

**OPINION
75-32**

May 2, 1975 (OPINION)

Mr. Kenneth E. Raschke
Commissioner of Higher Education
State Capitol
Bismarck, ND 58505

Dear Mr. Raschke:

This is in reply to your letter of April 15, 1975, relative to a potential referral of the appropriation for the University of North Dakota. You indicate that because of the ramifications of the referral and in order to receive answers to questions which will be raised by the agencies involved you desire our opinion on certain questions. The questions and our answers thereto are as follows:

1. "May a portion of a measure, such as the appropriation of the University of North Dakota, be referred or must the entire measure be referred?"

Section 25 of the North Dakota Constitution provides in part:

"The legislative power of this state shall be vested in a legislature consisting of a senate and house of representatives. The people, however, reserve the power, first, to propose measures and to enact or reject the same at the polls any measure or any item, section, part or parts of any measure enacted by the legislature.

* * *

The second power reserved is the referendum. Seven thousand electors at large may, by referendum petition, suspend the operation of any measure enacted by the legislature, except an emergency measure. But the filing of a referendum petition against one or more item, sections or parts of any measure, shall not prevent the remainder from going into effect. Such petition shall be filed with the Secretary of State not later than ninety days after the adjournment of the session of the legislature at which such measure was enacted.

* * *

The word 'measure' as used herein shall include any law or amendment thereto, resolution, legislative proposal or enactment of any character.

* * *

The budget appropriation for the University of North Dakota is set forth separately in House Bill 1001 of the Forty-fourth Legislative Assembly. As such we believe it is a "part or parts" of a measure as defined in section 25 of the North Dakota Constitution, quoted above. Article 54 of the

Amendments to the North Dakota Constitution requires that the appropriations for all institutions under the control of the Board of Higher Education should be contained in one legislative measure. It is clear from article 25 of the Constitution that a clause, section or part of a statute may be referred. See, e.g., Baird v. Burke County 205 N.W. 17 (N.D. 1925). See also Dawson v. Tobin 25 N.W.2d. 737 (N.D. 1946) in which the Court in discussing the referral provision of Section 25 of the North Dakota Constitution stated, page 745 of the reported case:

"This language is clear and specific. The scope of the power of the referendum as here stated is as broad as the power of the legislature to enact laws. It is stated specifically and emphatically that the people 'reserve the power * * * to approve or reject at the polls any measure or any item, section, part or parts of any measure enacted by the legislature.' The language used clearly evidences an intention and purpose that no enactment by the legislature and not part of any enactment by the legislature is excepted or withdrawn from the operation of the power of the referendum. Nothing is said in the constitutional amendment which in any manner limits the purpose and scope of the power of the referendum, as thus first clearly and specifically declared. Indeed, there is no contention that anything said in the constitution limits the power of the referendum or prevents it from being invoked against any measure enacted by the legislature and against any and every part of any measure enacted by the legislature."

We therefore conclude that a portion of measure, such as the appropriation of the University of North Dakota, may be referred without the referral of the entire measure appropriating moneys for the institutions under the control of the Board of Higher Education.

2. "If petitions referring the appropriations of one or more of the institutions are filed and found to be valid, what is the time schedule for holding an election on the referrals should the Governor determine to call a special election?"

Section 25 of the North Dakota Constitution further provides:

"Each measure initiated by or referred to the electors shall be submitted by its ballot title, which shall be placed upon the ballot by the Secretary of State and shall be voted upon at any state-wide election designated in the petition, or at a special election called by the Governor. The result of the vote upon any measure shall be canvassed and declared by the board of canvassers."

The North Dakota Supreme Court in construing this provision in State v. Hall 197 N.W. 687 (N.D. 1924) stated, page 688 of the reported case:

". . .we are clearly of the opinion that the language of the constitutional provisions and intent thereof, considered in connection with the cognate law, contemplated and gave the

power to petitioning electors to designate in referendum petitions a time when referred acts, not emergency measures, might be submitted to the electors at any state-wide election and also gave to the Governor the power to accelerate the time of holding an election upon such referred measures by calling a special election. These alternative powers so granted to the petitioning electors and to the Governor are consistent with the fundamental theory of checks and balances, and act as checks one upon the other, so that the petitioning electors, if they so desire, may fix the time beyond which such election may not be deferred, and, on the other hand, so that the Governor, if in his judgment the exigencies of the situation so require, may accelerate the time designated by calling a special election."

It is clear, therefore, that the Governor may call a special election on the referral petition if he so desires. If he does not call a special election, the election would be held at the time designated in the petition. Assuming the Governor would call a special election if valid referral petitions are filed, the procedure would be based on the election provisions of Title 16 of the N.D.C.C. Section 25 of the North Dakota Constitution requires the Secretary of State to pass upon each petition, and if he finds it insufficient, he must notify the Committee for Petitioners and allow twenty days for correction or amendment. Section 16-01-11.1 of the N.D.C.C. states that the Secretary of State shall have a reasonable period, not to exceed thirty-five days, in which to pass upon the sufficiency of the petitions. We do not believe the Governor could call a special election until the Secretary of State has certified that the petitions are valid and contain sufficient signatures.

Section 16-01-07 of the N.D.C.C., as amended, provides in part:

"Whenever a proposed constitutional amendment or other question is to be submitted to the people of the state for popular vote, the secretary of state shall, not less than thirty days before election, certify the same to the auditor of each county in the state, and the auditor of each county shall cause notice thereof to be included in the notice required by section 16-06-02 for the election."

Section 16-07-01 of the N.D.C.C. provides that a notice of a special election is to be issued in substantially the form and manner prescribed by section 16-06-02.

Section 16-06-02 of the N.D.C.C., as amended, provides that notice of any general election shall be published by the county auditor in the official county newspaper at the same time as, and as a part of, the publication of the sample ballot preceding such election. The statute requires the county auditor to publish for two consecutive weeks prior to the election in the official county newspaper.

Therefore the Governor in issuing a proclamation of special election must establish the date so as to permit the Secretary of State to certify the same to the county auditors at least thirty days prior to the date of the election. During that time the notice of election and the ballots must be printed. The Secretary of State is required

to cause the ballot to be prepared and perform his duties as prescribed in section 16-11-07. The length of time required to prepare the ballot including concise statements and the effect of a yes and no vote is uncertain and depends upon the time reasonably required by the office of Secretary of State to carry out these necessary functions. Our past experience indicates that the Secretary of State is aware of the duties imposed upon him by law and is prepared to act promptly.

Assuming there is no other question to be submitted to the electorate except the referral of the University appropriation, the minimum time allowed should be not less than thirty-two days. This period of time should allow the Secretary of State to perform his duties. We cannot be exact in the time needed by that office if there are other measures which would also appear on the special election ballot.

3. "If the appropriations for one or all of the institutions of higher education are referred, is there any procedure authorized by law for funding the operation of the institutions pending the outcome of the referral election?"

Section 54-16-04 of the N.D.C.C. provides:

"MAY ORDER TRANSFER OF MONEYS BETWEEN FUNDS - ORDER MAY DRAW FROM STATE TREASURY. Whenever it is made to appear to the emergency commission by an itemized, verified petition of any board, commission, or officer authorized to expend public funds, and after receiving information from the director of the department of accounts and purchases, that an emergency exists, the emergency commission shall assume that an emergency exists and may order money transferred from one fund to another fund belonging to or appropriated from the same institution or board or the same state enterprise, or in an extremity may authorize money to be drawn from the state treasury to meet the emergency until such time as the legislative assembly can make an appropriation available therefor. The term 'emergency' shall be limited to calamities or unforeseen happenings subsequent to the time such appropriation was made and which were clearly not within the contemplation of the legislative assembly and the governor."

Backman v. Guy 126 N.W.2d. 910 (N.D. 1964) construed this section to mean that the emergency commission could not allocate moneys from the State Treasury for purposes for which no appropriation was made. In that case the appropriation had been vetoed by the Governor and the Court indicated that this nullified the appropriation and that no appropriation existed (the validity of the Governor's veto of the particular appropriation was later declared invalid in State ex rel. Dahl v. Dewing 131 N.W.2d. 434 (N.D. 1964). In this instance, however, the appropriation is in existence; its effectiveness is only suspended pending the outcome of the referral election. Thus section 25 of the North Dakota Constitution provides: "Seven thousand electors at large may, by referendum petition, suspend the operation of any measure enacted by the legislature, except an emergency measure."

Since there is still an appropriation measure in effect, the

operation of which is suspended, we do not believe the rationale of the Backman case is necessarily applicable.

Even more pertinent, however, is the fact that section 54-16-04, at the time of the decision in the Backman case contained a clause that prohibited the emergency commission from increasing the amounts to be expended for any specific purpose by more than ten percent and then only to meet a deficiency arising in an attempt to carry out the purpose of the appropriation. This was apparently the basis for the decision of the Court that there must be an existing appropriation. The 1965 Legislature (the first session convening after the Backman decision) amended section 54-16-04 of the N.D.C.C. The bill deleted the clause referred to above and was a result of a recommendation of the Legislative Audit and Fiscal Review Committee. The 1965 Report of that Committee, in explaining the bill (Senate Bill 31) states, page 9 of the Report:

"Senate Bill 31 amends the Emergency Commission laws to conform with the recent Supreme Court's decision on these laws and to make the commission more flexible in meeting their purpose. The laws, as amended by the bill, would be changed so that funds could be provided for true emergencies regardless of whether or not an appropriation has previously been made. The Committee believed that the State should be able to provide necessary funds to combat a situation which is a true emergency. With this thought carried further, the Committee felt that the 10 percent restriction on amounts already appropriated for any agency should be stricken, because if a real emergency exists it seems impossible that there would always be such a thing as a 'ten percent emergency.'" (emphasis ours)

We therefore conclude that the Emergency Commission, in its discretion, could determine that an extremity exists and could determine that an extremity exists and could authorize money to be drawn from the State Treasury to meet the emergency until such time as the Legislative Assembly can make an appropriation available for the institution. Whether such "emergency" was a situation which was clearly not within the contemplation of the Legislature and the Governor must be determined by the Emergency Commission in its sound discretion.

4. "May a special session of the Legislature, if called by the Governor, enact appropriations to fund the operation of the institutions after filing of valid petitions but prior to a referral election?"

While we have no specific provision in Section 25 relative to this matter nor do we have any decisions of our Supreme Court directly in point, we do note the statement in 42 Am. Jur.2d. 706-707, sec. 57, INITIATIVE AND REFERENDUM, with regard thereto:

"Generally, the right of the voters to pass upon a referred act cannot be abridged by legislative action before the election. Accordingly, in some jurisdictions, it has been held that a legislative body has no power, pending referendum proceedings, over the measure in question or the subject matter thereof.

Under this view, a legislative body cannot amend or repeal an enactment while referendum proceedings are pending against it, even if there is a constitutional provision permitting the legislature to amend or repeal a statute passed by popular vote."

"In some states, the legislature continues to have jurisdiction of subject of a referred enactment but, generally, may not repeal the referred statute pending the election. In some other jurisdictions, legislative bodies may repeal referred statutes even during the pendency of referendum proceedings. But, generally, a legislative body cannot intentionally evade a referendum petition against an enactment by repealing and reenacting it, or by making changes in the enactment, not in good faith, but only to accomplish the evasion."

"A repeal of the referred enactment and a new enactment on the same subject is permitted in some jurisdictions where the new measure is an emergency measure and where the new enactment is for the same purpose as the old with changes calculated in good faith to avoid the objections evidenced by the referendum petition. This rule has been applied in a jurisdiction in which the general rule is that the legislature may not repeal a referred measure and reenact it pending referendum proceedings." (footnotes deleted)

We adhere to the position that the Legislature may not take action to intentionally evade a referendum petition by repealing and reenacting it, or by making changes in the enactment, not in good faith, but only to accomplish the evasion thereof. However, we do believe the Legislature could enact appropriation measures which are temporary in nature, i.e., to fund the institution pending the outcome of the referendum petition. While it may be conjecture on our part we would doubt that the potential referral has as its purpose the closing of the University. Indeed if that is the purpose, it is subject to legal question, as will be discussed in the answer to the next question. Assuming that the only purpose of the referral is to reduce the appropriations, we believe that Legislature could, pending the outcome of the referral election, take action to fund the University for that period or could enact a new reduced appropriation if done in good faith and without the intent to evade a referendum. We would not presume to dictate the precise course of action the Legislature might take in such an event, but there are several alternatives open to them, including but not limited to, funding the institution only until the outcome of the election has been determined, funding the institution with a provision that the continued funding would be dependent upon the outcome of the referral election, etc. We note the referral is concerned with a biennial appropriation which expires automatically and not with a substantive law which, if approved, would become a part of the laws of this State until repealed. Thus we believe the Legislature has somewhat greater flexibility in dealing with the matter than it might have with respect to a substantive statute which was the subject of a referral action.

5. "What is the constitutional obligation of the State to maintain the institutions of higher education?"

Certain public institutions of this State are prescribed by the Constitution. Thus Section 215 of the North Dakota Constitution provides that the "state university and school of mines" should be located in the city of Grand Forks in the county of Grand Forks. Article 54 of the North Dakota Constitution also establishes the State University at Grand Forks. Subsection 5 of that constitutional provision provides:

"The legislature shall provide adequate funds for the proper carrying out of the functions and duties of the State Board of Higher Education."

In discussing these same provisions in an opinion issued to Senator Earl H. Redlin, Ellendale, North Dakota, on March 4, 1971, we were concerned with the question of whether the Legislature must appropriate operating funds for the institution at Ellendale. We concluded:

"In summary, we favor a view that once the Legislature has, in accordance with the Constitution, established an operating institution they have an obligation to continue that institution until such time as the Constitution might be amended."

While the 1971 Legislature did not provide operating funds for the Ellendale institution, they did propose an amendment to the Constitution which removed the institution from the Constitution. This proposed amendment was adopted by the electorate in the September 5, 1972 election. see Chapter 526, 1973 Session Laws of North Dakota.

We therefore conclude the State has a constitutional obligation to maintain the institutions of higher education provided therein and to provide adequate funding for its operation. We do not believe the Legislature or the electorate can accomplish the closing of a constitutionally established institution by means of a legislative enactment or a referred or initiated measure. That can be accomplished only by constitutional amendment. In reaching this conclusion, we are aware, as indicated in the 1971 opinion to Senator Redlin, that we are unable to provide an answer to the question of how the Legislature could be forced to appropriate funds for the operation of the institution if they did not choose to do so. This question is not raised in your letter, however.

One further matter should also be noted. Section 153 of the North Dakota Constitution provides in part:

"All property, real or personal, received by the state from whatever source, for any specified educational or charitable institution, unless otherwise designated by the donor, shall be and remain a perpetual trust fund for the creation and maintenance of such institution, and may be commingled only with similar funds for the same institution. Should a gift be made to an institution for a specific purpose, without designating a trustee, such gift may be placed in the institution's fund; provided that such a donation may be

expended as the terms of the gift provide.

The interest and income of each institutional trust fund held by the state shall unless otherwise specified by the donor, be appropriated by the legislative assembly to the exclusive use of the institution for which the funds were given." (Emphasis ours)

This is a constitutional provision which stands equally with the referral provision in Section 25 of the North Dakota Constitution. As such they are in pari materia and must be construed together. The language of Section 153 is mandatory, i.e., the Legislature must appropriate the income of the lands held in trust for the University of North Dakota to the University of North Dakota. As such we do not believe it is subject to the referendum provision in Section 25 since it is a constitutional requirement and can be changed only by a constitutional amendment.

In addition to our reply to the third question herein, we therefore believe that the portion of the University appropriation which represents income from the funds subject to Section 153 of the Constitution would, if available at that time, be subject to expenditure by the University regardless of the suspension of the remainder of the University appropriation pending the outcome of the referral election. As stated in *State v. McMillan* 96 N.W. 310-315 (N.D. 1903):

"Perhaps it is not necessary to state that by the acceptance of the grant for educational purposes--and it is with that grant we are concerned in this case--a trust was created, the character of which was fixed by the terms of the grant. By the mere acceptance of the grant the honor of the state was pledged to the obligation of the trust; that is, to maintain the permanency of the trust fund and to use the interest thereof only for the support of the several schools to which it was dedicated. There was no attempt on the part of the framers of the Constitution to shrink from this obligation, or avoid its restrictions. On the contrary, the Constitution declares and reiterates the declaration that all of the lands granted by Congress for educational purposes, including 'all the proceeds of such lands, shall be and remain perpetual funds, the interest and income of which "shall be inviolably appropriated and applied to the specific objects of the original grants or gifts."' They went further, and included grants for charitable purposes; declaring that all grants to the state for educational or charitable institutions or purposes, from whatever source, shall constitute a perpetual fund, 'the interest and income of which "shall be inviolably appropriated and applied to the specific objects of the original grants or gifts."'"

We thus conclude that all rent, interest, or income from land, money, or property donated or granted by the United States and allocated to the University of North Dakota under the terms of the Enabling Act and the North Dakota Constitution, should be deposited in the special operating fund of the University and expended in accordance with the provisions of Section 153 of the Constitution and section 15-01-12 of

the N.D.C.C. regardless of the filing of any referral petitions.

I trust this will adequately set forth our position on the questions presented.

Sincerely,

ALLEN I. OLSON

Attorney General