Total Recall

Balancing the Right to Recall Elected Officials with the Orderly Operation of Government

By Jason Hanselman

FAST FACTS

Early cases considering Michigan's constitutional right to recall public officials required an adequate reason to recall an official, but the standard was relaxed by future cases.

In 2011, dozens of recalls prompted various changes in Michigan's recall statute.

Although some officials have questioned the propriety of the changes to the recall process, Michigan's legislature has plenary power to establish requirements for recall elections.

The Michigan Constitution has long guaranteed citizens the right to recall public officials before the end of their terms of office.[1] Delegates at Michigan's last Constitutional Convention sought to significantly enshrine the public's right to remove public officials but place reasonable limitations on doing so.

The delegates' solution was to provide a right to recall but leave delineation of the process and standards in the hands of Michigan's legislature. Those processes and standards have evolved over the years with the legislature seeking to strike an appropriate balance between the constitutional right to recall and the procedural requirements necessary to recall a public official who has been elected by a majority of electors in the jurisdiction.

History

In its 1908 Constitution, Michigan became the second state to provide for recall of public officials.[2] Although recalls were rare under the 1908 Constitution, the Michigan Supreme Court consistently held that the reasons identified on a recall petition must be based on an act or failure to act sufficient to justify recall.[3] But in *Newberg v Donnelly*, the Court created a new standard requiring a showing of malfeasance, misfeasance, or nonfeasance before the recall of a public official could begin.[4] Following that precedent, from 1926 to 1960, Michigan courts restricted recall of public officials to instances of malfeasance, misfeasance, or nonfeasance occurring while in office.[5]

In 1960, however, the Court reversed course and its own precedent, deeming the prior limitation improper.[6] In *Wallace v Tripp*, the Court held that recall is a political, not a legal, question, reasoning that "[i]t is obvious at the start that the constitutional provision does not limit the right of recall to situations wherein facts could be alleged on the petition which constituted 'nonfeasance, misfeasance, or malfeasance.'"[7] The Court went on to explain that:

> The basic power is held by the people in both our nation and our State. Our State Constitution as presently drawn places much confidence in the proper functioning of an intelligent and informed electorate. The recall provision is illustrative of that confidence. We feel bound to uphold its provisions against the aberration contained in the *Newberg* Case and subsequently followed in the cases cited.[8]

Coincidentally, shortly after the *Wallace* decision, Constitutional Convention delegates began convening to craft a new constitution, and the recall provision was among the provisions debated at length. Among the delegates, G. E. Brown offered an amendment to the proposal, which became the last sentence of Article 2, Section 8, clarifying that the reasons for recall are political questions. In explaining why the electorate has the right to undertake initiative, referendum, and recall without being required to state a reason, Brown explained:

> The requiring of signatures, the burden that is placed upon the proponents of a recall movement, to recall an officer and call an

election for that purpose, the burden of getting the signatures and getting people to sign for this purpose has proved to be a very adequate deterrent to any vexatious or spurious recall movements.[9]

Ultimately, the delegates determined that the appropriate policy balance was struck by retaining the inherent power of citizens to recall elected officials but delegating to the legislature the power to establish the process by which such recalls occur. Article 2, Section 8 retained the right of recall but directed the legislature that "laws shall be enacted" to establish the mechanism by which recall will occur.

The legislature, therefore, is tasked with developing a process for circulating petitions, gathering signatures, submitting petitions, and placing recall questions on the ballot. Over time, it has become apparent that the Constitutional Convention delegates were wise to retain a level of flexibility for the legislature to craft the recall process.

The 2011 recalls

Although the burden of obtaining signatures may have proven onerous in the past, between 2000 and 2011[10]—the modern era of multimillion-dollar political campaigns and paid petition circulators—at least 457 state and local elected officials faced a recall election in Michigan. The trend line for this sample shows the number of officials facing recall elections has been increasing in Michigan since 2000.

For the most part, recalls in Michigan target city, township, and village officials—such officials comprise 89 percent of recalls during the past 12 years. In the summer of 2011, though, various groups and individuals pushed the right to recall public officials to its limits in seeking to recall dozens of state legislators, the attorney general, and the governor.

At the time, the Michigan Election Law required an elector to submit all recall petition forms to the Board of County Election Commissioners in the officer's county of residence.[11] The board was charged with determining whether the reasons for recall were clearly stated as required by the Michigan Election Law.[12]

If petitions were deemed clear, they could be immediately circulated, regardless of whether an appeal had been taken from the board's clarity determination.[13] Signed petitions for the recall of state officers were to be filed with the Secretary of State.[14] Upon receipt, the Secretary of State—through the director of elections—was to determine compliance with threshold legal requirements before approving placement on the ballot.[15]

Because there was very little caselaw on the subject and each county's Board of County Election Commissioners acted autonomously, hearings to determine whether petitions satisfied statutory clarity requirements varied widely from jurisdiction to jurisdiction. Indeed, in several cases, language deemed clear in one jurisdiction was adjudged impermissibly vague in another. The inconsistency in clarity determinations caused the legislature to question whether the process fulfilled the obligation to create a workable method and procedure for the right to recall.

On December 27, 2012, Public Act 417 took immediate effect, substantially changing the way in which elected officials are recalled in Michigan.

Article 2, Section 4 of the Michigan Constitution vests the legislature with the constitutional authority to enact election laws. Among its provisions is the so-called "purity of elections" clause, which provides in pertinent part:

> The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.[16]

In interpreting the purity-of-elections clause, the Michigan Supreme Court has explained, "[t]o be sure, the Legislature may understandably and properly seek to maintain the integrity of Michigan's election process…by preventing the clogging of election machinery and by avoiding voter confusion."[17] As the legislature analyzed the issue in light of the 2011 recall attempts, it became apparent that the inconsistent application of the recall process caused voter confusion and disrupted the integrity of Michigan's election process, demanding correction.

2012 changes to the recall process

On December 27, 2012, Public Act 417 took immediate effect, substantially changing the way in which elected officials are recalled in Michigan.[18] The amendments clarify and make more uniform the process for recalling elected officials. Uniformity is accomplished by creating consistency in interpretation, placing recalls for all statewide (and some county) officeholders before the same body, requiring that the reasons stated for the recall be factual, and specifying the periods during which a recall petition may be circulated, precluding multiple, simultaneous recall petitions, etc.[19]

To address concerns regarding inconsistent application of the Michigan Election Law, the 2012 amendments now require petitions seeking the recall of public officials[20] to be submitted to the Board of State Canvassers before being circulated.[21] The board is a constitutionally created commission responsible for canvassing petitions and election results, conducting recounts, and administering elections in Michigan.[22] Because the Constitution provides that a majority of the Board of State Canvassers shall not be composed of members of the same political party, it is by design a bipartisan entity consisting of two Democrats and two Republicans.

The 2012 amendments also added a factuality requirement so that a petition must now state the reasons for recall both "factually and clearly."[23] Although the grounds for recall remain a political question, for the sake of avoiding voter confusion in the present climate of relentless (and often intentionally misleading) political advertisements, the legislature commanded that the ballot language itself must be both factual and clear.

To further encourage consistency in clarity and factuality determinations, the legislature has created a process by which all recall petitions for public officials are submitted to the same body—the Board of State Canvassers—and all appeals from those decisions are filed with the same court—the Michigan Court of Appeals.[24]

In response to the *Scott v Michigan Director of Elections*[25] decision, the statute provides that if an appeal is filed, recall petitions cannot be circulated until the sooner of (1) the appellate court decision or (2) 40 days following the date of the appeal.[26] This requirement allows appeals to be considered before petitions are circulated.

In *Scott*, the Michigan Supreme Court ruled that a recall election could proceed before the conclusion of a clarity hearing appeal in the circuit court. In that case, Rep. Scott argued that permitting a recall petition circulator to file invalid petitions and have a recall question placed on the ballot before the statutory appellate process was resolved effectively deprived him of his due process right to appeal the decision. Previously, a public official could win the appeal but nonetheless be recalled from office in the interim by an invalid petition. PA 417 struck a balance between an officeholder's right to appeal and the public's right to timely recall. Furthermore, both parties now have an incentive to prosecute the clarity/factualness appeal in the Court of Appeals

(or circuit court, as appropriate under the statute) with reasonable dispatch.

Potential challenges

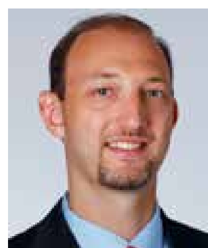
The changes made by PA 417 reflect a significant revision to Michigan's recall process and procedure and are not without controversy. The Washtenaw County clerk, one of three members of the County Board of Canvassers, recently declined to use the new requirements, concluding that the "requirement of 'factuality' in recall language is unconstitutional on its face."[27] The clerk's opinion on constitutionality appears to conclude that PA 417's changes infringe on the "political question" aspect of recalls. Such a position, however, fails to recognize the legislature's power to enact election laws,[28] specifically, and its general plenary power.[29]

Plenary power means the legislature possesses all the powers of the people and may exercise that power in the manner of its choosing unless a provision of the Michigan Constitution restricts its power to act or prescribes a particular manner of acting.[30] Rather than restricting the legislature's power with regard to recalls, Article 2, Section 8 explicitly directs the legislature to create a process by which recalls are conducted, stating that "[l]aws shall be enacted to provide for the recall...." The Michigan Constitution does not otherwise limit the legislature's plenary power to establish processes and requirements for recall elections, and the legislature acted under that authority in enacting 2012 PA 417.[31]

Conclusion

The Michigan Constitution provides that the people retain the power to recall public officials and directs the legislature to establish the process for doing so. Exercising its plenary power as well as its explicit constitutional authority, the legislature has created such a process under the Michigan Election Law requiring, among other things, that petitions to recall public officials be factual and clear. Although the Supreme Court decision in *Wallace* prohibits requiring malfeasance, misfeasance, or nonfeasance to recall officials, 2012 PA 417 attempts to provide reasonableness and consistency in the process. The legislature attempted to balance a citizen's right to recall with appropriate and reasonable procedures, practices, and requirements for the operation of recall; however, given the reaction of those implementing the statutory changes, it appears likely that Michigan courts will continue to shape the recall process. ■

> The Michigan Constitution provides that the people retain the power to recall public officials and directs the legislature to establish the process for doing so.



Jason Hanselman is a partner at Dykema, focusing on issues related to state and local government including election law, political compliance, and other highly regulated areas. He is involved in election-related litigation and advises corporate clients, candidates, and committees on issues such as recalls, recounts, ballot question campaigns, and campaign finance matters.

ENDNOTES

1. Article 2, Section 8 provides that: "Laws shall be enacted to provide for the recall of all elective officers except judges of courts of record upon petition of electors equal in number to 25 percent of the number of persons voting in the last preceding election for the office of governor in the electoral district of the officer sought to be recalled. The sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question." Const 1963, art 2, § 8.
2. See Const 1908, art 3, § 8 (as amended).
3. See, e.g., *Newburg v Donnelly*, 235 Mich 531; 209 NW 572 (1926).
4. *Id.*
5. *Id.*; see also *People ex rel Elliott v O'Hara*, 246 Mich 312; 224 NW 384 (1929); *Amberg v Welsh*, 325 Mich 285; 38 NW2d 304 (1949); *Eaton v Baker*, 334 Mich 521; 55 NW2d 77 (1952).
6. *Wallace v Tripp*, 358 Mich 668; 101 NW2d 312 (1960).
7. *Id.* at 676.
8. *Id.* at 680.
9. 2 Official Record, Constitutional Convention 1961, pp 2263–2264.
10. Citizens Research Council of Michigan, *Michigan's Recall Election Law*, June 2012.
11. MCL 168.952.
12. *Id.*
13. See *Scott v Mich Director of Elections*, 490 Mich 897; 804 NW2d 551 (2011).
14. MCL 168.959.
15. See, e.g., *Scott v Secretary of State*, 202 Mich 629, 644; 168 NW 709 (1918); *Pillon v Kavanagh*, 345 Mich 536, 543–544; 77 NW2d 257 (1956); *Newsome v Riley*, 69 Mich App 725, 731; 245 NW2d 374 (1976).
16. Const 1963, art 2, § 4.
17. *Socialist Workers Party v Secretary of State*, 412 Mich 571, 594; 317 NW2d 1 (1982).
18. 1954 PA 116, as amended by 2012 PA 417 and 2012 PA 418.
19. *Id.*
20. MCL 168.959 identifies United States senators, members of Congress, senators and representatives in the state legislature, elective state officers except the secretary of state, and county officials except county commissioners.
21. MCL 168.951a.
22. Const 1963, art 2, § 7.
23. See MCL 168.951a(1)(c); MCL 168.952(1)(c).
24. MCL 168.959; MCL 168.952.
25. *Scott*, n 13 *supra*.
26. See MCL 168.951a(6); MCL 168.952(6).
27. E-mail from Lawrence Kestenbaum, county clerk, Washtenaw County, to various media outlets (August 1, 2013).
28. See Const 1963, art 2, § 4.
29. See *Kelley v Riley*, 417 Mich 119, 197; 332 NW2d 353 (1983) ("Unlike the federal constitution, which grants only those powers specifically enumerated, the Michigan Constitution serves as a limitation on the plenary power of the Legislature.").
30. *Romano v Aten*, 323 Mich 533, 536–537; 35 NW2d 701 (1949) ("The function of a state Constitution is not to legislate in detail, but to generally set limits upon the otherwise plenary powers of the legislature.").
31. See, e.g., MCL 168.641 (limiting the dates for such elections to occur in November, February, May, and August) and MCL 168.544c (establishing the technical requirements for recall petitions, such as type, size, form, contents, circulation, and signing).