

**LETTER OPINION  
2007-L-10**

July 10, 2007

The Honorable Kari Conrad  
State Representative  
224 8th Street SE  
Minot, ND 58701-4038

Dear Representative Conrad:

Thank you for your follow-up letter to N.D.A.G. 2007-L-08. You ask whether subsections 4, 5, and 6 of section 10 of House Bill 1015, providing directives for a correctional facility review committee and study, violate the constitutional separation of powers doctrine. For the reasons indicated below, it is my opinion that the provisions for the correctional facility review committee and study in subsections 4, 5, and 6 of section 10 of House Bill 1015 do not violate the constitutional separation of powers doctrine, but rather are within the long-recognized power of the Legislature to form study committees and ascertain facts.

**ANALYSIS**

The first two subsections of section 10 of House Bill 1015 direct the Legislative Council to appoint a correctional facility review committee to address the needs of the State Penitentiary.<sup>1</sup> It is not unusual for the Legislature to convene study committees in the interim to study and recommend future legislation. In fact, the Legislative Council has broad statutory powers and duties that include such studies. The Council may:

[S]tudy, consider, accumulate, compile, and assemble information on any subject upon which the legislative assembly may legislate, and upon such subjects as the legislative assembly may by concurrent or joint resolution authorize or direct, or any subject requested by a member of the legislative assembly . . . .<sup>2</sup>

And subsection 3 of section 10 of House Bill 1015 requires that the correctional facility review committee operate according to the statutes and procedures governing the

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<sup>1</sup> 2007 N.D. Sess. Laws ch. 15, § 10.

<sup>2</sup> N.D.C.C. § 54-35-02.

operation of other Legislative Council interim committees.<sup>3</sup> Your question, however, is whether the creation of this study committee comprised of legislators usurps executive power by the Legislature in violation of the separation of powers doctrine.

Subsections 4, 5, and 6 of section 10 of House Bill 1015<sup>4</sup> provide instructions for the correctional facility review committee. Those provisions require hiring a consultant and architectural services to study whether a new correctional facility should be constructed or whether the existing Penitentiary facility should be remodeled.<sup>5</sup> Each of the three concepts must include a master plan, staffing plan, cost benefit analysis, and project cost estimates, among other things.<sup>6</sup> And the study committee is required by the bill to receive input from the Department of Corrections and Rehabilitation in developing the concepts.<sup>7</sup>

In N.D.A.G. 2007-L-08, in discussing the separation of powers doctrine, I quoted the following passage:

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

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<sup>3</sup> 2007 N.D. Sess. Laws ch. 15, § 10(3).

<sup>4</sup>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.

<sup>5</sup> 2007 N.D. Sess. Laws ch. 15, § 10(4).

<sup>6</sup> Id.

<sup>7</sup> 2007 N.D. Sess. Laws ch. 15, § 10(6).

functions conferred on that department by the organic law. However, the legislature may . . . hold committee hearings, conduct investigations, or request information from the executive branch.<sup>8</sup>

Furthermore:

While the legislature may engage in the performance of executive duties and functions incidental to, and comprehended within, the scope of legislative duties, ordinarily it cannot interfere with, or exercise any powers properly belonging to, the executive department. . . . [I]t is not an encroachment on the executive for the legislature to create a commission and designate its members to perform delegable legislative duties, and a statute appointing a committee but not imposing any executive duties on it cannot be held unconstitutional as encroaching on the executive department.<sup>9</sup>

The courts have consistently held that legislatures may validly hold committee hearings and conduct investigations. See, e.g., Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125, 136 (Mo. 1997) (legislature is free to empower committee to review regulatory action of the executive department and to take further action consistent with its constitutional role); Soucie v. David, 448 F.2d 1067, 1075 n.27 (D.C. Cir. 1971) (power of investigation has long been recognized as an incident to legislative power necessary to the enactment and effective enforcement of wise laws); State v. Kansas Turnpike Authority, 273 P.2d 198, 207 (Kan. 1954) (while legislature cannot interfere with or exercise any powers properly belonging to executive, it may engage in activities which may properly be regarded as incidental to and within the scope of legislative duties and it is not an encroachment on the executive for the legislature to create a commission and designate its members to perform delegable legislative duties); Eggers v. Kenny, 104 A.2d 10, 16 (N.J. 1954) (legislative body may conduct an inquiry in aid of its proper legislative functions even though the subject of inquiry may also be proper concern of judicial branch; this doctrine has universal recognition and is applicable equally to state investigating committees and municipal investigating committees acting pursuant to express or implied statutory authority); Parker v. Riley, 113 P.2d 873, 877 (Cal. 1941) (legislature may validly conduct an inquiry through a committee of its members or by utilizing an existing commission or board to make and report results of research); In re Joint Legislative Committee, 32 N.E.2d 769, 771 (N.Y. 1941) (law-making power given to legislature authorizes it by inquiry to ascertain facts affecting public welfare and affairs of

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<sup>8</sup> N.D.A.G. 2007-L-08 (quoting 16A Am. Jur. 2d Constitutional Law § 280 (1998)).

<sup>9</sup> 16 C.J.S. Constitutional Law § 250 (2005). See also 16 C.J.S. Constitutional Law § 249 (2005) (“Notwithstanding the constitutional prohibition of encroachment on the functions of the judiciary, each branch of the legislature has power to conduct investigations to determine the necessity and expediency of contemplated legislation.”).

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government; such power of inquiry with process to enforce it is essential auxiliary to legislative function and these powers may be delegated to a committee).

Based on the foregoing, I believe that it is within the Legislature's reasonable ambit of authority to set up a study committee to ascertain facts, to review the options for correctional facility construction or remodeling, and to forward the results of the study and any recommendations to the Emergency Commission or to the full Legislature for further action. Consequently, it is my opinion that the provisions for the correctional facility review committee and study in subsections 4, 5, and 6 of section 10 of House Bill 1015 do not violate the constitutional separation of powers doctrine, but rather are within the long-recognized power of the Legislature to form study committees and ascertain facts.

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.<sup>10</sup>

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<sup>10</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).