1999 SENATE GOVERNMENT AND VETERANS AFFAIRS

SB 2248

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2248

Senate Government and Veterans Affairs Committee

❑ Conference Committee

Hearing Date January 28, 1999

| Tape Number | Side A | Side B | Meter # |
|---|---|---|---|
| 2 | X | | 1760-2915 |
| 2/05/99 1 | X | | 3245-3605 |
| | | | |
| Committee Clerk Signature | | | |

Minutes: CHAIRMAN KREBSBACH called the committee to order and opened the hearing on SB 2248. Appearing before the committee was SENATOR CARL KINNOIN, District 4, presented his testimony as primary sponsor of the bill. He indicated that this proposed legislation would repeal section 11-10-05.1 of the 1997 supplement to the North Dakota Century Code. The reason he appeared in favor of repeal was that the bill which was passed in the previous session to change the date that the county commissioners would take office from the first Monday in January to the first Monday in December has caused some problems. He indicated that there was a possibility that this legislation was unconstitutional. I would hope that the committee would see fit to repeal that section. SENATOR STENEHJEM-Why is it unconstitutional? SENATOR KINNOIN-Personally I don't have a real problem with it and I don't think it would create much of a problem. The Ward county states attorney asked for an opinion from the Attorney General and she said there was a possibility that it fringes on being

unconstitutional. Because if they do not get to fulfill their full four year term. SENATOR KREBSBACH-Run through again what we did last session. SENATOR KINNOIN-Last session we changed the dates that the commissioner would take office from the first Monday in January to the first Monday in December. SENATOR DEMERS-Why are you looking to repeal rather than changing it back to the first Monday in January. If we repeal this won't we have no law saying when these terms would commence? SENATOR KINNOIN-My understanding is that it would revert back to the way it was. CHAIRMAN KREBSBACH-Senator this was a new section created in the last session. According to the repeal, if you look at the repeal. So someplace else in code it must be that they start the first Monday in January. SENATOR DEMERS-Except this would have changed that. CHAIRMAN KREBSBACH-Yes this would have changed that. SENATOR DEMERS-And now if we get rid of this altogether will we have none. CHAIRMAN KREBSBACH-I suppose we'll have to do some investigating to see where else it would be included. MARK JOHNSON, NDACo Executive Director appeared before the committee and offered testimony in support of SB 2248. A copy of his written testimony is attached. There were no further questions offered from the committee. The hearing was closed on SB 2243.

**COMMITTEE ACTION-February 5, 1999-Tape 1, Meter# 3245-3605**

SENATOR KREBSBACH opened the hearing on SB2248 and explained that the proposed amendment will not be attached to this bill, but rather it will be attached to a more appropriate place in political subdivisions.

SENATOR DEMERS moved for a DO PASS, seconded by SENATOR MUTZENBERGER.

Roll call vote indicated 6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING. SENATOR

DEMERS volunteered to carry the bill.

Date: 2/05/99
Roll Call Vote #:

**1999 SENATE STANDING COMMITTEE ROLL CALL VOTES**
**BILL/RESOLUTION NO.** 2248

Senate **GOVERNMENT AND VETERAN'S AFFAIRS** Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Sen. DeMers Seconded By Sen. Mutzenberger

| Senators | Yes | No | Senators | Yes | No |
|---|---|---|---|---|---|
| SENATOR KREBSBACH | ✓ | | | | |
| SENATOR WARDNER | ✓ | | | | |
| SENATOR KILZER | ✓ | | | | |
| SENATOR STENEHJEM | | | | | |
| SENATOR THANE | ✓ | | | | |
| SENATOR DEMERS | ✓ | | | | |
| SENATOR MUTZENBERGER | ✓ | | | | |
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Total (Yes) 6 No 0

Absent 1

Floor Assignment Sen. DeMers

If the vote is on an amendment, briefly indicate intent:

## REPORT OF STANDING COMMITTEE

**SB 2248: Government and Veterans Affairs Committee (Sen. Krebsbach, Chairman)** recommends **DO PASS** (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2248 was placed on the Eleventh order on the calendar.

# 1999 HOUSE POLITICAL SUBDIVISIONS

SB 2248

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2248

House Political Subdivisions Committee

❑ Conference Committee

Hearing Date 3-4-99

| Tape Number | Side A | Side B | Meter # |
|---|---|---|---|
| 1 | | x | 18.8--39.0 |
| | | | |
| | | | |
| Committee Clerk Signature | Pam Dever | | |

Minutes: BILL SUMMARY: Relating to commencement of terms of county commissioners.

Chairman Froseth opened the hearing with all committee members present except Rep. Gunter.

Terry Traynor, N.D. Assoc. of Counties, Assist. Director : 18.8 testified in opposition to the bill. First we thought the bill was necessary, but now we ask a DO NOT PASS (See attached testimony).

Rep. Koppelman : 21.9 This issue came up in a different bill, with regards to terms of office. Are you saying that the legal authorities are telling us that it isn't such a concern, being the beginning and the ending of a term in office need adjusting?

Terry : The legal authorities differ on their interpretation. This seems to create an overlap and isn't a constitutional problem but a conflict with state law. The new people came on and the old people stopped coming to work, is what happens, in a couple of cases.

Rep. Wikenheiser : We had a situation that both people came to work for a month. Do you pay the one finishing the term or the new one coming in, or both?

Terry : 24.3 The law would shorten the term. We created a problem last session, when we passed the bill. Repealing would cause a new problem. We feel to suffer through this one and make the adjustments would be the best solution.

Beth Baumstark, Attorney General's Office : 25.6 testified in support of the bill. I have handed out lots of opinions. The Attorney General's opinion relating to the shortening of the term of office. There was a case in which Gov. Olson chose to take office Jan. 6 instead of Jan. 1. He thought his term would be up Jan. 5 of the following year. Gov. Sinner wanted to take office Jan. 1. This went to the Supreme Court. You can't have two people in the office of governor. Only one person can hold that office. Under the constitution, the term is four year. The term can't be shortened. What is did was shorten Mr. Olson's tenure in office. There is a difference. Same thing if some one needs to leave office early. Some one can fill the term, but the term length is not changed. All county officials are elected to a four year term of office, which is stated in the constitution.

Chairman Froseth : How, then, can ever a change be made?

Beth : Through a constitutional amendment.

Rep. Delmore : 32.3 Are the exact dates in the constitution?

Beth : No, the dates are not in the constitution. It states "are elected for a four year term". If you move back, then we have a problem. Less than a year, is not a year. We looked hard to find a way to get around this, but we couldn't.

Rep. Severson : If the law is repealed, what will be the AG's role as prosecutor or taking care of the problem?

Beth : Don't think there will be any prosecution that would take place. The repeal of the bill will have an effective date of August 1, 1999. Won't be retroactive. Leaving this law in the books kind of prolongs the problem that someone may challenge it.

Chairman Froseth : Any more testimony in favor of the bill? Any more testimony against? Hearing none, the hearing is closed.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2248-a

House Political Subdivisions Committee

❑ Conference Committee

Hearing Date 3-11-99

| Tape Number | Side A | Side B | Meter # |
|---|---|---|---|
| 1 | x | | 10.2--15.1 |
| | | | |
| | | | |
| Committee Clerk Signature | Pam Dever | | |

Minutes: Chairman Froseth : Let's take up SB 2248. What are the committee wishes?

ACTION: Rep. Koppelman made a motion of DO PASS NOT PASS and Rep. Severson seconded the motion.

Chairman Froseth : I spoke with LC on this and they said it might be unconstitutional. They said it would not effect the commissioners in their four year terms that were elected before 1997. If they were elected after 1997, the people taking office knew their terms were 3 years and 11 months.

Rep. Disrud : The people who presented the bill changed their minds and didn't support the bill anymore.

ROLL CALL VOTE: 15 YES and 0 NO with 0 ABSENT. PASSED.

Rep. Severson will carry the bill.

Please type or use black pen to complete

Date 3-11-99

Roll call vote # 1

# 1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES

## BILL/RESOLUTION NO. SB 2248

House POLITICAL SUBDIVISIONS Committee

☐ Subcommittee on _____

☐ Conference Committee

} Identify or check where appropriate

Legislative Council Amendment Number _____

Action Taken DO NOT PASS

Motion Made By Rep. Koppelman Seconded By Rep. Severson

| Representatives | Yes | No | Representatives | Yes | No |
|---|---|---|---|---|---|
| Chairman Froseth | ✓ | | Rep. Wikenheiser | ✓ | |
| Vice Chair Maragos | ✓ | | | | |
| Rep. Delmore | ✓ | | | | |
| Rep. Disrud | ✓ | | | | |
| Rep. Eckre | ✓ | | | | |
| Rep. Ekstrom | ✓ | | | | |
| Rep. Glassheim | ✓ | | | | |
| Rep. Gunter | ✓ | | | | |
| Rep. Johnson, N. | ✓ | | | | |
| Rep. Koppelman | ✓ | | | | |
| Rep. Niemeier | ✓ | | | | |
| Rep. Rose | ✓ | | | | |
| Rep. Severson | ✓ | | | | |
| Rep. Thoreson, B. | ✓ | | | | |

Total 15 (Yes) 0 (No)

Absent -0-

Floor Assignment Rep. Severson

If the vote is on an amendment, briefly indicate intent:

DO NOT USE HIGHLIGHTER ON ANY FORMS

## REPORT OF STANDING COMMITTEE

**SB 2248: Political Subdivisions Committee (Rep. Froseth, Chairman)** recommends **DO NOT PASS** (15 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2248 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY

SB 2248

# CHAPTER 110

## SENATE BILL NO. 2370

(Senators Kinnoin, Lee)
(Representatives Delmore, Devlin, Huether)

## COMMENCEMENT OF COUNTY COMMISSIONER TERMS

AN ACT to create and enact a new section to chapter 11-10 of the North Dakota Century Code, relating to terms of office for county commissioners; and to provide an effective date.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1.** A new section to chapter 11-10 of the North Dakota Century Code is created and enacted as follows:

**When terms of county commissioners commence.** The regular term of office of each county commissioner, when the commissioner is elected for a full term, commences on the first Monday in December next succeeding the officer's election and each such commissioner shall qualify and enter upon the discharge of the commissioner's duties on or before the first Monday in December next succeeding the date of the commissioner's election or within ten days thereafter. If a commissioner is elected to fill an unexpired commission term held by an appointee, such officer may qualify and enter upon the discharge of the duties of such office at any time after receiving a certificate of election to that office but not later than the first Monday in December next succeeding the date of the commissioner's election to the unexpired term of office.

**SECTION 2. EFFECTIVE DATE.** This Act is effective for any full term of office of a county commissioner beginning after July 31, 1997.

Approved March 19, 1997
Filed March 19, 1997

**TESTIMONY TO THE**
**SENATE GOVERNMENT & VETERANS AFFAIRS COMMITTEE**
**Prepared January 28, 1999 by the**
**North Dakota Association of Counties**
**Mark Johnson, NDACo Executive Director**

**Concerning Senate Bill No. 2248**

Thank you Madam Chair and members of the Committee for the opportunity to explain why we believe it is necessary for the Legislature to pass Senate Bill 2248. To begin however, I must explain why we asked for the introduction and passage of the section of law that we are now asking to have repealed.

Last session the county commissioners of this state urged us to support a proposal to move the date on which future commission terms would start, from the first Tuesday of January after an election, to the first Tuesday of December. The intentions were two-fold; first to avoid the longer "lame-duck" period when it is more difficult to conduct county business, and second, to provide an opportunity for training before the rather intensive first meeting in January when the new budget must be implemented and all appointments must be made.

As the attached Attorney General's Opinion reflects, there is no possible way to implement this law, without either shortening someone's term on the front end or on the back end. And as the Opinion goes on to state, either way, we have created a conflict with the provision of the Constitution guaranteeing four-year terms.

While we still believe the original idea has merit, we recognize that it has created confusion and concern among officials and we respectfully request that you support Senate Bill 2248 to repeal the statute.

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL
STATE CAPITOL
600 E BOULEVARD AVE
BISMARCK ND 58505-0040
(701) 328-2210 FAX (701) 328-2226

Heidi Heitkamp
ATTORNEY GENERAL

November 24, 1998

COPY

Mr. Doug Mattson
Ward County State's Attorney
PO Box 5005
Minot, ND 58702-5005

Dear Mr. Mattson:

Thank you for your letter raising several questions about N.D.C.C. § 11-10-05.1 which changes the commencement of the term of office for county commissioners. Until the enactment of this statute, the terms of county commissioners would normally have commenced on the first Monday in January next succeeding the officer's election. See N.D.C.C. § 11-10-05. N.D.C.C. § 11-10-05.1 was enacted to change that date and provides, in part:

> The regular term of office of each county commissioner, when the commissioner is elected for a full term, commences on the first Monday in December next succeeding the officer's election and each such commissioner shall qualify and enter upon the discharge of the commissioner's duties on or before the first Monday in December next succeeding the date of the commissioner's election or within ten days thereafter.

Your first question concerns the effective date of the statute. Because the statute moves the commencement date of a county commissioner's term back about a month, the net effect will be to shorten the term of either the current officeholders or the newly elected ones by that period of time. 1997 N.D. Sess. Laws ch. 110, § 2 sets out the effective date for the change in commencement of the term of office, providing:

> This Act is effective for any full term of office of a county commissioner beginning after July 31, 1997.

As your letter points out, this provision has caused some confusion among county officials about when the law is effective and which officeholders' terms will be shortened.

In your letter you note that the North Dakota Constitution provides that elective county offices have four year terms. N.D. Const. art. VII, § 8. Thus, the full term of a county commissioner elected in 1994 and taking office in January of 1995 would run until the first Monday in

January of 1999. Similarly, the full term of a county commissioner elected in 1996 and taking office in January of 1997 would run until the first Monday in January of 2001.

Based on a plain reading of 1997 N.D. Sess. Laws ch. 110, § 2, it is my opinion that N.D.C.C. § 11-10-05.1 would not become effective for county commission positions until after the expiration of the full four-year terms for county commission positions which began in January of 1995 and 1997. This is the case because the new terms referred to in the effective date provision cannot commence until the full constitutionally required four-year terms have expired. In other words, the full terms of office beginning after the effective date of July 31, 1997, cannot begin until the existing terms have expired.

This interpretation is supported by the legislative history to Senate Bill 2370, which was enacted as 1997 N.D. Sess. Laws ch. 110. In written testimony presented to the House Political Subdivisions Committee by Mark Johnson, executive director of the North Dakota Association of Counties, he indicated that the bill was not intended to reduce any current terms of office and that the effective date provision was offered as an amendment "to clearly state that this change will not affect current terms." Id. Thus, it was intended that county commissioners elected to full terms prior to July 31, 1997, would serve their full four-year terms, while those persons elected to the position of county commissioner in 1998 and 2000 would have their terms shortened by approximately one month.

You then asked whether the shortening of a county commissioner's term would violate the mandate in Article VII, Section 8 of the North Dakota Constitution, which provides, in part:

> Any elective county office shall be for a term of four years.

(Emphasis supplied.)

In State v. Hagerty, ____ N.W.2d ____, 1998 W.L. 293750 (N.D. 1998), the North Dakota Supreme Court noted:

> "When interpreting constitutional sections, we apply general principles of statutory construction." *Comm'n on Med. Competency v. Racek*, 527 N.W.2d 262, 266 (N.D. 1995). "Our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement." *Id.* "The intent and purpose of a constitutional provision is to be determined, if possible, from the language itself." *Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632, 636 (N.D. 1994).

The use of the word "shall" (as in the constitutional provision) is generally mandatory. E.g., State v. McMorrow, 332 N.W.2d 232 (N.D. 1983). Thus, a plain reading of the pertinent provision in Article VII, Section 8 of the North Dakota Constitution is that the term of a county commissioner must be four years. The question then arises whether the Legislature may shorten a constitutionally mandated term of office.

"It is a well-established principle that 'the legislative power of a State except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service.'" Goldsmith v. Mayor & City Council of Baltimore, 845 F.2d 61, 64 (4th Cir. 1988) (quoting Higginbotham v. Baton Rouge, 306 U.S. 535, 538, rehearing denied, 307 U.S. 649 (1939)) (emphasis supplied).

In State ex rel. Stutsman v. Light, 281 N.W. 777, 778-79 (N.D. 1938), the North Dakota Supreme Court noted that "[i]f the [public] office is created by the legislature that body may, in the absence of any constitutional restriction, abolish the office entirely. The legislature may shorten the term of such an office after the election or appointment of the incumbent. However, the intention to so change the term of an office must be clearly expressed." (Citations omitted.)

In O'Laughlin v. Carlson, 152 N.W. 675 (N.D. 1915), the court noted: "[I]n the absence of a constitutional prohibition, the Legislature may change the term of an office even after the election or appointment of the incumbent thereof."

One well-known authority has written that "[a]ll changes in terms of office must be authorized and made in the manner provided to be valid. Terms of office may be changed by constitutional amendment, and unless restricted by the organic laws of the state, terms of office may be statutorily changed if the legislature has jurisdiction . . . . However, the legislature cannot change a term fixed by the constitution." 3 Eugene McQuillin, The Law of Municipal Corporations, § 12.114 (3d ed. 1990) (emphasis supplied). Similarly, in State ex rel. Wheeler et al. v. Stuht et al., 71 N.W. 941 (Neb. 1897), the court noted:

> [I]t is disclosed that police magistrates are constitutional officers, with a term of office prescribed by that instrument at two years. The term as fixed by the constitution cannot be extended by legislative act. Neither can the term of such an officer be shortened by legislative enactment.

See also New Castle County Council v. State, 688 A.2d 888 (Del. 1997) (office of county council member is statutory office and may be modified, abridged, or abolished as the legislature sees fit unless the legislation offends some constitutional limitation).

As is apparent from the foregoing discussion, the Legislature generally may not shorten the term of a constitutional office or one that is set in the Constitution. Thus, the constitutionality of N.D.C.C. § 11-10-05.1 is in doubt.

Traditionally, this office has been very reluctant to question the constitutionality of a statutory enactment. E.g., 1980 N.D. Op. Att'y Gen. 1. This is due, in part, to the fact that in North Dakota the usual role of the Attorney General is to defend statutory enactments from constitutional attack and because "[a] statute is presumptively correct and valid, enjoying a conclusive presumption of constitutionality unless clearly shown to contravene the state or federal constitution." Traynor v. Leclerc, 561 N.W.2d 644, 647 (N.D. 1997) (quoting State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996)). Further, Article VI, Section 4 of the North Dakota Constitution provides that "the supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide."

Nevertheless, in 1992 then Attorney General Nicholas Spaeth opined that a statutory provision limiting the terms of some senators elected in 1990 to two years was unconstitutional as it clearly contravened the constitutional requirement that senators be elected for terms of four years contained in Article IV, Section 4 of the North Dakota Constitution. Letter from Attorney General Nicholas J. Spaeth to Representative William E. Kretschmar (March 4, 1992).

Likewise, in the present case, the reduction of the term of office of a county commissioner by the operation of N.D.C.C. § 11-10-05.1 clearly contravenes the express mandate of Article VII, Section 8 of the North Dakota Constitution requiring county elective offices to be for a term of four years. While it is certainly arguable that a one-time transitional shortening of a four-year term by a mere month is an incidental and insubstantial legislative infringement on a constitutional term, I found no authority to support such an argument. Consequently, and reluctantly, it is my opinion that if a court were to consider a challenge to N.D.C.C. § 11-10-05.1, it would likely rule that provision, insofar as it shortens the length of a constitutional term of a county officer, is in direct conflict with Article VII, Section 8 of the North Dakota Constitution and thus unconstitutional.

In this instance, there is, however, ample time for the Legislature to address this problem before any terms are actually cut short. Because the statute only operates to shorten the term of the recently elected county commissioners, there is sufficient time for the Legislature to either propose a constitutional amendment to alleviate the conflict or to repeal the statutory provision shortening the term of office for the affected commissioners.

Sincerely,

Heidi Heitkamp

Heidi Heitkamp
Attorney General

jjf/vkk

**TESTIMONY TO THE**
**HOUSE POLITICAL SUBDIVISIONS COMMITTEE**
**Prepared March 4, 1999 by the**
**North Dakota Association of Counties**
**Terry Traynor, Assistant Director**

**Concerning Senate Bill No. 2248**

Thank you Chairman Froseth and members of the Committee for the opportunity to explain why we thought Senate Bill 2248 was necessary, and why we now believe it should be defeated. To begin, I must explain why we asked for the introduction and passage of the section of law that this bill would repeal.

Last session the county commissioners of this state urged us to support a proposal to move the date on which future commission terms would start, from the first Tuesday of January after an election, to the first Tuesday of December. The intentions were two-fold; first to avoid the longer "lame-duck" period when it is more difficult to conduct county business, and second, to provide an opportunity for training before the rather intensive first meeting in January when the new budget must be implemented and all appointments must be made.

When faced with implementing the statute, one county asked the Attorney General's Office for guidance. It was stated in the Attorney General's response that the law would likely be found to be unconstitutional, as its suggested method of implementation could shorten a commissioner's term. Rather than face that potential, we asked for SB2248 to repeal the law.

Since its passage in the Senate however, the Legislative Council and our Association's attorney have done further research on the issue; all of which has been attached. This information, and the fact that some counties have made the adjustment to terms beginning after last November's election, suggests that the 1997 law can be implemented without a Constitutional problem and passage of SB2248 now would be unwise. I would gladly respond to questions or talk in further detail about the opinions, but I will conclude with a request for a DO NOT PASS recommendation on SB2248.

The Law Offices of
ROLFSON & SCHULZ
LERVICK & GEIERMANN

March 2, 1999

Mark A. Johnson
Executive Director
N.D. Association of Counties
P.O. Box 417
Bismarck, ND 58502

**Re: Interpretation of SB 2370 (1997 Legislative Assembly)**

Dear Mr. Johnson:

You have presented the following issue for my analysis.

The 1997 Legislative Assembly adopted Senate Bill 2370 (1997 N.D. SESS Laws ch. 110, Sec. 2). This legislation is now codified as NDCC Sec. 11-10-05.1. The legislation that enacted this section established a special effective date as follows: "This Act is effective for any full term of office of a county commissioner beginning after July 31, 1997."

You have also asked me to review a letter from North Dakota Attorney General Heidi Hieitkamp, dated November 24, 1998, to Ward County States Attorney Doug Mattson, in which she concludes that NDCC 11-10-05.1 is unconstitutional because it conflicts with Article VII Section 8 of the North Dakota Constitution. That Constitutional provision states in part: "Any elective county office shall be for a term of four years." (Emphasis added).

You have asked me to analyze a letter from North Dakota Legislative Council Director John D. Olsrud to State Senator Gary J. Nelson dated December 18, 1998. In that letter, Mr. Olsrud offers the conclusion that the Attorney General's opinion referenced above does not accurately interpret the law. He specifically concludes that in light of prior decisions of the North Dakota Supreme Court, it is the "term of office" that is constitutionally restricted to the stated period of time (four years) and not the "term or tenure of an office holder." See State ex rel. Spaeth v. Olson, 359 N.W.2d 876(N.D.1985). See also State ex rel.Williams v. Meyer, 20 N.D. 628, 127 N.W. 834 (N.D. 1910).

I refer you to the discussion in these two letters for further elaboration. I will not repeat that discussion here. I am enclosing a copy of those two letters for your easy reference.

I am also enclosing a time-line graph that I prepared outlining four county commissioner election term examples over a period of years from 1995 through 2004.

Prior to the enactment of NDCC 11-10-05.1, county commissioner terms took office as provided under 11-10-05, providing that all county officers take office on the first Monday in January following the officer's election. That means that a county commissioner elected in 1994 took office on the first Monday of January, 1995 and served for four years, with his or her term ending on the first Monday of January, 1999. As the enclosed graph depicts, the election term example commenced on the first Monday of January, 1997 and will conclude on the first Monday of January, 2001. Since NDCC 11-10-05.1 is effective only for full terms beginning after July 31, 1997, the first full four-year term under this new provision would begin on the first Monday in December, 1998 and would end on the first Monday in December, 2002. The next county commissioner election term would commence on the first Monday in December, 2000 and would end on the first Monday of December, 2004.

Each term of a county commissioner is a four-year term both before the enactment of NDCC 11-10-05.1 and after that enactment under Article VII, Section 8 of the North Dakota Constitution quoted above. While other practical issues may surface with the term overlaps, I do not find a constitutional violation with the term overlaps, since each term is for four years. Aside from two one-time overlaps that will occur at the conclusion of the first terms as noted in the attached time-line graph, it should be noted that each of the terms is always for four years as required by the referenced Constitutional provision.

I agree with the analysis of Legislative Counsel John D. Olsrud.

You are reminded of the general position consistently taken by our North Dakota Supreme Court that statutes are presumed constitutional. The Attorney General is required to defend any Constitutional challenges to state statutes, and that it takes four of our five North Dakota Supreme Court justices to declare a statute unconstitutional. It is also clearly established that the opinion of the Attorney General should be followed until the courts decide otherwise. (Citation omitted).

I believe repealing NDCC 11-10-05.1 as is currently being considered by the Legislative Assembly in Senate Bill 2248, may be unwise.

Sincerely,

ROLFSON SCHULZ LERVICK & GEIERMANN
LAW OFFICES, P.C.

Calvin N. Rolfson
Attorney at Law

Enclosures

99495



# North Dakota Legislative Council

STATE CAPITOL, 600 EAST BOULEVARD, BISMARCK, ND 58505-0360 (701) 328-2916 TTY: 1-800-366-6888

December 18, 1998

Honorable Gary J. Nelson
State Senator
P.O. Box 945
Casselton, ND 58012-0945

Dear Senator Nelson:

This is in response to your request for information regarding the recent Attorney General's opinion indicating that North Dakota Century Code Section 11-10-05.1, which was enacted by the 1997 Legislative Assembly, is likely unconstitutional.

Section 11-10-05.1 provides that the term of office of each county commissioner commences on the first Monday in December following the officer's election. Before the enactment of Section 11-10-05.1, county commissioners took office as provided under Section 11-10-05 which provided that county officers take office on the first Monday in January following the officer's election. The Attorney General's opinion states that the legislative history of the 1997 legislation indicates that the bill was not intended to reduce any current terms of office and that the effective date provision in the bill was intended to provide that existing officeholders would not have their terms reduced. The opinion of the Attorney General concludes that the intent of the legislation was to allow commissioners elected to full terms before July 31, 1997, to serve their full four-year terms, "while those persons elected to the position of county commissioner in 1998 and 2000 would have their term shortened by approximately one month."

The opinion of the Attorney General appears to conclude that because the Constitution of North Dakota Article VII, Section 8, provides that the term of any elective county office shall be for a term of four years, the Legislative Assembly may never adopt legislation altering the time an elected county official may hold office. However, the North Dakota Supreme Court reached exactly the opposite conclusion in *State ex rel. v. Olson*, 359 N.W.2d 876 (1985). In that case, the Supreme Court found that a constitutional provision providing that the Governor "shall hold his office for a term of four years" did not entitle Governor Allen Olson to hold office for exactly four years.

In that case, the Supreme Court stated that there is a critical distinction between the "term of office" and the "term or tenure of an officeholder." The court indicated that the "term of office" has been defined as "the fixed and definite period of time which the law describes that an officer may hold an office." The "tenure" of the person holding an office may vary from the term of the office. The court stated that it "is well settled that the term of the office is separate and distinct from the term or tenure of the officer, so that the

term of the office is not affected by shortening of the officer's tenure. Thus, following the precedent of the North Dakota Supreme Court case quoted above, it can be argued that Section 11-10-05.1 merely shortens the tenure of certain county commissioners and does not violate the Constitution of North Dakota Article VII, Section 8.

In the November 24, 1998, opinion, the Attorney General relies on a 1992 opinion in which the Attorney General concluded that a statutory provision limiting the terms of senators elected in 1990 to two years was unconstitutional as it clearly contravened the constitutional requirement that senators be elected for terms of four years. However, it can be argued that that 1992 opinion failed to fully consider all relevant legal precedent. Several state and federal courts have addressed the effect of implementing legislative redistricting plans on four-year terms of senators and have held that the reduction of a term of office of a senator did not violate constitutional requirements regarding the length of terms of office. In a 1910 case, *State ex rel. Williams v. Meyer*, 20 N.D. 628, 127 N.W. 834, the North Dakota Supreme Court upheld a redistricting plan that reduced the terms of certain senators from four years (as required in the constitution) to two years in order to effectuate a new redistricting plan. Enclosed is a memorandum prepared by this office in March 1992 entitled *Reduction of Senate Terms to Effectuate Valid Redistricting Plan*, which contains citations to support the conclusion a state legislature can reduce terms when drawing a redistricting plan. Interestingly, neither Attorney General's opinion cites either the 1910 North Dakota Supreme Court decision, in which legislatively enacted shortened terms for state senators were upheld even though contrary to constitutional four-year terms, or the 1985 North Dakota Supreme Court decision in which the court differentiates between a Governor's tenure in office as compared to that officer's term of office.

It is always important to remember that an act of the Legislative Assembly is presumed to be valid, and doubt as to its constitutionality must, if possible, be resolved in favor of its validity. *Benson v. N.D. Workmen's Comp. Bureau*, 283 N.W.2d 96 (1979). In addition, a legislative act may not be determined to be unconstitutional unless at least four of the five members of the Supreme Court so decide.

We hope this information is of assistance. Please feel free to contact this office if you have additional questions.

Sincerely,

John D. Olsrud
Director

JDO/JFB
Enc.

# North Dakota Legislative Council

STATE CAPITOL, 600 EAST BOULEVARD, BISMARCK 58505-0360 TELEPHONE (701) 224-2916

March 13, 1992

TO: ALL MEMBERS OF THE LEGISLATIVE ASSEMBLY

Enclosed is a copy of a letter from the Attorney General to Representative William E. Kretschmar dated March 4, 1992, in which the Attorney General gives his opinion that the portion of the redistricting bill passed at the special session in November 1991 relating to staggering of terms of senators is unconstitutional. The reason provided for that conclusion is that Section 4 of Article IV of the Constitution of North Dakota provides that senators must be elected for terms of four years, and the redistricting bill provides that some senators who ran in 1990 must run again in 1992 and the senator from District 41 (a new district in Fargo) must be elected in 1992 for a two-year term.

Also enclosed is a memorandum prepared by the Legislative Council staff entitled "Reduction of Senate Terms to Effectuate Valid Redistricting Plan." Please notice that the cases found and cited in the memorandum, both state and federal, including a 1910 North Dakota Supreme Court decision, support the conclusion that a state legislature has the authority to reduce senatorial terms in order to effectuate a valid redistricting plan that maintains a constitutional requirement for the staggering of senatorial terms.

The Legislative Council memorandum points out the presumption of constitutionality that applies to any enactment of the Legislative Assembly, and the Attorney General's letter cites the constitutional requirement that 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. Therefore, the legislative enactment is presumed valid and constitutional until at least four of the five members of the Supreme Court declare it unconstitutional.

Although the North Dakota Supreme Court is the ultimate interpreter of the Constitution of North Dakota, the court has held that state officials who follow the advice of the Attorney General on constitutional issues will be protected even if the opinions are

later held to be erroneous (State ex rel. Johnson v. Baker, 74 N.D. 244, 21 N.W.2d 355 (1945)).

This information is provided so you might be in a better position to respond to inquiries from your constituents.

Sincerely,

John D. Olsrud
Director

JDO/CU
Encs.

ATTORNEY GENERAL
STATE OF NORTH DAKOTA
600 East Boulevard
State Capitol
Bismarck, North Dakota 58505-0040

701-224-2210
FAX 701-224-2226

Nicholas J. Spaeth
ATTORNEY GENERAL

Capitol Tower Offices
Consumer Fraud and Antitrust Division
701-224-3404
800-472-2600
Toll Free in ND

Fire Marshal
701-224-2434

Gaming & Licensing Division
701-224-4848

Racing Commission
701-224-4290

Capitol Complex Offices
State Office Building
900 East Boulevard
Bismarck, ND 58506-0040
FAX 701-224-3696

Civil Litigation
701-224-3640

Natural Resources
701-224-3640

Division Offices
Bureau of Criminal Investigation
P.O. Box 1054
Bismarck, ND 58502-1054
1-221-6180
800-472-2185
Toll Free in N.D.

FILE

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 Spaeth

Nicholas J. Spaeth

jfl

Prepared by the North Dakota
Legislative Council staff
March 1992

# REDUCTION OF SENATE TERMS TO EFFECTUATE VALID REDISTRICTING PLAN

In a letter to Representative William E. Kretschmar dated March 4, 1992, the Attorney General said it is his opinion that North Dakota Century Code (NDCC) Section 54-03-01.8 is unconstitutional as it is in direct conflict with Section 4 of Article IV of the Constitution of North Dakota which provides that senators must be elected for terms of four years.

Section 2 of Article IV of the Constitution of North Dakota requires the Legislative Assembly to establish the number of senators and representatives and to 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 are to "continue until the adjournment of the first regular session after each federal decennial census, or until changed by law." That section further provides that the Legislative Assembly is to guarantee, as nearly as is practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates. Section 3 of Article IV provides that the Legislative Assembly is required to establish by law a procedure whereby one-half of the members of the Senate, as nearly as is practicable, are elected biennially. Section 4 of Article IV provides that senators must be elected for terms of four years and representatives for terms of two years.

The North Dakota Supreme Court has said the court must give effect and meaning to every provision of the constitution and reconcile, if possible, apparently inconsistent provisions. State ex rel. Sanstead v. Freed, 251 N.W.2d 898 (N.D. 1977).

Since statehood, the Constitution of North Dakota has provided that senators are to be elected for four-year terms and that one-half of the senators, as nearly as is practicable, are to be elected biennially. In order to effectuate the one-man, one-vote principle enunciated by the United States Supreme Court in Reynolds v. Sims, 377 U.S. 533 (1964), redistricting plans have regularly provided for limitations of certain senatorial terms. The federal district court for North Dakota in Chapman v. Meier, 372 F. Supp. 363 (N.D. 1972), reduced the terms of five senators elected in 1970 to two-year terms and directed that senators elected from those districts in 1972 would serve for two years only. In the plan adopted by the North Dakota Legislative Assembly in 1981 (see Chapter 804, 1981 Session Laws), seven senators (those who were in even-numbered districts with new geographic areas having a population of more than 2,000) were required to run for a two-year term in 1982 even though those senators had been elected to four-year terms in 1980.

Even before Reynolds v. Sims, the Supreme Court of North Dakota construed the relationship of the provisions in the Constitution of North Dakota which provided for four-year terms for senators, reapportionment of the Legislative Assembly, and the biennial election of one-half of the senators, as nearly as practicable. In State ex rel. Williams v. Meyer, 20 N.D. 628, 127 N.W. 834 (1910), the Supreme Court of North Dakota upheld a redistricting plan that reduced the terms of certain senators from four years (as required in the constitution) to two years in order to effectuate a new redistricting plan and in order to uphold the constitutional requirement that the Senate be composed of two classes, one composed of senators from even-numbered districts and the other from odd-numbered districts and that one-half of the senators, as nearly as practicable, be elected every two years.

Federal courts have held that no state senator has a constitutionally vested right to serve out the entire term for which elected. See Ferrell v. State ex rel. Hall, 339 F. Supp. 73 (W.D. Okla. 1972) (holding that the Oklahoma Legislature had the authority to shorten the terms of certain senators in adopting its legislative redistricting plan); Chavis v. Whitcomb, 307 F. Supp. 1362 (S.D. Ind. 1969) (requiring that all senatorial terms expire at the same time and that all senators be elected biennially even though the state constitution provided for four-year terms for state senators); Reynolds v. State Election Board, 233 F. Supp. 323 (W.D. Okla. 1964) (striking down a portion of the Oklahoma redistricting plan because it was discriminatory and striking down a provision providing that a senator serving at the time of adoption of the amendment would serve a full term for which elected).

State courts also have addressed the effect of legislative redistricting plans on four-year terms of senators. In Egan v. Hammond, 502 P.2d 856 (Alaska 1972), the Alaska Supreme Court upheld a legislative redistricting plan that provided for terminating all senators' terms, with the exception of two senators whose districts were not altered. The court said:

> A need to truncate the terms of incumbents may arise when reapportionment results in a permanent change in district lines which either excludes substantial numbers of constituents previously represented by the incumbent or includes numerous other voters who did not have a voice in the selection of that incumbent. The discretionary authority to require mid-term elections when necessary is well established [Citing Mann v. Davis, 238 F. Supp. 458 (E.D. Va. 1964); Moss v. Burkhart, 220 F. Supp. 149 (N.D. Okla. 1963); Sims v. Amos, 336 F. Supp. 924 (M.D. Ala. 1972); and Butcher v. Bloom, 216 A.2d 457 (Pa. 1966)]

In State ex rel. Christensen v. Hinkle, 13 P.2d 42 (Wash. 1932), the Supreme Court of Washington held that reduction of the term of office of some senators from four to two years did not violate the

constitutional requirement that terms of senators would be for four years because the reduction in terms was necessary to enable half of the state senators to retire every two years.

The Legislative Council's interim Legislative Redistricting and Elections Committee discussed the question of whether senators elected in 1990 are entitled to four-year terms at its August 28-29, 1991, meeting. Mr. John Kelly of Fargo raised the issue and in response to a question said it appears that several state constitutional provisions must be considered together when looking at the redistricting question. Mr. Kelly noted the requirement that senators be elected to four-year terms and also the requirements that the Legislative Assembly redistrict after each federal decennial census and provide for a procedure whereby, as nearly as practicable, one-half of the senators are elected every two years.

North Dakota Century Code Section 54-03-01.8 requires the new senator from District 41 in Fargo to be elected in 1992 to a term of two years. The Attorney General concluded that that provision is violative of the constitutional requirement that senators be elected to terms of four years. However, that conclusion does not appear to be consistent with the Meyer decision of the North Dakota Supreme Court. Meyer was cited with approval by the Supreme Court of Nevada in State ex rel. Herr v. Laxalt, 441 P.2d 687 (Nev. 1968). In that case the court had before it a provision in a legislative redistricting statute which provided for the term of every incumbent senator to expire and provided for an entire new Senate with the allotment of two- and four-year terms. The court said:

> What is important is that each of the bodies responsible for the reapportionment recognized the importance of staggered terms in the State Senate, and provided for it. This principle, which is designed to assure continuity of experience in the upper house, dates from the inception of the United States Constitution, and has been adopted by most of the States. Its significance in conferring power upon a Legislature to provide shortened terms in order to balance the classes of Senators is expressly noted in State ex rel. Williams v. Meyer, 20 N.D. 628, 127 N.W. 834 (1910); State ex rel. Christensen v. Hinkle, 169 Wash. 1, 13 P.2d 42 (1932); and Selzer v. Synhorst, 253 Iowa 936, 113 N.W.2d 724 (1962).

North Dakota Century Code Section 54-03-01.8 requires that any senator in a district in which there is another incumbent senator as a result of legislative redistricting be elected in 1992 for a term of four years. As the judicial authorities cited in this memorandum make it clear that a state legislature has the authority to reduce senatorial terms and determine which senators are to stand for election in order to effectuate a valid redistricting plan, it is questionable how far the courts would go in

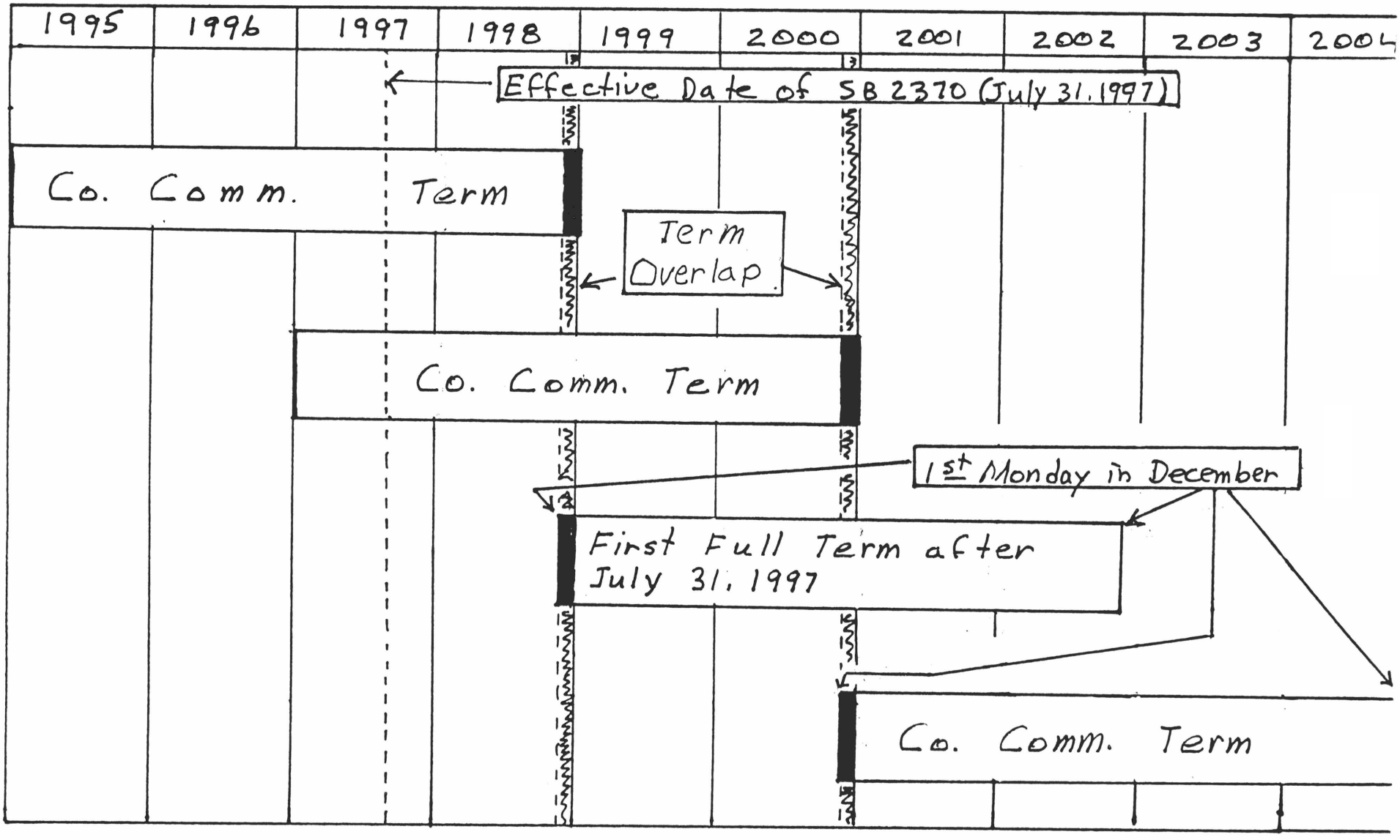
ascertaining when it is appropriate to reduce a senatorial term. The North Dakota Supreme Court has said the judiciary exercises great restraint when requested to intervene in matters entrusted to the other branches of government. State ex rel. Spaeth v. Meiers, 403 N.W.2d 392 (N.D. 1987). In Meyer the Supreme Court of North Dakota referred to the state constitutional provision that the Senate is the judge of the qualifications of its members. The court pointed out it was not attempting to say what members are to be seated and said it was unnecessary to consider whether its decision would have any effect on the action of the Senate should a new senator be elected and both the old senator and the new senator claim seats in the Senate.

An Act of the Legislative Assembly is presumed to be valid, and any doubt as to its constitutionality must, where possible, be resolved in favor of its validity. Benson v. N.D. Workmen's Comp. Bureau, 283 N.W.2d 96 (N.D. 1979). In describing the presumption of constitutionality which applies to every legislative Act, the North Dakota Supreme Court, in Menz v. Coyle, 117 N.W.2d 290 (N.D. 1962), said every legislative enactment will be upheld unless it is manifestly in violation of the state or federal constitution. The court further stated that the presumption is conclusive unless the statute is clearly shown to contravene some provision of the state or federal constitution. Citing previous cases, the court said the courts will not declare a statute void unless its invalidity is, in the judgment of the court, beyond a reasonable doubt.

## CONCLUSION

The decisions of state and federal courts that have discussed the issue have concluded that a state legislature has the authority to reduce senatorial terms in order to effectuate a valid redistricting plan that maintains a constitutional requirement for the staggering of senatorial terms.

# County Commission Term Transition Analysis (NDCC 11-10-05.1)



granted in part and denied in part, and the judgment is affirmed.

ERICKSTAD, C.J., and PEDERSON and GIERKE, JJ., concur.

Justice PAUL M. SAND, who died on December 8, 1984, was a member of this Court at the time this case was submitted.


**STATE of North Dakota ex rel. Nicholas J. SPAETH, Attorney General, Petitioner,**

**v.**

**Allen I. OLSON ex rel. George SINNER, Respondents.**

**Civ. No. 10878.**

Supreme Court of North Dakota.

Jan. 4, 1985.

As Amended Jan. 11, 1985.

In original proceeding in which Attorney General requested court to determine whether defendant or relator held office of Governor, the Supreme Court, Erickstad, C.J., held that: (1) while certificate of election issued to governor-elect by the Secretary of State evidenced his prima facie entitlement to assume office of governor, it was not determinative of nor relevant to a determination of term of office or date upon which governor-elect could assume duties of that office; (2) when defendant, as incoming governor, elected to not assume duties of his office until January 6, 1981, that choice did not affect term of his office, which commenced on January 1, 1981, but shortened his tenure; (3) term of governor begins on January 1 and terminates on December 31 in the fourth year thereafter and governor can assume duties of the office as of January 1 next succeeding his election without affecting the term of office; and (4) term of office for which incumbent governor was elected in 1980 commenced on January 1, 1981, and terminated on December 31, 1984, and thus governor-elect is currently, and has been since the first moment of January 1, 1985, the Governor of the state.

Order accordingly.

**1. Courts ⇐207.1, 209(2)**

Power vested in Supreme Court to issue original and remedial writs is a discretionary power which may not be invoked as a matter of right, and court will determine for itself in each case whether that particular case is within its jurisdiction. Const. Art. 5, § 1; Art. 6, § 2.

**2. Courts ⇐207.1**

Power of Supreme Court to issue writs in exercise of its original jurisdiction extends only to those cases in which question presented is publici juris, wherein the sovereignty of state, the franchises or prerogatives of the state, or the liberties of its people are affected. Const. Art. 5, § 1; Art. 6, § 2.

**3. Courts ⇐207.1**

To warrant exercise of Supreme Court's original jurisdiction the interest of state must be primary, not incidental, and the public, the community at large, must have an interest or right which may be affected. Const. Art. 5, § 1; Art. 6, § 2.

**4. Elections ⇐267**

Effect of certificate of election is to clothe person to whom it is issued with a prima facie right to possess and to exercise the functions of specified office; however, under statutory scheme, the certificate of election is not determinative of term or dates to which elected official is entitled to hold office. NDCC 16.1-15-44.

**5. Elections ⇐267**

While certificate of election issued to governor-elect by the Secretary of State evidenced governor-elect's prima facie entitlement to assume office of governor, it

was not determinative of or relevant to a determination of term of office or date upon which governor-elect may assume duties of that office. NDCC 16.1-15-44, 44-01-03.

**6. Elections ⇐267**

Since certificate of election was not relevant to or dispositive of term of elected office, governor-elect's failure to contest it or to otherwise challenge Secretary of State's actions was of no consequence. NDCC 44-01-03.

**7. Officers and Public Employees ⇐50, 60**

The term of office is separate and distinct from term or tenure of officer, so that the term of office is not affected by a shortening of officer's tenure.

**8. Officers and Public Employees ⇐54**

When incumbent holds over beyond expiration of his term, as when the successor fails to qualify prior to expiration of the term, it does not affect the term of the office, but merely shortens the tenure of his successor.

**9. States ⇐51**

When defendant, as incoming governor, elected to not assume duties of his office until January 6, 1981, that choice did not affect term of his office, which commenced on January 1, 1981, but merely shortened his tenure, and thus governor-elect could take office on January 1, 1985, without violating constitutional provision stating that term of office is for four years. Const. Art. 5, § 1.

**10. States ⇐51**

Term of governor begins on January 1 and terminates on December 31 in fourth year thereafter and governor can assume duties of office as of January 1 next succeeding his election without affecting term of office. NDCC 44-01-03; Const. Art. 5, § 1.

**11. States ⇐51**

Although a governor may serve less than four years if, upon his own choosing, he does not take office until subsequent to January 1 next succeeding his election, his tenure, but not the term of the office, is thereby affected. Const. Art. 5, § 1; NDCC 44-01-03.

**12. States ⇐51**

Term of office for which incumbent governor was elected in 1980 commenced on January 1, 1981, and terminated on December 31, 1984, and thus governor-elect is currently, and has been since the first moment of January 1, 1985, the Governor of state. Const. Art. 5, § 1; NDCC 44-01-03.

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Nicholas J. Spaeth, Atty. Gen., Bismarck, for petitioner.

Thomas F. Kelsch, Sp. Asst. Atty. Gen., Bismarck, for respondent Allen I. Olson.

Malcolm H. Brown, Sp. Asst. Atty. Gen., Mandan, for respondent George Sinner; appearance by Richard J. Gross, Sp. Asst. Atty. Gen., Bismarck.

ERICKSTAD, Chief Justice.

The petitioner, Nicholas J. Spaeth, acting as Attorney General, has requested this Court to exercise its original jurisdiction to determine "whether defendant Allen Olson or relator George Sinner holds the Office of Governor."

Allen I. Olson was elected Governor of North Dakota during November 1980. He filed his oath of office on January 6, 1981. George Sinner was elected Governor of North Dakota during November 1984. He filed his oath of office on December 31, 1984.

Olson asserts that his four-year term under the provisions of Article V, Section 1, of the North Dakota Constitution expires subsequent to January 5, 1985. Sinner asserts that his four-year term as Governor began on January 1, 1985. Consequently, Olson and Sinner each asserts that he is Governor of this State with all the powers and responsibilities which devolve upon the occupant of that office.

[1] Article VI, Section 2, of the North Dakota Constitution gives this Court appellate jurisdiction and also original jurisdic-

tion with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction. The power vested in this Court to issue original and remedial writs is a discretionary power which may not be invoked as a matter of right, and this Court will determine for itself in each case whether that particular case is within its jurisdiction. *State ex rel. Foughty v. Friederich*, 108 N.W.2d 681 (N.D.1961).

[2, 3] It is well-settled that the power of this Court to issue writs in the exercise of its original jurisdiction extends only to those cases in which the question presented is *publici juris*, wherein the sovereignty of the State, the franchises or prerogatives of the State, or the liberties of its people are affected. *Gasser v. Dorgan*, 261 N.W.2d 386 (N.D.1977). To warrant the exercise of this Court's original jurisdiction the interest of the State must be primary, not incidental, and the public, the community at large, must have an interest or right which may be affected. *State ex rel. Vogel v. Garaas*, 261 N.W.2d 914 (N.D.1978); *State v. Omdahl*, 138 N.W.2d 439 (N.D.1965).

The question before us is whether Olson or Sinner currently holds the office of Governor. In a broader sense, we must resolve the question of the duration of the term of the Office of Governor and when an incoming Governor is authorized to assume the duties of that office.

The stakes in this case are nothing less than a resolution of who currently resides in the seat of government as the head of the executive branch of this State. We consider this a case of great public concern, and, accordingly, we assume original jurisdiction to resolve it on the merits.

Section 44–01–03, N.D.C.C., provides that an elected state officer may assume the duties of his elected office on the "first day of January next succeeding [his] election":

> *"44–01–03. When state and district officers shall qualify.*—Except when otherwise specially provided, all state and district officers shall qualify on or before the first day of January next succeeding their election, or within ten days thereafter, and on said first day of January or within ten days thereafter, shall enter upon the discharge of the duties of their respective offices, . . ."

Sinner asserts that under the foregoing statute he assumed the duties of the Office of Governor on January 1, 1985, by qualifying prior to that date. Olson asserts that, notwithstanding the foregoing statute, Sinner is precluded from assuming the Office of Governor on January 1, 1985, because the Certificate of Election issued to Sinner by the Secretary of State provides that Sinner was elected to the Office of Governor for a term of four years "commencing on the first Monday in January 1985." Olson asserts that because Sinner did not directly contest the Certificate of Election he cannot now "collaterally" attack its statement that his term does not commence until the first Monday in January.

Our statutory scheme requires the State Canvassing Board, based upon a vote count, to submit to the Secretary of State its determination of which person has been elected to an office. The Secretary of State is then required, under Section 16.1–15–44, N.D.C.C., to record those results and to transmit to the elected person a Certificate of Election. Regarding the nature of the State Canvassing Board's responsibilities, this Court stated in *State ex rel. Sathre v. Byrne*, 65 N.D. 283, 258 N.W. 121 (1934):

> "Aside from the quasi judicial power to determine the genuineness of the election returns before them, and, in case of apparent mistake in the returns from any county, to take the necessary steps to have such mistakes corrected, *the functions and duties of the members of the state board of canvassers are purely ministerial.* 20 C.J. 200. See, also, State ex rel. Sunderall v. McKenzie, supra. The state board of canvassers has no authority to determine any question concerning the legality of an election or to pass upon the eligibility of a candidate for office. 20 C.J. 201. Such matters are wholly beyond the power of the state board of canvassers and are questions

for determination in some appropriate proceeding in a judicial tribunal." 258 N.W. at 124–125.

*See also Stearns v. Twin Butte Public School District No. 1,* 185 N.W.2d 641 (N.D.1971). It follows that the Secretary of State's statutory duty to prepare and transmit the Certificate of Election using the results submitted to him by the State Canvassing Board also constitutes a purely ministerial function. The preparation of the Certificate of Election does not require the Secretary of State to make discretionary determinations or to perform any function other than recording the results as submitted by the State Canvassing Board.

[4] The effect of the Certificate of Election is to clothe the person to whom it is issued with a *prima facie* right to possess and to exercise the functions of the specified office. *Byrne, supra.* Under our statutory scheme, however, the Certificate of Election is not determinative of the term or dates to which the elected official is entitled to hold office, and we have neither been given nor found any authority to the contrary. There is authority, however, for the position that the law, and not the face of the commission [1] or Certificate of Election issued to an officer, controls the term of the office. *See, Colbath v. Adams,* 184 So.2d 883 (Fla.1966); *Conley v. Brophy,* 207 Ga. 30, 60 S.E.2d 122 (1950). *See also* 67 C.J.S. Officers, Section 66 (1978).

[5] Application of the rule that a Certificate of Election is not determinative of the term of an office is particularly appropriate in the case before us where the term of the Office of Governor is provided for by constitutional provision [Art. V, Section 1, N.D. Const.], and the date upon which a Governor-elect is entitled to assume that office is provided for by statute [Section 44–01–03, N.D.C.C.]. Accordingly, we conclude that while the Certificate of Election issued to Sinner by the Secretary of State evidences Sinner's *prima facie* entitlement to assume the Office of Governor it is not determinative of nor relevant to a determination of the term of office or the date upon which the Governor-elect may assume the duties of that office.

Section 44–01–03, N.D.C.C., prior to its amendment in 1975, provided that officers were to qualify "on or before the first Monday of January or within ten days thereafter" and that "on said first Monday of January or within ten days thereafter" were to assume the duties of their offices. The 1975 Legislature amended the provision to provide that officers were to qualify "on or before the first day of January next succeeding their election" and that "on said first day of January or within ten days thereafter" were to assume the duties of their offices. It is readily apparent that the Certificate of Election form issued to Sinner, which refers to the "first Monday in January", was consistent with the pre-1975 version of Section 44–01–03, N.D.C.C., but it is inconsistent with that Section as amended.

In a 1980 Attorney General's opinion, authored by Olson in his capacity as Attorney General, the legislative amendments to Section 44–01–03, N.D.C.C., are discussed. In that opinion, Olson concluded:

> "[I]t is our opinion that the powers of the offices of Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Commissioner of Insurance, Attorney General, Commissioner of Agriculture, Public Service Commissioner, and Tax Commissioner devolve upon the persons elected at the November, 1980, general election, at the earliest moment of January 1, 1981, or at the moment the oath of office has been taken, subscribed, and filed, whichever moment is later."

As evidenced by that opinion, Olson apparently believed, or so we could assume, that

1. The term commission has a usage which is the functional equivalent of a Certificate of Election.

under Section 44–01–03, N.D.C.C., the time when an elected officer could take office was changed from the first Monday next succeeding his election to the first day of January next succeeding his election.

During November 1984, the Certificate of Election issued to Sinner was signed, as required under Section 16.1–15–45, N.D. C.C., by incumbent Governor Olson and Secretary of State Ben Meier. In addition to being inconsistent with Section 44–01–03, N.D.C.C., the Certificate, by stating that Sinner's term was to commence on the first Monday in January 1985, did not comply with the form required under Section 16.1–15–45, N.D.C.C.:

> "The certificate, in substance, shall be in the following form:
>
> "At an election held on the _____ day of _____, 19____, _____ was elected to the office of _____ of this state for the term of _____ years from the _____ day of _____ in the year _____ ... and until his successor is duly elected and qualified."

[6] Olson's assertion that the Certificate of Election precludes Sinner from taking office as Governor prior to the first Monday of January 1985 is based upon the mistaken premise that the Certificate of Election is relevant to the term of office or that it can effectively supersede or contravene a specific statutory provision. Where the Legislature has specified the time when an elected officer can assume the duties of his office, the ministerial act of the Secretary of State in preparing a statutorily prescribed form cannot be allowed to defeat the will of the Legislature. Having determined that the Certificate of Election is not relevant to nor dispositive of the term of an elected office, Sinner's failure to contest it or to otherwise challenge the Secretary of State's actions is of no consequence.

Olson next contends that, pursuant to Article V, Section 1 of the Constitution of North Dakota, he is entitled to serve as Governor for a full four years. Because he took the oath of office on January 6, 1981, Olson contends that his four-year term does not expire until the end of the day on January 5, 1985.

Article V, Section 1 provides:

> "*Section 1.* The executive power shall be vested in a governor, who shall reside at the seat of government and shall hold his office for the term of four years beginning in the year 1965, and until his successor is elected and duly qualified."

Prior to 1975, Section 44–01–03, N.D. C.C., provided that all state officers were to qualify for and enter upon the discharge of the duties of their respective offices on or before the first Monday in January. In 1975, the Legislature amended Section 44–01–03 to provide that all state officers "shall qualify on or before the first day of January next succeeding their election, or within ten days thereafter, and on said first day of January or within ten days thereafter, shall enter upon the discharge of the duties of their respective offices...."

Olson argues that the constitutional provision requires that he serve a minimum of four full years in office, and that the statute must be read to produce such a result. Sinner contends that the statute is clear and unambiguous on its face and not in conflict with the constitutional provision, which does not specify dates for commencement and expiration of the Governor's term. He contends that the directive of the statute must therefore be followed and that his term commenced on January 1, 1985.

Olson's argument is based upon the faulty premise that allowing Sinner to take office on January 1 will shorten his constitutionally mandated four-year term of office. The constitution does not, however, provide that the Governor shall serve for four years; it provides that he "shall hold his office for the *term* of four years...."

[7] Olson's argument does not recognize the critical distinction between the

term of the office and the term or tenure of the officeholder. The term of the office has been defined as "the fixed and definite period of time which the law describes that an officer may hold an office." *Sueppel v. City Council of Iowa City*, 257 Iowa 1350, 1357, 136 N.W.2d 523, 527 (1965). The tenure of the person holding an office may vary from the term of the office. *People ex rel. Sullivan v. Powell*, 35 Ill.2d 19, 217 N.E.2d 806 (1966). It is well settled that the term of the office is separate and distinct from the term or tenure of the officer, so that the term of the office is not affected by a shortening of the officer's tenure. *Graham v. Lockhart*, 53 Ariz. 531, 91 P.2d 265 (1939); *Wilson v. Shaw*, 194 Iowa 28, 188 N.W. 940 (1922); *State v. Young*, 137 La. 102, 68 So. 241 (1915); *State v. Johnson*, 156 Neb. 671, 57 N.W.2d 531 (1953); *Opinion of the Justices*, 112 N.H. 433, 298 A.2d 118 (1972); *Gillson v. Heffernan*, 40 N.J. 367, 192 A.2d 577 (1963); *Monte v. Milat*, 17 N.J.Super. 260, 85 A.2d 822 (1952); *Selway v. Schultz*, 268 N.W.2d 149 (S.D.1978); *State v. Meador*, 267 S.E.2d 169 (W.Va.1980).

[8, 9] Thus, when the incumbent holds over beyond the expiration of his term (as when the successor fails to qualify prior to the expiration of the term) it does not affect the term of the office, but merely shortens the tenure of his successor. *State v. Young, supra; State v. Johnson, supra; Opinion of the Justices, supra; Gillson v. Heffernan, supra; Monte v. Milat, supra; Selway v. Schultz, supra.* When Olson, as incoming Governor, elected to not assume the duties of his office until January 6, 1981, that choice did not affect the term of his office, which commenced on January 1, 1981. It merely shortened his tenure. "An officer may serve a shortened tenure, but nonetheless be deemed to have served a complete term." *Welty v. McMahon*, 316 N.W.2d 836, 839 (Iowa 1982).

This principle has been succinctly stated by the Supreme Court of South Dakota in *Selway v. Schultz, supra*, 268 N.W.2d at 151:

> "Although there may be holdovers into portions of succeeding terms and appointments are made to replace these holdovers, the term of the replacement can only run from the expiration of the last legal term. A statutory term stands apart from the person who holds the office, and an appointee cannot be validly given a term which runs longer than the statute permits by ignoring holdover periods in the determination of succeeding terms. See *State v. Smiley*, 1924, 304 Mo. 549, 263 S.W. 825.
>
> " 'Term of office' is distinct from and not to be confused with 'tenure of an officer;' therefore, we must adhere to the principle that the term of office is not affected by the holding over of an incumbent beyond the expiration of the term for which the incumbent was appointed, and such holding over does not change the length of the term but merely shortens the tenure of the succeeding officer."

In *Selway*, the incumbents remained in office for one year after the expiration of their terms when the appointing authority failed to make successor appointments. The court held that the term of office, which in this case was five years, began at the expiration of the prior terms, and the newly appointed successors could serve only the four years remaining on the unexpired terms.

There are strong public policy reasons which support the conclusion we reach today. Of primary importance to the citizens of the State of North Dakota is the need for certainty in the transference of the powers and duties of the chief executive officer of the State.

> "Public interest requires that all possible certainty exist in the election of officers and the beginning and expiration of their terms, by law or resignation, and forbids that either should be left to the discretion or vacillation of the person holding the office...." *Campbell v. City of Boston*, 337 Mass. 676, 678, 151 N.E.2d 68, 70 (1958) (*quoting Warner v. Select-*

*men of Amherst*, 326 Mass. 435, 439, 95 N.E.2d 180, 183 (1950)).

Other courts have also recognized the public interest in this situation and have noted the uncertainty caused by allowing an officeholder to determine the date upon which his term will commence. *See, e.g., Conley v. Brophy*, 207 Ga. 30, 60 S.E.2d 122 (1950); *State v. Young, supra; State ex rel. Wilson v. Parker*, 30 La.Ann. 1182 (1878).

**[10, 11]** We believe that there is no inconsistency between Section 44-01-03, N.D.C.C., and Article V, Section 1 of the North Dakota Constitution. The people of North Dakota, in amending that constitutional provision by initiated measure, envisioned that the Legislature would enact legislation implementing the provision:

> "This amendment shall be self executing, but legislation may be enacted to facilitate its operation." 1965 N.D.Sess. Laws, Ch. 475.

The term of Governor begins on January 1 and terminates on December 31 in the fourth year thereafter. The Governor can assume the duties of the office as of January 1 next succeeding his election without affecting the term of office. So construed, that constitutional and statutory scheme results in the term of office of Governor constituting exactly four years. Although a Governor may serve less than four years if, upon his own choosing, he does not take office until subsequent to January 1 next succeeding his election, his tenure, but not the term of the office, is thereby affected.

We are also mindful of the admonition that constitutional provisions should not be construed to bring about absurd results. *Haugland v. Meier*, 339 N.W.2d 100 (N.D. 1983). This is an outgrowth of the presumption that the people who adopt a constitutional provision intend a reasonable result. *State ex rel. Lein v. Sathre*, 113 N.W.2d 679 (N.D.1962). We envision that absurd results would ensue if we were to adopt Olson's position that Article V, Section 1 of our Constitution requires that each person who assumes the duties of Governor is entitled to serve for four full years. If Olson is correct, all Governors of the State of North Dakota elected hereafter will be prohibited from assuming the duties of the office prior to January 6 of the year following their election. If any incoming Governor should qualify at some date later than January 6 of the year succeeding his election, this would set a new "earliest date" for succeeding Governors to assume office. If carried to its logical extreme, Olson's position would require that a person who succeeded to the Office of Governor upon the death or resignation of the sitting Governor in the middle of his term would be entitled to serve a full four years from the date of taking office. It is obvious that the public interest in assuring certainty in succession to the Office of Governor militates strongly against such a result. The potential for such a result was recognized by the Supreme Court of Louisiana:

> "Does any body [sic] suppose that these provisions entitle one of these officers, who may be appointed in the middle of a term, to hold for a full term? When the law says that 'the Public Administrator shall hold his office for the term of four years' it means precisely what it does when it uses the same words with reference to other officers. It means to fix the 'term' of the office, i.e., the longest time it may be occupied without re-appointment; but does by no means imply that every incumbent shall hold it for four years, regardless of the time at which that term began, and of the time he was appointed. The effect of defendant's argument is to make the term of this office depend upon the mere agreement and consent of the executive and incumbent, instead of making it dependent upon the law. Its duration is at the caprice of these functionaries.... This is to completely confound the term of that office with Parker's tenure of it. The latter is within the control of the parties, and may be longer or shorter, according to circumstances; but the for-

mer is not. *The term remains invariable, always the same, and is not subject in its duration, to the wishes or agreements of any persons whomsoever;* while the tenure of an incumbent may always be terminated by his resignation and its acceptance." [Emphasis added.] *State ex rel. Wilson v. Parker,* 30 La. Ann. 1182, 1184 (1878) (quoted in *State v. Young, supra,* 137 La. at 110, 68 So. at 244).

Olson's position on this issue is also significantly weakened by the fact that he assumed the office less than four full years after the date on which his predecessor, Arthur A. Link, filed his oath of office. The documents submitted to this Court indicate that Link subscribed and filed his oath of office on January 13, 1977. If Olson's interpretation of the constitutional provision were correct, he was not entitled to assume the duties of the office of Governor until January 13, 1981; however, he assumed those duties on January 6.

Other undisputed facts presented to the Court support our conclusion that the term of the office commenced on January 1, 1981, and expired on December 31, 1984. An affidavit of Bernard (Bud) Walsh, Director of Accounting Operations for the Office of Management and Budget, states that Olson authorized, was paid, and accepted a full month's salary without proration for the month of January 1981. He also authorized, was paid, and accepted payment for unvouchered expenses without proration for the full year 1981. Furthermore, a certification form prepared within the past two weeks by Olson's office-manager and sent to the Office of Management and Budget Central Personnel Division indicates that Olson's employment date was January 1, 1981, and his termination was December 31, 1984.

We also note that shortly before taking office as Governor, Olson was requested as Attorney General to issue an opinion on the same issue presented to this Court today. In that Attorney General's opinion, dated December 24, 1980, Olson stated that "the powers of the offices of Governor ... devolve upon the persons elected at the November, 1980, general election, at the earliest moment of January 1, 1981, or at the moment the oath of office has been taken, subscribed, and filed, whichever moment is later." The opinion goes on to state that "[w]hile we are aware that the ceremonial transfer of offices will occur on January 6, 1981, the execution of the oath of office passes the final precursor to the legal transfer of offices on January 1, 1981." Olson concluded that the officials "who prior to January 1, 1981, have taken, subscribed, and filed with the Secretary of State their oaths of office shall have qualified and without the necessity of any further act shall, at the earliest moment of January 1, 1981, become the incumbents of the offices for which they have been elected, and the possessors of all the powers, duties, and responsibilities of the said offices."

On the same date, December 24, 1980, Olson sent a memorandum to all incumbent and newly elected constitutional officers which stated in part:

"It is my understanding that most, if not all, of the newly elected officials have already taken and filed the oath. Where such action has occurred, transfer of those offices must take place on January 1, 1981.

"For your information, I have chosen to wait until January 6, 1981, to take and file the oath so that both the ceremonial and actual transfers of the Office of Governor will coincide."

Olson conveyed the same information to then-Governor Arthur A. Link in a letter bearing the same date:

"Attached are an opinion issued to the Director of Accounts and Purchases and a memorandum to incumbent and newly elected constitutional officers relating to the time when transfers of those offices take place. You will note that if the oath of office has been taken and filed, transfer occurs on January 1, 1981.

"This is to advise you that I do not intend to take and file the oath of the office of Governor until January 6, 1981,

so that both the ceremonial and actual transfers of office will coincide."

[12] We believe that the foregoing facts, as evidenced by the materials presented by the parties to this Court, support our conclusion that the term of office for which Olson was elected in 1980 commenced on January 1, 1981, and terminated on December 31, 1984.

Based upon the foregoing reasoning, we hold that George A. Sinner is currently, and has been since the first moment of January 1, 1985, the Governor of the State of North Dakota. We therefore grant an original writ enjoining Olson from exercising the powers and duties of the Office of Governor of the State of North Dakota.

BENNY A. GRAFF, NORMAN J. BACKES, A.C. BAKKEN and MAURICE R. HUNKE, District Judges, concur.

The Justices, the Honorable VERNON R. PEDERSON, the Honorable GERALD W. VANDE WALLE, and the Honorable H.F. "SPARKY" GIERKE III, having disqualified themselves, and there being a vacancy created by the death of the Honorable PAUL M. SAND, the following presiding district court judges were asked to sit with this Court and did participate in this case: the Honorable BENNY A. GRAFF, the Honorable NORMAN J. BACKES, the Honorable A.C. BAKKEN, and the Honorable MAURICE R. HUNKE.


**Ernest LANG, Petitioner,**

**v.**

**Judge Gerald GLASER, South Central Judicial District, Respondent.**

**Civ. No. 10722.**

Supreme Court of North Dakota.

Jan. 8, 1985.

Petitioner requested Supreme Court to issue a writ of mandamus directing the District Court, Burleigh County, South Central Judicial District, to reverse order in which it denied petitioner's motion to enjoin foreclosure by advertisement. The Supreme Court, Gierke, J., held that since circumstances presented in instant case were not tantamount to a denial of justice and petitioner was provided with right to appeal District Court's decision, but he chose not to avail himself of that remedy and sought a writ of mandamus instead, case was not an appropriate one for exercise of Supreme Court's supervisory jurisdiction over the District Court.

Application denied.

1. Courts ⇐207.1

Supreme Court's power to issue supervisory writs is discretionary and cannot be invoked as a matter of right.

2. Courts ⇐209(2)

Supreme Court determines for itself on an ad hoc basis whether a particular case falls within its jurisdiction and, further, whether it should exercise its discretion in granting supervisory writ.

3. Courts ⇐204

Supreme Court's superintending control over inferior courts is used only in cases where justice is threatened and no other remedy is adequate or allowed by law.

4. Courts ⇐204

Since circumstances presented in case were not tantamount to a denial of justice and petitioner was provided with the right to appeal district court's decision denying his motion to enjoin foreclosure by advertisement, but he chose not to avail himself of that remedy and sought a writ of mandamus instead, case was not an appropriate one for exercise of Supreme Court's supervisory jurisdiction over district court.

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Ernest Lang, pro se.