Opinion No. 73-03

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BY: OPINION OF DAVID L. NORVELL, Attorney General

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QUESTIONS

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Is a municipal judge of the City of Albuquerque subject to a recall election under either state law or the Municipal Charter?

CONCLUSION

No.

OPINION

*{*5}* **ANALYSIS**

An analysis of the Albuquerque City Charter reveals two provisions which directly bear on the question presented:

"Article III, Section 1 (a). Any elective officer of the City shall be subject to a recall election at any time, except as hereinafter provided . . ."

"Article II, Section 3 . . . . The elective officers of the City shall consist of five commissioners, to be elected as hereinafter provided. . . . ."

If those two provisions of the Albuquerque City Charter were the only considerations which bear on the problem, there would be little question that an Albuquerque Municipal Judge is not subject to recall. However, several other considerations make the problem more difficult.

To begin with, the present Albuquerque Municipal Judges are, in fact, elected by the voters of the City of Albuquerque. Section 37-1-4, N.M.S.A., 1953 Comp., provides for the election of municipal judges and Section 14-9-1 (B)(2), N.M.S.A., 1953 Comp. provides that the municipal judge shall be an elective officer of the municipality. Further, Section 14-13-16, N.M.S.A., 1953 Comp. makes provisions for the recall of any elective officer in a commission manager municipality.

Since there is an apparent inconsistency between the state statutes noted above, and Article II, Section 3 of the Albuquerque City Charter which provides that "(t)he elective officers of the City shall consist of five commissioners . . .", we must consider whether the recall of a municipal judge is a matter of local as opposed to statewide concern in order to determine which provisions take precedence.

The form and organization of a municipal government, the designation of its officers and the manner in which these officers are to be selected, and whether they may be removed or recalled are generally regarded to be matters of purely local concern. **State ex rel. Hackley v. Edmonds,** 150 Ohio St. 203, 80 N.E. 2d 769 (1948); **State ex rel. Frankenstein v. Hillenbrand,** 100 Ohio St. 339, 126 N.E., 309 (1919); **Hinz v. Hubbard,** 95 Okla. 164, 216 Pac. 440 (1923). 1 Antieau, Municipal Corporation Law, Sections 3.18, 3.23 (1968).

While the creation of the court system and the extension of the judicial power to a municipal court may be matters of statewide concern which only the state has the authority to control, **Stout v. City of Clovis,** 37 N.M. 30, 16 P.2d 936 (1932), the manner of the selection of the individual to occupy the office and the question whether that individual may be subject to recall are matters which have relatively little, if any, effect on people or communities outside the municipality. *{*6}* These would appear to be strictly local affairs. See **Kansas City v. Brouse,** 468 S.W. 2d 15 (Mo. 1971). 1 Antieau, Municipal Corporation Law Section 3.36 (1968). Even though a certain matter in its broad scope may be a matter of general or statewide concern and a proper subject of state legislation, it is nevertheless proper to consider particular aspects of such a matter to be a purely local concern when the interest to the local community predominates over any interest of the state in the particular question, particularly in a home rule or charter municipality. **State v. City of Milwaukie,** 231 Ore. 473, 373 P.2d 690 (1962).

In most constitutional home rule states, the constitutional provision is a broad grant of power to a charter municipality to legislate and govern matters of purely local concern. It implies a power to adopt a complete, harmonious system of local municipal government. **Bellus v. Eureka,** 71 Cal. Rptr. 316, 444 P.2d 711 (1968); **City of Kansas City v. Marsh Oil Co.,** 140 Mo. 458, 41 S.W. 943 (1897). 1 Antieae, Municipal Corporation Law Section 3.01 (1968). 2 McQuillin, Municipal Corporations Section 9.08 (3rd Ed. Rev. 1966). The municipal charter itself, as to all proper provisions, has the same force and effect as an act of the legislature. **Phelps v. Prussia,** 60 Cal. App. 2d 732, 141 P.2d 440 (1943); **State ex rel Freeman v. Zimmerman,** 86 Min. 353, 90 N.W. 783 (1902); **Wiget v. City of St. Louis,** 337 Mo. 799, 85 S.W. 2d 1038 (1935). 2 McQuillin, Municipal Corporations Section 9.08 (3rd Ed. Rev. 1966).

The provisions of a municipal charter relating to a purely local matter supersede general statutes relative to the same subject, and by virtue of the charter provision, the municipality is excepted from such general laws. **Sanzere v. City of Cincinnati,** Ohio St. 515, 106 N.E. 2d 286 (1952); **Sullivan v. City of Omaha,** 146 Neb. 297, 21 N.W. 2d 510 (1946); **State ex rel. Frankenstein v. Hillenbrand, supra.** Indeed, the New Mexico

legislature has recognized this principle of law in Section 14-14-11, N.M.S.A., 1953 Comp., which specifies:

"A Municipality organized under the provisions of Sections 14-14-1 through 14-14-14, New Mexico Statutes Annotated, 1953 Compilation, **shall be governed by the provisions of the charter** adopted pursuant to sections 14-14-1 through 14-14-14 New Mexico Statutes Annotated, 1953 Compilation, **and no law relating to municipalities inconsistent with the provisions of the charter shall apply to any such municipality.** " (Emphasis added.)

From examination of the applicable city charter provisions, it is plain that the city's electorate, when adopting the charter, did not intend the municipal judges to be elective officers, subject to recall. Had they intended the municipal judges to be subject to recall, they would not have specifically limited the definition of elective officers as the "five commissioners" in Article II which immediately precedes Article III's authorization for recall of the elective officers only. With this in mind it follows that there is an actual conflict between the applicable city charter provisions which limit recall to the five commissioners, and the state statutes which seemingly authorize recall of municipal judges in certain instances.

To examine this conflict more closely, we must compare Section 14-9-1(B), supra, with Article II, Section 3 of the city charter. Since that section of the city charter provides that the elective officers of the city shall consist of five commissioners, it is felt that such provision directly conflicts with the state enactment which provides that the elective officers of a municipality are five commissioners and a municipal judge. With this conflict, the state provision is superseded by the applicable city charter provision. Since Section 14-13-16, supra, provides for recall of any "elective officer", and does not specifically mention municipal judges, it is clear that this statute is controlled by the applicable city charter provision for the definition of "elective officer." Since the city charter specifically defines "elective officers" as being the five commissioners, there is no authority, state or city, to allow recall of other persons.

Other provisions of state law provide for the removal, but not the recall, of judges, however. The Constitution of New Mexico, namely Article VI, Sections 3 and 32, provide for removal or discipline of "any justice, judge or magistrate of any court" for "willful misconduct in office or willful and persistent *{*7}* failure to perform his duties or habitual intemperance . . ." Such removal or discipline, however, may be ordered only by the Supreme Court of New Mexico, on recommendation of the judicial standards commission. This superintending control of the Supreme Court over inferior courts affords a present avenue for removal of any municipal judge, should the situation so warrant.

It must be remembered that the "Home Rule Amendment" to the New Mexico Constitution confers broad powers on the individual municipalities. By adopting the present city charter, the electorate of Albuquerque conferred those broad powers on

their city government. We see this as a perfect example of the kind of local determination which the Home Rule Amendment intended to vest in charter cities.

The conclusion arrived at hereinbefore is supported by the law and long standing interpretation placed thereon. Interestingly enough, however, it is supported even more soundly by the historical background surrounding judicial recall, particularly here in New Mexico. In reviewing the historical accounts surrounding judicial recall in New Mexico, in Arizona and in the nation, it is noteworthy that there is a common strand running throughout; viz., a fear that such provisions would eliminate the impartiality thought to be inherent in judicial deliberations by allowing public pressure to be brought to bear in each and every controversial or sensitive decision. At the time of the adoption of our constitution, it was thought, and such thought maintains in today's complex society, that it would be inherently wrong to subject the judicial decisions of this state to instant and continuous popularity contests. Rather, it has been the considered and thoughtful judgment of our people as well as our lawmakers that judges should be the subject of public scrutiny by way of removal proceedings, discussed above, if they have been guilty of some specific form of judicial misconduct. Such is the reason, I am sure, that we find only scant reference to judicial recall in the laws of this state.

Harvey B. Fergusson, a democratic delegate to our Constitutional Convention, was outspoken in his support for a recall provision in our constitution for elected officials. This, however, was considered dangerous by the convention, especially as it pertained to elected judges. It was the sentiment of the convention that the independence of the judiciary must not be subject to "sudden impulses . . ." and Fergusson's efforts were thwarted. See **New Mexico's Quest for Statehood 1846-1912,** Robert W. Larson, the University of New Mexico Press.

It was axiomatic that the convention delegates knew of President Taft's adamant dislike of judicial recall and it was over his signature that New Mexico would be admitted to statehood. It was also well known that the president was notably irked at a broad recall provision contained in Arizona's new constitution which was before the congress and the president for approval at the same time New Mexico was seeking admission to statehood.

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For the purpose of congressional consideration, New Mexico and Arizona were joined together in a series of resolutions, the first of which was sponsored by Senator Nelson, an opponent of recall. The substance of his resolution was that the Arizona recall provision be taken out as a "fundamental condition" to admission. This resolution failed by a vote of 43-26 in the senate. Thereafter, Senator Flood proposed admission of

Arizona with New Mexico, provided that subsequent to admission the Arizona electorate would be given the opportunity of voting by referendum on the question of retaining recall in its constitution. This resolution carried the senate by a vote of 53-18.

During the course of debate in the senate on these resolutions, it is interesting to note that Senator William E. Borah of Idaho, who usually voted as a progressive republican, expressed his *{*8}* concern about the Arizona recall provision when he said:

". . . without a free and independent judiciary, popular government would be tantamount to a tormenting delusion."

Senator Elihu Root of New York said that while judges were supposed to decide cases by evidence, the judges themselves would be judged by newspaper accounts of cases "necessarily brief and partial" if judicial recall were allowed.

True to his word, President Taft vetoed the Flood resolution on August 15, 1911. Referring to the controversial recall provision contained in the Arizona constitution, the president declared:

"This provision of the Arizona constitution, in its application to county and State judges, seems to me so pernicious in its effect, so destructive of independence in the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular majority, and, therefore, to be so injurious to the cause of free government, that I must disapprove a constitution containing it."

On the same date the veto message was reviewed by the congress, Senator Smith proposed a compromise resolution which would admit both Arizona and New Mexico to statehood, provided the recall provision in the Arizona constitution was removed and subsequently submitted by a referendum to the people of Arizona for adoption. This resolution carried the senate by a vote of 53-9 and was subsequently signed by the president.

After reviewing all available historical accounts of this controversial question, I believe the most poignant language bearing on the political advisability of judicial recall came from delegate Thomas B. Catron, an imposing power in the territory; he was recognized as the leader of the republican party and framed its policies, wrote its platform, controlled its convention, represented the party at the conventions and was a member of the Republican National Committee. He was further distinguished as being the leader of the "Santa Fe Ring." More recent history would indicate not only a change in name but a change in leadership, as well. On the floor of the convention, while discussing this question, Mr. Catron said:

"I do not believe in either the initiative, referendum, or recall; they are heresies and constitute the first movement in the direction of anarchy in this government of ours; that is, we will all be nihilists in a few years or in a nihilist government if those radicals who are starting such movement are allowed to get control."

I, considered by some to be a liberal democrat, concur with the well chosen words of Mr. Catron, a conservative republican. No need existed for judicial recall when this state began its voyage. No need exists for it now, and with only relatively minor exceptions, none has been provided by our constitution, our statutory law or the Albuquerque City Charter.

Judges must be allowed to speak freely without fear of irresponsible wrath. "Otherwise", said Lord Stair in an 1824 decision, "no man but a beggar or a fool would be a judge."

In conclusion, if there is to be judicial recall, the law providing therefor must be absolutely clear, convincing and unambiguous, whether it be in our constitution, our statutory law, or in a municipal charter. Such is not the case here.

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