

**LETTER OPINION  
2019-L-05**

June 28, 2019

The Honorable Joshua Gallion  
State Auditor  
600 East Boulevard Avenue  
Bismarck, North Dakota 58505

Dear Mr. Gallion:

Thank you for your letter inquiring as to the constitutionality of amendments contained in section 3 of Senate Bill 2004 passed by the 66th Legislative Assembly. For the reasons indicated below, it is my opinion that if a court were to rule on this matter, it is likely that it would determine that the amendments contained in subsections 2 and 4 of section 3 of S.B. 2004 are unconstitutional as a violation of the separation of powers doctrine.

**ANALYSIS**

The primary question raised is whether section 3 of S.B. 2004 violates the constitutional separation of powers doctrine because it grants the Legislative Council's Legislative Audit and Fiscal Review Committee (LAFRC) the power to approve or deny the State Auditor's request to perform certain types of audits.

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 explained in N.D.A.G. 2003-L-21:

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.<sup>1</sup> This presumption is conclusive unless the statute clearly contravenes the state or federal

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<sup>1</sup> *Haney v. N.D. Workers Comp. 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).

constitutions.<sup>2</sup> 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."<sup>3</sup>

However, this office has considered this issue on various occasions when the Legislative Assembly has enacted a law allowing it to act in an executive capacity, in violation of the separation of powers doctrine.<sup>4</sup> At issue in this opinion are two subsections found in section 3 of S.B. 2004 where the Legislative Assembly has attempted to grant itself authority to act in an executive capacity:

Section 54-10-01 of the North Dakota Century Code is amended and reenacted as follows:

The state auditor shall:

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2. Perform or provide for the audit of the general purpose financial statements and a review of the material included in the comprehensive annual financial report of the state and perform or provide for the audits and reviews of state agencies. . . .The state auditor may conduct any work required by the federal government. The state auditor may not contract for work required by the federal government without the prior approval of the legislative audit and fiscal review committee.

...

4. Perform or provide for performance audits of state agencies, or the agencies' blended component units or discreetly presented component units, as determined necessary by the ~~state auditor or~~ legislative assembly; the legislative audit and fiscal review

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<sup>2</sup> *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).

<sup>3</sup> *S. Valley Grain Dealers Ass'n v. Bd. of Cnty. Comm'rs of Richland Cnty.*, 257 N.W.2d 425, 434 (N.D. 1977).

<sup>4</sup> N.D.A.G. 2017-L-04; N.D.A.G. 2007-L-08; N.D.A.G. Letter to Treadway (Nov. 6, 1991); N.D.A.G. Letter to Rayle (Sept. 25, 1987).

committee; or the state auditor, subject to approval by the legislative audit and fiscal review committee.

These amendments require that the State Auditor seek the approval of the LAFRC prior to performing or providing certain types of audits.

The North Dakota Constitution creates three separate, coequal branches of government and vests each branch with a distinct type of power, making each branch “supreme in its own sphere.”<sup>5</sup> The N.D. Const. art. III, § 1 vests the legislative power of this state in the Legislative Assembly; N.D. Const. art. V, § 2 includes the State Auditor in the executive branch with powers and duties which must be prescribed by law; and N.D. Const. art. VI, § 1 vests the judicial power of the state in the unified judicial system. This apportionment of powers among the three branches “implicitly excludes each branch from exercising the powers of the others” and prohibits “one branch from encroaching on the central prerogatives of another.”<sup>6</sup>

The North Dakota Supreme Court recently recognized two “theories” that implicate the separation of powers doctrine, specifically the “theories of legislative encroachment and improper legislative delegation” in *N.D. Legis. Assembly v. Burgum*.<sup>7</sup> Improper legislative delegation “encompasses those situations where one branch of government consents to the exercise of its power by another body.”<sup>8</sup> The Legislative Assembly violates the separation of powers doctrine under this theory when it delegates legislative authority without “reasonably clear guidelines” and a “sufficiently objective standard.”<sup>9</sup> Legislative encroachment “encompasses those situations where one branch of government encroaches into the proper sphere of another branch without the consent of the other branch.”<sup>10</sup> The Legislative Assembly violates the separation of powers doctrine under this theory when it retains discretion and control over the execution of enacted legislation, thereby encroaching upon the role of the executive branch.<sup>11</sup> It is my opinion that section 3 of S.B. 2004 violates the separation of powers doctrine under both theories.

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<sup>5</sup> *N.D. Legis. Assembly v. Burgum*, 916 N.W.2d 83, 100 (N.D. 2018). See also N.D. Const. art. XI, § 26 (“The legislative, executive, and judicial branches are coequal branches of government.”).

<sup>6</sup> *Burgum*, 916 N.W.2d at 100 (citing *Miller v. French*, 530 U.S. 327, 341 (2000)).

<sup>7</sup> *Burgum*, 916 N.W.2d at 103.

<sup>8</sup> *Id.* at 101.

<sup>9</sup> *Id.* (citing *Cnty. of Stutsman v. State Historical Soc’y of N.D.*, 371 N.W.2d 321, 329 (N.D. 1985)).

<sup>10</sup> *Burgum*, 916 N.W.2d at 101.

<sup>11</sup> *Id.* at 106.

In *Burgum*, the North Dakota Supreme Court analyzed the constitutionality of delegating legislative power to another body, including a subset of its own members, and concluded:

Unless expressly authorized by the State Constitution, the Legislature may not delegate its purely legislative powers to any other body. The Legislative Assembly may not delegate to another body the power to make law—to legislate—but it may bestow authority to execute the laws it enacts. . . . 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. However, the law must set forth reasonably clear guidelines to enable the appropriate body to ascertain the facts.<sup>12</sup>

At issue in *Burgum* was H.B. 1020, 2017 N.D. Leg., at § 5, which provided the Budget Section, a legislative committee of its own members, authority to approve or reject an agency’s request to transfer funding. The Court held this violated the improper legislative delegation doctrine because the Legislative Assembly provided “unfettered discretion” with “no safeguards against arbitrary action” to the Budget Section to approve or reject the transfer request and was therefore unconstitutional.<sup>13</sup>

In this case section 3 of S.B. 2004 grants LAFRC authority to approve or deny the State Auditor’s request to conduct certain audits without any delineated guidelines or standards by which to issue the approval or denial. Therefore, it is my opinion that if a court were to rule on this bill, it would likely determine it is a violation of the “improper legislative delegation” theory of the separation of powers doctrine for failure to iterate reasonably clear guidelines or a sufficiently objective standard.

Given, however, that the crux of section 3 of S.B. 2004 is the retention of control by the Legislative Assembly, through its agent, LAFRC, over an executive power and duty,<sup>14</sup> the violation of the legislative encroachment theory of the separation of powers doctrine is

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<sup>12</sup> *Burgum*, 916 N.W.2d at 102 (internal citations omitted).

<sup>13</sup> *Burgum*, 916 N.W.2d at 103.

<sup>14</sup> As opposed to the *Burgum* opinion which dealt with the delegation of the purely legislative power of appropriation. *Burgum*, 916 N.W.2d at 103. (“The power to appropriate money is purely a legislative power.”) (citing *Trinity Medical Center v. N.D. Bd. of Nursing*, 399 N.W. 2d 835, 841 (N.D. 1987)).

likely the greater flaw, which would lead to a court determining this amendment unconstitutional.<sup>15</sup>

“The power to make a law is legislative, but the power to administer or execute the law under the provisions of the law itself, as enacted by the legislature, is executive.”<sup>16</sup> “It is a fundamental rule that the legislature may not infringe upon the constitutional powers of the executive department by interference with the functions conferred on that department by the organic law.”<sup>17</sup> “Under our constitutional system, the Legislature may not delegate to itself or to a subset of its members, executive or judicial functions.”<sup>18</sup> Once a bill is enacted, the Legislative Assembly may control the bill’s administration only indirectly through passing amendatory or supplemental legislation.<sup>19</sup> After enactment, the bill’s administration belongs to the executive branch, not a subset of the legislative branch.<sup>20</sup> The Legislative Assembly violates the legislative encroachment theory of separation of powers when it retains discretion and control after enacting a law for itself or its agent.<sup>21</sup>

In analyzing the separation of powers doctrine, this office opined:

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>22</sup>

The State Auditor is a constitutionally designated, elected official within article V of the North Dakota Constitution entitled “Executive Branch,” designating the Office of the State

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<sup>15</sup> As such, even if the Legislative Assembly had put guidelines and parameters in place for LAFRC to approve the audits, the bill would still violate the encroachment theory of the separation of powers doctrine.

<sup>16</sup> *Burgum*, 916 N.W.2d at 103 (citing *Ralston Purina Co. v. Hagemeister*, 188 N.W.2d 405, 410-11 (N.D. 1971)).

<sup>17</sup> N.D.A.G. 2007-L-10 (quoting N.D.A.G. 2007-L-08).

<sup>18</sup> *Burgum*, 916 N.W.2d at 105.

<sup>19</sup> *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986).

<sup>20</sup> *Burgum*, 916 N.W.2d at 105.

<sup>21</sup> *Id.* at 106.

<sup>22</sup> N.D.A.G. 2007-L-10 (quoting 16 C.J.S. *Constitutional Law* § 250 (2005)).

Auditor an agency of the executive branch of the state government.<sup>23</sup> In addition to its longstanding vestment with the “duties, powers, and responsibilities involved in performing the postaudit of all financial transactions of the state government, detecting and reporting any defaults, and determining that expenditures have been made in accordance with law and appropriation acts,”<sup>24</sup> the State Auditor has the authority and discretion to conduct work required by the federal government<sup>25</sup> and to perform or provide for performance audits of state agencies.<sup>26</sup> In identifying which state agencies would be subject to a performance audit, the Legislative Assembly previously granted authority to both the LAFRC and the State Auditor, independent of each other.<sup>27</sup> The amendments within S.B. 2004 now require that the Office of the State Auditor obtain approval from LAFRC, an agent of the Legislative Assembly, in order to perform the duties granted to it by law.

The North Dakota Supreme Court in *Burgum* analyzed what it deemed the “legislative encroachment theory” of the separation of powers doctrine, regarding, in part, a bill which conditioned an appropriation to the water commission on the approval of the budget section of the Legislative Assembly:

The budget section provision of House Bill 1020, § 5, requires budget section approval before any proposed transfer of funds by the water commission. Thus, although the water commission has the power to propose a transfer from one designated category to another, the budget section has ultimate authority to accept or reject the transfer.<sup>28</sup>

In holding this provision unconstitutional, the Court analyzed the theories of the separation of powers doctrine under the North Dakota Constitution.<sup>29</sup> The Court held that a “proper

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<sup>23</sup> N.D. Const. art. V, § 2.

<sup>24</sup> N.D.C.C. § 54-10-01(1).

<sup>25</sup> N.D.C.C. § 54-10-01(2).

<sup>26</sup> N.D.C.C. § 54-10-01(4), which provides the State Auditor the authority to perform or provide for performance audits of “state agencies, or the agencies’ blended component units or discreetly presented component units.” See *also* 1991 Sess. Laws, ch. 575, § 1.

<sup>27</sup> 1991 Sess. Laws, ch. 575, § 1, subsection 3 providing: “Perform or provide for performance audits of state agencies as determined necessary by the state auditor *or* the [LAFRC].” (Emphasis added.)

<sup>28</sup> *Burgum*, 916 N.W.2d at 105.

<sup>29</sup> See *Burgum*, 916 N.W.2d at 101. (“The essential structural division of power into three branches created by our Constitution parallels that of our sister states and also that of the U.S. Constitution. Accordingly, we may find the decisions from the U.S. Supreme Court and the highest courts of our sister states persuasive, but ultimately we are charged with interpreting the North Dakota Constitution and its distinct provisions. We have sometimes navigated our own path in defining the contours of separation of powers . . . doctrine.”)

grant of power to the executive branch is the result of a legislative act that creates in the executive branch the power to execute the new law.”<sup>30</sup> The Court indicated that with this section of the bill, “[t]he Legislative Assembly was not attempting to delegate its core legislative power to the executive branch, but to retain control over executing a law after it is enacted by delegating a power to a committee of its own members.”<sup>31</sup>

Section 3 of S.B. 2004 suffers the same flaw as the bill struck down in *Burgum*. The Legislative Assembly granted the State Auditor both the power to contract for audits required by the federal government and the power to perform or provide for performance audits of state agencies.<sup>32</sup> Section 3 of S.B. 2004 retains control over these powers by inserting a discretionary, legislative approval power over the execution of the law. “The Legislative Assembly violates separation of powers when it retains discretion after enactment for itself or its agent. . . .”<sup>33</sup> “Once a bill is enacted, the Legislative Assembly may control the bill’s administration only through passing new legislation.”<sup>34</sup> Senate Bill 2004, § 3, runs afoul of this tenet when it attempts to retain control by the LAFRC over the administration of a bill after enactment. That duty belongs to the executive branch, not an agent of the legislative branch.<sup>35</sup> Therefore, it is my opinion that if a court were to rule on section 3 of S.B. 2004, it would likely determine it is a violation of the “legislative encroachment” theory of the separation of powers doctrine because the Legislative Assembly has impermissibly attempted to retain control over execution of the law after its enactment.

In addition to implicating the separation of powers doctrine under the legislative encroachment theory, of concern is the bill inserting legislative oversight into core and

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<sup>30</sup> *Id.* at 101.

<sup>31</sup> *Id.* at 104.

<sup>32</sup> N.D.C.C. §§ 54-10-01(2) and (4), respectively. While N.D.C.C. § 54-10-01(4) also grants the power to determine which state agencies are subjected to a performance audit to the Legislative Assembly and the LAFRC, the State Auditor also had the independent authority to determine which state agency necessitated a performance audit. The problematic portion of the amendment only fetters the independent authority of the State Auditor to call for a performance audit.

<sup>33</sup> *Burgum*, 916 N.W.2d at 106.

<sup>34</sup> *Id.* at 105 (emphasis added).

<sup>35</sup> *Burgum*, 916 N.W.2d at 105. It does not matter if the legislative justification for the bill is efficiency or enhanced functionality because “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . .” *Burgum*, 916 N.W.2d at 106, quoting *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983).

inherent functions of a constitutional executive office, specifically, the ability of the Office of the State Auditor to conduct independent audits.<sup>36</sup>

Several executive branch offices are provided for in article V, section 2 of the North Dakota Constitution as elected offices with powers and duties which “must be prescribed by law.”<sup>37</sup> Although our Constitution does not specifically establish all of the duties of constitutional executive offices, the absence of specifically enumerated duties in the Constitution does not mean that any present statutory duty of an executive constitutional office may be modified legislatively. Some of the core, inalienable duties of constitutional offices are evident from the title of the offices themselves. The North Dakota Supreme Court has held that the “prescribed by law” provision in article V of our Constitution does not allow a state legislature to transfer inherent or core functions of executive offices from the elected officer.<sup>38</sup>

A fundamental core function of all offices of the executive branch is the duty to operate independently, providing for the democratic system of checks and balances of one branch over the other.<sup>39</sup> The North Dakota Supreme Court has long recognized that the creation of the three branches of government by our Constitution operates as an apportionment of the different classes of power whereby there is an implied exclusion of each branch from the exercise of the functions of the others.<sup>40</sup>

Other jurisdictions have consistently held that core or inherent functions of constitutional officers whose duties are not listed within the constitution, but rather are “prescribed by law,” are not transferable by a state legislature to an appointed officer or body.<sup>41</sup> The Nebraska Attorney General addressed this issue in an opinion in which a law prohibiting the State Auditor from auditing the Legislature, which instead would be audited by an executive board of Legislative Council, was deemed unconstitutional.<sup>42</sup> In reaching this conclusion, the Nebraska Attorney General recognized that the State Auditor has an

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<sup>36</sup> This opinion does not address whether performance audits are a core and inherent function of the office of State Auditor; rather, it is clear that the ability to conduct *independent audits* is a core and inherent function of the Office of the State Auditor.

<sup>37</sup> N.D. Const. art. V, § 2.

<sup>38</sup> *Ex parte Corliss*, 114 N.W. 962, 964 (N.D. 1907).

<sup>39</sup> *Med. Arts Clinic, P.C. v. Franciscan Initiatives, Inc.*, 531 N.W.2d 289, 294 (N.D. 1995).

<sup>40</sup> *State ex rel. Spaeth v. Meiers*, 403 N.W.2d 392, 394 (N.D. 1987) (citing *Ranta v. McCarney*, 391 N.W.2d 161 (N.D. 1986); *City of Carrington v. Foster Cnty.*, 166 N.W.2d 377 (N.D. 1969); *Kermott v. Bagley*, 124 N.W. 397 (N.D. 1910)).

<sup>41</sup> See *Otto v. Wright Cnty.*, 899 N.W.2d 186, 191-92 (Minn. Ct. App. 2017, *aff'd* 910 N.W.2d 446 (Minn. 2018)).

<sup>42</sup> Neb. Op. Atty. Gen. No. 93012.



inherent, constitutional right and authority to audit all claims payable out of state funds and such “core functions” cannot “be removed by legislative enactment.” Although the Nebraska Constitution did not specifically establish the duties of the auditor’s office, this did not allow legislative modification of certain unassailable duties of the auditor inherent in the title of the office. Included in these recognized, inherent duties was an independent auditor scheme in which the executive action of a governmental audit was not subject to the review and approval of the officers and agencies to be audited. The Legislature could not “transfer duties vested under the Constitution in one officer or entity to another officer, body, or jurisdiction”; specifically, the Legislature could not transfer the executive duties of auditing to a legislative appointee. The law was ultimately deemed unconstitutional under the separation of powers doctrine holding that the Legislature could not encroach upon the function and powers properly belonging to a constitutionally created executive office.

This principle of certain inherent powers and authority in a constitutional executive office that are not subject to legislative modification was recognized by the North Dakota Supreme Court, which analyzed the powers and duties of the Office of Attorney General:

By providing in the North Dakota Constitution for the election of certain officers, “the framers of the Constitution . . . reserved unto themselves the right to have the inherent functions theretofore pertaining to said offices discharged only by persons elected as therein provided. . . . The clear implication of this language is that the legislature has no constitutional power to abridge the inherent powers of the attorney general despite the fact that the constitution provides that the ‘duties of the . . . attorney general . . . shall be as prescribed by law.’” The Legislature may not strip officers “imbedded in the Constitution . . . of a portion of their inherent functions.”<sup>43</sup>

The ability of the executive branch to function, independent of the Legislative Assembly, is a core tenet of the three-branch system of government. “[T]he exercise of the executive, legislative, and judicial powers are to be vested in separate and independent organs of government.”<sup>44</sup> Because this bill diminishes the independence of the State Auditor’s office and instead entrusts an inherent executive power in the legislative branch, in my opinion, it violates the separation of powers doctrine.

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<sup>43</sup> *State v. Hagerty*, 580 N.W.2d 139, 146-47 (N.D. 1998).

<sup>44</sup> *State v. Kromarek*, 52 N.W.2d 713, 715 (N.D. 1952).

LETTER OPINION 2019-L-05  
June 28, 2019  
Page 10

It is my opinion that, for the reasons set forth herein, if a court were to rule on the constitutionality of section 3 of S.B. 2004, it would determine it is a violation of the separation of powers doctrine to condition the exercise of the State Auditor's powers on the approval of the LAFRC, and, therefore, is unconstitutional.

Sincerely,

Wayne Stenehjem  
Attorney General

amh/sld

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>45</sup>

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<sup>45</sup> See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).