**OPINION**
**75-41**

October 9, 1975 (OPINION)

The Honorable Lawrence Naaden
State Senator, 30th District
Braddock, ND 58524

The Honorable Jack Murphy
State Representative, 36th District
Killdeer, ND 58640

The Honorable Layton Freborg
State Representative, 8th District
Underwood, ND 58576

Gentlemen:

This is in reply to your letter of September 29, 1975, relative to the decision of the North Dakota Supreme Court in Walker v. Link decided in July, 1975, but not yet reported. You state the following facts and questions:

> "The Supreme Court in the case of State of North Dakota ex rel. LeRoy C. Walker, v. Arthur A. Link, Governor, et al, stated as follows:
>
> > "Neither the Legislature nor the people can, without a constitutional amendment, refuse to fund a constitutionally mandated function.
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> "This language follows a determination following the case of State v. Baker, 65 N.D. 190, 262 N.W. 183 (1934), that a failure to provide funds by appropriation would not defeat the performance of a constitutionally mandated function.
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> > "We have twice held that appropriations may be made by the constitution, and may be self-executing.
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> "In view of this decision, we have the following questions, which we would like answered in the form of an opinion issued by your office:"

(The questions which you present are listed below with our response thereto immediately following each question.)

> "As Legislators, we would like clarified the powers and duties of both the legislative branch of government and the executive branch of government as it pertains to the power to make, increase, or reduce funding levels for these institutions and functions, and the method by which some control is retained over them by both the Legislature and the Governor.
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> "We consider this matter to be of utmost importance to the people of North Dakota and would, therefore, appreciate

receiving your opinion in the very near future."

"1. Does this decision remove from the Legislature the necessity for appropriating funds for the operation of all of the institutions mentioned in the constitution or functions mandated therein?"

In responding to this question, we believe it is important to note that in the Walker decision the question of whether the Legislature must appropriate funds was not the issue. The actual issue in that case involved the contrary sets of facts, i.e., the Legislature had made the appropriation and the question presented was whether some other group through the referral action could halt that action of the Legislature. In its decision the Court concluded that Article 54 of the Amendments to the North Dakota Constitution which required the Legislature to provide adequate funds for the operation of the institutions of higher learning was in conflict with that portion of Section 25 which operated to suspend a measure when a referendum petition, referring an action of the Legislature, was filed. The Court held that to the extent such provisions applied in the case before it, Section 25 and Article 54 of the Amendments were in conflict and could not be harmonized and that since Article 54 was latest in enactment, it prevailed over Section 25 insofar as the two constitutional provisions were in conflict.

It seems clear that the Walker case does not remove the necessity for appropriating funds for the operation of all of the institutions of higher learning but in fact requires legislative action since, as noted above, Article 54 requires the Legislature to provide adequate funds. In the Walker case the Legislature had performed what was required by the Constitution. The question was not whether legislative action was necessary but whether, once the Legislature had acted under their constitutional mandate, that action could be suspended or overturned by some other force.

In the Baker case the issue was the publication of the publicity pamphlet and the fact the Legislature had not appropriated sufficient funds for the publication of the pamphlet. The Legislature had appropriated funds for the publication of the pamphlet, which at that time was constitutionally required to be published, but due to the large number of special elections caused by the filing of initiative and referral petitions and the resultant number of publicity pamphlets published, the amount was not sufficient. The additional amount required for the publication of the pamphlets was determined as of the time of the Court action and the Court did state that a failure to provide funds by appropriation would not defeat the performance of a constitutionally mandated function since the constitutional provision requiring the publication of the pamphlet also contained a provision that its provisions were self-executing. The Court concluded that this amounted to a constitutional appropriation of funds. The Court further stated, at page 184 of column 262 of the Northwestern Reporter:

"In our opinion, the contention of the relator must be sustained. The provisions of the Constitution involved here are mandatory. The North Dakota Constitution, sections 21, 25. The constitutional provision quoted above enjoins upon the

> secretary of state a specific duty. The provision by its terms is made self-executing, and, hence, given the force and effect of a positive, active rule of action. The provision further restricts legislative power; it gives to the lawmakers only power to enact laws to facilitate the operation of the constitutional provision, and specifically deprives them of power to enact any law 'to hamper, restrict, or impair the exercise of the rights' reserved to the people in the provision. Hence, if the Legislative Assembly had enacted any legislation which would have interfered with the performance by the secretary of state of the duty enjoined upon him by the constitutional provision, such legislative enactment would have been a mere nullity. It is apparent that the secretary of state cannot perform the duty enjoined upon him by the provisions of the Constitution without incurring the expense incident to the publication and mailing of the public pamphlet. If the Legislative Assembly could prevent the secretary of state from performing this duty by failing or refusing to appropriate funds for the prescribed constitutional purpose, it could, in effect, nullify the constitutional mandate. We are of the opinion that it was the intention of the people as evidenced by this constitutional provision that the secretary of state should perform all the functions prescribed, without legislative interference, and that the cost incident to the publication and distribution of the publicity pamphlet is a proper expenditure to be defrayed out of the state treasury, upon bills audited by the state auditing board, even though the Legislative Assembly has made no specific appropriation for the purpose." (Emphasis supplied)

The Court in Walker was referring to the emphasized portion of the above-cited statement of the Court in Baker. However it is significant to note that in Baker a constitutional provision which was self-executing was under consideration, i.e., the Court indicated no appropriation was necessary to authorize expenditure of the funds to pay for publication of the publicity pamphlet. In Walker on the other hand, the Court was concerned with Article 54 which expressly required an appropriation by the Legislature and which the Legislature had, in fact, made. Thus the Baker decision does not speak to the situation in which the Legislature, while it may be constitutionally required to fund a certain constitutionally mandated function, has discretion as to the level of that funding. Neither does Walker speak directly to that situation since the Legislature had, in fact, determined the level of funding by its appropriation measure.

Thus we would conclude that Walker does not remove from the Legislature the necessity for appropriating funds for the operation of all of the institutions mentioned in the Constitution or functions mandated therein in those instances in which the level of funding is discretionary and no self-executing appropriation is contained in the constitutional provision. In fact, insofar as the institutions of higher learning are concerned, Article 54 specifically provides that it is only the Legislature which can determine that funding since the Article states the "Legislature shall provide adequate funds."

> "2. What is the authority of the Legislature to set the level

of funding for these institutions and functions?"

As noted above, the Legislature is, by constitutional provision, to establish "adequate funding" for the institutions of higher learning pursuant to Article 54 of the Amendments to the Constitution. In those instances in which the level of funding involves the discretion of the Legislature, as we believe it does under Article 54, the Legislature has the authority to establish the level of that funding within its discretion. As a legal theory it would only be in those instances in which an abuse of discretion could be shown that the Legislature's determination of what is an adequate level of funding would be subject to challenge. In fact, we believe that is a basis for the Walker decision, as noted in our reply to question 1, i.e., the Legislature had acted and that action was not subject to legal challenge by others. An abuse of discretion is very difficult to prove since different persons, all exercising their good judgment and discretion, can and obviously do disagree on what is an adequate level of funding. Perhaps if an institution was, on the one hand, given an appropriation of only $1.00 for a biennium or, on the other hand, given an appropriation of all state funds available, a good argument could be made that the Legislature had abused its discretion in providing less than adequate funding in the first instance and more than adequate funding in the second instance. While we do not mean to suggest that only in such extremes can an abuse of discretion be shown, it is probable that it would be difficult to prove an abuse of legislative discretion in most instances even though there may be disagreement with the appropriation as finally enacted.

3. The Court made reference to the requirement for adequate funding. Who is to determine whether funding is or is not adequate?"

This question is answered in our response to question 2, i.e., that except in a case of clear abuse of discretion, the Legislature is to determine whether funding is adequate. If an abuse of discretion could be shown, the Court would necessarily have to determine that issue since abuse of discretion involves questions of fact and law. Traditionally, however, the courts have been reluctant to substitute their judgment for that of bodies which have been authorized to exercise such discretion.

"4. Does this decision remove from the Governor the power to veto any appropriation measure for a constitutionally mentioned institution or mandated function?"

The cases above cited do not concern this question. However the Court in State ex rel. Dahl v. Dewing 131 N.W.2d. 434 (N.D. 1964), did indicate a limitation on the Governor's authority to veto. In that case the Governor had vetoed the line item of the salary for the director of the State Laboratories Department whose salary had been established by initiated measure. The Court held that the veto of that item would have the effect of making that initiated provision ineffective in violation of Section 25 of the North Dakota Constitution which provides that an initiated or referred measure may only be repealed or amended by a two-thirds vote of the Legislative Assembly. That decision, along with the decision of the Court in Walker that neither the people nor the Legislature can, without a

constitutional amendment, refuse to fund a constitutionally mandated function would appear to us to indicate that the Governor could not, by veto, reject the entire funding of an institution. In so concluding we do not foreclose the possibility of line item vetoes which might not affect the adequate funding of the institution as a whole although that matter is not entirely clear and there is no Court precedent directly in point by which we may be guided. Such matters would necessarily involve the extent of the veto insofar as affecting the operation of the institution is concerned.

> "5. Should the Legislature refuse to fund a constitutionally mandated function, what procedure currently exists for the funding of such a constitutionally mandated function?"

This question is, of course, the opposite of the question presented to the Court in Walker in which the Legislature had funded the institution and the purpose of the referral was to reject that action. This question was therefore not answered in Walker and to our knowledge, there exists no firm precedent in this state to guide our answer. Our reply must necessarily be somewhat conjectural as the question is also conjectural.

In fact the Constitution does not speak to the specific procedure to be followed in such instance. If such a situation did arise, a petition might be presented to the courts requesting that the Court order the Legislature to perform its constitutional function. If such a petition were granted the courts might mandate the Legislature to perform their constitutional obligation. In so doing the courts could not prescribe the amount of the funding but could only require the Legislature to exercise its discretion. Writs of Mandamus are issued in certain instances although we are unaware of any such writ ever having been directed to the Legislature of this state. A violation of a Court order may result in proceedings for contempt of court.

As noted above, our answer is necessarily conjectural. Inherent in any proceedings whereby the courts would order the Legislature to perform a function is the separation of powers doctrine under which our government is established and whether the courts could order the Legislature to act through a writ would certainly involve that question.

> "6. By what authority or on what basis are the current expenses of the University of North Dakota being paid?"

It is our understanding that the expenses of the operation of the University of North Dakota are being paid from the general fund of the state and the other monies appropriated to the University pursuant to and in accordance with the appropriation made by the Legislature and under the authority of the decision in Walker.

> "7. Does not the filing of a referral petition, referring the appropriation for the University of North Dakota, stay the operation of the appropriation measure enacted by the Legislature; and, if so, upon what authority or basis are funds being expended for the operation of the University of North Dakota?"

The latter part of this question is identical to question number six, and our response to this portion of the question is found in our response to question six.

Insofar as the first part of the question is concerned, we believe that is also involved in the preceding questions. However we believe a further analysis of the decision in Walker should be made in response thereto.

We conclude that the Court in Walker held that the referendum petition did not stay the operation of the appropriation measure enacted by the Legislature. As noted above, the Court in its opinion discussed the provisions of Article 54 of the Amendments to the Constitution, which requires the Legislature to provide "adequate funding" for the institutions of higher learning and discussed also Section 25 of the North Dakota Constitution which contains the referendum provision. The Court noted that Article 54 had been enacted subsequent to Section 25 and, following, the rules of constitutional construction, if the two provisions are incompatible the later in enactment will prevail. Thus the Court stated:

> "The overriding issue is whether a referral petition filed with the Secretary of State suspends a legislative appropriation to fund a constitutionally mandated function."

The Court concluded:

> "To the extent that they apply to this case, we find that section 25 and Article 54 of the Amendments are in conflict and cannot be harmonized.
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> "The constitutional mandate for suspension of the measure referred in this case, as provided in section 25, predates the constitutional mandate requiring the funding of the operation of the University of North Dakota, as provided in Article 54. Applying the rule that the latest in enactment prevails, we hold that Article 54 prevails over section 25 insofar as they are in conflict.
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> "We would arrive at the same conclusion were we to apply the rule that special provisions prevail over general provisions when there is an irreconcilable conflict. The referral provisions in section 25 are general in nature and must yield to the special provision in Article 54 mandating the funding of the University of North Dakota."

We therefore conclude that in those instances in which provisions of the North Dakota Constitution are in conflict, the constitutional provision later in enactment will prevail or the specific will supersede the general provision. Insofar as the applicability to specific questions involving issues other than those resolved in Walker the pertinent provisions of the Constitution involved in such questions must be considered individually and no blanket conclusion can be made.

Insofar as the institutions of higher learning are concerned, the

Court has examined Article 54 and Section 25 and found that Article 54 is later in enactment and a specific provision which prevails over Section 25, the referral provision, because Article 54 was enacted subsequent to Section 25 and because it is a specific provision whereas Section 25 is a general provision.

> "8. Is there any procedure which could be followed to force the North Dakota Legislature to fund a constitutionally mandated function?"

This question involves the same factors as question five, and we reiterate our response to question five. This question also implies the ultimate crisis in the American democracy at both the Federal and State levels; that is a final confrontation between or among the three branches of government. When, in our governmental history, these confrontations have appeared imminent, good judgment has prevailed to avoid or resolve such confrontation.

In summary, we further note in Walker the Court was concerned with a constitutional provision which expressly stated that the Legislature should provide adequate funding. Such provision is not found in all constitutionally mandated functions but perhaps can be implied therein. The Courts have considered specific cases in which the constitutional provision contained a self-executing appropriation (Baker) and in which the constitutional provision specifically required a legislative appropriation which was enacted but which was subject to being nullified by other action (Walker). The Court has, in some of its comments in these decisions, indicated that the Legislature cannot defeat a constitutional right of the citizens of this state by refusing to fund a constitutionally mandated function. However, it has had no case with that specific factual situation before it. An ultimate answer as to what should occur should the Legislature refuse to fund a constitutionally mandated function which did not involve a constitutional appropriation must therefore be determined if and when such event should occur.

The result of the decisions to date indicate that neither the Legislature nor some other force such as referendum petitioners can take away from the citizens of this state a right which they have determined to protect by constitutional provision. The determination as to those rights which are to be protected by constitutional provision is necessarily vested in the citizens of this state and are not subject to legislative, executive or judicial attack insofar as they do not conflict with the United States Constitution. As we stated in an opinion dated July 22, 1975, "A constitution is a broad framework of authority granted by the people to their government" and it ". . .is the product of approval by the citizens of this state delegating their sovereign authority. . ." (Emphasis ours.) Such sovereignty cannot be thwarted by any branch of government the authority for which is derived from the people as expressed through their constitution.

Sincerely,

ALLEN I. OLSON

Attorney General