

**LETTER OPINION  
2010-L-08**

May 13, 2010

The Honorable Blair Thoreson  
State Representative  
1246 2nd Street North  
Fargo, ND 58102-2723

Dear Representative Thoreson:

Thank you for your letter asking whether the Constitution and laws of the State of North Dakota allow for the recall of a congressional officer, specifically a United States senator. For the reasons given below, it is my opinion that neither the Constitution nor laws of the State of North Dakota allow for the recall of a congressional officer, specifically a United States senator.

**ANALYSIS**

Provisions for recalling elected officials in this state are governed by the North Dakota Constitution and, in certain cases dealing with the recall of elected officials of political subdivisions, also by state statute. The form of a recall petition is governed by statute.<sup>1</sup> N.D. Const. art. III, § 10 provides, in part, as follows:

Any elected official of the state, of any county or of any legislative or county commissioner district shall be subject to recall by petition of electors equal in number to twenty-five percent of those who voted at the

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<sup>1</sup> See N.D.C.C. § 16.1-01-09.1(1) & (2). (“A request of the secretary of state for approval of a petition to recall an elected official or appointed official of a vacated elected office may be presented over the signatures of the sponsoring committee on individual signature forms that have been notarized. The secretary of state shall prepare a signature form that includes provisions for identification of the recall; the printed name, signature, and address of the committee member; and notarization of the signature . . . . A petition must be in substantially the . . . form [as set out in the statute].”).

preceding general election for the office of governor in the state, county, or district in which the official is to be recalled.

The petition shall be filed with the official with whom a petition for nomination to the office in question is filed, who shall call a special election if he finds the petition valid and sufficient. No elector may remove his name from a recall petition.

A plain reading of this section shows that it applies to state or local elected officials, and it does not address federal or congressional elected officials.<sup>2</sup>

The North Dakota Supreme Court has provided guidance for construing constitutional provisions:

The sole object sought in construing a constitutional provision is to ascertain and give effect to the intention and purpose of the framers and of the people who adopted it, and all rules of construction are subservient to and intended to effectuate such objects. Primarily such intention and purpose are to be found in and deduced from the language of the Constitution itself but, if the language is ambiguous or the answer doubtful, then [sic] the field of inquiry is widened and the rules applicable to the construction of statutes are to be resorted to, and the court may look to the history of the times and examine the state of being existing when the question was framed and adopted by the people in order to ascertain the prior law, the mischief, and the remedy.<sup>3</sup>

A plain reading of N.D. Const. art. III, § 10 does not reveal any ambiguity about the applicability of recall procedures. However, even assuming for the sake of argument that there is such an ambiguity or that the answer would be doubtful, the case law indicates that resorting to principles of statutory construction is then available to construe the meaning of a constitutional provision.

One well-known presumption or principle of statutory construction is that if the Legislature amends an existing statute, it is a “clear indication that the Legislature intended to change the law.”<sup>4</sup> The omission of federal or congressional elected officials from N.D. Const.

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<sup>2</sup> Those elected officials of political subdivisions who are not covered by the constitutional provision are subject to recall under N.D.C.C. § 44-08-21, which is not pertinent here.

<sup>3</sup> Newman v. Hjelle, 133 N.W.2d 549, syllabus 7 (N.D. 1965) (syllabus by the Court).

<sup>4</sup> State Bank of Towner v. Edwards, 484 N.W.2d 281, 282 (N.D. 1992). See also City of Minot v. Knudson, 184 N.W.2d 58, syllabus 5 (N.D. 1971) (“Generally, the mere fact that

art. III, § 10 appears to be intentional when the current provision is compared with the prior, repealed, provision governing recall of elected officials. The original recall provision in the state Constitution first appeared in former article 33 of the amendments to the Constitution of North Dakota, and provided as follows:

The qualified electors of the state or of any county, or of any congressional, judicial or legislative district may petition for the recall of any elective congressional, state, county, judicial or legislative officer by filing a petition with the officer with whom the petition for nomination to such office in the primary election is filed, demanding the recall of such officer. Such petition shall be signed by at least thirty per cent of the qualified electors who voted at the preceding election for the office of governor in the state, county or district from which such officer is to be recalled. The officer with whom such petition is filed shall call a special election to be held not less than forty or more than forty-five days from the filing of such petition.

(Emphasis added.)

In 1977, in House Concurrent Resolution (H.C.R.) No. 3088, the Legislature proposed a constitutional amendment which, among other things, would repeal article 33 of the amendments to the Constitution of North Dakota and replace it with a revised provision dealing with recall.<sup>5</sup> The resolution passed in 1978 and took effect January 1, 1979.<sup>6</sup>

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the Legislature enacts an amendment to an existing statute is an indication that it thereby intended to change the original Act.”).

<sup>5</sup> See 1977 N.D. Sess. Laws ch. 613, §§ 1 and 3.

<sup>6</sup> Id. at § 4; This change in the recall provision was discussed in N.D.A.G. 2003-L-50:

The historical background for this constitutional provision was explained in N.D.A.G. 85-9:

The original provision for a recall procedure of public officers in North Dakota was found in Article 33 of the Amendments to the Constitution of the State of North Dakota, as approved on March 16, 1920.

N.D.A.G. 85-9 went on to explain the development of N.D. Const. art. III, § 10:

The Joint Committee on Constitutional Revision also considered House Concurrent Resolution No. 3088, which would repeal Article 33 dealing with recall of public officials and create a new article of the Constitution of

Thus, on January 1, 1979, North Dakota's Constitution no longer provided for recall of congressional officers. The rule of construction that an amendment to an existing law indicates an intent to change the law may be applied to the constitutional recall provision. Doing so indicates that, by deleting the references to "congressional officers" formerly contained in article 33 of the amendments to the North Dakota Constitution, the electors intended that a change be made in the law and that congressional officers would no longer be subject to recall.

Other sources for interpreting ambiguous or unclear statutes or constitutional provisions include the legislative history<sup>7</sup> of the provision and newspaper articles<sup>8</sup> from the time a constitutional provision was being considered by the people. The legislative history of H.C.R. 3088 is very sparse and not particularly instructive. However, there were a number of newspaper articles and editorials discussing H.C.R. 3088, which was denominated Constitutional Amendment No. 3 on the ballot. While most of these articles concerned the increased number of petition signatures required for initiated and referred measures,<sup>9</sup> at least one article discussed the elimination of recall of congressional officers in 1978 Constitutional Amendment No. 3:

Provisions for recalling elected officials would also be altered. It would allow the recall of "any elected official of the state, of any county or of any legislative or county commissioner district."

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the State of North Dakota relating to the power of initiative, referendum, and recall. Thus, as part of this proposed article to the Constitution, a provision was included allowing for the recall of any elected official of the state, of any county, or of any legislative or county commissioner district. . . . This proposed amendment was passed by the North Dakota Legislature and presented to the qualified electors of the State of North Dakota at the November, 1978, general election. The proposed amendment was approved by the voters of North Dakota and became the present N.D. Const. Art. III, § 10.

<sup>7</sup> See N.D.C.C. § 1-02-39(3).

<sup>8</sup> N.D.A.G. 87-3 ("The North Dakota Supreme Court has considered such newspaper articles in its interpretation of constitutional provisions in the past. See, e.g., State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 907 (N.D. 1977)."); see also N.D.A.G. 2004-L-59.

<sup>9</sup> See, e.g., Editorial, "Amendments and Measures," Bismarck Tribune, Nov. 6, 1978; Editorial, "To review – vote 'no' on N.D. measure No. 4, Fargo measure No. 8," Fargo Forum, Nov. 6, 1978.

The current Constitution includes officers of congressional and judicial districts. Congress doesn't recognize state recall provisions.

Although judges are not specifically mentioned in the new recall provisions, they are still subject to recall since they are "officers of the state."<sup>10</sup>

Additionally, the minutes of the 1972 Constitutional Convention are entitled to weight even though the language regarding recall petitions as proposed in article XVI, section 8 was not approved by the voters after the 1972 Second Constitutional Convention. Language was drafted by the delegates during the Convention to repeal and replace article 33 of the Constitution dealing with recall petitions.<sup>11</sup> This proposal was explained by Delegate Berg:

This section from the Legislative Functions Committee has been assigned to me, and this is the last section of the powers reserved to the people. If you will note, we repealed Article 33 of the amendments to our old Constitution, and we created Section 8 of Article XVI as follows:

You will notice the similarity between the sections - between the section and Article 33 are apparent, but we make no reference to congressional offices and we have removed the judicial officers from recall.<sup>12</sup>

The proposed language was not approved by the voters, and the language did not become part of the Constitution. "[T]he minutes of the 1972 Constitutional Convention [indicating an attempt to remove congressional offices from article 33] are entitled to considerable weight as to objective and purpose" because nearly identical provisions were later approved by the people in 1978.<sup>13</sup>

Despite all this, it has been argued that recall of a United States senator is allowed under the language in N.D. Const. art. III, § 10 permitting recall of "[a]ny elected official of the state," i.e., that this phrase includes a federal officeholder such as a member of Congress or a United States senator.<sup>14</sup> However, as indicated above, the intention and purpose of a constitutional provision are to be found in and deduced in the first instance from the

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<sup>10</sup> Hal Simons, "Amendment No. 3, Number of signers to initiate laws would equal 2 percent of population," Fargo Forum, Oct. 27, 1978.

<sup>11</sup> See Debates of the North Dakota Constitutional Convention of 1972, p. 1138. Article 33 would have been replaced with proposed article XVI, section 8.

<sup>12</sup> Id. (Emphasis added.)

<sup>13</sup> Haugland v. Meier, 339 N.W.2d 100, 107-08 (N.D. 1983).

<sup>14</sup> Letter from Peter J. Ferrara to Secretary of State Al Jaeger, April 2, 2010.

language of the Constitution itself.<sup>15</sup> The plain language of “[a]ny elected official of the state” refers to elective offices created under the Constitution and laws of the State of North Dakota and not to federal offices established by the United States Constitution. This interpretation is consistent with published opinions of attorneys general in other states<sup>16</sup> as well as the above-quoted contemporaneous news article discussing this issue.<sup>17</sup>

Further, the case law on whether a member of Congress or a United States senator is subject to recall within a state is quite sparse.<sup>18</sup> A reference is made in a 2003 Report for Congress to an unreported decision by a federal court in Idaho, noting that

[A] federal court in 1967 dismissed a suit which attempted to compel the Idaho Secretary of State to accept petitions recalling Senator Church of Idaho. In the unreported decision, the court found that Senators are not

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<sup>15</sup> Newman v. Hjelle, 133 N.W.2d at 551.

<sup>16</sup> See La. Att’y Gen. Op. 78-341 (“Because the office of United States Senator is established by the United States Constitution and not by the constitution or laws of Louisiana, a United States Senator is not a ‘public officer’ within the meaning of the recall statute. Therefore, it is my opinion that a United States Senator is not subject to recall under Louisiana law.”); 1978 Nev. Op. Att’y Gen. 14 (“Obviously, federal legislative officers, such as United States Senators, do not occupy positions created by the Constitution and laws of Nevada. United States Senators, of course, occupy positions created by the United States Constitution.”); Kan. Att’y Gen. Op. No. 94-35 (“The United States constitution has delegated to congress the power to determine the qualifications of its own members and to expel its members when necessary. Because this is a power reserved for the individual houses of congress, the tenth amendment of the United States constitution does not reserve to the states the authority to remove members of congress from office. . . .” “There can be no doubt that a member of Congress is not, strictly speaking, a state officer. He does not represent the state, but represents the people of the United States in the district from which he is elected. He is a United States officer.” (citing Harless v. Lockwood, 332 P.2d 887, 888 (Ariz. 1958)); 17 Or. Op. Att’y Gen. 312 (1935) (while all public offices in Oregon are subject to recall, “[a] Representative in Congress is not a state officer.”).

<sup>17</sup> See note 10.

<sup>18</sup> Although not on point to the question of whether a state recall law may be applied to congressional officers without violating the United States Constitution, the United States Supreme Court has held that states may not impose term limits on congressional officers, and that term limits could only be imposed on congressional officers through an amendment to the United States Constitution. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837-38 (U.S. 1995). It is likely that the United States Supreme Court would apply a similar analysis to a state recall law if that issue were to be before that court.

subject to state recall statutes, and that such a state provision is inconsistent with the provisions of the United States Constitution.”<sup>19</sup>

In a recent New Jersey state case,<sup>20</sup> an intermediate state appellate court determined that procedures permitting the recall of a United States senator were available under state law, but specifically declined to address whether such a recall was permissible under the federal constitution. The senator involved in that litigation is appealing the decision to that state’s highest court.<sup>21</sup> In the New Jersey case, however, the state constitution specifically permits a recall of “any elected official . . . representing this state in the United States Congress,”<sup>22</sup> which is clearly not the case in North Dakota where no constitutional provision or statute explicitly permitting recall of a member of Congress or a United States senator exists.

Based on the foregoing, it is my opinion that neither the Constitution nor laws of the state of North Dakota allow for the recall of a congressional officer, specifically a United States senator.

Sincerely,

Wayne Stenehjem  
Attorney General

jjf/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.<sup>23</sup>

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<sup>19</sup> See Jack Maskell, Report for Congress, Recall of Legislators and the Removal of Members of Congress from Office (Updated Mar. 20, 2003) (citing a New York Times article of October 1, 1967, p. 47, col. 1.).

<sup>20</sup> Comm. to Recall Menendez v. Wells, No. A-2254-09T1, 2010 W.L. 908673 (N.J. Super. Ct. App. Div. Mar. 16, 2010).

<sup>21</sup> Associated Press, “US Senator from N.J. Appeals Recall Ruling,” N.Y. Times, Apr. 6, 2010.

<sup>22</sup> See Note 20.

<sup>23</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).