

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

JUDICIAL PROCESS COMMITTEE

Monday, September 19, 2005
Harvest Room, State Capitol
Bismarck, North Dakota

Senator Stanley W. Lyson, Chairman, called the meeting to order at 10:00 a.m.

Members present: Senators Stanley W. Lyson, John T. Traynor, Constance Triplett; Representatives Ron Carlisle, Dawn Marie Charging, Duane DeKrey, Lois Delmore, Dennis Johnson, Joyce Kingsbury, Lawrence R. Klemin, Kim Koppelman, William E. Kretschmar, Shirley Meyer

Members absent: Senator Carolyn Nelson; Representatives Kathy Hawken, Stacey Horter

Others present: See attached appendix

At the request of Chairman Lyson, Mr. Jay E. Buringrud, Assistant Director, Legislative Council, reviewed the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Council](#).

JUDICIAL ELECTIONS STUDY

At the request of Chairman Lyson, committee counsel reviewed a memorandum entitled [Conduct of Judicial Elections - Background Memorandum](#).

Chairman Lyson called on Chief Justice Gerald VandeWalle for testimony regarding the judicial elections study. Chief Justice VandeWalle said he does not have a solution to the issues raised in the recent federal cases that declare certain judicial election canons unconstitutional. He said he tends to disagree with his federal colleagues on this issue. He said the federal judges are of the opinion that a judicial election is the same as any other election. He said judicial elections are different. He said the recent North Dakota case, *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005), is not a surprise. He said the ruling was similar to the 2002 United States Supreme Court decision, *Republican Party of Minnesota v. White*. He said when *White* was heard on remand, the Eighth Circuit held that certain canons that address political party affiliation and political contributions were unconstitutional. He said judges who seek political party endorsements, solicit campaign contributions, and declare their beliefs on issues are more likely to have to recuse themselves from hearing cases because their impartiality might be questioned. He said North Dakota has a very small judiciary. He said if judges are recusing themselves, it creates a problem in finding judges to replace them. He said under the current system, judges and judicial candidates are not permitted to

know the identity of their contributors. He said contributions are made through a committee. He said he is not sure if this process would survive the ruling in the Eighth Circuit's decision.

In response to a question from Senator Traynor, Chief Justice VandeWalle said as a result of the recent court decisions, a judge or a judicial candidate is permitted to answer certain questions but is not required to answer. He said while there is no requirement that the candidate answer certain questions, there may be political repercussions for not answering. He said judicial candidates in this state appear as no-party candidates on the ballot. He said he did not think the federal opinions would affect this practice.

In response to a question from Representative Kretschmar, Chief Justice VandeWalle said there should not be a distinction in the conduct of a sitting judge who is seeking reelection and a judicial candidate who is not a sitting judge. He said to do so would raise equal protection and due process questions.

In response to a question from Representative Koppelman, Chief Justice VandeWalle said while a general statement about judicial philosophy may not be grounds for recusal, it is difficult to determine at what point a recusal is appropriate. He said judicial candidates should be careful in making statements that may require a recusal at a later date.

In response to a question from Representative Klemin, Chief Justice VandeWalle said a recusal is not a penalty. He said candidates often extend themselves more than they should. He said judicial candidates should be cautious of placing themselves in that position. He said he is not sure what can be done to the canons to make the language more narrowly tailored to serve a compelling state interest. He said he is not sure if any revised language would meet that test.

In response to a question from Representative Carlisle, Chief Justice VandeWalle said the canons that were held to be unconstitutional will need to be revised before the next judicial election.

In response to a question from Representative Meyer, Chief Justice VandeWalle said the Commission on Judicial Conduct is a statutory committee. He said North Dakota Century Code Section 27-23-02

provides that membership of the commission consists of two district court judges, one lawyer licensed in this state, and four citizens who are not judges, retired judges, or lawyers. He said the commission has the power to investigate complaints against judges in the state.

Chairman Lyson called on Mr. Jack McDonald for testimony regarding the Judicial Process Committee. Mr. McDonald said he was appearing on behalf of the State Bar Association of North Dakota (SBAND). He said Mr. Michael Williams, President, SBAND, has formed a special task force to address issues raised by the recent court decisions involving judicial elections. He said the task force is composed of experienced judges and lawyers from around the state. He said the task force will be available to assist the Judicial Process Committee in its study. He provided written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative DeKrey, Mr. McDonald said it is likely that the task force will work with the committee and bring any recommendations before the committee.

In response to a question from Representative Koppelman, Mr. McDonald said allowing a judicial candidate to know the identity of a contributor to the candidate's campaign and the amount of the contribution is likely to increase the number of judicial recusals in the state. He said an independent judge is one who is not affiliated with any political party or particular cause. He said an independent judiciary is free from political pressures.

In response to a question from Representative Klemin, Mr. McDonald said the task force will be reviewing the issue of judicial campaign contributions.

In response to a question from Representative Delmore, Mr. McDonald said as a result of the recent federal cases, there will be more attempts, especially by special interest groups, to get information from judicial candidates.

In response to a question from Representative Carlisle, Mr. McDonald said state law requires a judicial candidate or a candidate committee to file a statement that includes the name and mailing of all contributors who made contributions in excess of \$200 in the aggregate.

In response to a question from Senator Traynor, Mr. McDonald said the judicial conduct canons cannot prohibit a judicial candidate from responding to certain questions but the candidate can refuse to answer the questions.

In response to a question from Representative DeKrey, Mr. McDonald said the task force would keep the committee informed as it studies the judicial election issues.

In response to a question from Senator Traynor, Mr. McDonald said the task force is interested in having a member of the Judicial Process Committee serve on the task force.

Chairman Lyson said he would contact the chairman of the Legislative Council regarding the appointment of a committee member to the task force.

Representative Klemin said because any revisions to the judicial canons are a responsibility of the judiciary, he is unsure of what the Legislative Assembly can do.

Chairman Lyson called on Mr. John Val Emter for comments concerning the judicial elections study. Mr. Emter said an incumbent judge is difficult to defeat. He said there is no justice in the judicial system.

COMMISSION ON LEGAL COUNSEL FOR INDIGENTS

Chairman Lyson called on Representative DeKrey for an update of the status of the Commission on Legal Counsel for Indigents. Representative DeKrey said he is a member of the commission. He said the commission has held two meetings. He said the commission has received 14 applications for the position of executive director of the commission. He said seven of the top candidates will be interviewed during an upcoming meeting. He said the commission's priority is to hire an executive director. He said the executive director's first duties will be to locate office space, hire office staff, and award indigent defense contracts. He said he would provide further information regarding the commission throughout the interim.

In response to a question from Representative Delmore, Representative DeKrey said Senator Trenbeath is the other legislative member on the commission.

In response to a question from Representative Koppelman, Representative DeKrey said the commission includes a retired judge, attorneys, a certified public accountant, and legislators. He said one of the attorneys on the commission has experience with contract public defense work.

IDENTITY THEFT STUDY

At the request of Chairman Lyson, committee counsel presented a memorandum entitled [*Identity Theft - Background Memorandum*](#).

Representative Koppelman said the committee should receive a copy of a new Delaware law that deals with security breaches.

Representative Klemin said the committee may want to review international jurisdiction issues as they relate to identity theft cases.

Chairman Lyson called on Attorney General Wayne Stenehjem for testimony regarding the identity theft study. Mr. Stenehjem said identity theft is the fastest growing white color crime in the country. He said his office offers a kit to help victims of identity theft. He said it can take up to 600 hours for a victim to correct the credit problems created by an identity thief. He said the average identity theft nets between \$45,000 and \$50,000. He said most identity thieves

are never caught. He said the average bank robber nets \$3,000 to \$4,000. He said most bank robbers get caught. He said legislative changes allow for prosecution in the jurisdiction where the victim lives. He said the problem is finding the thief. He said identity thieves often relocate to countries in which there is not extradition, like Nigeria. He said Canada provides varying degrees of help with the extradition of identity thieves. He said the security breach law passed in 2005 was based upon California law. He said North Dakota has a very trusting population that is more willing than most to provide information when asked. He said the ways of stealing identity are continually changing. He said identity theft is a huge problem that can take years for a victim to correct.

In response to a question from Representative Delmore, Mr. Stenehjem said credit card companies are very concerned about identity theft problems. He said input from a representative of a credit card company may be helpful to the committee.

Senator Lyson said some of the additional law enforcement training funds authorized during the last legislative session are being used to provide training on identity theft.

In response to a question from Representative Carlisle, Mr. Stenehjem said a number of national organizations, such as the National Conference of State Legislatures and the National Association of Attorneys General, are working on ways to combat identity theft.

In response to a question from Representative Meyer, Mr. Stenehjem said identity theft can damage a person's credit rating. He said a person can request up to three free credit reports each year, one from each of the credit reporting agencies. He said it is important to request your credit report periodically to make sure it is accurate.

In response to a question from Representative Johnson, Mr. Stenehjem said the Attorney General's office can issue an affidavit to an identity theft victim. He said the affidavit can be used to show that the person has been a victim of identity theft.

In response to a question from Representative Charging, Mr. Stenehjem said he was not aware of negative consequences that would result from a person requesting his or her own credit report.

In response to a question from Representative Koppelman, Mr. Stenehjem said one of the better solutions for reducing identity theft is consumer education. He said identity thieves are getting more and more sophisticated.

In response to a question from Representative Klemin, Mr. Stenehjem said users of wireless Internet need to install security measures to ensure that others are not able to tap into their computer files.

Chairman Lyson called on Ms. Marilyn Foss, North Dakota Bankers Association, for testimony regarding federal identity theft legislation. Ms. Foss said numerous pieces of legislation have been introduced

in Congress. She said on September 13, 2005, the House Financial Services Committee considered a bill that amends the Fair Credit Reporting Act and extends protection to sensitive personal information, sensitive financial account information, and sensitive financial identity information. She said the bill requires notice to consumers if there is a breach that risks "substantial harm" or "substantial inconvenience." She said the bill preempts state law with respect to the responsibilities of any person to protect confidentiality of consumer information. She said several other bills, including the Consumer Data Security and Notification Act, the Consumer Identity Protection and Security Act, and the Notification of Risk to Personal Data Act, are also pending in Congress. Ms. Foss provided written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Koppelman, Ms. Foss said several of the pending acts would preempt state action. She said it is likely that the pending federal legislation will be acted upon after January 1, 2006.

Chairman Lyson called on Mr. Emter for comments concerning the identity theft study. Mr. Emter said he is concerned that credit reporting agencies are selling personal information.

Representative Klemin said the committee should look into the security issues of wireless computers.

Representative Delmore said locked mailboxes would help solve some of the identity theft problems.

Representative Charging said locked mailboxes would be difficult for people in rural areas.

Senator Traynor said it would be helpful to hear from a person who has been a victim of identity theft.

Representative Delmore said the committee may want to receive testimony regarding identity theft from law enforcement, credit card companies, and the United States Post Service.

DEFINITIONS OF DEMENTIA-RELATED CONDITIONS STUDY

At the request of Chairman Lyson, committee counsel presented a memorandum entitled [*Legal and Medical Definitions Used for Dementia-Related Conditions - Background Memorandum*](#).

Chairman Lyson called on Mr. Rodger Wetzel, Director, St. Alexius Eldercare and Community Health Program, for testimony regarding the study. Mr. Wetzel said he has been working in the field of aging services for 35 years. He said it was only about 30 years ago that he did his first presentation on this "new" disease called Alzheimer's. He said before that dementia-related conditions were just referred to as senility or getting old. He said much progress has been made in those 30 years in terms of awareness of these conditions.

Mr. Wetzel said he serves on the Real Choice Systems Change Task Force that is being funded

through a federal grant. He said one of the goals of this task force and the grant program is to support family caregivers. He said many people with Alzheimer's and related dementia can be cared for at home. He said it is important to look at the legal and medical definitions of dementia because of how complicated the diseases are and because people with dementia often fall between the cracks in our legal and medical systems. He said a person with dementia may look very healthy physically and may present very well in a situation such as a guardianship, conservatorship, or power of attorney proceeding. He said, however, that person may not later remember anything about the proceeding. He said he hopes the task force will collaborate with the Judicial Process Committee in its efforts. Mr. Wetzel provided information regarding Alzheimer's disease and related dementia, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Traynor, Mr. Wetzel said social workers are often available to help families obtain services for persons afflicted with dementia-related conditions.

In response to a question from Representative Koppelman, Mr. Wetzel said although a definitive diagnosis of Alzheimer's disease can be made only at the time of autopsy, by process of elimination, Alzheimer's disease can be diagnosed with about 90 percent accuracy. He said North Dakota ranks first in the nation in the percentage of its population over the age of 85.

Chairman Lyson called on Ms. Kristi Pfliger-Keller, Minnesota-North Dakota Alzheimer's Association, for comments concerning the study. Ms. Pfliger-Keller said the Alzheimer's association is working with a graying population in North Dakota. She said Alzheimer's disease is growing at an alarming rate. She said this growth will impact in-home services, long-term care services, and the Medicaid and Medicare programs. She said the Alzheimer's association will be available to the committee to provide information and resources. She said the goal of the association is to provide supportive services to the Alzheimer's and related-dementia population.

Representative Delmore said the committee should receive information on what are the legal and medical definitions of dementia. She said the Department of Human Services would be a likely resource for the committee. Committee counsel said the North Dakota Century Code does not contain specific definitions of dementia or Alzheimer's disease.

Chairman Lyson said the task force funded by the federal grant will be addressing the services issues that were raised in Senate Concurrent Resolution No. 4027. He said this committee is limited to the definitions issues.

Representative Klemin said federal regulations may provide some guidance regarding the definitions of these terms.

Representative Koppelman said it appears that the definitions may affect legal issues such as guardianship and powers of attorney.

EMINENT DOMAIN STUDY

At the request of Chairman Lyson, committee counsel read a letter from Legislative Council Chairman Bob Stenehjem to Chairman Lyson regarding the need for a study of eminent domain issues. A copy of the letter is on file in the Legislative Council office.

At the request of Chairman Lyson, committee counsel presented a memorandum entitled [*Eminent Domain - Background Memorandum*](#).

In response to a question from Senator Traynor, committee counsel said Alabama, California, Florida, Michigan, New Jersey, and Texas are considering constitutional amendments to address the eminent domain issues in the *Kelo v. New London* case.

In response to a question from Representative Koppelman, committee counsel said she would provide the committee with the legislative history for North Dakota Century Code Section 11-36-17, a provision regarding the authority of a port authority.

Chairman Lyson said the committee will be conducting public hearings around the state to determine whether there is a need to enact legislation to address the issues raised in the *Kelo* case and whether the best approach is statutory or by constitutional amendment. At the request of Chairman Lyson, committee counsel distributed a copy of a proposed initiated measure for a constitutional amendment relating to eminent domain. A copy of the proposed initiated measure is on file in the Legislative Council office.

Chairman Lyson called on Mr. Dave Forth for testimony regarding the eminent domain study. Mr. Forth said the United States Constitution only gave the federal government limited rights. He said the use of eminent domain for private benefit is against the intentions of the founding fathers. He said the people own the rights. He said unless the government is given a specific right to act, the government does not have that right.

Chairman Lyson called on Mr. Myron Atkinson for testimony regarding the eminent domain study. Mr. Atkinson said any change to the North Dakota Constitution should be done slowly and carefully. He said the use of eminent domain is a very complicated issue. He said there should be public hearings and discussions on the issues. He said in less than 90 days since the opinion was issued, numerous states have reacted, due in large part to the media hype about the case. He said the reaction should not be to amend the constitution without serious consideration of the effects the amendment may have. He said it is important to have faith in local governments and other bodies of elected officials.

In response to a question from Senator Traynor, Mr. Atkinson said if eminent domain authority is to be limited, it would be better to address the issue legislatively. He said the proposed constitutional amendment would limit urban renewal.

At the request of Chairman Lyson, committee counsel provided to the committee a copy of the *Kelo* decision and a copy of the 1996 North Dakota Supreme Court decision, *City of Jamestown v. Leever's Supermarkets, Inc.*, 552 N.W.2d 365 (N.D. 1996), which addressed a similar eminent domain issue.

Chairman Lyson called on Ms. Heidi Heitkamp for testimony relating to the eminent domain study. Ms. Heitkamp said the proposed constitutional amendment was drafted based upon citizens' concerns about the *Kelo* decision. She said the constitutional amendment, which would restrict state or local governments from taking private land for economic development, will be voted on by the public in June 2006 if the required number of signatures are gathered by March. She said she is confident that the measure will be on the ballot. She said the Legislative Assembly will need to analyze what statutory changes will be needed as a result of the constitutional change. She said the decision in *Kelo* is and has been the law in North Dakota since the 1996 *Leever's* decision. She said she disagrees that the reaction to the *Kelo* decision is just media hype. She said the surest way to protect private property from an eminent domain taking is a constitutional amendment. She said the constitution and state law allow for a citizen-initiated process to create statutes or to amend the constitution without legislative involvement. She said this measure will not affect the ability of the government to build roads or put in a sewer system. She said this measure simply provides that economic development, an increase in the tax base, or general economic health cannot be used as the rationale for an eminent domain condemnation.

In response to a question from Senator Lyson, Ms. Heitkamp said the intent of the initiated measure sponsoring committee is to get the measure on the June 2006 primary ballot. She said if she did not feel confident that this measure is what the majority of citizens want, she would not be participating in this process.

In response to a question from Representative Carlisle, Ms. Heitkamp said regarding the development of land for a biodiesel plant, if the owners of the land are not willing to sell their land for the plant project, this measure would prohibit the use of eminent domain to take that property.

In response to a question from Representative Delmore, Ms. Heitkamp said the United States Supreme Court has been steadily eroding property owners' rights through the eminent domain process since 1954. She said the *Kelo* decision was not that

shocking in light of previous decisions on eminent domain.

In response to a question from Representative Klemin, Ms. Heitkamp said the measure would allow a governmental entity to condemn property that is blighted provided that economic development is not the purpose of the taking but rather is only incidental to the taking. She said the constitutional measure would prohibit a taking for economic development purposes.

In response to a question from Representative Koppelman, Ms. Heitkamp said the majority of people disagree with the *Kelo* decision and want to protect property rights. She said the way to protect those rights is to amend the constitution. She said state law allows for different ways to amend the constitution. She said it is not always in the people's best interest to have the Legislative Assembly make those decisions. She said this was the case in the financial information privacy issue. She said the initiated measure process allows the measure to get on the ballot without undue input from special interest groups.

Representative Koppelman said regardless of whether the constitutional amendment gets on the ballot by the initiated measure process or by the Legislative Assembly, the public still votes on the issue.

In response to a question from Senator Traynor, Ms. Heitkamp said the interim committee may want to look at how to harmonize state law with the new constitutional measure. She said the committee may also want to hear from citizens who have gone through the eminent domain process. She said in the *Kelo* decision, Justice Stevens encouraged states to take action.

Chairman Lyson called on Mr. Curly Haugland for testimony regarding the eminent domain study. Mr. Haugland said the Landowners Association of North Dakota has been working with the initiated measure group. He said the measure has been well thought out and will create a forum for discussion. He said this measure would put an end to urban renewal law which, he said, is bad law. He said there are many reasons why citizens should not always have faith in their local government.

In response to a question from Senator Triplett, Mr. Haugland said if there is a legitimate public nuisance or health hazard, eminent domain can be used. He said urban renewal is a broad brush approach under which a municipal decree can take down entire blocks or neighborhoods regardless of whether the entire area is blighted or not.

Chairman Lyson called on Mr. Jerry Hjelmstad, North Dakota League of Cities, for comments regarding the eminent domain study. Mr. Hjelmstad said the League of Cities would like to offer its services to the committee as it studies the eminent domain issue. He said the league has a 15-member

executive board that develops policy for its organization when its annual conference is not in session. He said the annual conference of the league will be in September. He said he expects that the eminent domain issue will be discussed at that meeting and that a policy decision will likely be made on the issue.

Chairman Lyson called on Mr. Claus Lembke, North Dakota Association of Realtors, for testimony regarding the eminent domain study. Mr. Lembke said the association is not opposed to changes but its members want more time to give their input. He said there is concern the amendment could stifle the growth of cities.

Chairman Lyson called on Mr. Brian Kramer, North Dakota Farm Bureau, for testimony regarding the eminent domain study. He said the North Dakota Farm Bureau is not sure as to whether the best way to address the issue is through legislation or by constitutional amendment. He said the issue needs

to be studied to determine what will best protect the private property owners in the state.

Chairman Lyson said the committee will conduct additional public hearings on the eminent domain issue. He said it is likely that the hearings will be held in Bismarck in October, Fargo in November, and Minot in January.

Chairman Lyson adjourned the meeting at 3:10 p.m.

Vonette J. Richter
Committee Counsel

[ATTACH:1](#)