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STATE OF NEBRASKA
OFFICIAL
MAY 16 1991
DEPT. OF JUSTICE

DATE: May 16, 1991

SUBJECT: Amendments to LB 579; State Election Board

REQUESTED BY: Senator Elroy M. Hefner, Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Linda L. Willard, Assistant Attorney General

You have requested that this office review LB 579, as amended, to determine if the bill is now constitutional. The bill, as amended and presented to this office for review, consists of 225 pages. Your question does not narrow the constitutional review to a specific section of the Constitution nor does it limit the review to either the State or Federal Constitution. Because of the nature of the bill and the timing of your request, we have limited our review to those issues discussed in our earlier Opinion (No. 91031) (attached hereto) and those portions of the Nebraska Constitution addressing the duties of the Secretary of State. Specifically, Article III, Sections 2 and 3, and Article IV, Section 4.

The amendments to LB 579 have not altered the list of candidate members submitted by the political parties to the Governor for selection. Therefore, we reiterate our earlier Opinion that this method of restricting the Governor's selection is constitutionally suspect under Article IV, Section 10, of the Constitution of the State of Nebraska.

It appears that none of the amendments to LB 579 have altered the language of the bill as it relates to Neb.Rev.Stat. § 32-704 (Reissue 1988). Therefore, our concerns in regard to this section as it relates to Article III, Sections 2 and 3, of the Constitution of the State of Nebraska, as expressed in Opinion No. 91031, remain unchanged.

L. Jay Bartel
J. Kirk Brown
Laurie Smith Camp
Elaine A. Chapman
Delores N. Coe-Barbee
Dale A. Comer
David Edward Cygan
Mark L. Ells
James A. Elworth
Lynne R. Fritz
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
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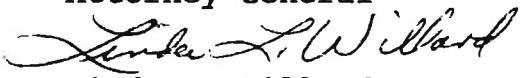
Harold I. Mosher
Fredrick F. Neid
Paul N. Potadle
Marie C. Pawol
Kenneth W. Payne
LeRoy W. Sievers
James H. Spears
Mark D. Starr
John R. Thompson
Susan M. Ugai
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

We were not previously asked to review the bill in regard to Article IV, Section 4. The Office of Secretary of State had certain common law duties at the time of its adoption in Nebraska, including maintenance of the State's records. Most duties pertaining to elections, other than the canvass, apparently were adopted by statute in 1891 (Chapter 15, Consolidated Statutes of Nebraska, 1891). Any attempt to legislatively remove, restrict, or transfer common law duties of the Secretary of State embodied in Article IV, Sections 1 and 4, would be void as an encroachment on the executive powers of that office. State v. State Board of Equalization and Assessment, 123 Neb. 259, 243 N.W. 264 (1932); Ex parte Corliss, 114 N.W. 962 (N.D. 1907). That portion of LB 579, as amended, which addresses Neb.Rev.Stat. § 32-4,101 and those related to the Secretary's receipt of ballots are not in conflict with the constitutional duties of the Secretary of State. However, Neb.Rev.Stat. § 32-4,104, as amended by LB 579, would be an unconstitutional restriction on the common law duties of the Secretary of State relative to the canvassing of votes.

As stated above, our constitutional review of this bill is limited due to time limitations.[1] If you have questions regarding specific portions of LB 579 or specific constitutional provisions, we would be willing to address those questions.

Sincerely,

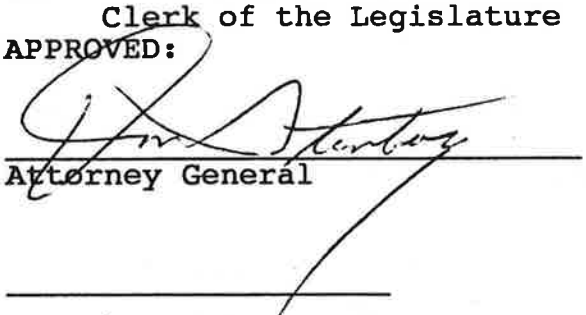
DON STENBERG
Attorney General



Linda L. Willard
Assistant Attorney General

28-06-14.91
cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED:



Attorney General

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[1] Time has not permitted us to undertake an analysis of whether LB 579 creates an executive state office which would require a two-thirds majority vote for passage. See Neb. Const. art. IV, § 27. See also Sommerville v. Johnson, 149 Neb. 167, 30 N.W.2d 577 (1948); Mekota v. State Board of Equalization and Assessment, 146 Neb. 370, 19 N.W.2d 633 (1945).