

N.D.A.G. Letter to Goetz (Nov. 7, 1991)

November 7, 1991

Honorable William G. Goetz
State Senator
251 Allen Street
Dickinson, ND 58601

RE: House Bill No. 1517

Dear Senator Goetz:

Thank you for your September 4, 1991, letter requesting my opinion on the constitutionality of section 1, subsection 3 of House Bill No. 1517 passed by the 1991 Legislative Assembly.

Section 1 of House Bill No. 1517 was codified as N.D.C.C. § 27-05-00.1. The pertinent portions provide:

2. District court judgeships are established on January 2, 1995, in number equal to the number of county judges serving the county courts on January 1, 1991, or the number of county judges serving the county courts on January 1, 1994, whichever is the lesser number. The district court judgeships established pursuant to this subsection must be filled by election at the general election in 1994. All statutes relating to the district court apply to the district court judgeships established pursuant to this subsection, except as otherwise provided by this section.
3. The supreme court shall designate by rule, prior to January 1, 1994, the judicial district for each additional district court judgeship established pursuant to subsection 2. The judicial district designated by the supreme court for each district court judgeship established pursuant to subsection 2 is the area of election for that office at the general election in 1994. The supreme court shall designate, prior to January 1, 1994, staggered terms for each district court judgeship established pursuant to subsection 2 in a manner that results in approximately one-third of those offices with initial terms of two years, one-third with initial terms of four years, and one-third with initial terms of six years. Any judge elected pursuant to subsection 2 shall take office on January 2, 1995, and shall hold office until completion of the designated initial term or until a successor is elected and has qualified. Subsequent to these initial terms, a judge

elected to a judgeship established by subsection 2 shall hold office for the term provided in section 27-05-02.

A written report of North Dakota Consensus Council, Inc., filed at hearings before the House Judiciary Committee on February 5, 1991, and before the Senate Judiciary Committee on March 5, 1991, included a document entitled "A Section by Section Analysis of House Bill No. 1516 and Summary of House Bill No. 1517." This document analyzed section 1, subsection 3 of House Bill No. 1516, now N.D.C.C. § 27-05-00.1(3), in part, as follows:

The term of office for a district judge pursuant to section 27-05-02 is six years or until the judge's successor is qualified. Subsection 3 would provide for departure from this general provision with respect to the initial terms of additional district court judgeships. This subsection would require that the Supreme Court designate, prior to January 1, 1994, staggered terms for the additional district court judgeships with initial terms of two, four, or six years. The additional district judges . . . would hold office until completion of the designated initial term or until a successor is elected and qualified. Subsequent to these initial terms, the term of office would be the same as provided other district judges.

Hearing on H. 1516 and 1517 Before the Senate Comm. on the Judiciary, 52nd ND Leg. (March 5, 1991) (Statement of Bruce Levi, counsel for North Dakota Consensus Council, Inc.).

N.D.C.C. § 27-05-02 provides that a district judge "shall hold office for six years or until his successor is elected and has qualified." This tracks N.D. Const. art. VI § 9 which provides in pertinent part:

The state shall be divided into judicial districts by order of the supreme court. In each district, one or more judges, as provided by law, shall be chosen by the electors of the district. The term of office shall be six years, and a district judge shall hold office until his successor is duly qualified.

N.D.C.C. § 27-05-00.1(3) contravenes the plain mandate of the state constitution that the "term of office [of a district judge] shall be six years." N.D. Const. art. VI § 9

The authority of the Legislature to amend existing laws is subject to constitutional restrictions. State ex rel. Linde v. Taylor, 156 N.W. 561 (N.D. 1916), appeal dismissed sub nom. Moore v. Olsness, 245 U.S. 627 (1917). The only test of the constitutional validity of an act is whether it directly violates any of the express or implied restrictions of the state or federal constitutions. Asbury Hospital v. Cass County, 7 N.W.2d 438, 454 (N.D. 1943). A statute can be declared unconstitutional where the constitutional infirmity is beyond reasonable doubt. State ex rel. Sathre v. Board of University School Lands, 262 N.W. 60 (N.D. 1935).

In my opinion, section 1, subsection 3 of House Bill No. 15-7, now codified as N.D.C.C. § 25-05-00.1(3), is unconstitutional because it directly contravenes N.D. Const. art. VI, § 9. In North Dakota, however, a legislative enactment may not ultimately be determined to be unconstitutional "unless at least four of the [five] members of the [supreme] court so decide." N.D. Const. art.: VI, § 4; Wilson v. Fargo, 186 N.W. 263 (N.D. 1921); Daly v. Beery, 178 N.W. 104, 110 (N.D. 1920).

The supreme court is required to designate prior to January 1, 1994, staggered terms for each additional district court judgeship. N.D.C.C. § 27-05-00.1(3). There is time for the Legislature to remedy this constitutional glitch during the 1993 legislative session, prior to the election scheduled in 1994.

Addressing unforeseen problems during the 1993 legislative session was contemplated. Included in the report of the North Dakota Consensus Council, Inc., submitted in connection with the hearings in both houses of the 1991 Legislature on House Bill Nos. 1516 and 1517 was a document entitled "Schedule for Implementation of a Single Trial Court of General Jurisdiction North Dakota: House Bill Nos. 1516 and 1517" which allowed for "[r]eview and refinement, if any, of 1991 enabling legislation" during the 1993 legislative session.

I trust this matter will be rectified by the Legislature.

Sincerely,

Nicholas J. Spaeth

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