

**LETTER OPINION
2003-L-50**

November 13, 2003

Honorable Alvin A. Jaeger
Secretary of State
600 East Boulevard Avenue
Bismarck, ND 58505-0500

Dear Secretary of State Jaeger:

Thank you for your letter requesting my opinion on whether a state district court judge is subject to recall under N.D. Const. art. III, § 10. That provision states, in pertinent part:

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 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.

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. This article as originally adopted read:

The qualified electors of the state or of any county, or of any congressional, judicial, or legislative district may petition for the recall 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 a recall of such officer. . . .

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 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.

It is unclear from a plain reading of N.D. Const. art. III, § 10 whether state district court judges are subject to recall under its provisions.¹ In the predecessor provision, article 33, it was explicitly provided that any elected judicial official was subject to recall. That language does not appear in current N.D. Const. art. III, § 10. While it seems clear that a Supreme Court justice as an elected official of the state is subject to N.D. Const. art. III, § 10, the same cannot necessarily be said about a district court judge. Although a district court judge is part of the state judicial system, is paid by the state, and has some limited statewide jurisdiction,² a district judge is not elected on a statewide basis but, rather, from the multicounty judicial district in which the judge will serve. See N.D.C.C. § 27-05-22. Judicial districts are not specifically mentioned in N.D. Const. art. III, § 10.

“When interpreting constitutional sections, we apply general principles of statutory construction. Our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement.” North Dakota Comm’n on Medical Competency v. Racek, 527 N.W.2d 262, 266 (N.D. 1995) (citations omitted). In State of North Dakota ex rel. Link v. Olson, 286 N.W.2d 262 (N.D. 1979), the North Dakota Supreme Court quoted with approval the following language about construing constitutional provisions from Newman v. Hjelle, 133 N.W.2d 549, 556 (N.D. 1965):

The questions must be answered, if possible, from the language of the constitutional provision itself but, if the language is ambiguous or the answer doubtful, then the field of inquiry is widened and rules applicable to construction of statutes are to be resorted to. In fact, a wider field of inquiry

¹ The phrase “elected official of the state” arguably brings district court judges within the scope of Article III, § 10.

² See generally N.D. Const. art. VI, §§ 8, 9, 10, 12.1; N.D.C.C. §§ 27-05-00.1, 27-05-03, 27-05-22.

for information is proper where needed in construing constitutional provisions than legislative enactments.

Extrinsic aids include the legislative history and the common law or former [constitutional] provisions. N.D.C.C. § 1-02-39(3) and (4).

As noted above, the predecessor constitutional provision, article 33, specifically provided for the recall of any elected judicial officer. When the Joint Committee on Constitutional Revision considered House Concurrent Resolution No. 3088, Representative Kretschmar, one of its sponsors, stated that the measure “[allows] recall of judicial officials. It would allow recall of state judicial and county officials.” Hearing on H.C.R. 3088 Before the Joint Comm. on Constitutional Revision, 1977 N.D. Leg. (Mar. 16). He also indicated that House Concurrent Resolution No. 3088 would keep the present structure for the recall provisions as they were in the Constitution at that time, with some exceptions not pertinent here. Id.³ Thus, the legislative history, as well as the former constitutional provision, indicate that it was intended that elected judicial officials would be subject to recall under N.D. Const. art. III, § 10. Consequently, it is my opinion that a state district court judge is subject to recall under the provisions of N.D. Const. art. III, § 10.

You further ask two procedural questions if it is determined that state district court judges are subject to recall under the constitutional provision: how many days do petition circulators have to gather signatures, and if recall petitions with sufficient signatures are submitted to the Secretary of State, what is the time frame in which the special election must be called following submission of the petitions. Neither of these questions is specifically addressed in N.D. Const. art. III, § 10.

As to the first procedural question, N.D.C.C. § 1-01-50 provides as follows:

Whenever in this code provision is made for the filing or presentation of a petition with or to any officer or governing body or board of the state or any agency, instrumentality, or political subdivision thereof as a prerequisite to the calling of an election, or the performance or prohibition of any act, such petition must be filed with or presented to such officer or governing body or board not later than one year from the date such petition is first placed in circulation, or the date the first signature is affixed thereto, whichever date is the latest.

Consequently, it is my opinion that petition circulators must file any recall petition within one year from the date the petition is first placed in circulation or the date the first signature is affixed to the petition, whichever date is later.

³ The only other witness testifying at the hearing expressed approval for including judges in the recall resolution. Id. (Statement of Mr. Kouba).

As to your second procedural question, there is no general statute which governs a time frame in which special elections must be called after the submission of petitions. As noted above, courts apply extrinsic aids in construing constitutional provisions that are ambiguous or unclear. One extrinsic aid is consideration of laws upon the same or similar subjects. N.D.C.C. § 1-02-39(4). See also State ex rel. Laird v. Hall, 186 N.W. 284, 285 (N.D. 1921) (recall provision in constitution contained no machinery concerning special election to be held; in calling special election, secretary of state must "call to his aid statutory election laws, so far as applicable, and other cognate law.")

Section 44-08-21, N.D.C.C., is a statutory recall provision for officials of political subdivisions who are not subject to recall under the Constitution. That statute requires the filing officer "to call a special election to be held not sooner than fifty days nor later than sixty days following the date the filing officer certifies the petition valid and sufficient. No special election may be called if that date would be within ninety days of the next scheduled election." N.D.C.C. § 44-08-21. As a general matter, when no time is stated in a document or contract, the law will imply a reasonable time. See, e.g., N.D.C.C. §§ 41-02-12 and 41-02.1-14; Jessen v. Pingel, 257 N.W. 2, 4 (N.D. 1934). You indicated to a member of my staff that the 50 to 60-day period contained in N.D.C.C. § 44-08-21 would be a reasonable time frame for calling a special election. Based on the foregoing, it is my further opinion that, assuming all necessary filing and ballot requirements may be met, the Secretary of State may utilize the time frame set out in N.D.C.C. § 44-08-21 for calling a special election for the recall of a district judge.

Sincerely,

Wayne Stenehjem
Attorney General

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