

# RECALLING U.S. SENATORS AND CONGRESSMEN

## A Legal Analysis Prepared for the U.S. Citizens Association

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### INTRODUCTION

While 18 of the 50 United States offer their citizens an opportunity to recall their elected officials, it is a fact that in our nation's history, no federal legislator has yet been recalled.

It has not been for lack of interest. Rather, the process has languished in part due to debates on whether or not legal authority exists for recall of U.S. Senators and Congressmen; and, in the case of Idaho, interference by a state court prevented recall of a federal legislator.

An Idaho state court in an unreported memorandum decision interpreted Idaho's recall statute to only apply to state officers, and further opined that the law was unconstitutional for the dubious reason that it would constitute a new "qualification" for office in addition to age, residency and inhabitancy, the existing stated qualifications in the U.S. Constitution.

That the Idaho Court's reasoning is, in this author's view, flawed and possibly vulnerable will be discussed later in this report. See *Rankin v. Cenarrusa*, Civil No.39700 (District Court for Fourth Judicial District of Idaho, 1967).

In addition, a Michigan federal court simply declined to hear a case seeking declaratory judgment that United States Senators were subject to recall. See *Hooper v. Hart* 56 FRD 476 (1972) A simple review of the decision indicates that the plaintiff's poor legal strategy and timing prevented the Court from acting. The case was not ripe for hearing yet as no actual facts were brought to the court's attention that a real controversy presently existed. The court stated it was essentially being asked to give an advisory opinion and could not do so.

Legal scholars who have written concerning the issue frequently point out that the issue of recall was heavily debated by the Founding Fathers during the drafting of the Federal Constitution. They deliberately omitted language enabling recall from the Constitution, and some use this as a basis for arguing that recall is not constitutionally permissible.

The Founding fathers did, however, subsequent to the body of the Constitution, amend it. The first ten amendments to the Constitution are known as the Bill of Rights. Most appropriate to this discussion is the Tenth Amendment.

The Tenth Amendment reads as follows:

*The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

What certain commentators and scholars don't acknowledge that while debate over recall occurred in 1787, it was four years later (1791) that they gave us the Tenth Amendment. The timing may or may not be indicative of a shift of attitude about recall on the part of the Framers.

After reviewing the body of law and opinion concerning recall, it is apparent that if recall of federal legislators is to succeed, it will likely only be after an intense battle in the federal court system as to the degree to which the courts will go to allow the literal meaning of the Tenth Amendment to be in force and effect.

As this author reads this language, it appears clear that " the States " and " the people " living with in them, should be recognized to have the right of recall.

But in order to implement a strategy that will enable recall petitions to result in actual removal of errant Senators and Congressmen, considerable legal and political obstacles will present themselves and can only be overcome by understanding the lengths to which those opposed to recall can be expected to go.

## **THE QUALIFICATIONS ISSUE AND THE TENTH AMENDMENT**

It can be anticipated that any recall efforts of a Senator or Congressman will be challenged in the federal courts on the qualifications issue referenced in *Hooper* above.

The qualifications issue was litigated again in the United States Supreme Court in the case of *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) While this was not a case concerning recall, the case made rulings on issues that are applicable to the recall.

In Arkansas, voters had adopted a state constitutional amendment which included a ballot access restriction that prohibited (1) the appearance on the ballot for election to the United States House of Representatives from Arkansas of the name of anyone who had been elected three terms to the House or (2) the appearance on the ballot for election to the United States Senate from Arkansas of anyone who had been elected to two or more terms as a member of the Senate from Arkansas.

A majority of the Court held that the ballot access restriction violated the qualification clauses, because the Constitution forbade states from adding or altering the qualifications specifically enumerated in the Constitution, since the power to add

qualifications was not within the original powers of the states and thus, according to the Court, was not reserved to the states by the Constitution's Tenth Amendment.

This is a serious erosion of state sovereignty, basically saying if a state did not have the power to do something prior to 1791, it doesn't have it now. This opinion is controversial.

A minority of justices, Thomas, Scalia, and Rehnquist failed to concur in this particular view, and perhaps a hearing today would have a different result, as the court's composition has changed.

Moreover, the majority overlooked arguments raised by the proponents of term limits in their brief to the effect that states, for example, subsequent to the Tenth Amendment, enacted constitutions that gave broader constitutional rights to criminal defendants than does the federal constitution. Under the majority's logic, this was illegal, hence an argument that clearly points to the unreasonable nature of the majority's position.

Justices Thomas Rehnquist, O'Connor and Scalia, in their dissent, expressed the view that people of Arkansas enjoyed reserved powers over the selection of their representatives in Congress, and that nothing in the Constitution deprived the people of each state of the power to prescribe eligibility requirements for Congressional candidates.

## **WHAT STATES OFFER**

Eighteen states have recall provisions. Alaska, Arizona, California, Colorado, Georgia, Idaho, Kansas, Louisiana, Michigan, Minnesota, Montana, Nevada, New Jersey, North Dakota, Oregon, Rhode Island, Washington, and Wisconsin all have recall of some kind available to their voters. Only seven of these states require any grounds.

Some examples:

Alaska's Constitution, Article XI, Section 8 states;

All elected public officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision, from which elected. Procedures and grounds for recall shall be prescribed by the legislature.

Alaska's statute AS Section 15.45.510 allows recall for lack of fitness, incompetence, neglect of duties and corruption.

California limits recall to state officials. No grounds for recall are required.

Georgia Code Sections 21-4-3(7), 21-4-4(c) allows recall for malfeasance or misconduct while in office, violation of oath of office and failure to perform duties

prescribed by law. Recall is also provided for willful misuse, conversion or misappropriation without authority of public property or funds. Enabling authority for the law is found within the state constitution. All public officials in Georgia are subject to recall.

Minnesota's constitution was amended in 1996 to permit recall of state legislators, the governor and other executive officers, and judges for "malfeasance or nonfeasance" or conviction of a serious crime.

In Kansas, the specific grounds for recall of state officers are

1. Conviction for a felony
2. Misconduct in office
3. Incompetence
4. Failure to perform duties prescribed by law. The statute exempts judges and "national office holders".

Wisconsin is a state which has a very broad statute because it allows for recall of "any incumbent elective official" by filing a petition with the same official or agency with whom nomination papers or declarations of candidacy for the office are filed demanding the recall of the officeholder.

New Jersey specifically allows for impeaching Congressmen and Senators.

These are just a few examples of what existing law offers voters. The websites of secretaries of state and numerous other websites provide detailed instructions on how to proceed. Usually there are detailed procedures for preparing and filing such petitions.

The accompanying chart gives state constitutional authority for recalling and the ground, if any, required under state constitutional law.

## **CONCLUSION**

The recall of federal and state legislators must be considered at present to have a questionable likelihood of success. While, unquestionably, large segments of the American population feel alienated from their politicians, political organizations, as in the past, will subsidize serious legal challenges to any recall petitions. The courts have precedents and complex constitutional arguments to prevent petitions from succeeding. However, the composition of the U.S. Supreme Court has changed and different results are possible.

Recall efforts may serve other purposes, such as a focus for building consensus and organizations and as a warning to politicians that their conduct is not appreciated.

**RECALL INFORMATION**

STATE	WHO CAN BE RECALLED	STATE LEGAL AUTHORITY	NOTES	OFFICIAL WEBSITE
ALASKA	Governor, Lieutenant Governor, State legislators	Alaska Constitution Article 9, Alaska Statutes, Section 15.470	Grounds include lack of fitness, neglect, corruption incompetence	<a href="http://www.legis.state.ak.us/default.html">http://www.legis.state.ak.us/default.html</a>
ARIZONA	Every public officer in the state of Arizona	Arizona Constitution, Article 8	No grounds necessary	<a href="http://www.azleg.gov/const/Arizona_Constitution.pdf">http://www.azleg.gov/const/Arizona_Constitution.pdf</a>
CALIFORNIA	State officers	California Constitution, Article II, Section 13-20	No grounds necessary	<a href="http://www.leginfo.gov/const.html">www.leginfo.gov/const.html</a>
COLORADO	Every elective public office in the state of Colorado	Colorado Constitution	No grounds specified	<a href="http://www.leg.state.co.us">http://www.leg.state.co.us</a>
GEORGIA	Every elected public official	Georgia Constitution, Article II, Section II, Paragraph IV	Grounds include violation of oath of office, misconduct, conduct adversely affecting public interest	<a href="http://www.sos.georgia.gov/elections/constitution_2007.pdf">http://www.sos.georgia.gov/elections/constitution_2007.pdf</a>
IDAHO	Every public officer in the state of Idaho except judicial officers	Idaho Constitution, Article VI, Section 6	Grounds not required	<a href="http://www.accessidaho.org/laws_rules">http://www.accessidaho.org/laws_rules</a>
KANSAS	Every public	Kansas	No grounds	<a href="http://www.kslib.info/constitution/index.html">http://www.kslib.info/constitution/index.html</a>

	officer in the state of Kansas except judicial officers	Constitution, Article IV, Section 2	necessary	
LOUISIANA	Any state, district, parochial, ward or municipal official except “judges of the courts of record”	Louisiana Constitution, Article X, Section 26	Grounds not necessary	<a href="http://www.legis.state.la.us/lss/toc.htm">http://www.legis.state.la.us/lss/toc.htm</a>
MICHIGAN	All elected officials of the state, except, judges of the court of record.	Michigan Constitution, Article II, Section 8	Petitions must be screened by “clarity hearing”	<a href="http://www.legislature.mi.gov/documents/publications/constitution.pdf">www.legislature.mi.gov/documents/publications/constitution.pdf</a>
MINNESOTA	State legislators, executive officers, supreme court, appeals or district court judges	Minnesota Constitution, Article VIII, Section 6.	Malfeasance, misfeasance, serious criminal conviction	<a href="http://www.leg.state.mn.us">www.leg.state.mn.us</a>
MONTANA	Every person holding a public office, whereby by appointment or by election	Montana Recall Act MCA 2-16-600	Grounds include lack of fitness, incompetence, violation of his oath of office, official misconduct, felony conviction	<a href="http://www.leg.met.gov">www.leg.met.gov</a>
NEVADA	“Every public officer”	Nevada Constitution Article II, Section	Grounds not stated	<a href="http://www.leg.state.nv.us">www.leg.state.nv.us</a>

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NEW JERSEY	“any elected official in this state or representing this state in Congress”	New Jersey Constitution Article 1, Section 2-B	Grounds not stated	<a href="http://www.njleg.state.nj.us">www.njleg.state.nj.us</a>
NORTH DAKOTA	Any elected official of the state, of any county, or of any legislative county or district”	North Dakota Constitution Article III, Section 1 and 10	No grounds stated	<a href="http://www.legis.nd.gov">www.legis.nd.gov</a>
OREGON	Every public officer	Oregon Constitution, Article II, Section 18	No grounds necessary	<a href="http://www.leg.state.or.us">www.leg.state.or.us</a>
RHODE ISLAND	“General Officer”	Rhode Island Constitution, Article IV, Section 1	Indicted for felony, convicted of misdemeanor, ethical violations.	<a href="http://www.rileg.state.ri.us">www.rileg.state.ri.us</a>
WASHINGTON	Every elective public officer, except judges of courts of record	Washington State Constitution, Article I, Section 33 and 34	Malfeasance, misfeasance, violation of oath of office	<a href="http://www.courts.wa.gov/education/constitution">www.courts.wa.gov/education/constitution</a>
WISCONSIN	Any incumbent elected officer.	Wisconsin Constitution, Article XIII, Section 12	Grounds include violation of oath, malfeasance, misfeasance	<a href="http://www.legis.state.wi.us">http://www.legis.state.wi.us</a>