N.D.A.G. Letter to Kretschmar (March 4, 1992)

Overruled in part by N.D.A.G. 2001-L-25

March 4, 1992

Honorable William E. Kretschmar
State Representative
PO Box A
Venturia, ND 58489-0114

Dear Representative Kretschmar:

Thank you for your January 30, 1992, letter in which you inquire as to the constitutionality of a statute which in effect limits the terms of state senators to two years.

You inquire whether the Legislative Assembly may constitutionally limit the term of a senator elected in the general election in 1990 to a term of two years by requiring those senators to run again in 1992. You also inquire whether the Legislative Assembly may limit the term of a state senator who will be elected in the general election in 1992 to a term of two years.

North Dakota Century Code (N.D.C.C.) § 54-03-01.8 was amended during a special session of the 1991 Legislative Assembly to provide as follows:

> **Staggering of the terms of senators.** A senator from an even-numbered district must be elected in 1992 for a term of four years and a senator from an odd-numbered district must be elected in 1994 for a term of four years. The senator from district forty-one must be elected in 1992 for a term of two years. A senator from a district in which there is another incumbent senator as a result of legislative redistricting must be elected in 1992 for a term of four years. Based on that requirement, districts six, ten, fourteen, twenty-eight, and thirty-six must elect senators in 1992.

N.D.C.C. § 54-03-01.8 (1992 Special Supp.).

N.D. Const. art. IV, § 4, provides "[s]enators must be elected for terms of four years and representatives for terms of two years." N.D.C.C. § 54-03-08.1, as amended by the Legislative Assembly during its special session of November 1991, limits the terms of some senators elected in 1990 to two years and provides that one senator will run for a two-year term in 1992. These provisions contravene the plain mandate of the state constitution that the term of office of a senator must be four years.

The authority of the Legislature to amend existing state 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. Bd. of Univ. School Lands, 262 N.W. 60 (N.D. 1935).

It is my opinion that N.D.C.C. 54-03-08.1 is unconstitutional as it is in direct conflict with N.D. Const. art. IV, § 4. In North Dakota, however, a legislative act 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); Daily v. Beery, 178 N.W. 104, 110 (N.D. 1920).

In order to challenge this statute expeditiously, a senator adversely affected by this statute may want to assert the original jurisdiction of the North Dakota Supreme Court found in art. VI, § 2, of the North Dakota Constitution. In doing so, you could seek either a declaratory judgment seeking to have the statute declared unconstitutional or an injunction seeking to enjoin enforcement of the statute.

I trust this responds to your inquiry.

Sincerely,

Nicholas J. Spaeth

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