

**OPINION
71-198**

March 15, 1971 (OPINION)

The Honorable I. J. Wilhite, Senator
Chairman of Senate Rules Committee
North Dakota Legislative Assembly
State Capitol

RE: Legislature - Senate - Membership - includes vacancies

This is in response to your letter in which you observe that the name of Senator Kenneth Lowe has been removed from the Senate roster. You then ask if it still requires 33 votes to satisfy a constitutional two-thirds to amend or repeal a measure approved by the vote of the electors under Section 25 of the North Dakota Constitution.

The specific provision is:

No measure enacted or approved by a vote of the electors shall be repealed or amended by the legislature upon a yea and nay vote upon roll call of two-thirds of all the members elected to each house."

It further provides that this provision shall be self-executing.

For comparison purposes, Section 65 of the North Dakota Constitution provides:

No bill shall become a law except by a vote of a majority of all the members-elect in each house, nor unless, on its final passage, the vote be taken by yeas and nays, and the names of those voting be entered on the journal."

Section 46 provides as follows:

A majority of the members of each house shall constitute a quorum, but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such a manner, and under such a penalty, as may be prescribed by law."

This section is referred to only for comparing language. Section 46 has no application to passage of bills.

Section 67 pertains to passing emergency measures and the effective date of such measure. It provides:

No act of the legislative assembly shall take effect until July first after the close of the session, unless the legislature by a vote of two-thirds of the members present and voting, in each house, shall declare it an emergency measure, which declaration shall be set forth in the act, * * * "

Section 79, relating to overriding veto of governor, also uses the expression "two-thirds of the members-elect."

We see no significant difference between the expression "all members-elect in each house" and "all the members elected to each house." These two expressions, while using a slightly different style, mean the same thing. This phrase means the entire membership of each house. It does not mean members present and voting. For example, Section 67 uses the expression "members present and voting in each house."

Section 65 has been construed historically to mean the total membership of the house as distinguished from those present and voting.

Jurisdictions which have had occasion to construe the language "members-elect in each house" or "members elected to each house" have reached a conclusion that it means the entire body, including all members who were certified as elected, regardless if they are present or not and regardless of any vacancy. See *State ex rel. Peterson v. Hoppe*, 260 N.W. 215, (Minnesota); *Polasky v. Schmidt*, 87 N.W. 1030, (Michigan); and opinion of the justices, 230 Atlantic 2d. 802 (Maine) and 2 A.L.R. 1593.

We recognize that Section 65 is part of the Constitution as adopted and that Section 25 has been amended since its initial adoption. We cannot as a matter of law say that the language used in Section 25 in this respect is substantially different than the language used in Section 65. Both provisions clearly specify a certain number of the entire body. The fact that the membership of the entire body will or may fluctuate from time to time because of reapportionment does not alter this specific requirement. There should be no difficulty once the size of the body has been set or established to determine and apply the constitutional majority or the constitutional two-thirds requirement. The meaning of the phrases "members-elect" and "members elected" becomes clear in comparing same to the language "members present and voting."

It is therefore our opinion that the language in Section 25 of the North Dakota Constitution requiring a two-thirds vote of all of the members elected to each house means two-thirds of the entire membership with no reduction in the entire membership for vacancies or absence.

The Senate has a total of 49 members - the death of Senator Lowe does not reduce such membership. A two-thirds vote of all members elected would require a vote of 33.

HELGI JOHANNESON

Attorney General