OPINION
79-158

August 14, 1979 (OPINION)

The Honorable Earl S. Strinden
State Representative
House Majority Leader
2812 Chestnut Street
Grand Forks, ND 58201

Dear Representative Strinden:

This is in response to your letter dated July 9, 1979, regarding the partial referral of House Bill 1138, election law revision, and the effect of the nonreferral of Section 16 of the Bill. You state the following in your inquiry:

> This letter is my request for an official opinion from you, the Attorney General, as to the constitutionality of a portion of the referral action of the recently passed election reform legislation.
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> The legislature in its wisdom legislated an effective date for the use of a rotating ballot of July 1, 1981. Testimony was brought to the committee and to the legislature which pointed to very real problems in the use of a rotating ballot in our North Dakota elections. We had expert testimony which was convincing in showing a need to delay the effective date for the implementation of the rotating ballot until certain mechanical and printing problems could be solved.
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> In the referral, the rotating ballot section is separated out - not being referred. The effective date of implementation of the rotating ballot of July 1, 1981, is, however, being referred. In my judgment, this is the use of the referral process to amend legislation. I believe this raises questions as to the constitutional function of a referral process. Can a referral be used to amend legislation? I would ask for your official opinion on this matter - specifically to the question of the separating of the rotating ballot section and the section containing the implementation or effective date.

The referendum petition for the partial referral of House Bill 1138, pursuant to Article 105 of the Amendments to the North Dakota Constitution, has been submitted to the Secretary of State and he has passed upon and certified the sufficiency of the petition form and signatures. In response to your specific inquiry we offer our opinion on this partial referral based upon the relevant constitutional and statutory provisions and judicial decisions of the North Dakota Supreme Court that are considered to be controlling. However, as in all such cases, the courts would make the final dispositive determination as to the legal effect of the partial referral of House Bill 1138, if such issue were presented to and accepted by the courts for resolution.

Sections 15, 16 and 17 of House Bill 1138 provide:

SECTION 15.) Section 16.1-06-07 of the North Dakota Century Code is hereby created and enacted to read as follows:

16.1-06-07. ARRANGEMENT OF NAMES ON BALLOT FOR PRESIDENTIAL ELECTORS.) The ballot provided for in section 16.1-06-05 shall be arranged as follows: The names of the candidates of the party casting the highest number of votes in the state for members of Congress at the last preceding general election shall be arranged in the first or left-hand column of such ballot; of the party casting the next highest number of votes in the second column; of the party casting the next highest number of votes in the third column; and of such other party as the secretary of state may direct in the fourth and successive columns. In presidential election years the names of presidential electors presented in one certificate of nomination shall be arranged in a group enclosed in brackets to the right and opposite the center of which shall be printed in bold type the surname of the presidential candidate represented. To the right and in a line with such surname, near the margin, shall be placed a single square, and a mark within such square shall be designated a vote for all the electors, and such group shall be placed at the head of the column under the party designated or represented in such certificate.

SECTION 16). Section 16.1-06-07 of the North Dakota Century Code is hereby created and enacted to read as follows:

16.1-06-07. ARRANGEMENT OF NAMES ON BALLOT FOR PRESIDENTIAL ELECTORS.) The ballot provided for in section 16.1-06-05 shall be arranged as follows:

1. Initially, the names of the candidate of the party casting the highest number of votes in the state for members of Congress at the last preceding general election shall be arranged in the first or left-hand column of such ballot; of the party casting the next highest number of votes in the second column, of the party casting the next highest number of votes in the third column; and of such other party as the secretary of state may direct in the fourth and successive columns.

2. In printing each set of official ballots for the various election precincts, one-half of the ballots shall be printed with the political party columns arranged as prescribed by subsection 1 of this section, and the other half of the ballots shall be printed by interchanging only the first two political party columns.

3. After the ballots are printed as prescribed in subsection 2 of this section, they shall be kept in separate piles and then repiled by taking one ballot from each pile and placing it upon the new pile so that

every other ballot in the new pile has the first two political party columns in different positions. This repiling for political party column rotation shall be done in conjunction with the required rotation of names within the political party columns. After the repiling is completed, the ballots shall be cut and packaged for the various election precincts.

4. In presidential election years the names of presidential electors presented in one certificate of nomination shall be arranged in a group enclosed in brackets to the right and opposite the center of which shall be printed in bold type the surname of the presidential candidate represented. To the right and in a line with such surname, near the margin, shall be placed a single square, and a mark within such square shall be designated a vote for all the electors, and such group shall be placed at the head of the column under the party designated or represented in such certificate.

5. In precincts in which voting machines are used, the rotation of political party columns required by this section shall be performed in the same manner as provided for the primary election ballot.

SECTION 17. EFFECTIVE DATES.) The provisions of section 15 of the Act shall be effective from July 1, 1979, through June 30, 1981. The provisions of section 16 of this Act shall be effective on July 1, 1981.

Section 18 of House Bill 1138 repeals, inter alia, section 16-11-06 of the North Dakota Century Code, which provides:

16-11-06. ARRANGEMENT OF NAMES ON BALLOT - PRESIDENTIAL ELECTORS. - The ballot provided for in section 16-11-05 shall be arranged as follows: The names of the candidates of the party casting the highest number of votes in the state for members of Congress at the last preceding general election shall be arranged in the first or left-hand column of such ballot; of the party casting the next highest number of votes in the second column; of the party casting the next highest number of votes in the third column; and of such other party as the secretary of state may direct for state officers. In presidential years, the names of electors of president and vice president of the United States, presented in one certificate of nomination, shall be arranged in a group enclosed in brackets to the right and opposite the center of which shall be printed in bold type the surname of the presidential candidate represented. To the right and in a line with such surname, near the margin, shall be placed a single square, and a mark within such square shall be designated a vote for all the electors, and such group shall be placed at the head of the column under the party designated or represented in such certificate.

This section provides for the same candidate name arrangement as

Section 15 of House Bill 1138.

Sections 15, 17, and 18 of House Bill 1138 have been referred to the voters by the sponsoring petitioners. Section 16 of the Bill is not included in the referral and stands alone with Sections 1 and 3 of House Bill 1138 which were also not referred by the sponsoring petitioners.

Article 105 of the Amendments to the Constitution provides that the submission of a referendum petition suspends the operation of the measure enacted by the Legislature which is the subject of the referendum. It also provides that the "submission of a petition against one or more items or parts of any measure shall not prevent the remainder from going into effect." (Emphasis added). By referring Section 17, the sponsoring committee appears to have attempted to change the effective date of Section 16 from July 1, 1981, to July 1, 1979, by depending upon the suspension of the operation of the provisions of Section 17. However, by the referral of Section 18 of House Bill 1138, section 16-11-06 of the North Dakota Century Code remains in effect pending the vote on the referendum Dawson v. Tobin, 24 N.W.2d. 737, 744 (N.D. 1946); Cuthbert v. Smutz, 282 N.W. 494, 498 (N.D. 1938); Attorney General Opinion 475 (1929). While section 16-11-06 provides for the same manner of candidate ballot name arrangement as provided for by Section 15 of House Bill 1138, Section 16 of House Bill 1138 provides for yet another manner of candidate ballot name arrangement.

The intention of the Legislature in passing Sections 15, 16, and 17 of House Bill 1138 is clear. The manner of candidate name arrangement on the general election ballot as provided for in Section 15 is to be the law from July 1, 1979, through June 30, 1981. The manner of candidate name arrangement on the general election ballot as provided in Section 16 is to be the law beginning on July 1, 1981, and continuing thereafter. (Both sections are dependent upon North Dakota Century Code section 16.1-06-05, form of general election ballot, created by Section 4 of House Bill 1138 being effective, however, Section 4 is part of petitioners referral.) The Legislature intended the repeal of section 16-11-05, form of general election ballot, and section 16-11-06, arrangement of names on ballot by including those sections in Section 18 of House Bill 1138. However, as a result of the petition to partially refer House Bill 1138, sections 16-11-05 and 16-11-06 remain as law.

The intentions of the sponsoring committee of petitioners is not so clear. If Section 16 were to be given effect as of July 1, 1979, the sponsoring committee would, by its action, accomplish the immediate implementation of legislation clearly not intended by the Legislature. On the other hand, by the referral of Section 18, which includes the repeal of sections 16-11-05 and 16-11-06, the sponsoring committee also apparently intended those sections to remain law pending a vote on the referendum. However, the provisions of those sections are inconsistent with the provisions of Section 16. The Legislature, of course, in passing House Bill 1138 provided that the candidate name arrangement provisions of section 16-11-06 continue in effect through June 30, 1981, by means of the provisions of Section 15, and further provided that on July 1, 1981, the provisions of Section 16 would become law.

The North Dakota Supreme Court in State v. Hanna, 154 N.W. 704 (1915), in an early interpretation of the constitutional provisions of the Initiative and Referendum held that an affirmative vote on a petition to refer an act of the legislature would revoke the repealing section of the act being referred and thereby reinstate the "old statutes." The Court stated that the petitioners must be held to have understood the plain reading of the Constitution, and that in effect they petitioned for a reinstatement of the old law. The Court stated:

> . . . To each petitioner knowledge of the law must be presumed. It must be assumed that every petitioner understood fully that for which he petitioned, and contemplated the result that might be brought about by it. Indeed the results achievable must be taken as the object sought by each respective petitioner. . . (Emphasis added).
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> . . . Those who would seek to set aside a legislative act, the work of a coordinate branch of government and in whom is reposed and to whom is delegated the exercise of lawmaking as both the arm and the voice of the sovereign state, should be required to come within the plain, as well as mandatory constitutional provisions. They should be held to petition to suspend only what they have plainly sought to refer. . .

By their petition to suspend the operation of Section 18 of House Bill 1138, the petitioners are presumed to know that the effect of such suspension prevented the repeal of sections 16-11-05 and 16-11-06.

Section 1 of Article 105 of the Amendments to the Constitution provides in part:

> Section 1. While the legislative power of this state shall be vested in a legislative assembly consisting of a Senate and a House of Representatives, the people reserve the power to propose and enact laws by the initiative, including the call for a constitutional convention; to approve or reject legislative acts, or parts thereof, by the referendum; . . . (Emphasis added).

In the landmark case of Baird v. Burke, 205 N.W. 17 (1925), the North Dakota Supreme Court had before it the partial referral of a legislative act and the legal effect, if any, to be given the remaining part of the act not referred. Before directly addressing the issue before it, the Court made the following observations regarding the State Constitution and the reserved powers of the Initiative and the Referendum:

> . . . The state Constitution is a limitation, not a grant of power; it is, in this respect, fundamentally different from the federal Constitution, which is a grant of power to the federal government. The state Legislature therefore has full power of legislation except as limited by the federal or the state Constitution. The initiative and the referendum neither add to nor subtract from that power; except as its scope is restricted

> by constitutional limitations, the power is still plenary in the Legislature. Though the people have reserved legislative power, the representative character of the government is fully retained. See Kadderly v. Portland, 44 Or. 118, 145, 74 P. 710, 75 P. 222. By the initiative, the people have provided against nonaction by their duly constituted representatives in the legislative branch; and by the referendum, an appeal may be taken directly to the people from affirmative action by these representatives. In the one case affirmative legislation results, the people, without the intervention of representatives, declare what shall be law; in the other case, the people veto affirmative action by their agents; in the one instance we have a constructive exercise of legislative power; in the other, merely negation. (Page 20. Emphasis added).

In determining the effect of the referral of one section of the Act under review upon two remaining sections of the Act, the Court stated:

> . . . We are confronted with a statute, some parts of which are inconsistent and self-contradictory, which purports to command and authorize public action directly contrary to the avowed purpose of the whole law, and which does not express the real purpose or intention of the Legislature that enacted the law or of the people to whom a single paragraph was referred. . . .
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> . . . It is difficult to conceive of a situation where a legislative purpose, unequivocally expressed, could be more clearly subverted. We think it is too plain for argument that the purpose, intention, and result of chapter 300, with section 2 stricken out, are fundamentally and essentially different from the purpose and intention of the enactment with section 2 in it.
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> A direct outgrowth of the principle that a statute shall be construed so as to speak the purpose of the lawmaker is the universally recognized rule that, if a legislative act be in part unconstitutional, the valid portion shall stand, unless the result be one not contemplated or desired by the Legislature. . . . (Page 22)
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> . . . If striking out a part of the law results in a substantial departure from the legislative purpose, or effects an object not within the contemplation of the lawmaking body when the law was passed, and it cannot be presumed that the law would have been passed without the void part, the entire statute falls. . . . (Emphasis added). * * *

May the inducement of a legislative act be stricken by means of the referendum, and must the remainder, notwithstanding the purpose of the lawmakers has been completely subverted as a result of the elimination, be given effect and enforced as an act of the Legislature? It is not disputed that the answer must be negative if we apply the rule when the part of an act which constitutes its inducement is held unconstitutional and void. It is strongly urged that the same result must follow when, through the referendum, the legislative purpose is completely frustrated or altered by striking a

portion. Upon what sound principle can a distinction be drawn under the facts in this case? We see none. . . .

> . . . If a part only be disapproved, the remaining portion stands, if at all, as an act of the Legislature, not as one that has come into being or derived any force through the exercise of the power of direct legislation through the initiative. . . . The reserved power, known as the referendum, is negative; it is entirely distinct and fundamentally different from that of the initiative. Through the referendum a definite number of electors may have submitted to the people as a whole a specific act, or part of an act, for approval or disapproval. Nothing is before the electorate but the concrete proposition, as advertised in the election notices and as appearing on the ballot, whether a certain law, or a specified part of a certain law, shall be approved or disapproved. From the standpoint of the effect of an adverse referendum of a part of an enactment upon the legislative intention, it is difficult to discover any distinction in principle between excision of a section or a part of a law by the referendum and the same operation through the decision of a court that such section or part is void because unconstitutional (Page 23 Emphasis added).
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In holding that the parts of the Act not referred and standing alone could have no legal effect, the Court gave the following concluding reasons:

> . . . There is no approval of sections 1 and 3 by implication, or otherwise. They were simply left alone by the sponsors of the referendum and must stand as reflecting the purpose and intention of the legislative assembly, if given effect as a law. As we have seen, the portion of chapter 300, remaining after section 2 has been stricken, is a complete perversion of the legislative purpose existing when the full chapter was enacted. The bulk that is left expresses the intention neither of the Legislature nor of the people. . . .
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> . . . Suppose a Legislature should enact a complete Political Code and at the end thereof append a section expressly repealing by number all existing statutes on the same subject. Suppose an unfavorable referendum against all the new Code, except the repealing clause. Can it be possible that any person in his right senses would attribute to the Legislature an intention to enact the repealing clause, or to the people a purpose to leave no law upon the subject dealt with in the Political Code? The question answers itself and demonstrates the soundness of the construction we have put on the referendum provision in the Constitution.

It may be in the interest of clear thinking on the subject to draw attention to the fact that the people do not start the machinery of the referendum. That is done by individuals whose identity may be quite unknown and who have no substantial legal responsibility for the outcome. It is unfortunate that such an instrumentality,

powerful for good, if properly used, may be set in motion without able, painstaking, and conscientious scrutiny into the effect of directing the referendum against a fraction of a legislative enactment. Irresponsible or incompetent leadership in this method of legislation, is, no less here than in other branches of the public service, fraught with grave danger. The opportunities as well as the pernicious consequences of that sort of leadership multiply, as the people extend direct participation into the more technical aspect of government. For this there is no remedy save a keener consciousness of personal responsibility on the part of the citizen, and a determination on his part to exercise the great privilege of the franchise with discriminating intelligence. Be that as it may, we are satisfied that it was not contemplated by the people, when the initiative and referendum became a part of the Constitution, that fraud and injustice could be perpetrated in its name by removing, through the referendum, the principal inducement that led to the enactment of a statute, with resulting perversion of the legislative purpose and consequent wrong and injustice against any class of citizens. If a section of a law be deemed objectionable, and if that portion cannot be removed without doing violence to the manifest purpose the Legislature had in view, the remedy is simple and is found in the Constitution itself. The entire act can be referred to the people and a suitable one initiated at the same or at another time. The means of giving effect to the popular will are so easily available that it is unnecessary to sanction or encourage methods that are subversive of fundamental principles.

If, through the referendum, the very soul and purpose of a statute may be stricken from it, the most pernicious form of log rolling is invited. It would be a simple matter to load a legislative bill with riders and clauses in order to insure its passage, only to remove them later by the referendum. On the other hand, the interpretation we have put on the referendum clauses in the Constitution guards against an abuse of this reserved power, the possibilities of which are abundantly illustrated in the case at bar, without in any manner limiting its usefulness as a check or veto power against undesirable legislation by the people's representatives. The referendum may always, when deemed necessary, be supplemented by the initiative.

> We conclude that if the result of striking from a law an item, a part, clause, or section, be to take from it the principal inducement that led to its passage in the Legislature, and to leave a portion which, standing alone, is in reality a fundamental perversion of the purpose the lawmaking body intended to effect when the whole was enacted, the effect of such a referendum is to nullify the whole act as if the statute had been disapproved by the people in its entirety. (Page 24. Emphasis added).

In determining that the rejection of a legislative act by the voters at a referendum election had the effect of abrogating the repeal provisions of the act and reinstating the old law, the Supreme Court in Dawson v. Tobin, supra, made the following observations regarding the power of the referendum:

> * * *

> Obviously, it is impossible for the petitioners in a referendum petition, or for the people at a referendum election, to make any provision qualifying the effect which will follow as a legal consequence from the rejection of the referred measure. The only question that is or can be submitted at a referendum election is whether the referred measure, or such parts thereof as are referred, shall be approved or rejected. It is impossible for the petitioners in a referendum petition, or for the people at a referendum election, to make "express provision to the contrary". . . (Pages 747 and 748. Emphasis added).

The Court went on to state that the rejection of a measure through the referendum, while an action taken in the course of legislating, does not result in a legislative enactment. Rather, the Court said: "It results in disapproval and disaffirmance of the action of the Legislature and in the recall and destruction of the law which the Legislature enacted." (Page 748)

The law is well settled in this state that the Constitutional provisions, the rules of construction and tests of constitutionality regulating the exercise of the legislative power, apply to the processes involved in the Initiative and Referendum, the same as to laws passed by the Legislature. State, ex rel., Walker v. Link, 232 N.W.2d. 823 (N.D. 1975); State v. Houge, 271 N.W. 677 (N.D. 1937); State v. Shafer, 246 N.W. 874 (N.D. 1933).

Based upon our review of the petition to partially refer House Bill 1138, and in particular as that petition affects Section 16 of the bill, it is our opinion that the sponsoring committee and petitioners have attempted, through the exercise of the negative power of the Referendum, to enact affirmative legislation neither envisioned nor intended by the Legislature when it enacted House Bill 1138 in its entirety. By not referring Section 16 providing for the so-called rotating ballot and by referring Section 17 providing for the future effective date of Section 16 intended by the Legislature, the sponsoring petitioners have attempted to initiate new legislation. Such a result can only be accomplished directly by the people through the exercise of the power of the Initiative, equally and as readily available as the exercise of the power of the Referendum.

If Section 16 were to be allowed to stand alone, its legal effect would be doubtful because of the specific dependence, as stated in the section itself, upon Section 4 of House Bill 1138 (section 16.1-06-05) for purposes of preparation of the official ballot at the general election. Since Section 4 has been included, by the sponsoring petitioners, in the petition for referral it would be impossible to comply with the provisions of Section 16 because of its dependence upon a provision of law, the operation of which has been suspended by the action of the petitioners.

Section 64 of the North Dakota Constitution provides:

> SECTION 64. No bill shall be revised or amended nor the provisions thereof extended or incorporated in any other bill by reference to its title only, but so much thereof as is revised, amended or extended or so incorporated shall be reenacted and published at length.

The North Dakota Supreme Court in State v. Shafer, supra., applied the requirements of Section 64 of the Constitution to an initiative measure which attempted to reduce the salaries of all appointed state officials and concluded that a statute which is not complete in itself and which is dependent upon other statutes for its complete expression is in conflict with Section 64. The Court stated:

> . . . The chief evil at which this section is aimed is the framing "of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect." Cooley, J., in People v. Mahaney, supra. If it be important to guard against deception of legislators when their attention is absorbed exclusively in the enactment of legislation, how much more important it is that the voters participating only occasionally in the enactment of legislation be protected against deception as to the effect of a proposed law? It is a matter of common knowledge and of current history in this state that at the time the act in question was pending diverse opinions of competent persons were expressed as to the effect of the proposed enactment upon existing statutes and previous regulations concerning salaries. A proper observance of section 64 of the Constitution would clearly have avoided such uncertainties and the possibility of reasonable persons being deceived as to the effect of such pending legislation. (Page 880)
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It is our opinion that the rules of construction and tests of constitutionality as applied to the exercise of the power of the Referendum as set forth by the North Dakota Supreme Court in Baird v. Burke, supra, apply equally to the petition for the referral of House Bill 1138. As the Supreme Court stated in Baird, the power of the referendum is a negative power, like the power of the veto, and is not an affirmative power resulting in the creation of legislation. The effect of the nonreferral of Section 16 of House Bill 1138 is an attempt to accomplish a legislative result contrary to the legislative purpose intended when the Bill was passed. We believe that the courts in reviewing the petition for the referral of House Bill 1138 would apply the principles established by the judicial decisions cited above and would conclude that Section 16, as left standing alone by the sponsors of the referendum, expresses neither the intention and purpose of the Legislature nor of the people, and therefore, the petition has the effect of suspending its operation pending the vote on the referendum. If the vote on the referendum results in the rejection of those parts of House Bill 1138 referred by the sponsors' petition, it is our further opinion that the reviewing courts would also determine that Section 16 of House Bill 1138 has no effect as a result of the application of the rules of construction and tests of constitutionality firmly established in this state.

As we stated before, the effect, if any, to be given Section 16 of House Bill 1138 is a matter upon which the courts would make the final dispositive determination. However, this response to your inquiry represents our opinion as to the law governing the exercise

of the Referendum and its application to the sponsoring petitioners' partial referral of House Bill 1138.

It is hoped that the foregoing will be of assistance.

Sincerely,

ALLEN I. OLSON

Attorney General