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STATE OF NEBRASKA
OFFICIAL
APR 6 1992
DEPT. OF JUSTICE

DATE: April 6, 1992

SUBJECT: Referendum Powers of the Nebraska State Legislature

REQUESTED BY: Senator Thomas R. Horgan
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Jan E. Rempe, Assistant Attorney General

You have requested our opinion on the constitutional and statutory authority for a proposed legislative amendment to LB 958. The amendment provides in part:

> (4) . . . [u]pon passage of Legislative Bill 958, . . . section 6 of this act shall be referred to the electors of this state and placed on the ballot by the Secretary of State at the general election in November 1992 pursuant to section 32-707.01.
>
> (5)(a) A vote Repeal shall repeal section 6 of this act and the law in effect prior to passage of Legislative Bill 958 . . . shall be effective.
>
> (b) A vote Retain shall approve section 6 of this act and it shall remain in effect as the law.

Amendment 3569, Ninety-second Legislature, Second Session, 1992.

Specifically, you have asked whether the Nebraska Constitution and state statutes authorize the Legislature to direct that the above referendum be invoked, and whether the results of a referendum election held without constitutional or statutory authorization would be binding. Based on the following analysis,

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we conclude that neither the Nebraska Constitution nor state statutes permit the Legislature to initiate a referendum. Further, if a referendum election was held despite the lack of constitutional and statutory authority for such an election, the election would be a nullity.

The Legislature has plenary legislative authority, which is limited only by the Nebraska and federal constitutions. State ex rel. Creighton Univ. v. Smith, 217 Neb. 682, 353 N.W.2d 267 (1984); Lenstrom v. Thone, 209 Neb. 783, 311 N.W.2d 884 (1981); Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N.W. 643 (1922). The state constitution is not a grant of power like the federal constitution, but is instead a limitation of power. Creighton, supra; Lenstrom, supra; Consumers, supra.

> We look . . . in the Constitution of the state to ascertain if any limitations have been imposed upon the complete powers with which the legislative department of the state is vested in its creation. . . . The law-making power of the state recognizes no restraints, and is bound by none, except such as are imposed by the Constitution.

Consumers, supra at 64-65, 189 N.W. at 648 (emphasis deleted). Thus, the Legislature may legislate on any subject not inhibited by the state or federal constitutions, and restrictions on this legislative power will not be inferred unless the restriction is clearly implied. Creighton, supra; Lenstrom, supra.

Article III, Section 1, of the Nebraska Constitution provides that "the legislative authority of the state shall be vested in a Legislature . . . . The people reserve for themselves, however, the . . . power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature." (Emphasis added). Section 2 of the same Article states that the "first power reserved by the people is the initiative." Article III, Section 3, provides that the "second power reserved is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature." (Emphasis added). The remainder of Section 3 sets out petition requirements and referendum procedure.

Pursuant to Article III, Section 4, of the Nebraska Constitution, the Legislature has enacted Neb. Rev. Stat. §§ 32-702 to 32-713.02 (Reissue 1988) in order to facilitate operation of the above initiative and referendum provisions. These statutes address petition format, circulation, and filing, as well as election procedures.

The constitutional and statutory provisions discussed above clearly limit invocation of the referendum to "the people" by petition. Because referendum power is restricted in this way, the Legislature is without authority to refer laws to the people. It is widely held that the referendum involves the exercise of legislative power reserved to the people by the state constitution. State ex rel. Boyer v. Grady, 201 Neb. 360, 269 N.W.2d 73 (1978); Lawrence v. Beermann, 192 Neb. 507, 222 N.W.2d 809 (1974); State ex rel. Morris v. Marsh, 183 Neb. 521, 162 N.W.2d 262 (1968); Klosterman v. Marsh, 180 Neb. 506, 143 N.W.2d 744 (1966). See also Opinion of the Attorney General, No. 222 (Mar. 17, 1982); Opinion of the Attorney General, No. 215 (Feb. 5, 1980).

Our conclusion that the Legislature does not have constitutional or statutory authority to invoke a referendum is consistent with prior opinions of this office. See Opinion of the Attorney General, No. 247 (Mar. 10, 1980) (referendum may be initiated only by the people); Opinion of the Attorney General, No. 46 (Apr. 26, 1965) (Legislature may not refer laws to the people).

In response to your question involving the validity of results received in a referendum election not constitutionally or statutorily authorized, an election held without affirmative constitutional or statutory authority is a nullity, Thompson v. James, 125 Neb. 350, 250 N.W. 237 (1933), making the ensuing results void.

Sincerely,

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cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved By:

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13-112-6.92