OPINION
75-167

July 22, 1975 (OPINION)

The Honorable Earl Strinden
State Representative, 18th District
2812 Chestnut Street
Grand Forks, ND 58201

Dear Representative Strinden:

This is in reply to your letter of June 26, 1975, relative to an initiated measure petitions for which have been filed in the Office of the Secretary of State. You state the following facts and questions:

> "Petitions have now been filed with the Office of the Secretary of State for an initiated measure which would purport to limit an appropriation of funds from the general fund of the State of North Dakota for the operation of state government to a maximum of $332 million during the biennium beginning July 1, 1975, and ending June 30, 1977, and also for the biennium beginning July 1, 1977, and ending June 30, 1979.
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> Presumably, this initiated measure will be place before the electorate at the next statewide election which currently would be scheduled for September of 1976, unless a special election should be called by the Governor in accordance with the Constitution prior to that time. Since Section 25 of the Constitution requires initiated measures to be filed at least 90 days in advance of the election at which they are to be voted upon, it would appear that even if a special election should be held, the measure could not be placed on the ballot unless the special election were held 90 days after the date of filing the petitions. But, regardless of whether it is voted upon at the statewide primary election held in September of 1976, a portion of the 1975-1977 biennium will already have passed at the time of the election. If the initiated measure were adopted by the electorate, Section 25 of the Constitution provides that it would not go into effect until 30 days after the election since no other effective date is specified in the measure.
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> The placement of a $332 million limitation upon all state general fund expenditures and transfers after the biennium has started, would cause serious problems for all of state government, school districts, and political subdivisions. For instance, the appropriation of $153,378,000 for the Educational Foundation Program and for school transportation programs is transferred periodically during the biennium to school districts. School districts have contracted with teachers for the next school year based upon the moneys available to that district, which of course includes their anticipated payments under the $153,378,000 general fund appropriation. Obviously, if it became necessary to scale down state appropriations to the extent contemplated in the initiated measure, this major

general fund appropriation for the support of elementary and secondary education would have to take a portion of the cut in funding. Most school districts are already at or near maximum property tax levels permitted by law, and special elections would be necessary to increase the maximum mill levies in an attempt to make up the deficiency resulting from the cut in the State Foundation Program. Even if such special elections and real estate tax increases occurred, the real estate taxes from the increased levies would not flow into the school districts until after January 1 of 1977. Obviously, many if not most school districts would find it impossible to pay the teachers' salaries that they had contracted for in reliance upon the State Foundation Program payments. Almost every other program or activity funded by the state general fund would be in a similar position in that activities or programs that are mandated by law and funded by the Legislative Assembly would have started at the intended levels. Rather drastic disruptions could occur if these activities were curtailed to a level to make up the necessary fund reductions during the remaining months of the biennium, and in some cases they may have to be halted with a complete loss of the previous effort and funds invested in them. In the case of building construction, valid contracts may be outstanding which obligate the state to complete the building project or subject the state to major damage suits. These are just a few of the destructive and chaotic situations which could result if such a general fund appropriation limitation is imposed after the new biennium has begun. This initiated measure, in effect, attempts to undo all general fund appropriations made during the last Legislative Session.

Inasmuch as the biennium will already have begun when this initiated measure is voted upon, I am requesting an opinion from your office as to whether the $332 million general fund limitation as proposed in the initiated measure can apply and would apply under our Constitution to appropriation measures and governmental activities during the 1975-1977 biennium.

A second question would involve a determination of what agency, department, or branch of government would be responsible to carry out the provisions in enforcing the $332 million general fund limitation. The Legislative Assembly does not have authority to call itself into special session and will not meet in regular session until January of 1977. Therefore, it does not seem practical that the responsibility for enforcing such a limitation could be placed with the Legislative Assembly. I would appreciate an opinion from your office as to what department or agency would have the responsibility of enforcing this limitation, which appropriations would or could be scaled down or abolished, and upon what basis or premise such reductions would occur in the event the measure should be approved by the electorate."

In addition to your letter we have received a letter dated July 9, 1975, from Edward J. Klecker, Director of Institutions, which concerns the same matter. We will take this opportunity to reply to both letters in one opinion since they concern the same subject. Mr.

Klecker's letter reads as follows:

> "The recent initiated measure to limit state spending in North Dakota has created a legitimate concern on the part of our architects, engineers, and construction contractors who have already entered into contracts; as well as those who are requested to submit bids for legislatively approved building and remodeling projects.
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> Because of inflation, weather and seasonal constraints, as well as the intended time frame of the legislature, some projects have been contracted prior to the filing of the initiated measure, and others should probably be entered into before any vote on the measure, if taken, is tallied.
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> What effect will the filing of said measure have on existing contracts, and what course of action should be followed in the case of projects which should shortly be put out on bids? Will any contract entered into prior to the election on the measure be invalid should the electorate vote to limit state spending?"

The initiative petition would propose the following enactment:

> "SECTION 1. No appropriation of funds from the general fund for operation of the government of the state of North Dakota may exceed the total sum of three hundred thirty-two million dollars ($332,000,000.00) during the period set out in section 2 hereof. For purposes of this Act, funds for operation of the government of the state of North Dakota shall mean funds for the operation of all departments, branches, boards, agencies and programs which obtain funding through enactments of the legislature of the state of North Dakota.
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> "SECTION 2. The period covered by this Act shall be the biennial appropriations periods beginning July 1, 1975, and ending June 30, 1977, and beginning July 1, 1977, and ending June 30, 1979."

The measure has not yet been voted upon by the electorate of the State. Section 25 of the North Dakota Constitution provides in part:

> "Any measure, except an emergency measure, submitted to the electors of the state, shall become a law when approved by a majority of the votes cast thereon. And such law shall go into effect on the thirtieth day after the election, unless otherwise specified in the measure."

The word "measure" would include an initiated measure as well as a referred measure.

Certain measures enacted by the 1975 session of the North Dakota Legislative Assembly have generated legally significant initiative and referendum activity. At the time this opinion is written, such activity has resulted in the filing of apparently valid petitions referring legislative action ratifying the ERA, appropriating funds to UND and, the subject of this opinion, initiating a spending limitation for this and the next succeeding biennium.

Referrals of the ERA ratification and the UND appropriation have been recently considered by the North Dakota Supreme Court, the Court holding that the ERA ratification is not subject to a referendum under state law and that neither the legislative assembly nor the people can refuse to fund UND, a constitutionally mandated function, without a constitutional amendment. By this opinion we now begin legal review of the reservation of legislative power in the people to initiate legislation pursuant to Section 25 of the North Dakota Constitution, as it and other constitutional and statutory law applies to the measure to limit state spending during this and the next biennium.

We believe a brief review of initiative in North Dakota and applicable, well-tested rules of constitutional and statutory construction is important to place the matters before us in historical and legal perspective. We are mindful that while lawyers and courts necessarily deal with a complex and sometimes contradictory body of law, the public for whom the law is designed to protect our basic rights, becomes understandably confused and impatient. Hopefully, our review will assist in clarifying the issue and defining the rules which must be applied toward its resolution.

Generally, initiative is defined as a political process by which a portion of the voters can propose a statutory law or amendment to the constitution and have it submitted to the voters at the polls for adoption or rejection. This process may be used in an indirect or direct method. Under the direct method (which is the method now provided by the North Dakota Constitution after amendment in 1918) the measure goes directly to the voters for approval or disapproval. Under the indirect method (which was the original method in North Dakota approved in 1914) the measure is first submitted to the legislature by the appropriate state official and if passed unchanged, the measure becomes law. But, if the legislature rejects the measure, it is submitted to the electorate for final consideration.

Initiative was first used in Switzerland in 1869, and South Dakota in 1898 was the first state to adopt the procedure. Initiative was first generally discussed by the citizens of North Dakota in 1906. Two measures dealing with initiative and referendum were considered by the 1907 Legislative Assembly but neither became law. The Legislative Assemblies of 1909 and 1911 considered the matter but favorable action did not occur until 1913. The question was the subject of numerous bills and all were opposed by "prohibitionists" who feared the process would be used to repeal the constitutional prohibition against the manufacture, sale and use of alcoholic beverages. Typical of this opposition was the 1912 resolution of the State Enforcement League:

> "Resolved, that we are opposed to the proposed amendment of our state constitution by so-called initiative and referendum advocated by the liquor interests, on the grounds that in effect it abolishes the constitution and reduces its provisions to mere statutes."

Notwithstanding this opposition, the original provisions for

initiative and referendum were enacted at the general election of November 3, 1914, by a vote of 48,783 to 19,964 on the former and 43,111 to 21,815 on the latter. The original provisions for an "indirect" method of referral initiative were amended by a favorable vote of the people in 1918, to provide for "direct" referral and initiative which is the method in existence today.

The American system of government is a "representative", not a "pure" democracy. Article IV of the United States Constitution guarantees each state a republican (representative) form of state government. To the extent that initiative and referendum is a form of "pure" rather than "representative" democracy, the Federal constitutional guarantee is expanded, but the right to initiate and review legislation is no less valid and the basic form of our government remains representative. The choice of a representative democracy over a pure democracy was made by the founding fathers of our nation and reasons for that choice are illustrated by Madison in the tenth essay of the "Federalist." He says, in part:

> A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.
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> The two great points of difference between a democracy and a republic are; first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.

A constitution is a broad framework of authority granted by the people to their government. The whole of a constitution is made up of its parts or provisions none of which exceed any other in force and effect unless clearly stated. As the Supreme Court held in the recent case of State ex rel. Walker Section 25 stands to no greater effect than any other constitutional provision and must be construed according to well-established guidelines of constitutional construction. This is true because Section 25, like all other constitutional provisions, is the product of approval by the citizens of this state delegating their sovereign authority, and in so doing they have not defined Section 25 as being paramount. If our citizens should now feel that Section 25 should have a different effect, the process of constitutional amendment is available to them. Until such time we must deal with the constitution and its respective provisions as we find them. We now consider the questions at hand.

While the proposed measure provides that it is applicable to the current biennium we have serious doubts that it would, if enacted, be held applicable to the current biennium without further legislative action. We are aware of no provision which would permit any state officer to pare the current appropriations to fit within the limitations provided by the initiated measure. The measure itself contains no provisions for so doing and therefore it appears there is no method under current law whereby reduction of the current biennial appropriations (which exceed three hundred thirty-two million) could

be reduced without legislative actions. Insofar as such legislative action is concerned, the Legislative Assembly cannot meet until 1977 unless called into special session by the Governor. Section 75 of the North Dakota Constitution provides in part that the governor "shall have power to convene the legislative assembly on extraordinary occasions." There is no provision in the Constitution whereby the Governor is required, as a matter of law, to call a special legislative session. It is a totally discretionary function upon which other acts or functions cannot be conditioned.

It would further appear that insofar as the 1975-1977 biennium is concerned, the proposed initiative measure could be considered a broad attempt to refer all legislative appropriations to a vote of the electorate. Had the appropriations measures for other than constitutional obligations been referred, it appears a different result would ensue. In any event, we do not believe the initiative can be substituted for the referral in this instance since both as a legal and a practical matter, there is no method for implementing the initiative measure for the current biennium.

The initiative measure, as it purports to apply to the current biennium, must necessarily be considered as an attempt to amend existing appropriations. In State ex rel. Gammons v. Shafer 246 N.W. 874 (N.D. 1922) the North Dakota Supreme Court stated:

> "Reference to the authorities cited above to the effect that the constitutional provisions limiting and regulating the exercise of legislative power are applicable to legislation effected through the initiative process, in the light of the circumstances in which the act in question was submitted, shows the importance of observing such salutary requirements as are contained in section 64. The chief evil at which this section is aimed is the framing of 'amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect.' (citation omitted) If it be important to guard against deception of legislators when their attention is absorbed exclusively in the enactment of legislation, how much more important it is that the voters participating only occasionally in the enactment of legislation be protected against deception as to the effect of a proposed law? It is a matter of common knowledge and of current history in this state that at the time the act in question was pending diverse opinions of competent persons were expressed as to the effect of the proposed enactment upon existing statutes and previous regulations concerning salaries. A proper observance of section 64 of the Constitution would clearly have avoided such uncertainties and the possibility of reasonable persons being deceived as to the effect of such pending legislation.
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> "The measure purports to amend all existing laws relating to salaries or compensation of public officials and employees of the state government by reducing salaries and compensation, leaving the law thus changed otherwise intact so that new provisions are intermingled with different provisions in the old law. The statute is clearly within the class of statutes which are not complete themselves and which offend against section 64 of the Constitution."

Based on the above statements the Court held that section 2 of the initiated measure which purported to make a change in all existing laws relating to salaries or compensation of appointive public officials and employees of the state government by reducing such salaries or compensation according to a method which could not be given effect without recourse to the laws purporting to be changed and leaving these laws otherwise intact so that the new provisions were intermingled with the remaining provisions of the old law violated section 64 of the North Dakota Constitution which provides:

> "No bill shall be revised or amended nor the provisions thereof extended or incorporated in any other bill by reference to its title only, but so much thereof as is revised, amended or extended or so incorporated shall be reenacted and published at length."

If the initiated measure were to be given effect without further legislative action in this instance, we believe the statements of the Court in Shafer supra, would be applicable, since the purpose of the measure would be in some way to amend (reduce) those appropriations bills which have already been made and which became effective on July 1, 1975, unless another date was otherwise specifically provided therein.

The process by which those appropriations were made and became effective July 1, 1975, was pursuant to the constitutional requirements that the legislative assembly appropriate moneys subject to review by and the veto power of the Governor.

The initiated measure, for the purpose of this biennium, would attempt to affect appropriations bills already enacted and constitutionally effective. If the measure were to be enacted and if the legislature were to meet and attempt to reduce the current appropriations in compliance therewith, it is conceivable that by such time moneys in excess of $332,000,000 might already have been expended. It seems obvious that those moneys already expended, although in excess of that permitted, could not be recovered if, at the time the expenditures were made, such expenditures were legal as being within the sums appropriated. As to those sums which were appropriated and, while not yet actually expended are committed by contract, we believe there is considerable doubt the Legislature could repeal those appropriations . Section 16 of the North Dakota Constitution provides that no bill of attainder, ex post facto law, or law impairing obligations of contracts shall ever be passed. This provision is applicable to initiative measures as well as enactments of the Legislature. See Shafer supra. Thus if the Legislature were to attempt to repeal an appropriation under which a contract by a state agency with another party has been executed, we believe such action might well be considered in violation of Section 16 of the North Dakota Constitution. In this respect, an agency has authority to enter into contracts for the expenditure at the time that appropriation becomes legally available. Since the bulk of appropriations were legally available on July 1, 1975, we believe neither the initiated measure nor any future action by the Legislature attempting to repeal the appropriation could affect those contracts requiring an expenditure of that appropriation.

In direct reply to your first question, we do not believe the initiated measure limiting expenditures to $332 million would apply to the appropriation measures and governmental activities during the 1975-1977 biennium despite the statements contained therein.

In direct reply to your second question, there is presently no agency, department, or branch of government, short of the Legislature itself, which would be authorized to carry out the provisions in enforcing the $332 million general fund limitation. As noted above, only the Governor may call a special session of the Legislature and such call is at his exclusive discretion.

In direct reply to Mr. Klecker's question, we do not believe the initiated measure could affect contracts entered into under existing appropriations. Any contract entered into prior to the election on the measure would not be invalid should the electorate vote to limit state spending. In view of our answers to your questions it would not appear it would apply to any contracts for the current biennium entered into after the election unless further action would be taken by the Legislative Assembly prior to the execution of such contracts.

Finally, although the question was not presented, we believe it is necessary to observe that our doubts concerning the effect of the initiated measure on appropriations for the current biennium do not necessarily extend to the effect of the measure on appropriations for the 1977-1979 biennium. The questions raised and considered herein concerning appropriations for the current biennium would not, in our view, operate prospectively.

Sincerely yours,

ALLEN I. OLSON

Attorney General