the question before us would be relatively simple. Unfortunately, we do not have the benefit of the Court's thinking on this question. Had the Court merely refused to clarify, it would have created a strong argument that the Court, having been advised of the presumption as to the status of the Legislative members it could be considered as acquiescent in such presumption, but this is not the situation here. The Court merely declined to consider the motion for clarification on the basis that it exceeded its authority.

The ruling and decision of the Federal Court in which the new apportionment plan was adopted for both the House and the Senate was filed with the Clerk of Court and the Secretary of State on August 10, 1965. As of said date, it became the law for the State of North Dakota and will continue to be the law until it is superseded by subsequent legislative action or until the same is reversed or set aside by a Court of competent jurisdiction. The Secretary of State has publicly stated he does not intend to appeal the decision. For purposes of discussion herein, we are assuming that the apportionment plan adopted by the Federal judges is the law in the State of North Dakota.

In examining the new law, we find that the House of Representatives is set at ninety-eight (98) and the Senate at forty-nine (49). There is no change in the number of Senators, but there is a change as to the number of Representatives - from 109 to 98. While the number of Senators did not change, the districts are differently constituted "area-wise" in a great number of instances. The same is also true for the House of Representatives. Does this create a vacancy?

As to the vacancies, section 44-02-01 of the North Dakota Century Code provides as follows:

"* * * An office shall become vacant if the incumbent shall:

* * *

7. Cease to be a resident of the state, district, county or township in which the duties of the office are to be discharged, or for which he may have been elected; * * *." (Emphasis supplied.)

In some instances where the district was changed, the former district as such went out of existence. Under a technical construction, this could be construed as having created a vacancy. However, this would apply only to certain districts. Again in other instances in certain areas (districts) representation has been reduced. Consequently, numerically there is an excess of members in that district. This raises the question: "Which member, if any, would retain the office?" In other instances, representation has been increased.

The Legislature is one of the necessary branches of government under our form of government. The three branches of government are separate but equal and all three are necessary for a "Republican Form of Government" as guaranteed under Section 4, Article IV of the United States Constitution. While the Constitution provides for the term of the representatives and senators, it does not contain the normal language found pertaining to holding said office until a successor is duly elected and qualified. The holding of office until a successor is duly elected and qualified, however, seems to be an implied provision because the law abhors a vacancy. As long as an incumbent can fill the office, the Courts are reluctant to declare a vacancy unless the office were to remain unfilled. Because of the inherent purpose for which the Legislature exists - which is to represent the people - said offices cannot be permitted to become vacant and remain vacant without replacing the officers to fill the representative positions. We believe the State must have a legislative body at all times.

In direct response to your first question, it is our opinion that the term of any present de facto legislator did not automatically terminate as of the date of the Court's ruling and that his term extends up to the time a successor is elected and qualified.

As to Question No. 2, we have made reasonable research and we are unable to find any case law or decisions concerning this particular question; therefore, this question would be one of first impression in this State, and for that matter in many other States. There are arguments pro and con and the real answer will never be determined until a Court of competent jurisdiction decides it. In many respects, it is a question which, we presume, will be resolved by the Courts, if it is ever presented, on the rules of equity rather than rules of law.

Assuming for the moment that the present body were to act in a special session, the action could be challenged and any laws said

body may pass might be challenged. While we believe that the Courts would resolve any doubt in favor of the proposition that the Legislature was authorized to act, but because of lack of decisions on this point, we cannot give any assurance that a challenge in this respect would not be successful.

From what law is available, it is our opinion that the present de facto Legislature would have a presumption of legality and, as such, would be capable of being called into a special session if a true emergency should arise before the Legislature could be constituted under the new plan. The answer to this question, however, should be considered in light of the answer given in Question No. 3.

As to Question No. 3, we wish to refer to some of the earlier discussion herein as to the change in districts and the number of representatives. Under the Constitution, the Governor apparently has the sole power of calling a special election. (See Section 44 of the North Dakota Constitution). Whether or not a vacancy or cogent reason exists so as to call a special election is a matter in which sound judgment must be exercised. As we stated earlier, if the present de facto Legislature were called into a special session, the same might be subject to challenge. The same would be true if the Governor called a special election to fill "vacancies." However, it is our opinion that any challenge or action to prevent a call of a special election would be unsuccessful under the circumstances as we have here.

The various laws and constitutional provisions in this State contemplate that the Legislature meets once every two years. In addition to this, the composition of the legislative districts and members to the Legislature are constant for approximately a ten year period. In other words, the Legislature is not reapportioned at every session. Consequently, under the normal routine pattern, the situations developed here do not exist and under the normal situation, the legislators elected for a two-year term would be able to fill all requirements during the two-year term. The statutes and constitutional provisions do not contemplate a realignment of the Senate and House of Representatives except every ten years. This apparently accounts for the lack of law on this question.

The proposition whether or not to call a special election is primarily a matter for the Governor to decide. The call for a special election might be challenged, but in our opinion, it would not be successful. While ordinarily the decision of calling a special election is left to the discretion of the Governor, except where he is required by law to call a special election, (such as section 16-07-09, section 16-07-10 and section 16-07-11 of the North Dakota Century Code), it is possible that where a special session is contemplated or is eminent, by appropriate action through the Courts a special election writ could be obtained to compel the holding of a special election.

In direct response to your third question, we cannot as a matter of law state that you must hold a special election or that you may not hold a special election in conjunction with the announced statewide election to be held on September 21, 1965. It is primarily a matter of equity as to when the implementation of the new law should take

place. Whether or not a special election should be called is a matter of evaluating the equities involved and making sound judgment thereon. In this connection the need for assemblying the legislative members would be a prime factor to consider. One of the other principles which we believe must be considered is how important it is to have representation from the districts as they now exist as compared to having representation from districts which no longer exist and the value and need for equal representation. In no event may the implementation of the new plan be delayed any longer than the next general election, (1966).

As to Question No. 4, the North Dakota Constitution in Section 39 provides as follows:

> SECTION 39. No member of the legislative assembly shall, during the term for which he was elected, be appointed or elected to any civil office in this state, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected; nor shall any member receive any civil appointment from the governor, or governor and senate, during the term for which he shall have been elected."

Article 51 of the North Dakota Constitution provides as follows:

> The Governor or an officer of this State, or any manager or executive head, or other person employed either directly or indirectly in any department, bureau, commission, institution, or industry of this State, or any member of any State board shall not appoint a member of the Legislative Assembly to any civil office or employment of any nature whatsoever, during the term for which said member of the Legislative Assembly shall have been elected. No member of the Legislative Assembly shall accept any such appointment to civil office or other employment during the term for which he was elected."

It is noted that the prohibitions in both constitutional provisions are "for during the term for which he was elected" or "for which he shall have been elected." Under the plan adopted by the Federal Court, which is now law, all terms and offices as such will terminate in no event later than when newly elected members under the present plan "take office" at the next regular session in January of 1967. Thus, if no intervening action, either by Court or by process of special election, is undertaken, the present members of the Legislature would not be eligible to be appointed to any office until the expiration of this term, which under the present set up would be no later than January of 1967. If, however, a special election is called and the offices are filled under the new apportionment act, it would follow that the terms of the present members of the Legislature would expire at such time. This would hold true even though some Senators were elected for a four year term in the 1964 election. Their term would expire in any event no later than January of 1967. However, if through some Court action it is determined that the existence of the present de facto Legislature is no longer permissible, then it would follow that the terms for which said members were elected would also become extinct. In the happening of these events the present de facto members of the Legislature

thereafter would no longer be subject to the prohibitions or bars of Section 39 and Article 51 of the North Dakota Constitution.

Thus, in direct response to your question, no present member of the Legislature would be eligible for appointment to a State office until January of 1967, or until a successor has been duly elected and qualified by a special election process or until a Court of competent jurisdiction orders the present members of the Legislature as no longer being a duly, legally constituted body.

We do not anticipate any particular problem with any of these procedures, except if the term of the present members of the Legislature is reduced by either Court action or special election it might give rise to further questions pertaining to the expense account they received at the beginning of the term which was to be for a two-year period.

Should the present body be terminated by reason of a special election or by Court action, in all probability membership in the Legislative Research Committee would also terminate. If a special election is held, the newly elected members would serve only until their successors are elected in the 1966 General Election and qualify thereunder. If a Court were to terminate the present legislative membership, it would be inconceivable that the Court would do so without requiring a Special Election to fill the offices under the new plan.

HELGI JOHANNESON

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