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June 15, 1990

H. F. Magnuson  
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P.O. Box 469  
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Re: Recall of hospital trustees

Dear Mr. Magnuson:

By letter dated May 1, 1990, you requested an opinion from this office regarding the ability to recall trustees of East Shoshone Hospital District. You note that you have received differing legal opinions from attorneys in your area.

The fact that different opinions have arisen is not surprising when comparing the statutory authority for recall elections in Article VI, Section 6, of the Idaho Constitution and Idaho Code Section 34-1701. Article VI, Section 6, of the Idaho Constitution provides:

*Every public officer in the state of the Idaho, excepting the judicial officers, is subject to recall by the legal voters of the state or of the electoral district from which he is elected. The legislature shall pass the necessary laws to carry this provision into effect. (Emphasis added.)*

The legislature in implementing the constitutional provision enacted Idaho Code Section 34-1701 which states:

Officers subject to recall.--The following officers, whether holding their

elective office by election or appointment, and none other, are subject to recall:

(1) State officers:

(a) The governor, lieutenant-governor, secretary of state, state auditor, state treasurer, attorney general, and superintendent of public instruction;

(b) Members of the state senate, and members of the state house of representatives.

(2) County officers:

(a) The members of the board of county commissioners, sheriff, treasurer, assessor, prosecuting attorney, clerk of the district court, and coroner.

(3) City officers:

(a) The mayor;

(b) Members of the city council.

(Emphasis added.)

The two statutes are in direct conflict. In light of this direct conflict, the question then is whether Idaho Code Section 34-1701 is constitutional.

The appellate courts of Idaho have not addressed the constitutionality of the Idaho Code Section 34-1701. The issue was addressed by District Court Judge Arthur Oliver in *Brewster v. Ellis*, Case No. 39-198-B, Sixth Judicial District of the State of Idaho, in and for the County of Bannock (1985). Speaking directly to the constitutionality of the statute, Judge Oliver stated:

While the legislature may no doubt regulate the details of such recall elections for the purpose of "carrying this provision into effect", the legislature is overstepping its

authority when it excludes some public officers from recall. . . . The court concludes that Idaho Code Section 34-1701 is unconstitutional to the extent that it excludes school board trustees from recall in violation of Article VI, Section 6, of the Idaho Constitution.

Judge Oliver's decision was cited and utilized by District Court Judge John H. Bengtson in *In re John Bennett*, Case No. C-1040, Second Judicial District of the State of Idaho, in and for the County of Latah. Although Judge Bengtson was addressing the recall of school board trustees pursuant to Idaho Code Sections 34-424, et seq., he concurred with the analysis and conclusion drawn by Judge Oliver in relation to the force and effect of Article VI, Section 6, of the Idaho Constitution.

The policy of Article VI, Section 6, of the Idaho Constitution is undoubtedly to reserve to the electorate the unfettered, unlimited right to recall public officers--the exercise of a political process; the policy behind Section 33-424, Idaho Code, was undoubtedly to protect a particular class of public officers, i.e., school trustees, from the vicissitudes and often fickle whims of public opinion. However, rules of expediency must not be placed above the constitution, *State v. Arregui*, 44 Idaho 43; and the policy of the Constitution of this state must prevail over legislative policy in conflict therewith. *State v. Johnson*, 50 Idaho 363.

The legal principles set forth by Judge Oliver and Judge Bengtson are sound. To the extent that Idaho Code Section 34-1701 conflicts with the clear language of Article VI, Section 6, of the Idaho Constitution, it is constitutionally infirm.

The conclusion that Idaho Code Section 34-1701 is partially unconstitutional does not resolve the issues presented. There is still no enabling legislation from the legislature for the recall of hospital district trustees.

The recall process, as established by Idaho Code Section 34-1701, et seq., is based upon voter registration and the

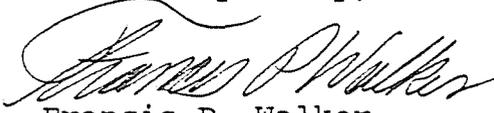
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percentage of registered voters calling for the recall of the public official. The election of hospital district trustees does not require special registration to qualify as an elector, merely residency in the district. As a result, the mechanics of Idaho Code Section 34-1701, et seq., are not compatible with recalling hospital district trustees.

The state legislature has addressed this incompatibility in regard to recalling school board trustees and irrigation district directors. Idaho Code § 33-424, et seq.; Idaho Code § 43-214, et seq. The legislature has not specifically addressed the recall of hospital district trustees and until such enabling legislation is passed, hospital district trustees are not subject to recall by any effective means.

If I can be of further assistance in this matter, please do not hesitate to contact me.

Yours very truly,

  
Francis P. Walker  
Deputy Attorney General

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