

LETTER OPINION
2007-L-08

June 6, 2007

The Honorable Tim Mathern
State Senator
429 16th Avenue South
Fargo, ND 58103-4329

Dear Senator Mathern:

Thank you for your letter asking about the constitutionality of section 10 of House Bill No. 1015 passed by the 2007 Legislative Assembly. For the reasons indicated below, it is my opinion that if a court were to rule on this matter, it would determine that subsection 8 of section 10 of House Bill No. 1015, which provides the Budget Section of the Legislative Council authority to approve or reject a plan to construct or remodel state correctional facilities, is unconstitutional as a violation of the separation of powers doctrine. In light of the strong presumption of constitutionality of legislative enactments, and the absence of controlling case law on the issue, I decline to offer an opinion on the constitutionality of the delegation of decision-making authority to the Emergency Commission.

ANALYSIS

The primary question raised is whether section 10 of House Bill No. 1015 violates the constitutional separation of powers doctrine, *i.e.*, usurps an executive function, because it grants the Budget Section of the Legislative Council¹ the power to approve or reject the Emergency Commission's² authorized option for constructing or remodeling state correctional facilities.³ Because it is the Attorney General's role to defend statutory enactments from constitutional attacks, this office is ordinarily reluctant to issue an opinion questioning the constitutionality of a legislative enactment. As I explained in N.D.A.G. 2003-L-21:

¹ The Legislative Council is established by law under N.D.C.C. ch. 54-35. The Council is composed of members of the North Dakota Legislature. N.D.C.C. § 54-35-01.

² The Emergency Commission consists of the Governor, the majority leaders of the Senate and House of Representatives of the Legislative Assembly, the Secretary of State, and the chairmen of the Senate and House of Representatives Appropriations Committees. N.D.C.C. § 54-16-01.

³ In your letter you indicate you are primarily concerned with the constitutionality of section 10 of House Bill No. 1015, but that sections 8 and 9 "may also be problematic." Sections 8 and 9 are not subject to the same infirmities as section 10 and are thus entitled to the strong presumption of constitutionality afforded legislative enactments. *See* N.D.A.G. 2003-L-21. Also, sections 8 and 9 are appropriation provisions. Even if the Legislature attached void conditions to an appropriation bill, only the void condition fails, not the appropriation. *See People v. Tremaine*, 168 N.E. 817 (N.Y. 1929).

It is presumed when construing a statute that the Legislature intended to comply with the constitutions of North Dakota and of the United States and any doubt must be resolved in favor of a statute's validity. Haney v. North Dakota Workers Compensation Bureau, 518 N.W.2d 195, 197 (N.D. 1994); Snortland v. Crawford, 306 N.W.2d 614, 626 (N.D. 1981); State ex rel. Johnson v. Baker, 21 N.W.2d 355, 359 (N.D. 1945); N.D.C.C. § 1-02-38(1). This presumption is conclusive unless the statute clearly contravenes the state or federal constitutions. State v. Hegg, 410 N.W.2d 152, 154 (N.D. 1987); State ex rel. Lesmeister v. Olson, 354 N.W.2d 690, 694 (N.D. 1984). Also, a statute will only be found unconstitutional upon concurrence of four of the five justices of the North Dakota Supreme Court. N.D. Const. art. VI, § 4. "One who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely." S. Valley Grain Dealers Ass'n v. Bd. of County Comm'rs of Richland County, 257 N.W.2d 425, 434 (N.D. 1977).

Section 10 of House Bill No. 1015 provides in part:

1. During the 2007-08 interim, the legislative council shall appoint a correctional facility review committee to address the immediate and future needs of the state penitentiary. The membership of the committee must include six members of the legislative assembly selected by the legislative council. . . .

. . . .
4. The committee shall engage consultant and architectural services, subject to legislative council approval, for the development of the following three correctional facility concepts:
 - a. The construction of a new correctional facility on the existing state penitentiary site;
 - b. The construction of a new correctional facility at a site other than the state penitentiary site; and
 - c. The remodeling of the existing state penitentiary facility.
5. Each of the three correctional facility concepts developed by the consultant and architect must:

- a. Include a master plan, staffing plan, a cost-benefit analysis, and project cost estimate;
 - b. Be based upon housing a population of approximately nine hundred to one thousand inmates;
 - c. Include options for expansion;
 - d. Take into consideration the transfer of the inmates at the Missouri River correctional center to the new or remodeled facility; and
 - e. Take into consideration the facility and staffing needs of the James River correctional center.
6. In developing the concepts, the committee shall seek the input of the department of corrections and rehabilitation.
 7. Before June 1, 2008, the committee shall forward the three concepts along with a recommendation for one of the three concepts to the emergency commission for the commission's consideration and authorization.
 8. If the emergency commission authorizes one of the three concepts, the emergency commission shall forward the authorized concept to the budget section of the legislative council. The budget section may approve or reject the concept as authorized by the emergency commission.

Although several parts of section 10 could be questioned, the most problematic is subsection 8 of section 10 which gives the Budget Section of the Legislative Council authority to approve or reject the Emergency Commission's authorization of one of the three concepts proposed in subsection 4 of section 10. This arrangement requires an analysis of the separation of powers doctrine because the Budget Section of the Legislative Council is an agent of the Legislature.⁴ The application of this doctrine on the state level has been explained as follows:

It is a fundamental rule that the legislature may not infringe upon the constitutional powers of the executive department by interference with the

⁴ N.D.A.G. Letter to Treadway (Nov. 6, 1991).

functions conferred on that department by the organic law. However, the legislature may attempt to control the executive branch by passing amendatory or supplemental legislation and presenting such legislation to the governor for signature or veto, or by its power of appropriation, and the legislature may also hold committee hearings, conduct investigations, or request information from the executive branch.⁵

Although I found no North Dakota Supreme Court case directly on point,⁶ there are a number of federal and state cases as well as two opinions issued by this office that address similar situations.

Three United States Supreme Court decisions are instructive. In I.N.S. v. Chadha, 462 U.S. 919 (1983), the Supreme Court analyzed a federal law that allowed one House of Congress to veto the United States Attorney General's decision to allow deportable aliens to remain in the country.⁷ Before the one-House veto law was enacted, the only remedy a deportable alien had to lawfully remain in the United States was to have his status altered by a private bill enacted by both Houses of Congress and presented to the President pursuant to the procedures set out in Article 1, Section 7 of the U.S. Constitution.⁸ Congress found these private bills intolerable and later authorized the Attorney General to suspend the deportation of certain aliens.⁹ But both Houses of Congress could, by concurrent resolution, disapprove the suspension.¹⁰ Congress later amended the law to allow a one-House veto of the Attorney General's suspension of an alien's deportation.¹¹

The Court explained that the one-House veto was legislative in character:

After long experience with the clumsy, time consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not

⁵ 16A Am. Jur. 2d Constitutional Law § 280 (1998). See also 16 C.J.S. § 252 (2005) ("The use of the legislative veto to register disapproval of delegated executive action . . . violates the separation of powers doctrine.").

⁶ See generally State ex rel. Wattam v. Poindexter, 183 N.W. 852 (N.D. 1921) (legislative action effective only if both houses of Legislature act independently and concurrently); City of Carrington v. Foster County, 166 N.W.2d 377, 382 (N.D. 1969) (although constitution contains no general distributing clause, there is an "implied exclusion of each branch from the exercise of the functions of the others.").

⁷ 462 U.S. at 954.

⁸ Id. at 933.

⁹ Id.

¹⁰ Id.

¹¹ Id.

disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation - that is, Congress' decision to deport Chadha - no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.¹²

The Court determined that the law's one-House veto provision was unconstitutional because a congressional veto can only be validly implemented by bicameral passage¹³ followed by presentment¹⁴ to the President.¹⁵

In Bowsher v. Synar, 478 U.S. 714 (1986), the Supreme Court addressed whether the United States Comptroller General's role under the Gramm-Rudman-Hollings Act¹⁶ violated the constitutionally imposed separation of powers. Under certain budgetary conditions, the Comptroller General was to make budget reduction recommendations to the President.¹⁷ The President was then required to issue an order mandating the spending reduction specified by the Comptroller General.¹⁸ The problem, however, was that the Comptroller General was removable only at the initiative of Congress.¹⁹ The Court explained:

The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. The President appoints "Officers of the United States" with the "Advice and Consent of the Senate. . . ." Art. II, § 2. Once the appointment has been made and confirmed, however, the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate. An impeachment by the House and trial by the Senate can rest only on "Treason, Bribery or other high Crimes and Misdemeanors." Article II,

¹² 462 U.S. at 954-55.

¹³ For North Dakota's constitutional requirement of bicameral passage, see N.D. Const. art. IV, § 13 ("No law may be enacted except by a bill passed by both houses . . .").

¹⁴ North Dakota's presentment clause is contained in N.D. Const. art. V, § 9 ("Every bill passed by the legislative assembly must be presented to the governor . . .").

¹⁵ 462 U.S. at 954-55 and 959.

¹⁶ The purpose of the Act was to eliminate the federal budget deficit. 478 U.S. at 717.

¹⁷ Id. at 718.

¹⁸ Id.

¹⁹ Id. at 727-28.

§ 4. A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.²⁰

The Court concluded that Congress cannot reserve for itself the power of removal of an officer²¹ charged with the execution of the laws except by impeachment.²² To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws.²³ The Court further reasoned:

To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of the laws, Chadha makes clear, is constitutionally impermissible.²⁴

Finally, in Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991), the Supreme Court reviewed the Transfer Act, passed by Congress that authorized the federal government to transfer operating control of two airports to an entity, the Metropolitan Washington Airport Authority (“MWAA”), created by Virginia and the District of Columbia.²⁵ Although the MWAA had its own board of directors, the Transfer Act required that the MWAA create a Board of Review²⁶ composed of nine congressmen who served on transportation-related committees with veto power over the MWAA board of directors.²⁷

The issue, as defined by the Court, was whether the powers of the Board of Review, an agent of Congress,²⁸ could be exercised consistent with the separation of powers.²⁹ That

²⁰ Id. at 722-23.

²¹ The Court concluded that the Comptroller General’s functions were executive in nature. Id. at 733-34.

²² Id.

²³ Id.

²⁴ Id. at 726-27.

²⁵ Id. at 258-61. The MWAA was created only after an advisory commission created by the U.S. Secretary of Transportation recommended that the authority be created by a congressionally approved compact between Virginia and the District of Columbia. Id. at 257.

²⁶ The Board of Review was authorized by legislation from Virginia and the District of Columbia and the MWAA adopted bylaws providing for its creation. Id. at 261.

²⁷ 501 U.S. at 258-60.

²⁸ Id. at 269.

is, “whether the Legislature has followed a constitutionally acceptable procedure in delegating decisionmaking authority”³⁰ The Court explained:

To forestall the danger of encroachment “beyond the legislative sphere,” the Constitution imposes two basic and related constraints on the Congress. It may not “invest itself or its Members with either executive power or judicial power.” And, when it exercises its legislative power, it must follow the “single, finely wrought and exhaustively considered, procedures” specified in Article I.³¹

The Court reasoned that it did not agree or disagree with the characterization that the power exercised by the Board of Review over key operational decisions was quintessentially executive, and that it did not need to determine whether the Board of Review’s power was constitutionally impermissible.³² Rather “[i]f the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7.”³³ The Court concluded that the statutory scheme could prove to be innocuous, but that it provided a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role.³⁴

A number of other courts have had occasion to apply the separation of powers doctrine to legislative intrusions on executive functions. See, e.g., Opinion of the Justices, 892 So.2d 332, 338 (Ala. 2004) (proposed legislation that would permit either house of state legislature to veto contract entered into by the executive branch would impermissibly interfere with the core executive powers and would be unconstitutional); Federal Election Comm. v. NRA Political Victory Fund, 6 F.3d 821, 826-27 (D.C. Cir. 1993) (Congress violated separation of powers doctrine by appointment of Secretary of Senate and Clerk of House of Representatives as ex officio members of the Federal Elections Commission; their mere presence as agents of Congress conveyed tacit message to other commissioners); General Assembly of the State of New Jersey v. Byrne, 448 A.2d 438, 439 (N.J. 1982) (legislative veto provision in state law was contrary to separation of

²⁹ Id. at 271.

³⁰ Id. at 272.

³¹ Id. at 274 (citations omitted).

³² Id. at 276.

³³ Id. at 276.

³⁴ Id. at 276-77; see, e.g., Hechinger v. Metropolitan Washington Airports Auth., 36 F.3d 97, 101-02 (D.C. Cir. 1994) (modified Board of Review still was an agent of Congress and, as constituted, violated the separation of powers doctrine because board members had to be selected from lists prepared by Speaker of the House and President *pro tempore* of the Senate; the Board of Review had the ability to force any issue onto agenda; and, the Board of Review members could participate as non-voting members in meetings).

powers principle by allowing legislature to effectively amend or repeal existing laws without participation by governor as required by constitutional presentment clause); State ex rel. Schneider v. Bennett, 547 P.2d 786, 799-800 (Kan. 1976) (statutory powers vested in state finance council comprised in part of legislators, in practical effect, set up little legislature with power to appropriate and authorize expenditure of state moneys; statutes were unconstitutional delegation of legislative power insofar as legislative members participated in supervising operations of the department of administration and usurped executive power by the legislative department in violation of the separation of powers doctrine); People v. Tremaine, 168 N.E. 817, 822 (N.Y. 1929) (portions of appropriation bills conferring power on the legislative chairmen to approve segregations of appropriations determined to be unconstitutional and void; legislature may not attach void conditions to an appropriation bill and if attempted to do so, the attempt and not the appropriation would fail).

The effect of the Supreme Court decisions on the authority of the Budget Section of the Legislative Council was discussed in two prior opinions issued by this office. In N.D.A.G. Letter to Rayl (Sept. 25, 1987), this office reviewed the constitutionality of N.D.C.C. § 54-44.1-13.1 (1987) which delegated authority to the Budget Section to make budgetary cutbacks caused by initiative or referral measures.³⁵ The opinion, relying on the precedent set by the Chadha and Bowsher cases, explains that a substantial constitutional question clearly existed with respect to the role reserved by the Legislature in executing N.D.C.C. § 54-44.1-13.1 (1987), and whether the Budget Section's role impermissibly usurped executive functions and violated separation of powers principles.

In N.D.A.G. Letter to Treadway (Nov. 6, 1991), the Attorney General analyzed, in light of the Metropolitan case, the Budget Section's power to authorize the State Board of Higher Education ("SBHE") to issue certain bonds.³⁶ The Budget Section had adopted a motion authorizing SBHE to issue bonds. But, as the opinion explains, the Budget Section had no statutory authority to authorize the issuance of bonds; SBHE's statutory procedure for issuing bonds was set by N.D.C.C. ch. 15-55.

The opinion further explains that the Budget Section of the Legislative Council cannot fill the void of the Legislature when it is not in session and that the Budget Section's approval action was "inappropriate because it violates the separation of powers doctrine." The opinion concludes that "a court would find that the Budget Section is merely an agent of the Legislature, not a body to which the Legislature has properly delegated decision making authority" and that "when the Budget Section . . . acts in an executive capacity, as

³⁵ N.D.A.G. Letter to Rayl (Sept. 25, 1987).

³⁶ N.D.A.G. Letter to Treadway (Nov. 6, 1991).

it did by approving the issuance of bonds for UND's project, it violates the Separation of Powers Doctrine."³⁷

Under section 10 of House Bill No. 1015, the Legislature has granted the Budget Section of the Legislative Council the authority to veto the choice of the Emergency Commission in approving one of the three correctional facility building options. Consistent with the case law and other authorities cited above, the Budget Section would likely be determined to be an agent of the Legislative Assembly. And, its power to veto the Emergency Commission's choice without the further action of the passage by both houses of the Legislature³⁸ and signing by the Governor³⁹ would implicate the separation of powers doctrine. Consequently, it is my opinion that if a court were to rule on this matter, it would determine that subsection 8 of section 10 of House Bill No. 1015 would violate the separation of powers doctrine and therefore be unconstitutional.⁴⁰

Although not specifically asked, an additional constitutional concern is whether the Legislative Assembly has properly delegated to the Emergency Commission the authority to choose one of the three alternatives to be developed by the study provided for in section 10 of House Bill No. 1015. Subsections 7 and 8 of section 10 direct the Emergency Commission to consider one of the three alternatives forwarded to it by the Legislative Council. But the Commission is not mandated to authorize one of the three alternatives; subsection 8 states "[i]f the Commission authorizes one of the three concepts"

What is unique, however, about the procedure outlined in section 10 of House Bill No. 1015 is that the Emergency Commission is neither part of the Legislative Council nor part of the legislative branch. "The United States Supreme Court has held that the principle of separation of powers does not prevent the legislative branch from obtaining the assistance of its coordinate branches."⁴¹ "So long as the legislative branch lays down by legislative act an intelligible principle to which the body authorized to exercise the delegated authority

³⁷ Id.

³⁸ See N.D. Const. art. IV, § 13.

³⁹ See N.D. Const. art. V, § 9.

⁴⁰ The same constitutional infirmities that plague subsection 8 of section 10 of House Bill No. 1015 also apply to N.D.C.C. §§ 54-16-04, 54-16-04.1, 54-16-04.2, and 54-16-09 wherein the Legislature has reserved in the Budget Section of the Legislative Council the authority to approve or reject actions of the Emergency Commission. If these Budget Section approval provisions were properly before a court, I believe that they would also be determined to be an unconstitutional usurpation of executive power. Any constitutional infirmity, however, would likely be limited to the Budget Section approval provisions and not the Emergency Commission's powers generally. See N.D.C.C. § 1-02-20; State ex rel. Link v. Olson, 286 N.W.2d 262 (N.D. 1979); Baird v. Burke County, 205 N.W. 17 (N.D. 1925).

⁴¹ N.D.A.G. 92-15 (citing Mistretta v. United States, 488 U.S. 361, 372 (1989)).

is directed to conform, such legislative action is not a forbidden delegation of legislative power.”⁴²

The North Dakota Supreme Court has explained the delegation concept as follows:

Unless expressly authorized by the State Constitution, the Legislature may not delegate its purely legislative powers to any other body. Ralston Purina Company v. Hagemeister, 188 N.W.2d 405 (N.D. 1971). However, the Legislature may delegate powers which are not exclusively legislative and which the Legislature cannot conveniently do because of the detailed nature. Simply because the Legislature *may* have exercised a power does not mean that it *must* exercise that power. In Ralston Purina Company, *supra*, we pointed out that the true distinction between a delegable and non-delegable power was whether the power granted gives the authority to make a law or whether that power pertains only to the execution of a law which was enacted by the Legislature. The power to ascertain certain facts which will bring the provisions of a law into operation by its own terms is not an unconstitutional delegation of legislative powers. Ferch v. Housing Authority of Cass County, 79 N.D. 764, 59 N.W.2d 849 (1953). However, the law must set forth reasonably clear guidelines to enable the appropriate body to ascertain the facts. Ralston v. Purina Co., *supra*.⁴³

“North Dakota follows ‘the modern view of the delegation doctrine which recognizes that, in a complex area, it may be necessary and appropriate for the legislature to delegate in broad and general terms, as long as there are adequate procedural safeguards and adequate standards.’”⁴⁴

The case law does not clearly enunciate what are adequate safeguards and standards when the Legislature delegates decision-making authority. In this case, there are some procedures and standards articulated for the review committee to follow in section 10 of House Bill No. 1015.⁴⁵ I must presume these standards and procedures would also be considered by the Emergency Commission⁴⁶ when it would review the committee’s work

⁴² Id.

⁴³ County of Stutsman v. State Historical Soc’y., 371 N.W.2d 321, 327 (N.D. 1985).

⁴⁴ N.D.A.G. 92-15 (citing Lawrence v. Lawrence, 432 N.W.2d 897, 897-98 (N.D. 1988)).

⁴⁵ House Bill No. 1015, section 10, subsections 4, 5, and 6. Section 8 of the bill appropriates a sum certain of \$41,000,000 to the Department of Corrections and Rehabilitation for a project approved under section 10. Section 9 of the bill appropriates a sum certain of \$250,000 to the Legislative Council for the study authorized in section 10.

⁴⁶ Cf. State ex rel. Schneider v. Bennett, 547 P.2d at 800 (state finance council containing some legislative members may lawfully exercise powers and duties to make allocations to and authorize expenditures by state agencies from state emergency fund).

and recommendation prior to authorizing one of the three concepts. Although not free from doubt, because of the strong presumption of constitutionality of legislative enactments, and in the absence of controlling case law guidance on whether the type of standards and procedural safeguards contained in section 10 of House Bill No. 1015 are adequate, I must decline to offer an opinion on the question of the delegation of decision-making authority to the Emergency Commission in this instance.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.⁴⁷

⁴⁷ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).