

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 91-15

Date issued: October 14, 1991

Requested by: Senator Jim Yockim

- QUESTION PRESENTED -

Whether the legislative redistricting plan may be referred.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the legislative redistricting plan may be referred.

- ANALYSIS -

Section 2 of article IV of the North Dakota Constitution states that "[t]he legislative assembly shall fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators. The districts thus ascertained and determined after the 1990 federal decennial census shall continue until the adjournment of the first regular session after each federal decennial census, or until changed by law." N.D. Const. art. IV, ' 2. This section requires the Legislative Assembly to determine the number, shape, and contents of the state's legislative districts. The Legislative Assembly may fulfill its duty to establish the number of legislative districts by enacting appropriate legislation. "The legislative assembly shall enact all laws necessary to carry into effect the provisions of this constitution." N.D. Const. art. IV, ' 13. Therefore, the constitution of the state of North Dakota requires that the Legislative Assembly adopt legislation establishing appropriate state legislative districts.

The North Dakota Constitution also provides:

"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; to propose and adopt constitutional amendments by the initiative; and to recall certain elected officials. This article is self-executing and all of its provisions are mandatory. Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers."

N. D. Const. art. III, ' 1. This section of the North Dakota constitution reserves to the people the power to "approve or reject legislative acts." The language of art. IV, ' 2 of the North Dakota constitution raises a question of

whether the constitutional mandate requiring the Legislature to adopt a legislative redistricting plan precludes any plan from being referred by the people under N. D. Const. art. III, ' 1.

Construing earlier versions of N. D. Const. art. III, ' 1, reserving the right of referendum to the people, the North Dakota Supreme Court stated:

"This language is clear and specific. The scope of the power of the referendum as here stated is as broad as the power of the legislature to enact laws. It is stated specifically and emphatically that the people 'reserve the power . . . to approve or reject at the polls any measure or any item, section, part or parts of any measure enacted by the legislature.' The language used clearly evidences an intention and purpose that no enactment by the legislature and no part of any enactment by the legislature is excepted or withdrawn from the operation of the power of the referendum."

Dawson v. Tobin, 24 N. W. 2d 737, 745 (N. D. 1946) (emphasis in original). The legislative history of the current version of N. D. Const. art. III, ' 1 does not reveal any intent on the part of the drafters to impose any limits or impairments on the referendum power reserved to the people. The court in Dawson further stated that "[a] legislative enactment becomes final only in the sense that the legislative processes are completed, and that it is no longer subject to rejection (through the legislative power reserved by the people) - either when the time for invoking the power of the referendum has passed without such power being invoked, or when the measure has been approved at the referendum election." Dawson, 24 N. W. 2d at 748. Thus, the people have the final say on legislative enactments in North Dakota.

Although the current language of the constitution is slightly different than the language construed by the court in Dawson, the construction is the same. "It is clear from our review of the constitutional provisions and our prior cases [including Dawson] that the referendum is the means by which the legislative power is reserved to the people. It is a part of the legislative process which is not complete until the time for filing referral petitions has passed, or the measure has been either rejected or approved by the voters at an election having the referred measure on the ballot." State ex. rel. Wefald v. Meier, 347 N. W. 2d 562, 566 (N. D. 1984). Further, if there is any doubt regarding the power of referendum, "[a]ll doubt as to the construction of applicable provisions pertaining to the rights so reserved to the people must be resolved in favor of upholding those rights." Hernett v. Meier, 173 N. W. 2d 907, 911 (N. D. 1970).

In the present case, there are two seemingly conflicting constitutional provisions, the people's referral power and the Legislature's duty to adopt a redistricting plan. Although it has not addressed this precise issue, the North Dakota Supreme Court addressed a similar situation in State ex. rel. Walker v. Link. In Walker the Emergency Commission had transferred funds to

the University of North Dakota pursuant to a constitutional provision which mandated that the Legislature provide adequate funds for the maintenance of institutions of higher education. The Court held that the provision requiring the Legislature to adequately fund the higher education system and the provision allowing non-emergency legislative acts to be suspended upon referral to be in conflict. State ex. rel. Walker v. Link, 232 N. W. 2d 823, 826 (N. D. 1975). The Court determined that "[n]either the Legislature nor the people can, without a constitutional amendment, refuse to fund a constitutionally mandated function." 232 N. W. 2d at 826 (N. D. 1975).

Providing funding for the University of North Dakota was the constitutionally mandated function. Because the referral immediately suspended all funding, UND would be effectively eliminated, thus amending the constitution. Because the constitution may only be amended through the formal procedure established for amending the constitution, the Court held a referral of UND's appropriation invalid.

Although in Walker the court determined neither the Legislature nor the people could refuse to follow a constitutional mandate, the case is distinguishable from the present situation.

The present situation does not present a factual basis for finding a conflict between the applicable constitutional provisions. A successful referral of a redistricting plan would not suspend or eliminate current legislative districts. See, Dawson v. Tobin, 24 N. W. 2d 737 (N. D. 1946). (When a referral successfully rejects an enactment, "the law that [was replaced is] revived." Id. at 738.) Unlike the fate in store for UND in Walker, current legislative districts would remain in effect until legislation creating new districts takes effect. Because referral of a redistricting plan would not result in elimination of the existing plan, the two constitutional provisions do not conflict with each other. Thus, referral of the redistricting plan would not amend the constitution. It is therefore my opinion that the legislative redistricting plan required by N. D. Const. art. IV, ' 2 may be referred by the people.

Other courts have reached a similar result when addressing the referendum power as it applies to redistricting. Article 21 of the California constitution provides that "the Legislature shall adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts . . ." Cal. Const. art. XXI, ' 1. This provision, while limiting the redistricting power to the Legislature, does not preclude the referendum. Assembly of State of California v. Deukmejian, 639 P. 2d 939, 949 (Cal. 1982).

Nevada has recognized the availability of the referendum to submit legislative redistricting plans to the people for approval. See Dungan v. Sawyer, 250 F. Supp. 480 (D. Nev. 1965) (recognizing that while the legislature has a duty to redistrict pursuant to the Nevada Constitution, the plan is still subject to the political remedy of referendum). The United States Supreme Court considered a Colorado redistricting plan mandated by "[a]rticle V, ' 45, of the Colorado constitution [which] provided that the legislature

'shall revise and adjust the apportionment for senators and representatives . . . according to ratios to be fixed by law.' " Lucas v. Forty-fourth General Assembly of Colorado, 377 U.S. 713, 722-3 (1964). The Court presumed the availability of referendum when stating that "the fact that a practicably available political remedy, such as initiative and referendum, exists under state law provides justification only for a court of equity to stay its hand temporarily while recourse to such a remedial device is attempted or while proposed initiated measures relating to legislative apportionment are pending and will be submitted to the State's voters at the next election." Lucas, 377 U.S. at 737.

The establishment of legislative districts for the state of North Dakota must be accomplished pursuant to appropriate legislation. North Dakota's legislative process is not complete until the people have either exercised their power to refer legislation, or have chosen to tacitly approve legislation by not exercising that power. Further, the constitutional provision conferring upon the Legislature the duty to establish legislative districts does not confer that duty to the exclusion of the power of the people to approve or disapprove of that legislation pursuant to a referendum. It is therefore my opinion that a redistricting plan approved by the Legislature may be referred by the people.

- EFFECT -

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.

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Attorney General

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Assistant Attorney General

krb

October 14, 1991

Senator Jim Yockim  
1123 Second Avenue East  
Williston, ND 58801-0234

Dear Senator Yockim:

Enclosed please find the Attorney General's Opinion you requested.

Sincerely,

Nicholas J. Spaeth

krb  
Enclosure

**Senator Jim Yockim  
1123 Second Avenue East  
Williston, ND 58801-0234**