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NORTH DAKOTA'S NEW ELECTION CODE

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I. INTRODUCTION

The new election code in North Dakota became law in April 1981, but became a reality in July 1981 when the deadlines to refer the new code expired and no referendum petitions were filed.¹ In substantially similar form, this code had been passed by the 1979 legislature over the Governor's veto. It was law for a few weeks, until most of it was referred to the people in the 1980 election.² The code passed by the 1979 Legislature was contained primarily in three bills — Senate Bill 2340, House Bill 1138, and House Bill 1471.³ Senate Bill 2340, which called for the establishment of a presidential preference primary and a new primary date (the

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1. N.D. CENT. CODE tit. 16.1 (Interim Supp. 1981). A referendum petition may be submitted only within 90 days after the filing of the law with the secretary of state. N.D. CONST. art. III, § 5. Since no referendum petitions were filed in July 1981, the new code will be in effect for the primary election on June 8, 1982. *See* N.D. Cent. Code § 16.1-11-01 (Interim Supp. 1981).

2. 1981 N.D. Sess. Laws ch. 653. The submission of a referendum petition suspends the operation of any measure enacted by the legislature with the exception of emergency measures and appropriation measures for the support and maintenance of state departments and institutions. N.D. CONST. art. III, § 5. Thus, after the referendum petitions were submitted in June 1979, the repeal of North Dakota Century Code title 16 was suspended, and title 16, for the most part, remained in effect for the 1980 primary and general elections. 1981 N.D. Sess. Laws ch. 653.

3. 1979 N.D. Sess. Laws chs. 276, 271, & 274 respectively.

second Tuesday in June),⁴ was referred to the voters and was approved by them in the 1980 primary election.⁵ The bulk of the new law was contained in House Bill 1138. Except for three sections,⁶ that bill was referred and was rejected by the voters in the 1980 general election.⁷ The law for political party organization, contained in House Bill 1471, was not referred.⁸

The new election code changed or modified three potentially controversial areas⁹ in House Bill 1138, a bill that was defeated by the voters in 1980.¹⁰ First, the new code does not require the registration of voters;¹¹ therefore, North Dakota continues as the only state without statewide registration. Second, the new code allows absentee ballots to be sent or delivered to a voter's agent, but no person may act as an agent for more than four voters in any one election.¹² Third, although the new code retains a chapter on campaign contributions, which prohibits direct contributions to political candidates by unions and which was part of House Bill 1138,¹³ it also adds a new chapter calling for the disclosure of certain campaign contributions.¹⁴ The 1981 legislature passed the new rules, relating to agents of absentee voters and campaign

4. 1979 N.D. Sess. Laws ch. 276.

5. 1981 N.D. Sess. Laws ch. 651.

6. The three portions of the election law revision bill that were not referred were as follows: (1) section 16.1-01-01 dealing with the duties of the secretary of state and the county auditor; (2) section 16.1-05-05 which raised the compensation for election officers; and (3) section 16.1-06-07 requiring rotation of party columns on the ballot. 1979 N.D. Sess. Laws ch. 271, §§ 1, 3, 16. Although section 16.1-06-07 was law, the attorney general issued an opinion in 1979 that the section was not to be followed in the 1980 general election because, among other reasons, the section depended on another provision of law that was suspended by the filing of the referendum petition. 179 N.D. Op. Att'y Gen. 158 (Aug. 14, 1979). For another opinion arriving at the same conclusion as the attorney general, but for different reasons, cf. *The Legal Effect of the Partial Referral of House Bill 1138* (1981) (unpublished paper on file at University of North Dakota Law School Library).

7. 1981 N.D. Sess. Laws ch. 653.

8. 1979 N.D. Sess. Laws ch. 274 (currently codified in N.D. CENT. CODE ch. 16.1-03 (Interim Supp. 1981)).

9. These areas were absentee voter's ballots, campaign contributions by union or corporate funds, and voting precinct lists. See LEAGUE OF WOMEN VOTERS OF NORTH DAKOTA, *VOTER'S GUIDE—GENERAL ELECTION 5* (Nov. 14, 1980).

10. 1981 N.D. Sess. Laws ch. 653.

11. See N.D. CENT. CODE § 16.1-04-04 (Interim Supp. 1981). All other states require statewide registration. CONGRESSIONAL RESEARCH SERVICE, *ELECTION LAWS OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA — RELATING TO VOTER QUALIFICATIONS, REGISTRATION, ABSENTEE VOTING* 170 (Rev. ed. 1976). In House Bill 1138 the county auditor was authorized to list previous voters except for those persons who did not vote in either of the last two elections conducted at a precinct. 1979 N.D. Sess. Laws ch. 271, § 4. The person whose name was not on the list was required to execute an affidavit that included name, age, street address, phone number, if any, occupation, name of employer, if any, and the period of time the affiant lived in the precinct. 1979 N.D. Sess. Laws ch. 271, § 5.

12. N.D. CENT. CODE § 16.1-07-08(1) (Interim Supp. 1981). House Bill 1138, section 16.1-07-08 did not permit a person to have an agent. 1979 N.D. Sess. Laws ch. 271, § 5. Note that prior law put no limitations on the number of electors an agent could act for. Compare N.D. CENT. CODE § 16.1-07-08(1) (Interim Supp. 1981) with N.D. CENT. CODE § 16-18-09 (repealed 1981).

13. 1979 N.D. Sess. Laws ch. 271, § 6.

14. N.D. CENT. CODE ch. 16.1-08.1 (Interim Supp. 1981) (chapter entitled Campaign Contribution Statements).

contributions, in separate bills¹⁵ rather than including them in the major election revision bill as was done by the 1979 legislature.¹⁶

This article will discuss some of the significant changes in North Dakota's new election code,¹⁷ which has been codified as title 16.1 of the North Dakota Century Code.¹⁸ The new code regulates presidential, congressional, statewide, legislative, district, and county elections¹⁹ and has streamlined the former twenty-two chapters of title 16 into the sixteen chapters of title 16.1.²⁰ With one exception²¹ all the chapters contain at least some changes from the former law. The major election changes in the North Dakota Century Code that will be discussed in this article can be grouped into four areas: primary and general elections;²² corrupt practices;²³ campaign contributions;²⁴ and recount and election contests.²⁵ Minor changes have occurred in the following areas:

15. 1981 N.D. Sess. Laws ch. 234 (absentee voter's agents); 1981 N.D. Sess. Laws ch. 243 (campaign contribution restrictions); 1981 N.D. Sess. Laws ch. 244 (campaign contribution statements). The aim of passing the law in separate bills might have been to avoid having the entire election law revision referred to the voters because of objections to a few sections in the law.

16. 1979 N.D. Sess. Laws ch. 271.

17. In 1975, House Concurrent Resolution Number 3017 directed the legislative council to conduct a study of the state's election laws and procedures. The resolution read in part as follows:

That the Legislative Council is hereby authorized and directed to conduct a study and review of the election laws of the State of North Dakota for the purpose of revising and modernizing such laws in order to clarify voting procedures and responsibilities and eliminating factors which tend to disenfranchise voters. The Council shall direct its efforts towards a revision of the substance, form, and style of current voting statutes, towards integration and correlation of those statutes where possible, and towards deletion of outmoded or unnecessary statutory material or procedures. The Council shall also review each measure, dealing with election laws, which was introduced during the Forty-fourth Legislative Assembly.

1975 N.D. Sess. Laws 1618.

18. N.D. CENT. CODE tit. 16.1 (Interim Supp. 1981). The new election code contains law that (1) was passed or not repealed by the 1979 legislature and not referred to the people; (2) was passed by the 1979 legislature, referred and approved in the 1980 primary; and (3) was passed or not repealed by the 1981 legislature. A few sections of the former law were not repealed and were therefore codified in title 16.1. Many provisions of the former law have been unchanged and adopted as part of the new code. Also, in many instances there have been no substantive changes, but only changes in phraseology.

19. This article does not treat local government elections such as municipal elections, *see* N.D. CENT. CODE ch. 40-21 (1968 and Supp. 1981), or school elections, *see* N.D. CENT. CODE ch. 15-28 (Interim Supp. 1981). The 1981 legislature passed a concurrent resolution directing the legislative council to conduct a study of the feasibility and desirability of consolidating school district, city, and primary elections. 1981 N.D. Sess. Laws ch. 715.

20. For example, the new chapters for primary and general elections (N.D. CENT. CODE chs. 16.1-11, -13 (Interim Supp. 1981)) have addressed all elections thereby eliminating separate former chapters dealing with special elections (N.D. CENT. CODE ch. 16-07 (repealed 1981)) and no-party ballots (N.D. CENT. CODE ch. 16-08 (repealed 1981)).

21. *See* N.D. CENT. CODE ch. 16.1-09 (Interim Supp. 1981) (chapter entitled Statement of Interests).

22. The discussion of primary and general elections, which is considered *infra* notes 33-67, will also consider changes in North Dakota Century Code chapter 16.1-06 (entitled Ballots — Voting Machines — Electronic Voting Systems), and North Dakota Century Code chapter 16.1-12 (entitled Certificates of Nominations — Vacancies).

23. N.D. CENT. CODE ch. 16.1-10 (Interim Supp. 1981).

24. N.D. CENT. CODE chs. 16.1-08, -08.1 (Interim Supp. 1981).

25. N.D. CENT. CODE ch. 16.1-16 (Interim Supp. 1981).

General provisions;²⁶ party committee organization;²⁷ precincts and voting places;²⁸ election officers;²⁹ absent voters' ballot and absentee voting;³⁰ presidential electors;³¹ and canvass of voters.³²

26. See N.D. CENT. CODE ch. 16.1-01 (Interim Supp. 1981). The powers and duties of the secretary of state, designated as the supervisor of elections, have substantially increased. N.D. CENT. CODE § 16.1-01-01(1) (Interim Supp. 1981). To carry out his duties and to assume uniform voting opportunities throughout the state, the secretary of state is given the power to issue those rules and regulations he deems necessary. N.D. CENT. CODE § 16.1-01-01(3) (Interim Supp. 1981). The secretary of state has the power to examine any election ballot or the material, machine, or device used in connection with any election for the purpose of determining sufficient compliance with the law. N.D. CENT. CODE § 16.1-01-01(1) (Interim Supp. 1981). Some of the secretary's duties include: (1) developing training programs for all election officials; (2) preparing information for voters on voting procedures; (3) distributing to each county a political calendar, a manual on election procedures, and a map of all election districts for state and national office in that county; (4) convening an annual state election conference of county auditors to discuss uniform implementation of state election policies; and (5) publishing biennial reports on the conduct and costs of voting in the state. N.D. CENT. CODE § 16.1-01-01(2) (Interim Supp. 1981).

27. See N.D. CENT. CODE ch. 16.1-03 (Interim Supp. 1981). The new code has set the following new dates for political party meetings: (1) precinct caucuses will meet on or before May 15 following the last preceding general election, N.D. CENT. CODE § 16.1-03-01(1) (Interim Supp. 1981); (2) district committees will meet within 15 days after the caucus meetings, N.D. CENT. CODE § 16.1-03-07 (Interim Supp. 1981); and (3) the state committee will meet on or before July 1 of each odd-numbered year, N.D. CENT. CODE § 16.1-03-11 (Interim Supp. 1981). The district committee's executive committee will consist of from five to eighteen persons which shall include, among others, the party's nominees for and members of the legislative assembly. N.D. CENT. CODE § 16.1-03-07(4) (Interim Supp. 1981). The state committee's officers, together with the national committee persons, a representative of state elected officials who are party members, the party's floor leaders in the house of representatives and senate, and four district chairmen selected by the state committee, constitute the executive committee of the state committee. N.D. CENT. CODE § 16.1-03-11 (Interim Supp. 1981).

28. See N.D. CENT. CODE ch. 16.1-04 (Interim Supp. 1981). The board of county commissioners of each county, subject to the rights of incorporated cities, retain the power to divide the county into precincts and to designate the voting place for each precinct. N.D. CENT. CODE §§ 16.1-04-01, -02 (Interim Supp. 1981). The only limitation on the board's power is that although any number of townships or parts of townships may be joined into a single precinct, no precinct shall encompass more than one legislative district, and if voting places are altered, it must be done for a good and sufficient reason. N.D. CENT. CODE §§ 16.1-04-01(1), -02(1) (Interim Supp. 1981). Voting places that are reasonably accessible to the elderly and the handicapped must be provided. N.D. CENT. CODE § 16.1-04-02(2) (Interim Supp. 1981).

29. See N.D. CENT. CODE ch. 16.1-05 (Interim Supp. 1981). The compensation for election inspectors, election judges, poll clerks, and any other private individual who performs duties in the election process has been increased and set at the state's minimum wage, but it cannot exceed \$50 for each election. N.D. CENT. CODE § 16.1-05-05 (Interim Supp. 1981). State, county, or other election officials and other persons performing election duties shall be reimbursed for only their actual and necessary expenses and mileage in accordance with sections 54-06-09, 44-08-04 and 11-10-15 of the North Dakota Century Code. *Id.* Members of the election board who attend training sessions shall be paid 25% more than the state minimum wage during the time spent in the performance of their election duties; however, they shall receive only their actual and necessary expenses and mileage for attendance at the training session. *Id.* Poll challengers and poll clerks must be qualified electors of the district in which they are assigned. N.D. CENT. CODE § 16.1-05-06(2) (Interim Supp. 1981). The new law has added another reason for disqualifying a person from being a member of the board of electors. If a person is a brother or a sister, whether by birth or by marriage, of the whole or half blood, of any candidate in the election in which he is serving, that person is disqualified from being a member of the board. N.D. CENT. CODE § 16.1-05-02(2)(c) (Interim Supp. 1981).

30. See N.D. CENT. CODE ch. 16.1-07 (Interim Supp. 1981). A new section has provided for Americans overseas who intend to vote by absentee ballot in federal elections only. N.D. CENT. CODE § 16.1-07-01(2) (Interim Supp. 1981). An application for an absentee voter's ballot must be made 40 days preceding an election. N.D. CENT. CODE § 16.1-07-05 (Interim Supp. 1981). If an envelope containing an absentee voter's ballot has no postmark or has an illegible postmark, it must be received by mail by the proper official within 24 hours after the closing of the polls in order to be counted. N.D. CENT. CODE § 16.1-07-09 (Interim Supp. 1981). A voter may personally deliver the absentee voter's ballot to the appropriate office prior to 4:00 p.m. on the day before the election. *Id.* If a person votes by absentee voter's ballot and returns before or on election day, that person cannot vote in person. N.D. CENT. CODE § 16.1-07-02 (Interim Supp. 1981). The requirement no longer exists wherein the county auditor must keep a record of voters who are military personnel on active duty and must send them absentee voter's ballots. See N.D. CENT. CODE § 16-18-11 (repealed 1981).

31. See N.D. CENT. CODE ch. 16.1-14 (Interim Supp. 1981). Members of the board for the trial

II. PRIMARY AND GENERAL ELECTIONS

The major changes in the primary election law have taken place as a result of a desire by the people for a presidential preference primary.³³ The holding in *McLain v. Meier*,³⁴ which invalidated the state's ballot access³⁵ and ballot position laws,³⁶ was also influential.

The primary date has been scheduled for the second Tuesday in June of every general election year.³⁷ Precinct committeemen will no longer be elected in the primary, but in the precinct's caucus.³⁸ In presidential years, a presidential preference primary will be conducted.³⁹ The delegates who are selected by the political parties will be bound to cast their first ballots at the party's national convention in a specified manner. Each candidate at the party's presidential preference primary will receive a proportion of the total votes cast by the delegates equal to the proportionate total received by that candidate at the primary.⁴⁰

of contest of elections for presidential electors are to be compensated in the same manner as state officials. N.D. CENT. CODE § 16.1-14-17 (Interim Supp. 1981).

32. See N.D. CENT. CODE ch. 16.1-15 (Interim Supp. 1981). The new law extends the time for the county canvassing board to meet to no later than 10 days after the election and the time for the state canvassing board to meet to no later than 25 days after the election. N.D. CENT. CODE §§ 16.1-15-17, -35 (Interim Supp. 1981). The county canvassing board members who are not paid officials of the county are to be compensated according to North Dakota Century Code section 16.1-05-05. N.D. CENT. CODE § 16.1-15-18 (Interim Supp. 1981). The state canvassing board may receive compensation "only for their expenses incurred in attending meetings in accordance with sections 44-08-04 and 54-06-09." N.D. CENT. CODE § 16.1-15-33 (Interim Supp. 1981). Members of the county canvassing board are disqualified if they would not be eligible to serve on an election board and, if disqualified, the county commissioners or district chairmen are authorized to replace the disqualified member. N.D. CENT. CODE § 16.1-15-16 (Interim Supp. 1981).

33. 1981 N.D. Sess. Laws ch. 651 (presidential preference referred measure approved).

34. 637 F.2d 1159 (8th Cir. 1980).

35. N.D. CENT. CODE § 16-04-20(4) (repealed 1981) (current version at N.D. CENT. CODE § 16.1-11-30 (Interim Supp. 1981)).

36. N.D. CENT. CODE § 16-11-06 (repealed 1981) (current version at N.D. CENT. CODE § 16.1-06-07.1 (Interim Supp. 1981)).

37. N.D. CENT. CODE § 16.1-11-01 (Interim Supp. 1981). Previously, the primary was held on the second Tuesday in September of every year in which a general election occurred. N.D. CENT. CODE § 16-04-01 (repealed 1980) (current version at N.D. CENT. CODE § 16.1-11-01 (Interim Supp. 1981)). The general election in North Dakota is held on the first Tuesday after the first Monday in November of each even-numbered year. N.D. CENT. CODE § 16.1-13-01 (Interim Supp. 1981).

38. N.D. CENT. CODE § 16.1-03-01(2)(f) (Interim Supp. 1981). Only those persons who are qualified electors may vote or be elected as committeemen at the precinct caucus. N.D. CENT. CODE § 16.1-03-02(1) (Interim Supp. 1981). Also, only those persons who either voted or affiliated with the party at the last general election or who intend to vote or affiliate with the party at the next general election may vote at the precinct caucus. N.D. CENT. CODE § 16.1-03-02(2) (Interim Supp. 1981). A person whose right to participate is challenged may be excluded from the caucus by a two-thirds vote of the whole caucus. N.D. CENT. CODE § 16.1-03-02(3) (Interim Supp. 1981). To be entitled to elect a precinct committeeman, the political party must have received at least five percent of the total votes cast at the last preceding presidential election for its set of presidential electors whose names were printed on the ballot. N.D. CENT. CODE § 16.1-03-03(2) (Interim Supp. 1981). Each political party is entitled to one precinct committeeman for each 250 votes, or major fraction thereof, cast for the party's presidential electors in the last presidential election. N.D. CENT. CODE § 16.1-03-03(3) (Interim Supp. 1981). Each precinct that qualifies under section 16.1-03-03(2) of the North Dakota Century Code is entitled to at least one committeeman who shall serve a two-year term. *Id.*

39. N.D. CENT. CODE § 16.1-11-02 (Interim Supp. 1981).

40. N.D. CENT. CODE § 16.1-11-04 (Interim Supp. 1981). The 1981 amendment to this section provides:

In order to get on the primary ballot of a qualified party,⁴¹ a presidential candidate must file an affidavit and either a certificate of endorsement signed by the chairman of the party's state committee or a petition in the same form and with the same number of signatures as a candidate for state office.⁴² For the purposes of the presidential primary only, political parties may file certificates of endorsement for more than one presidential candidate.⁴³ The certificate and affidavit, or petition and affidavit, must be filed with the secretary of state not more than sixty-six nor less than fifty-five days prior to the primary election, and before 4:00 p. m. of the fifty-fifth day prior to the primary election.⁴⁴

Currently, the value of North Dakota's presidential preference primary depends upon the actions of the national parties. In *Democratic Party of the United States v. LaFollette*⁴⁵ the United States Supreme Court held that a state holding an open primary cannot constitutionally compel the national party to seat a delegation chosen in a way that violates party rules. Both Wisconsin, the state in the *LaFollette* case,⁴⁶ and North Dakota conduct open primaries; which allow voters to participate without regard to affiliation or a public declaration of party preference.⁴⁷ In both states the delegates to the national convention are chosen not through the primary, but separately at caucuses or conventions of persons who have stated their affiliation with the national party. The delegates are bound to vote at the national convention in accord with the results of the open primary election.⁴⁸ Unless national party rules are changed,

In computing the number of delegates a candidate may be entitled to on the first ballot, if party rules do allow apportionment of a delegate and such an apportionment appears necessary because no candidate received more than five-tenths of a delegate, then that delegate shall be assigned to the candidate receiving the highest number of votes in the primary election. If a candidate withdraws before the first ballot voting begins, delegates obligated to vote for that candidate on the first ballot would be released from that obligation.

Id.

41. The qualified parties that are provided a separate column on the primary ballot are the Republican Party, the Democratic Party, any party that cast five percent of the total votes for Governor in the last election, and any other party filing with the secretary of state a petition signed by at least 7,000 electors of the state. N.D. CENT. CODE § 16.1-11-30 (Interim Supp. 1981).

42. N.D. CENT. CODE § 16.1-11-07 (Interim Supp. 1981). If not endorsed by the party, the presidential candidate will have to submit a petition with the signatures of three percent of the total votes cast for the candidates of the party with which the candidate affiliated for the same position at the last general election. N.D. CENT. CODE § 16.1-11-06(2)(c)(1) (Interim Supp. 1981). However, no more than 300 signatures shall be required. *Id.* In the first presidential primary to be held in June 1983, the petition must contain 300 signatures since there would be no candidate of a party for the position at the last preceding general election. N.D. CENT. CODE § 16-11-06(2)(c)(2) (Interim Supp. 1981).

43. N.D. CENT. CODE § 16.1-11-07 (Interim Supp. 1981).

44. N.D. CENT. CODE §§ 16.1-11-06, -07 (Interim Supp. 1981).

45. 101 S. Ct. 1010, 1021 (1981).

46. *Democratic Party of the United States v. LaFollette*, 101 S. Ct. 1010, 1013 n.4 (1981).

47. *See supra* note 11 and accompanying text.

48. N.D. CENT. CODE § 16.1-11-04 (Interim Supp. 1981). North Dakota, in addition to requiring no declaration of political affiliation, has no statewide voter registration.

particularly those of the Democratic Party which prohibit delegates from being bound by the results of an open primary, the national party could reject the North Dakota delegates chosen at the party convention.⁴⁹ The Court in *LaFollette* did not hold that the state could not conduct an open primary, but only that the state could not compel the national party to seat delegates not chosen according to the party rules.⁵⁰

Aside from the presidential preference primary, the new law significantly changes the ballot access and ballot position laws. In order to get a separate column on the primary ballot, a party must present a petition signed by at least 7,000 voters.⁵¹ The petition must be filed not more than sixty-six nor less than fifty-five days before the primary election, or approximately 206 days before the general election.⁵² In *McLain v. Meier* the court held that the statutes requiring a petition of 15,000 voters filed some ninety days before the general election were unconstitutional.⁵³

With regard to ballot access in the general election, the law now requires that independents for statewide office must file a petition signed by 1,000 voters.⁵⁴ This petition must be filed fifty-five days before the general election.⁵⁵

The *McLain* court also invalidated the "incumbent first" statute,⁵⁶ which permitted the party that received the highest number of votes in the state for members of Congress in the last preceding election to have first position on the ballot in the next

49. The Democratic Party rules in 1980 stated that "[p]articipation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded." Democratic Party of the United States v. LaFollette, 101 S. Ct. at 1012 (footnote omitted). The Republican National Party did not have such rules in 1980. The North Dakota presidential preferential primary was adopted by the referendum vote of the people in September 1980 (1981 N.D. Sess. Laws ch. 651), while the decision in the *LaFollette* case was decided on February 25, 1981. 101 S. Ct. at 1010.

50. 101 S. Ct. at 1019. As a result, one possibility is that a party at, or prior to, its national convention could decide to accept the results of the state primary.

51. N.D. CENT. CODE § 16.1-11-30(4) (Interim Supp. 1981).

52. N.D. CENT. CODE § 16.1-11-06 (Interim Supp. 1981). In North Dakota a party can only receive a separate column in the general election if it appeared on the ballot in the primary election. See N.D. CENT. CODE § 16.1-11-39 (Interim Supp. 1981) (allows persons nominated in the primary to be candidates on the general election ballot); N.D. CENT. CODE § 16.1-13-04 (Interim Supp. 1981) (certificates of nomination required for person in primary election); N.D. CENT. CODE §§ 16.1-15-23, -40 (Interim Supp. 1981) (issuance of certificates of nomination for person in the primary election).

53. *McLain v. Meier*, 637 F.2d 1159, 1164 (8th Cir. 1980). Whether the present law is constitutional is still questionable. See 57 N.D. L. REV. 495 (1981).

54. N.D. CENT. CODE § 16.1-12-02(5)(a) (Interim Supp. 1981). The previous law (North Dakota Century Code § 16-03-02 (repealed 1981)) required a petition signed by 300 voters. The new law retains the requirement that in order to get on the ballot in an election less than statewide, an independent need only file a petition signed by 300 voters. N.D. CENT. CODE § 16.1-12-02(5)(b) (Interim Supp. 1981).

55. N.D. CENT. CODE § 16.1-12-04(4) (Interim Supp. 1981). The previous law required that petitions be filed in statewide elections 40 days before the general election and 35 days before the general election in county-wide elections. N.D. CENT. CODE § 16-05-03 (repealed 1981).

56. N.D. CENT. CODE § 16-11-06 (repealed 1981) (current version at N.D. CENT. CODE § 16.1-06-07.1 (Interim Supp. 1981)).

election.⁵⁷ To remedy the unconstitutional statute, the new law requires the partisan parties to be rotated so that each party receives a first column position in its turn.⁵⁸ The new rotation law does not apply to independents, who are grouped together in one column.⁵⁹ According to an attorney general's opinion, issued on August 17, 1981, however, the secretary of state is directed to rotate all candidates.⁶⁰

A few changes have been made in the regulations governing initiative, referendum, and recall petitions. The circulator of such petitions must be at least eighteen years of age, and he must prepare an affidavit stating that each signature obtained was signed in his presence and that the petition was circulated in its entirety.⁶¹ The qualified voter signing this petition must include, in addition to his signature, post office address, and date of signing, his telephone number if he has one.⁶² The new code no longer requires that a complete text of any amendment or measure be published when the sample ballot is published.⁶³ At the time the sample ballot is published, only a written analysis of the amendment or measure need be published.⁶⁴ The new code also requires that every resolution proposing a change in the state constitution contain a statement of the legislative purpose and intent of the proposed change. It further requires that the statement precede the ballot title of the proposed constitutional amendment on the ballot.⁶⁵

Finally, there have been two new developments with regard to the offices of United States Senator and the North Dakota Governor. First, the Governor is now required in some circumstances to call a special election in the event of a vacancy in the office of United States Senator.⁶⁶ Second, the voters will be

57. *McLain v. Meier*, 637 F.2d at 1167.

58. N.D. CENT. CODE § 16.1-06-07.1 (Interim Supp. 1981).

59. N.D. CENT. CODE § 16.1-06-05(4) (Interim Supp. 1981).

60. 81-88 N.D. Op. Att'y Gen. (Revised) (Aug. 17, 1981). This attorney general's opinion interpreted the court's directive for relief in the *McLain* opinion to require the rotation of the names of all candidates on the ballot. *Id.* Presumably, this would require a rotation of both independents and nonpartisan candidates. For a discussion on the constitutionality of the new law, see 57 N.D. L. REV. 495 (1981).

61. N.D. CENT. CODE § 16.1-01-09 (Interim Supp. 1981).

62. N.D. CENT. CODE § 16.1-01-09(1) (Interim Supp. 1981). A question could be raised whether a petition would be declared invalid if a person who has a telephone number did not write it on the petition. *See McCarney v. Meier*, 286 N.W.2d 780, 785 (N.D. 1979), wherein the court interpreted the constitution liberally in the area of initiative and referendum. The new statute requires a person's telephone number, which is not required by the North Dakota Constitution. N.D. CONST. art. III, § 3.

63. N.D. CENT. CODE § 16.1-01-07 (Interim Supp. 1981).

64. *Id.*

65. N.D. CENT. CODE § 16.1-06-09.1 (Interim Supp. 1981).

66. N.D. CENT. CODE § 16.1-13-08 (Interim Supp. 1981). The Governor may still appoint a person temporarily to fill the vacancy. *Id.* However, that person shall serve only until the vacancy is filled by an election which is held as follows:

1. If the vacancy occurs during a calendar year in which there is a regularly scheduled

asked in the 1982 general election to approve a constitutional amendment scheduling the election of the Governor in each even-numbered year that is not a presidential election year.⁶⁷

III. CORRUPT PRACTICES

The Corrupt Practices Act, chapter 16.1-10 of the North Dakota Century Code, has received more revision than the other chapters in the new code. It is considerably shorter than the former act⁶⁸ because many practices that were usually associated with corrupt practices are now treated in other chapters of the code. For example, the rules for campaign contributions are set forth in separate chapters.⁶⁹ A number of election offenses are listed in a separate provision in chapter 16.1-01.⁷⁰ In the general provisions

statewide election and at least ninety days prior to the general election in that year, the vacancy shall be filled at the next statewide election; however, if there is not at least a ninety-day period between the date of the vacancy and the date of the next statewide election, the vacancy shall be filled at the general election.

2. If the vacancy occurs during a calendar year in which there is not a statewide election regularly scheduled or during a calendar year in which such an election is scheduled but less than ninety days prior to the general election, the governor shall issue a writ of election which shall designate a time for holding a special election to fill the vacancy, which election must be held within ninety days of the occurrence of the vacancy.

Id.

67. 1981 N.D. Sess. Laws ch. 672.

68. N.D. CENT. CODE ch. 16-20 (repealed 1981).

69. See generally N.D. CENT. CODE ch. 16.1-08 (Interim Supp. 1981) (entitled Campaign Contributions); N.D. CENT. CODE ch. 16.1-08.1 (Interim Supp. 1981) (entitled Campaign Contribution Statements).

70. N.D. CENT. CODE § 16.1-01-12 (Interim Supp. 1981). This section is stated as follows:

It shall be unlawful for a person to:

1. Fraudulently alter another person's ballot or substitute one ballot for another, or to otherwise defraud a voter of his vote.
2. Obstruct an elector on the way to a polling place.
3. Vote or offer to vote more than once in any election.
4. Knowingly vote in the wrong election precinct or district.
5. Disobey the lawful command of an election officer as defined in chapter 16.1-05.
6. Knowingly exclude a qualified elector from voting, or knowingly allow an unqualified person to vote.
7. Knowingly vote when not qualified to do so.
8. Sign an initiative, referendum, recall, or any other election petition when not qualified to do so.
9. Sign a name other than his own name to an initiative, referendum, recall, or any other election petition.
10. Circulate an initiative, referendum, recall, or any other election petition not in its entirety, or circulate such a petition when unqualified to do so.
11. Willfully fail to perform any duty of an election officer after having accepted the responsibility of being an election officer by taking the oath as prescribed in this title.
12. Willfully violate any rule or regulation promulgated by the secretary of state pursuant to this title.
13. Willfully make any false canvass of votes, or make, sign, publish, or deliver any false return of an election, knowing the same to be false, or willfully deface, destroy, or conceal any statement or certificate entrusted to his care.
14. Destroy ballots, ballot boxes, election lists, or other election supplies except as provided by law.

chapter of the new election code,⁷¹ the secretary of state is given the power to investigate certain errors, wrongful acts, and neglect of duties with regard to the election process, and in the event his order to correct such defects is violated, the secretary is empowered to prosecute the wrongdoers.⁷² Certain chapters of the new Code stipulate a penalty for violation of any of the provisions of that chapter.⁷³ The chapter on political party committee organization⁷⁴ makes the Corrupt Practices Act applicable to all elections and conventions provided for in its sections.⁷⁵

The new Corrupt Practices Act has incorporated two sections of the Criminal Code.⁷⁶ The new Act has revised the standard for

A violation of subsections 1 through 13 shall be a class A misdemeanor. A violation of subsection 14 occurring after an election but before the final canvass, or during an election, shall be a class C felony, and in other cases shall be a class A misdemeanor.

Every act which by the provisions of this chapter is made criminal when committed with reference to the election of a candidate is equally criminal when committed with reference to the determination of a question submitted to electors to be decided by votes cast at an election.

Id.

71. N.D. CENT. CODE ch. 16.1-01 (Interim Supp. 1981).

72. N.D. CENT. CODE § 16.1-01-08 (Interim Supp. 1981). This section states that the secretary of state must thoroughly investigate the following:

1. Any error or omission which has occurred or is about to occur in the placing of any name on an official election ballot.
2. Any error which has been or is about to be committed in printing the ballot.
3. Any wrongful act which has been or is about to be done by any judge or election clerk, county auditor, canvassing board, a canvassing board member, or any other person charged with any duty concerning the election.
4. Any neglect of duty which has occurred or is about to occur.

Id. Under the former law, such errors and irregularities could be corrected only by petitioning directly to the court. N.D. CENT. CODE § 16-01-10 (repealed 1981).

73. *See, e.g.*, N.D. CENT. CODE § 16.1-07-14 (Interim Supp. 1981). Any person who violates any of the provisions of the chapter on absent voter's ballots and absentee voting is guilty of a class A misdemeanor. *Id.* Any person who violates the law relating to electronic voting systems or "who tampers with or injures any electronic voting system or device to be used or being used in any election, or who prevents the correct operation of any such system or device to be used or being used in any election shall be guilty of a class A misdemeanor." N.D. CENT. CODE § 16.1-06-25 (Interim Supp. 1981).

74. N.D. CENT. CODE ch. 16.1-03 (Interim Supp. 1981).

75. N.D. CENT. CODE § 16.1-03-18 (Interim Supp. 1981).

76. N.D. CENT. CODE § 16.1-10-01(2) (Interim Supp. 1981) ("[e]ngages in any of the practices prohibited by section 12.1-14-02 or 12.1-14-03"). The former law forbade the corrupt practices of treating, undue influence, and overpersoneation. N.D. CENT. CODE § 16-20-01 (repealed 1981). The two incorporated sections of the Criminal Code are stated as follows:

A person is guilty of a class A misdemeanor if, whether or not acting under color of law, he, by force or threat of force or by economic coercion, intentionally:

1. Injures, intimidates, or interferes with another because he is or has been voting for any candidate or issue or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher or other election official, in any primary, special, or general election.
2. Injures, intimidates, or interferes with another in order to prevent him or any other person from voting for any candidate or issue or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher or other election official, in any primary, special, or general election.

knowingly sponsoring any political advertisement or news release containing falsehoods by limiting a violation to those falsehoods that are "deliberately calculated."⁷⁷ The new election code retains sections of the former code that deal with a person's using state services or property for political purposes;⁷⁸ the wearing or selling of political badges or buttons on election day;⁷⁹ the paying of an owner, editor, publisher, or agent of a newspaper to editorially advocate or oppose a candidate;⁸⁰ electioneering on election day;⁸¹ and paying another person for attendance at the polls, transporting persons to the polls, and rendering personal services on caucus or election day to affect the result of such election or caucus.⁸² The new campaign literature disclosure law⁸³ makes it a class A misdemeanor for persons who do not state the names of sponsors on political advertisements which are made "on behalf of or in opposition to any candidate for public office, designed to assist, injure, or defeat the candidate by reflecting upon the candidate's personal character or political action."⁸⁴ Two other previous

N.D. CENT. CODE § 12.1-14-02 (1976).

A person is guilty of a class A misdemeanor if, in connection with any election, he:

1. Makes or induces any false voting registration;
2. Offers, gives, or agrees to give a thing of pecuniary value to another as consideration for the recipient's voting or withholding his vote or voting for or against any candidate or issue or for such conduct by another;
3. Solicits, accepts, or agrees to accept a thing of pecuniary value as consideration for conduct prohibited under subsections 1 or 2; or
4. Otherwise obstructs or interferes with the lawful conduct of such election or registration therefor.

As used in this section, "thing of pecuniary value" shall include alcoholic beverages, by the drink or in any other container.

N.D. CENT. CODE § 12.1-14-03 (1976).

77. N.D. CENT. CODE § 16.1-10-04 (Interim Supp. 1981).

78. N.D. CENT. CODE § 16.1-10-02 (Interim Supp. 1981).

79. N.D. CENT. CODE § 16.1-10-03 (Interim Supp. 1981).

80. N.D. CENT. CODE § 16.1-10-05 (Interim Supp. 1981).

81. N.D. CENT. CODE § 16.1-10-06 (Interim Supp. 1981). This statute is probably constitutionally invalid. *See* Mills v. Alabama, 384 U.S. 214, 220 (1965) (state statute making it a crime for a newspaper editor to publish an editorial on election day urging people to vote in a particular way was in violation of the first amendment applied to the states by the fourteenth amendment).

82. N.D. CENT. CODE § 16.1-10-06.1 (Interim Supp. 1981).

83. This law was passed by the 47th North Dakota Legislative Assembly in a special session held from November 16, 1981 to November 19, 1981. The law is contained in House Bill 1675. The former laws (N.D. CENT. CODE § 16-20-17.1 and § 16-20-17.2) were repealed by the 47th North Dakota Legislative Assembly in its full session held from June 6, 1981 to March 31, 1981.

84. House Bill 1675, 47th N.D. Legislative Assembly (1981). *See* N.D. CENT. CODE § 16.1-10-08 (Interim Supp. 1981). The new law contains a number of changes from the former law. First, the former law applied to elections for and against any initiated measure, referred measure, or constitutional amendment to be voted on by the people. N.D. CENT. CODE § 16.1-20-17.1 (repealed 1981). This repealed law, however, had been declared unconstitutional insofar as it required disclosure of sponsors of political advertisements dealing with initiated or referred measures. *State v. North Dakota Educ. Ass'n*, 262 N.W.2d 731, 736, 741 (N.D. 1978). Second, the former law applied to all statements about candidates whereas the new law appears to regulate only literature that contains personal and political statements about the candidates. *Compare* N.D. CENT. CODE § 16-20-17.1 (repealed 1981) with House Bill 1675, 47th N.D. Legislative Assembly (1981). Third, the former law not only required the names of sponsors but also their addresses. N.D. CENT. CODE § 16-

regulations that have not been included in the new law deal with (1) prohibiting candidates from making contributions to religious or charitable causes,⁸⁵ and (2) permitting and limiting the amount of a candidate's contributions and expenditures in an election campaign.⁸⁶

IV. POLITICAL CONTRIBUTIONS

A. POLITICAL COMMITTEES

The new election law prohibits not only corporations and cooperative corporations from directly contributing to political campaigns for public office, but also extends the prohibition to unions.⁸⁷ Corporate money, union money, and other associations' money, however, may now be used to pay the costs of establishing and administering a separate and segregated fund, which may then be utilized for political purposes.⁸⁸ The political committees set up

20-17.1 (repealed 1981). Fourth, the former law contained a penalty section imposing a class B misdemeanor for violation of section 16-20-17.1. N.D. CENT. CODE § 16-20-17.2 (repealed 1981). Fifth, the new law stipulates that if the sponsor is an association or partnership, the political advertisement must disclose the name of the chairman or other responsible person from the association or partnership. House Bill 1675, 47th N.D. Legislative Assembly (1981). Finally, the former law penalty statute, North Dakota Century Code section 16-20-17.2 (repealed 1981), specifically stated that any editor of a newspaper, managing officer of any printing establishment, radio station, novelty concern, or poster or billboard advertising company printing or furnishing such political advertisement without disclosing the information required by North Dakota Century Code section 16-20-17.1 was guilty of a class B misdemeanor. N.D. CENT. CODE § 16-20-17.2 (repealed 1981). Although the new law could be read broadly to include the print and broadcast media, it might be argued that the legislature intended to exclude the media from the operation of the new statute by not referring to it specifically. However, it should be noted that the reference was made to the media in the penalty statute, North Dakota Century Code section 16-20-17.2 (repealed 1981) and not in North Dakota Century Code section 16.20-17.1 (repealed 1981), which prohibited anonymous campaign literature. The new law does not contain such a separate penalty statute but is placed in North Dakota Century Code chapter 16.1-10. House Bill 1675, 47th N.D. Legislative Assembly (1981); *see* N.D. CENT. CODE § 16.1-10-08 (Interim Supp. 1981). Therefore, any violation of the new law would be subject to the penalty section of the Corrupt Practices chapter. N.D. CENT. CODE § 16.1-10-08 (Interim Supp. 1981).

85. N.D. CENT. CODE § 16-20-07 (repealed 1981).

86. N.D. CENT. CODE § 16-20-04 (repealed 1981). This law was declared unconstitutional in *Snortland v. Crawford*, 306 N.W.2d 614, 627 (N.D. 1981).

87. N.D. CENT. CODE § 16.1-08-02(1) (Interim Supp. 1981). Under North Dakota Century Code section 16-20-08 (repealed 1981), unions were permitted to contribute directly to political campaigns for public office. The new law prohibits "associations" from making a direct contribution to aid any political party, political committee or organization, to aid any candidate for political office or nomination to such office, or to aid any corporation or association organized or maintained for political purposes. N.D. CENT. CODE § 16.1-08-02(1) (Interim Supp. 1981). "Association" is defined in section 16.1-08-01(1) as follows:

"Association" means any club, association, union, brotherhood, fraternity, organization, or group of any kind of two or more persons, including, but not limited to, labor unions, trade associations, professional associations, or governmental associations, which is united for any purpose, business, or object and which assesses any dues, membership fees, or license fees in any amount, or which maintains a treasury fund in any amount. Association shall not include corporations, cooperative corporations, political committees, or political parties.

Id. § 16.1-08-01(1)

88. N.D. CENT. CODE § 16.1-08-02(2) (Interim Supp. 1981).

to administer these separate and segregated funds on the state level are similar to the political action committees (PACs) that are allowed by the Federal Election Campaign Financing Law, which regulates the campaign finances of nominees and candidates for federal office.⁸⁹ Those controlling the state political committees are prohibited from securing money by the use of threat or physical force, job discrimination, or financial reprisal.⁹⁰ The person soliciting money from employees, stockholders, or members of the association must inform those persons, at the time of such solicitations, of the political purposes of the fund or the general political philosophy intended to be advanced through committee activities.⁹¹ Those solicited must also be informed that they have a right to refuse to contribute without any reprisal.⁹²

Those political committees that receive contributions or make expenditures for political purposes from the segregated fund are required to keep an accurate record of amounts contributed and of amounts expended for political purposes.⁹³ In addition, the political committees must file an annual statement listing all contributions in excess of \$100 in the aggregate and listing all the distributions made for political purposes.⁹⁴

Officers, employees, agents, attorneys, or other representatives of a corporation, cooperative corporation, or other association are prohibited from making any contribution out of such organization's funds, other than to establish, administer, or solicit contributions for its segregated fund.⁹⁵ If such a direct contribution is made, those persons are guilty of a class A misdemeanor and are liable to the company, cooperative, or association for the amount so contributed.⁹⁶ The new law specifically allows corporations, cooperative corporations, and other associations to make expenditures and contributions for the purpose of promoting passage or defeat of initiated or referred measures,⁹⁷ or for promoting any general political philosophy or

89. 2 U.S.C. § 441(b)(2)(C) (1976); 11 C.F.R. §§ 114.3, .4 (1980).

90. N.D. CENT. CODE § 16.1-08-02(2)(a) (Interim Supp. 1981).

91. N.D. CENT. CODE § 16.1-08-02(2)(b) (Interim Supp. 1981). Contributions to the separately segregated funds can be made only by employees, stockholders, patrons, and members of corporations, cooperative corporations, and the associations maintaining the political committee. N.D. CENT. CODE § 16.1-08-02(2)(c) (Interim Supp. 1981).

92. N.D. CENT. CODE § 16.1-08-02(2)(c) (Interim Supp. 1981).

93. N.D. CENT. CODE § 16.1-08-02(2)(d) (Interim Supp. 1981).

94. N.D. CENT. CODE § 16.1-08-02(3) (Interim Supp. 1981). The form of the statement shall be prescribed by the secretary of state, but must include the name and mailing address of such contributor. *Id.* The secretary of state may arrange an audit on his own and must arrange one if requested to do so by the attorney general. N.D. CENT. CODE § 16.1-08-02(3)(b) (Interim Supp. 1981). These statements and records are to be preserved for four years from the date of filing and are public records open to public inspection. N.D. CENT. CODE § 16.1-08-02(3)(c) (Interim Supp. 1981).

95. N.D. CENT. CODE § 16.1-08-02(5), (7) (Interim Supp. 1981).

96. N.D. CENT. CODE § 16.1-08-02(7), (8) (Interim Supp. 1981).

97. N.D. CENT. CODE § 16.1-08-04 (Interim Supp. 1981). *See also* First Nat'l Bank v. Bellotti,

belief deemed to be in the interest of employees, stockholders, partners, or members of such organization.⁹⁸

B. DISCLOSURE OF CONTRIBUTIONS

Prior to the passage of the new election code, North Dakota was the only state that did not have a campaign financial disclosure law.⁹⁹ The new law requires that any candidate¹⁰⁰ for public office¹⁰¹ at any general, primary, or special election must file a statement of all contributions¹⁰² in excess of \$100 received from an individual or political committee.¹⁰³

The statement shall include the name and mailing address of all such contributors.¹⁰⁴ It must be filed on the thirtieth day prior to any election, and within fifteen days after the election, an additional statement must be filed that is complete through ten days after the election.¹⁰⁵ Within thirty days after the close of the

435 U.S. 765 (1978) (struck down Massachusetts statute prohibiting corporation from making any contribution or expenditure in referendum contests not directly affecting corporation's business).

98. N.D. CENT. CODE § 16.1-08-04 (Interim Supp. 1981). See generally *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1979) (electric utility allowed to promote use of electricity).

99. The present law requires candidates to disclose only contributions; it does not require a list of expenditures. N.D. CENT. CODE § 16.1-08.1-02 (Interim Supp. 1981). Political parties may have to list expenditures made on behalf of candidates, however. N.D. CENT. CODE § 16.1-08.1-03(1) (Interim Supp. 1981). See also FED. ELECTION COMM., CAMPAIGN FIN. LAW 267 (1978).

100. N.D. CENT. CODE § 16.1-08.1-01(1) (Interim Supp. 1981). This section defines "candidate" as follows:

"Candidate" means a person whose name is presented for nomination to public office at any primary election whether the person is actually nominated or not; a person whose name is printed as a candidate on an official ballot used at any election; or a person who seeks election through write-in votes.

Id.

101. N.D. CENT. CODE § 16.1-08.1-01(7) (Interim Supp. 1981). "Public office" means statewide and legislative offices to which persons can be elected by vote. *Id.* It does not apply to candidates for county or other local government offices.

102. N.D. CENT. CODE § 16.1-08.1-01(2) (Interim Supp. 1981). This section defines "contribution" as follows:

"Contribution" means a gift, subscription, loan, advance, or deposit of money, made for the purpose of influencing the nomination for election, or election, of any person to office. Contribution also means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for any of the above purposes, and includes funds received by a political committee which are transferred to that committee from another political committee or other source. This definition does not include:

- a. A loan of money from a bank or other lending institution made in the regular course of business.
- b. Time spent by volunteer campaign or political party workers.
- c. Money spent by a candidate on his own behalf.
- d. Any money received from a district or state committee of a political party, as established pursuant to sections 16.1-03-06 and 16.1-03-08, except for contributions reported pursuant to section 16.1-08.1-03.

Id.

103. N.D. CENT. CODE § 16.1-08.1-02 (Interim Supp. 1981).

104. *Id.*

105. *Id.*

calendar year, candidates or their committees must file an additional statement for the remainder of that calendar year.¹⁰⁶ All reports shall be consecutive and shall cover the entire year's receipts.¹⁰⁷ If a candidate receives from an individual contributor any contribution of \$500 or more within the nine days immediately prior to any election, that candidate must file in the appropriate office within forty-eight hours of the receipt of the contribution a supplemental statement containing the name and address of such contributor.¹⁰⁸ When determining the amount of individual contributions from any contributor, all amounts from the same contributor during a reporting period shall be aggregated for the purposes of the statements required by this law.¹⁰⁹ Although the secretary of state may arrange an audit of any statement, he must arrange an audit if requested to do so by the attorney general, and the results of the audit must be reported to the attorney general.¹¹⁰

In addition to the requirement that candidates must disclose the names of certain contributors, there is a requirement that political parties that receive contributions in excess of \$100 must also file a disclosure statement.¹¹¹ The political party is given a choice of either (1) filing a statement of the total amount contributed to or expended on behalf of a candidate or candidates, or (2) filing a statement containing a detailed list of all contributions that exceed \$100 received from an individual or political committee.¹¹² This latter statement must include the names and addresses of all contributors listed.¹¹³ All statements are considered a part of the public records and must be open to public

106. *Id.*

107. *Id.* Candidates are not required to file any statement if they have not received contributions in excess of \$100. Statements of a legislative candidate must be filed in the county auditor's office of the candidate's county of residence. *Id.* Statements of state office candidates must be filed in the secretary of state's office. *Id.*

108. N.D. CENT. CODE § 16.1-08.1-04 (Interim Supp. 1981).

109. N.D. CENT. CODE § 16.1-08.1-02 (Interim Supp. 1981).

110. N.D. CENT. CODE § 16.1-08.1-05 (Interim Supp. 1981). All reports must be verified by oath or by the affidavit of the person filing the statement. N.D. CENT. CODE § 16.1-08.1-06(1) (Interim Supp. 1981). The statements are deemed properly filed when deposited in an established post office within the prescribed time, with postage affixed and directed to the secretary of state or county auditor. N.D. CENT. CODE § 16.1-08.1-06(2) (Interim Supp. 1981).

111. N.D. CENT. CODE § 16.1-08.1-03 (Interim Supp. 1981).

112. N.D. CENT. CODE § 16.1-08.1-03 (Interim Supp. 1981). If a party did not want to be associated publicly with a particular candidate, a contribution to the political party might accomplish the same result if the party gave the money to that particular candidate. The party could then file a statement listing the total amount contributed to, or expended on behalf of, a candidate. The purpose of the disclosure law, which is to ascertain a particular candidate's contributors, might thereby be frustrated. The federal law minimizes this problem because political parties, like individuals, are subject to a limitation on the amount of contributions that can be made to a particular candidate. 2 U.S.C.A. § 441(a)(2) and (d) (1977); 11 C.F.R. § 110.7 (1981). The new North Dakota election code imposes no limitation on the amount of contributions which may be made to any particular candidate by either individuals, political committees, or political parties. N.D. CENT. CODE ch. 16.1-08 (Interim Supp. 1981).

113. N.D. CENT. CODE § 16.1-08.1-03 (Interim Supp. 1981).

inspection.¹¹⁴

V. RECOUNTS AND CONTESTS

A. RECOUNTS

The new code retains the mandatory system of automatic recount if the difference in votes between candidates is less than a certain figure.¹¹⁵ The former law required the counties to pay most of the expenses for the recount, while the new law requires costs of recounts of a congressional, state, or legislative election to be paid by the state from the general fund. Expenses incurred in a recount of a county election are to be paid by the county.¹¹⁶

In addition to the recount for close candidate votes, the new law extends the same automatic recount to elections involving a referred or initiated measure. When a question or measure submitted to the electors has been decided by a margin not exceeding one-fourth of one percent of the total vote cast for and against the question at any election, a mandatory demand for a recount may be made by any person who files a petition signed by at least five electors.¹¹⁷ The new procedure for conducting the recount has removed court involvement in the early stages.¹¹⁸ Now the person qualified to make the demand for a recount files the demand with the secretary of state when the recount is for a congressional, state, district, or legislative office, or a question submitted to the voters of the entire state.¹¹⁹ The person files with the county auditor when the recount is for a city office or a question submitted to the electors of a county.¹²⁰ Recounts are conducted by the county auditor.¹²¹ Challenged ballots are decided by a recount board.¹²² The decision of the recount board is final, subject to the

114. N.D. CENT. CODE § 16.1-08.1-06(3) (Interim Supp. 1981). All statements are to be preserved by the secretary of state or county auditor for a period of four years from the date of filing. *Id.*

115. Compare N.D. CENT. CODE § 16-13-47.1 (repealed 1981) with N.D. CENT. CODE § 16.1-16-01(1) (Interim Supp. 1981). Both statutes provide that a recount can automatically be initiated by a candidate who failed to be nominated in a primary election by less than two percent of the highest vote cast for a candidate of his party for the office sought, and by a candidate who failed to be elected in a general or special election by less than one-half of one percent of the highest vote cast for a candidate for that office. N.D. CENT. CODE § 16-13-47.1 (repealed 1981) and N.D. CENT. CODE § 16.1-16-01(1) (Interim Supp. 1981).

116. N.D. CENT. CODE § 16-13-47.1 (repealed 1981) and § 16.1-16-01(8) (Interim Supp. 1981).

117. N.D. CENT. CODE § 16.1-16-01(1)(c) (Interim Supp. 1981).

118. Compare N.D. CENT. CODE § 16-13-47.1 (repealed 1981) with N.D. CENT. CODE § 16.1-16-01 (Interim Supp. 1981).

119. N.D. CENT. CODE § 16.1-16-01(2)(a) (Interim Supp. 1981).

120. N.D. CENT. CODE § 16.1-16-01(2)(b) (Interim Supp. 1981).

121. N.D. CENT. CODE § 16.1-16-01(4) (Interim Supp. 1981).

122. N.D. CENT. CODE § 16.1-16-01(5) (Interim Supp. 1981). The recount board is composed

right to contest the election.¹²³

B. CONTESTS

The new election code deals with the contests of primary and general elections in one chapter,¹²⁴ whereas the rules for contesting elections under previous law were contained in three chapters.¹²⁵ The major change in the new law is in the area of contests for statewide and county offices. Under the previous law an elector other than an aggrieved candidate could bring a contest action only if his notice of contest was approved by certain officials.¹²⁶ In addition, the person bringing the contest of the election had to furnish surety for costs.¹²⁷ The new law eliminates both these requirements for approval and surety for costs and allows a suit to be brought either by a defeated candidate or ten qualified electors.¹²⁸

While the new law relaxes the requirements for initiating a contest of a statewide or county election, it has restricted the grounds of the election contest.¹²⁹ An election contest may be commenced if the contestee does not or can not meet the qualifications to hold the office as required by law, or if the election involved illegal votes or erroneous or fraudulent voting, count, canvass, or recount of votes.¹³⁰ If the election involved illegal votes it cannot be set aside unless either of the following is shown:

- a. The contestee had knowledge of or connived in the illegal votes.
- b. If the number of illegal votes is taken from the contestee, it would reduce the number of his legal votes

of the state's attorney of the county, the chairman of board of county commissioners and the clerk of the district court of the county, provided these individuals would be qualified to serve on an election board pursuant to North Dakota Century Code section 16.1-05-02(2). *Id.*

123. *Id.*

124. N.D. CENT. CODE ch. 16.1-16 (Interim Supp. 1981).

125. N.D. CENT. CODE ch. 16-15 (repealed 1981) (regulated contests of state or city elections); N.D. CENT. CODE ch. 16-14 (repealed 1981) (regulated contests of the legislative assembly election); N.D. CENT. CODE ch. 16-04 (repealed 1981) (regulated contests of primary elections, particularly sections 16-04-30, -31, -32, -33). The North Dakota law makes no provisions for contests of federal elections. Furthermore, under both the new and former laws, the contests of the presidential electors are treated in separate chapters. N.D. CENT. CODE ch. 16.1-14 (Interim Supp. 1981) and N.D. CENT. CODE ch. 16-16 (repealed 1981).

126. N.D. CENT. CODE §§ 16-15-01.1, -03 (repealed 1981).

127. N.D. CENT. CODE § 16-15-08 (repealed 1981).

128. N.D. CENT. CODE § 16.1-16-02 (Interim Supp. 1981). This law also permits contest of the approval or rejection of any question or proposition submitted to a vote of the electorate. *Id.*

129. N.D. CENT. CODE § 16.1-16-05 (Interim Supp. 1981). Under prior law, North Dakota Century Code sections 16-15-01 (repealed 1981) and 16-15-01.1 (repealed 1981), the requirement was that the contestant set forth the facts and grounds upon which he or she relied.

130. N.D. CENT. CODE § 16.1-16-05 (Interim Supp. 1981).

below the number of votes cast for some other person for the same nomination or election, after deducting any illegal votes from the other person.¹³¹

VI. CONCLUSION

The new code has improved the administration of elections. The most significant improvement in the administration of elections in the new Code is the designation of the secretary of state as the *ex officio* supervisor of elections.¹³² The office of the secretary of state can now control a wide range of election procedures, from maintaining standards for all election machinery to correcting errors and irregularities in the election process. The new code encourages the secretary of state to educate both the voters and voting officials in election procedures by publishing and circulating election information.¹³³ Thus, with increased powers and duties, the secretary of state will be in a better position to communicate with voters and voting officials and to assure uniform voting opportunities and an efficient administration of the election procedures.

The new code modernized the law with regard to the establishment of precincts and voting places by eliminating unnecessary regulations and by giving the county board of commissioners greater discretion.¹³⁴ Outdated corrupt practice terms like "treating," "undue influence," and "overimpersonation" were withdrawn, and the more detailed election violations of the Criminal Code were incorporated into the new Corrupt Practices Act.¹³⁵

Certain factors in the area of absentee voting, which tended to

131. N.D. CENT. CODE § 16.1-16-08(6) (Interim Supp. 1981). Under prior law, North Dakota Century Code section 16-15-05 (repealed 1981), the court had the power in election contest actions to make all orders and enter final judgment as in a civil action. Under the new law the court is directed in its discretion to award court costs on the following bases:

- a. If the contest action is dismissed for insufficient evidence or want of prosecution, or if the court confirms the election results, judgment for costs shall be for the contestee and against the contestant.
- b. If an election is annulled for errors or malfeasance of any election official during any part of the election procedure, the costs shall be a charge against the state or political subdivision in which the election was held.
- c. When an election is annulled on any other ground or when the contestant is declared elected, judgment for costs shall be for the contestant and against the contestee.

N.D. CENT. CODE § 16.1-16-08(5) (Interim Supp. 1981).

132. N.D. CENT. CODE § 16.1-01-01(1) (Interim Supp. 1981).

133. N.D. CENT. CODE § 16.1-01-01(2) (Interim Supp. 1981).

134. Compare N.D. CENT. CODE ch. 16-09 (repealed 1981) with N.D. CENT. CODE ch. 16.1-04 (Interim Supp. 1981).

135. *Supra* note 76 and accompanying text.

disenfranchise voters, have also been eliminated. For example, ballots in envelopes with illegible postmarks can be counted if received within twenty-four hours after the election, and voters' ballots inadvertently sent to the wrong precinct can be returned to be counted by the appropriate canvassing board.¹³⁶

The state has adopted a new approach with regard to recounts and contests of elections. The recount is now an administrative function rather than a judicial one, and the initial proceedings are conducted through state and county officers and a county recount board, rather than the district court.¹³⁷ An election contest can now be brought by electors instead of by the aggrieved candidate, and it can be brought without first receiving the approval of a state officer or judge.¹³⁸

Although the code addresses some politically sensitive areas, there are still areas that might need review or revision in the next legislative session. These areas include the questions of registration and public declaration of party affiliation, the ballot access and ballot position law, and the disclosure of names of contributors to political parties.

It is possible that voter registration is on the horizon in North Dakota. In order to comply with national party rules and thus conduct a meaningful presidential preference primary, voters must declare their party affiliation and vote only in that party's primary. A simplified "same day" registration could be conducted, listing among other information, a declaration of party affiliation.

The new ballot access law may still cause some constitutional concern. The unique feature of North Dakota law that requires all parties to conduct primary nominations in a state-held primary in order to gain access to the ballot in the general election¹³⁹ might have to be revised. For example, a distinction could be made between major and minor parties. Major parties could be required to use the primary system. Minor parties could use other methods of nomination, such as a convention, and then could be permitted to file for the general election at the same time independents do. If the filing deadline for minor parties would be fifty-five days before the general election, it should be constitutional.

The ballot position statute will remain as interpreted by the attorney general's opinion:¹⁴⁰ the names of all candidates on the

136. N.D. CENT. CODE § 16.1-07-11 (Interim Supp. 1981).

137. *Supra* notes 115-23 and accompanying text.

138. Compare N.D. CENT. CODE § 16-13-47.1 (repealed 1981) with N.D. CENT. CODE § 16.1-16-01 (Interim Supp. 1981).

139. See N.D. CENT. CODE §§ 16.1-11-01, -13-04, -13-06 (Interim Supp. 1981).

140. 81-88 N.D. Op. Att'y Gen. (Aug. 17, 1981).

ballot will be rotated with each election unless the legislature revises the present law.¹⁴¹ If the legislature concurs with the attorney general's opinion, the office group ballot may be a viable alternative. Under this ballot type, the names of candidates with their party affiliation after their names are listed under the title of the office to which they aspire.

A "wait and see" attitude can be taken on the question of whether the state needs more control of campaign finances. The new disclosure law will reveal the amounts of money contributed and whether money is contributed by a few people, many individuals, or groups.¹⁴² No "wait and see" attitude needs to be taken, however, with regard to the provision allowing contributors to hide their identity by contributing to a political party rather than to an individual candidate.¹⁴³ Such a provision frustrates the main purpose of the disclosure law and makes such a law a sham.

The new election code will be in effect for the primary and, most likely, the general election in 1982. The North Dakota Legislature will not meet in full session until 1983. The legislature will then be in an advantageous position to evaluate and amend, if necessary, the new electoral process.

141. N.D. CENT. CODE § 16.1-06-07.1 (Interim Supp. 1981).

142. See N.D. CENT. CODE §§ 16.1-08.1-02 to -04 (Interim Supp. 1981). See also *supra* notes 99-123.

143. N.D. CENT. CODE § 16.1-08-02 (Interim Supp. 1981). See *supra* notes 88-89 and accompanying text.