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95055
NO.
STATE OF NEBRASKA
OFFICIAL
JUL 11 1995
DEPT. OF JUSTICE

DATE: July 10, 1995

SUBJECT: Effect and Correction of Improper Internal References in Constitutional Amendments Imposing Term Limits; Authority of the Secretary of State to Correct Technical Errors While Printing Constitutional Amendments Approved by the People.

REQUESTED BY: Scott Moore
Nebraska Secretary of State

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

At the general election in November, 1994, the people of the State of Nebraska approved amendments to the Nebraska Constitution which impose term limits on various state and federal officials. Those term limit amendments were proposed by means of an initiative petition effort by the people.

On December 13, 1994, we issued Op. Att'y Gen. No. 94099 to Governor Nelson in which we discussed certain aspects of the term limits initiative process, and insertion of those term limits amendments into the Nebraska Constitution. Specifically, Governor Nelson noted that the petition language implementing constitutional term limits which was approved by Nebraska voters contains some technical errors with regard to the placement of appropriate constitutional sections, and that those errors have been acknowledged by the individuals who drafted the original initiative petition. Governor Nelson then asked whether those technical errors could be corrected, and who had proper legal authority to cure them. We concluded that the Governor did not have such authority in connection with his duties to proclaim election

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results under the Nebraska Statutes. However, we also concluded that the technical errors could be corrected by your office and by the Revisor of Statutes in connection with your respective duties regarding the printing of constitutional amendments initiated by the people.

In your opinion request letter, you state that you are "uneasy about changing constitutional provisions, however minor those changes may seem, that were voted on by the citizens of this state without clear precedent that such changes are permitted." Therefore, you have now posed a number of questions to us regarding how the amendments in question should be printed, and regarding the effects of certain "grandfathering" provisions in the amendments themselves. We will respond to each of your various questions in turn.

The technical errors at issue involve the amendments approved for Art. III, § 8, Art. IV, § 3 and Art. VII, § 15 of the Nebraska Constitution, which generally impose term limits upon Nebraska legislators, state constitutional officers and state educational officers. In each of those amendments, the term limiting paragraph ends with language which makes the officer in question unable to serve in or ineligible to file for the office involved for a specified period after the expiration of the second of two consecutive terms "and as further provided in Article XV Section 20." Article XV, Section 20 of the Nebraska Constitution, as amended through the same petition effort in November, 1994, applies to federal officers. Article XV, Section 21 of the 1994 petition amendments, on the other hand, applies to state officers. As a result, it appears clear that the reference to "Article XV Section 20" in the amendments petition at issue should actually be a reference to "Article XV Section 21."

There is also an additional technical error in the November, 1994, initiative measure which we pointed out in Opinion No. 94099. The latter portion of the initiative petition purports to amend Article XV of the Nebraska Constitution by adding new Sections 19, 20, 21 and 22. However, there is currently an existent Section 19 in Article XV of the Nebraska Constitution which deals with local liquor licenses. Therefore, Sections 19, 20, 21 and 22 in Article XV of the initiative petition must be renumbered when they are placed in the Constitution as Sections 20, 21, 22 and 23, respectively. We indicated in Opinion No. 94099 that you clearly have authority to make that change in numbering as the amendments are printed, since the initiative petition in question itself states in its preamble that: THE CONSTITUTION OF THE STATE OF NEBRASKA SHALL BE AMENDED AS INDICATED; ***OR PLACED IN ARTICLES AND SECTIONS AS DETERMINED BY COMPETENT AUTHORITY OF THE STATE AS***

FOLLOWS. (emphasis added). That change will necessitate a further change in numbering in the paragraphs involving the other technical errors discussed above.

We will now discuss each of the questions which you posed to us.

> **1. "Is it your opinion that this is the appropriate change for [Art. II, § 8 of the Nebraska Constitution in light of the technical errors noted above]: No person shall be eligible to file for election to or to serve as a member of the Legislature for a period of four years after the expiration of the second of two consecutive terms for which they were previously elected and as further provided in Article XV Section 22?"**

We believe that the language stated in your question No. 1 is the appropriate correction for Art. III, § 8. As noted above, the section of Article XV referenced at the end of Art. III, § 8 would have to be corrected in any event from the language in the initiative petition, given the continued existence of a Section 19 in Article XV. For the reasons stated in our earlier opinion to the Governor, we believe that you have the authority to make an additional correction in printing the Constitution so that the language in Art. III, § 8 references the subsequent constitutional provision dealing with state officers as opposed to the subsequent constitutional provision dealing with federal officers.

> **2. "While I agree that such a change would accomplish what I personally feel was the sponsors' and probably the voters' intent, does making such a change [as outlined in question 1 above] run contrary to the decision in <u>Omaha National Bank vs. Spire</u> where the court stated, 'We hold that the intent of the voters adopting an initiative amendment to the Nebraska Constitution must be determined from the words of the initiative amendment itself'?"**

In our view, making the change in internal constitutional references noted above does not violate the rule for constitutional interpretation which you quoted from ***Omaha National Bank v. Spire***, 223 Neb. 209, 389 N.W.2d 269 (1986). The issue in the ***Omaha National Bank*** case involved the construction of the language of a particular amendment to the Nebraska Constitution enacted as the result of an initiative petition effort. The Supreme Court noted that, unlike the situation with a constitutional provision created as a result of a constitutional convention where the debates and discussions of the delegates can be consulted to determine the framers' intent, there is no way to determine the intent of all the

individual signers who signed a petition for a constitutional amendment proposed by the initiative petition method. Nor is there any way to determine the intent of all the individual voters who voted for a particular initiative measure in such an instance. As a result, only the plain language of an initiative petition itself can be used to interpret the meaning of its provisions.

In the present instance, however, the technical corrections proposed for the term limits amendments in the printed version of the Nebraska Constitution do not, in any way, interpret or construe the meaning of the language of the amendments approved in 1994. Rather, those changes simply involve a technical correction of the internal references within those amendments. Consequently, we do not believe that the rule for construction of constitutional language in the *Omaha National Bank* case applies.

3. "While I recognize that you have provided some authority in AO #94099 . . ., is there a precedent for making changes to an adopted amendment? Is it possible to make the changes using the argument that it is presumed that the voters intended a sensible rather than absurd result?"

If, in your third question, you are asking if there are Nebraska cases directly on point which clearly allow you to make the technical corrections at issue in this matter, then we must state that we have been unable to find any such cases. However, as you noted, there is authority which supports the proposition that you have the power to make those technical corrections, and we believe that you may do so for the reasons stated in our Opinion No. 94099.

Apart from your question involving precedent for the technical corrections here, you also wish to know if an argument supporting the propriety of the technical corrections can be based upon the maxim of statutory construction which states that a court will try to avoid a construction of a statute which leads to absurd, unjust or unconscionable results. ***Coleman v. Chadron State College***, 237 Neb. 491, 466 N.W.2d 526 (1991).

As a general rule, the usual principles governing the construction of statutes apply to the construction of constitutions. 16 C.J.S. ***Constitutional Law*** § 19. But, constitutional provisions should receive a broader and more liberal construction than statutes, and constitutions are not subject to the rules of strict construction. ***Neb. Public Power District v. Hershey School District***, 207 Neb. 412, 299 N.W.2d 514 (1980). Within those parameters, there is authority for the premise that

constitutional language should be construed so as to avoid absurd or unreasonable results. ***Carman v. Hare***, 384 Mich 443, 185 N.W.2d 1 (1971); ***Kayden Industries v. Murphy***, 34 Wis.2d 718, 150 N.W.2d 447 (1967); 16 Am.Jur.2d ***Constitutional Law*** §112.

While an absurd construction of a constitutional provision is to be avoided, the technical corrections in the amendments which are proposed here, as discussed above, do not involve ascertaining the meaning of the term limits amendments or construing the language of their provisions. Instead, the changes involve correcting internal references within the amendments themselves so that they reference the proper subsequent constitutional provisions. On that basis, we do not believe that the maxim of statutory construction which you cited applies to the process of making corrections in printed versions of the Nebraska Constitution.

> **4. "If such a correction [of the technical errors at issue] is not made or ruled as improper, is it permissible to read Article III Section 8 and Article XV Section 21 (c) (of the proclamation) together and accept the filing of an incumbent who has previously served two complete terms or does Article III Section 8 conflict with Article XV Section 21 (c)? If a conflict does exist, should such filing be accepted? Is it possible to use the `sensible rather than absurd result' argument as to the effect of the `grandfather' clause if the changes are not made or ruled improper?"**

Before we specifically discuss your question number 4, we must point out some general rules regarding the application and construction of constitutional provisions. The Nebraska Constitution must be read as a whole, and constitutional amendments become an integral part of the instrument which must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument. ***Jaksha v. State***, 241 Neb. 106, 486 N.W.2d 858 (1992); ***Banner County v. State Board of Equalization and Assessment***, 226 Neb. 236, 411 N.W.2d 35 (1987). Constitutional provisions relating to the same subject matter should be construed together, with a view to giving effect to each provision if possible. ***State ex rel. Randall v. Hall***, 125 Neb. 236, 249 N.W. 756 (1933). Constitutional provisions are repugnant to each other or conflicting only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict. ***Swanson v. State***, 132 Neb. 82, 271 N.W. 264 (1937). Differences in constitutional provisions must, if possible, be reconciled. ***State ex rel. Randall v. Hall, supra.***

Art. III, § 8 of the Nebraska Constitution, as amended by the 1994 initiative effort, places a limit of two consecutive terms upon service in the Nebraska Legislature except "as further provided in Article XV Section 20." While Article XV, Section 20 of the initiative applies to federal officers, Article XV Section 21 of the initiative adds a new clause to the Nebraska Constitution which provides, at subsection (c), that "[t]he term held and being served [by various state officers including members of the Legislature] as a result of an election prior to the effective date of this amendment shall not be included in the number of consecutive terms referred to in stipulating ineligibility to file for election or to serve for any of the offices named in this initiative petition." Based upon the various rules for the construction and application of constitutional provisions cited above, it seems to us that Article III, Section 8 and Article XV, Section 21 (c) of the 1994 initiative are not repugnant or conflicting. Moreover, we believe that our courts would attempt to give effect to both provisions, and that the admittedly faulty reference in Art. III, § 8 of the initiative to "Article XV, Section 20" would not, in and of itself, serve to vitiate the "grandfathering" provisions in Art. XV, § 21 of the initiative. Therefore, it appears to us that you may accept the filing of an incumbent who has previously served two complete terms and who fits under the "grandfathering" provision of Art. XV, § 21 even if the technical corrections which are the subject of this opinion are not made or are ruled as improper in some forum. On that basis, it is not necessary for you to advance the "sensible rather than absurd result" argument with respect to application of the "grandfathering" provision in Article XV, Section 21 of the initiative.

5. "If the correction is made, I would accept a filing to reelect an incumbent who has previously served two complete terms as the incumbent would be `grandfathered' under Article XV Section 22. If however, that filing is successfully challenged (because the changes were improper) as being in violation of Article III Section 8 which prohibits a filing by a two term incumbent, am I subject to the provisions of Article XV Section 22 (of the proclamation) which include removal from office and ineligibility to further hold public office?"

For the reasons stated above, it is our view that courts would give effect to both Art. III, § 8 of the initiative amendments and Article XV, Section 21 of those amendments containing the "grandfathering" provision, irrespective of whether the technical corrections at issue are inserted in the printed version of the Nebraska Constitution. Therefore, we do not believe that a filing

by an incumbent subject to the "grandfathering" provision in Article XV, Section 21 of the initiative can be successfully challenged simply because you correct faulty internal references in the term limits amendments as those amendments are printed. It necessarily follows that you would not be subject to the provisions of Article XV, Section 22 of the initiative regarding removal from office and so forth because you chose to implement the technical corrections at issue here.

6. In the event of a challenge to the acceptance of a filing by a two term incumbent for reelection in 1996, will your office provide my defense to accepting the filing?

For the reasons discussed above, it is our view that all of the term limiting provisions for state officers contained in the various portions of the 1994 constitutional amendments proposed by initiative and the "grandfathering" provision found in Article XV, Section 21 (c) of that initiative are effective even though there are incorrect internal references in several of the initiative petition sections. Therefore, we do not believe that an action to challenge a filing by a two-term incumbent for reelection in 1996 purely on the grounds that such a filing would be improper under the term limits amendments or purely on the grounds that you improperly corrected the erroneous internal references in the term limits amendments would be successful. This office would defend you in such an action.

7. If such a challenge is successful, will your office provide my defense against removal from office or will your office be required to seek my removal?

As discussed above, we do not believe that such a challenge would be successful. However, if an action were brought against you for removal from office under Article XV, Section 22 of the 1994 term limits amendments because you followed our counsel and made the technical corrections in the constitution at issue here, or because you accepted a reelection filing by an incumbent under Article XV, Section 21 of the term limits amendments based upon our advice, this office would provide your defense.

8. "Is there a possibility that this issue may be clarified by the Court in <u>Duggan v. Beerman</u> (sic), No. 94-1112 currently before the Court.?"

In *Duggan v. Beermann*, No. S-94-1112, the Nebraska Supreme Court will consider several aspects of the legality of the term limits amendments that were approved by the voters in November,

1994. On September 9, 1994, the plaintiffs in the ***Duggan*** case filed an action in Lancaster County District Court in which they raised several issues regarding the legality and sufficiency of the initiative petition effort which ultimately presented the term limits amendments to the people of Nebraska. Those issues included: 1. whether the initiative petition form was defective, 2. whether the object clause of the initiative petition was incomplete or misleading, 3. whether submission of the term limits amendments to the people in November, 1994, violated Art. III, § 2 of the Nebraska Constitution, and 4. whether the term limits amendments were unconstitutional on their face. On November 7, 1994, the Lancaster County District Court held that:

> 1. the initiative petition form was not defective, as any defects or errors were clerical or technical, and the form substantially complied with statutory requirements,
>
> 2. the object clause of the initiative petition satisfied statutory requirements and was legally sufficient,
>
> 3. submission of the term limits initiative to the voters in November, 1994, was not precluded by Neb. Const. Art. III, § 2, and
>
> 4. the constitutionality of the term limits amendments was not yet justiciable, and ruling on the constitutionality of the proposed amendments would constitute an impermissible advisory opinion.

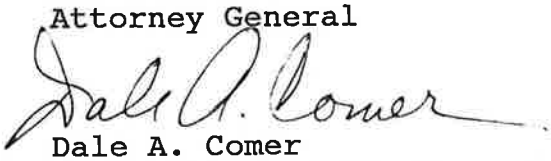
The District Court decision in ***Duggan*** was appealed, and that appeal is currently pending before the Nebraska Supreme Court.

The technical errors in the term limits initiative petition which reference the wrong subsequent sections of the constitution and which are the subject of your opinion request present only subsidiary issues in the ***Duggan*** case. The primary issues in that case involve the constitutionality of the term limits themselves. However, the plaintiffs in ***Duggan*** did argue that the technical errors made the initiative petition internally inconsistent and legally insufficient, and while the District Court disagreed, the Supreme Court might discuss that issue on appeal. Nevertheless, even in that context, it is unlikely that an opinion in the ***Duggan*** case will deal specifically with your authority to correct the technical errors in question as you print the Nebraska Constitution.

This office has vigorously defended the term limits amendments, and we will continue to do so. It is possible, however, that the Nebraska Supreme Court could hold in ***Duggan*** that the term limits amendments were improperly placed before the voters or that the provisions themselves are unconstitutional under the federal constitution.[1] In that case, the term limits amendments could be removed from the Nebraska Constitution, and the bulk of your opinion request in that regard would be rendered moot.

Sincerely yours,

DON STENBERG
Attorney General



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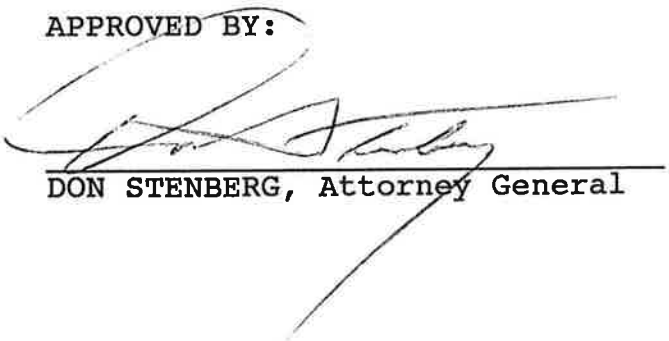

DON STENBERG, Attorney General

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[1] For example, in ***U.S. Term Limits, Inc. v. Thorton***, 63 U.S.L.W. 4413 (U.S. May 22, 1995) (Nos. 93-1456 and 93-1828), the United States Supreme Court held that certain portions of an Arkansas term limits provision violated the federal constitution.