

Takeaways from California's recent local recalls

Overview

There are two takeaways from this year's general election results for the contests involving Los Angeles District Attorney George Gascón, Alameda County District Attorney Pamela Price, and Oakland Mayor Sheng Thao. Combined with the recall of San Francisco District Attorney Chesa Boudin, these contests are a clear voter rejection of sentencing reform and progressive prosecutors. And obvious flaws in recent changes to recall laws at the state and local level are now causing headaches for local officials struggling to apply the tangled new procedures to these contests. The results show that attempts by elected officials to discourage recalls failed, that by bungling the reforms those officials made recalls more expensive, and they opened the door to some bizarre replacement scenarios.

Discussion

Strong signs of voter preferences

Voters have turned against the progressive prosecutor movement and its push for rethinking some fundamental tenets of the criminal justice system. The movement, launched with the election of Philadelphia defense attorney Larry Krasner as district attorney in 2017, initially scored some big wins with ideologically-aligned candidates winning district attorney elections nationwide. But Election Day 2024 in California highlights the movement's electoral problems: Alameda County District Attorney Pamela Price and Oakland Mayor Sheng Thao were recalled, and Los Angeles District Attorney George Gascón lost his reelection race (after surviving a recall drive that just missed qualifying in 2022) — all this just two years after San Francisco District Attorney Chesa Boudin was recalled. That might be the end of progressive prosecution in California.

Add the fact that state voters approved Proposition 36, which reversed the penalties lowered by 2014 Proposition 47 for certain drug and theft crimes. Proposition 36

passed by a wide 20% margin and undid Proposition 47, restoring some of these offenses to felonies. That suggests voters believed it was a mistake to reduce those crimes to misdemeanors, given the perception of higher crime statewide.

Suffering swift electoral losses is not surprising for reformers with new ideas, particularly in the criminal justice arena. The same fate befell past attempts to soften California's crime-and-punishment laws, with a voter backlash following soon after. California has a long history of voter reactions to perceived soft-on-crime programs: witness the 1986 purge of the California Supreme Court after it abolished capital punishment, and California led the nation in experimenting with three-strikes-you're-out legislation. District attorneys in particular have long been judged based on crime-fighting success and high-profile convictions. As with any other significant change in policy, softening criminal justice approaches is always vulnerable once challenges set in.

Nor is it surprising that voters deployed direct democracy against the nouveau progressives. The initiative and the recall are ready tools for voters feeling buyers' remorse, and are often used by voters who fault elected officials for moving too slowly or for blocking specific policy. And they work well — since 2011 in California 79% of recalls that went to the ballot resulted in removal.

Progressive prosecution advocates may have succeeded in temporarily reframing the debate around criminal justice issues. But voters rejected those policies at the ballot box. These election results, plus other trends showing California voters trending towards more conservative political options, are perhaps a sign of returning to "tough-on-crime" positions.

The legislature's errors make the replacements unclear

Votes are still being counted, but both Price and Thao lost their recalls and Alameda County and Oakland now need to use the untested new replacement laws. The legislature (in 2022) and Alameda County (in 2024) revised state and local recall law, substituting a tangled new set of contradictory provisions for what had been a simple replacement procedure.

In 2022, following recall campaigns against state Senator Josh Newman, California

Governor Gavin Newsom, San Francisco District Attorney Chesa Boudin, and three San Francisco school board members, the legislature adopted AB 2582 and 2584. Those laws, coupled with a major 2017 revision, made significant changes aimed at making recalls more difficult to get on the ballot.^[1]

Those new laws also revised the replacement model for recalled local offices; the important revised provision here is Elections Code section 11382. California's local official recall law is used by all non-charter cities, and many charter cities and counties also adopted it.^[2] Before 2022, both that law and the law for recalling state officials used the same replacement procedure: a same-day replacement race in which the targeted official is not allowed to run. The new section 11382 now uses a *replaced by law* model; the state official replacement procedure is unaffected because changing it requires a constitutional amendment.

Section 11382 refers back to local vacancy laws, with the office filled "according to law." That's the same law local governments use for any vacancy, and may allow appointment by other officials to fill the remaining term of office. There is no immediate same-day replacement vote. In some cases, as in Oakland and Alameda County, there is a later replacement election. Legislators argued that the change would make recalls less partisan (and perhaps hoped to discourage recalls in general), but that is not how recalls work.^[3] With most local electorates dominated by one party, local recalls generally are motivated by policy not partisanship.

The new rules have already caused problems: Shasta County recall proponents petitioned the governor to allow them to vote on a replacement, and in Downey a recall in January resulted in a city council seat staying vacant for nearly a year until the general election. The upshot is that the new replacement procedure is largely untested and unknown by voters, and experiments with it have gone poorly.

And if the intent was to discourage recalls by switching to appointed replacements, that was always unlikely; for example, Oregon has an appointed model and has nearly as many recalls as California since 2011 despite being a fraction the size. The incidence of California recalls looks unaffected by the change — 22 officials have faced recall votes in the two years since the law revision.

Next, let's look at how problems with the new replacement procedure are playing out in real time in Alameda County and Oakland.

Oakland replacement issues

No one knows who Oakland's replacement mayor will be. That's because Oakland ties itself to the new Elections Code section 11382 — which, as a charter city, it could have ignored.^[4] This likely causes a revolving door of mayors and a low-turnout replacement race.

Here's how it works. The mayor is temporarily replaced by the city council president (who remains as council president) and, if the next election takes place over a year later, there is a special election within 120 days of certification.^[5] The replacement uses ranked choice. The current city council president is Nikki Fortunato Bas, who appears to have won the race for county supervisor. She presumably will remain as president until she is sworn in as a supervisor, and then another council member replaces her as council president and mayor. Then there will be a new election, maybe in April 2025.

Oakland voters can thank the legislature for the added mayoral election expense — from a change in law that was touted as *reducing* recall costs — when it could simply have held a special election for a replacement at the same time as the recall vote.

Alameda County District Attorney

Alameda County has several problems. The county's outdated recall law (adopted in 1926) set a timeline for counting the signatures and holding a recall election that officials claimed would be impossible to meet.

The county supervisors moved to solve these problems with Measure B, which aligned the county with existing state recall laws for local officials — the same laws the legislature recently changed. Measure B caused great confusion, leading to arbitrary choices by the county in navigating between the two potentially-applicable recall laws, and a long delay in getting the recall to the ballot.^[6] The county now

faces three unknowns that did not exist before the laws were changed: when is Price removed, when does the replacement procedure occur, and can Price replace herself?

It's unclear when Price is actually removed from office. Elections Code section 11382 says that the office is vacated once the recall is deemed successful, which may not be until the certification occurs.^[7] But Elections Code section 11384 says that the officer is removed "upon the qualification of the officer's successor."^[8] Neither section references the other, so it's unclear when a recalled local office should be considered vacated.

Alameda County supervisors apparently intend to install a temporary replacement (term TBD), and then choose a longer-term replacement to serve until the next general election in November 2026. The county charter lacks a clear procedure here, so no one knows if that plan is lawful. If section 11384 controls, Price could claim the position until the qualification of a full successor. But the temporary replacement can also claim that they are the only replacement allowed until the replacement race. Litigation, anyone?

And the discrepancy between the old and new recall rules has apparently pushed the replacement race to November 2026. The former laws would have required a faster signature count, and the county clerk would have been barred from using statistical sampling — both factors produced a longer count time here. Alameda's charter says that the appointed replacement sits until the replacement race is held in the next general election, which could have taken place in November 2024 if the process followed the older, faster timeline. Instead, thanks to the 2022 revision and Measure B, county voters may not get to choose a replacement prosecutor for two years.

Can Price and Thao replace themselves?

The new recall laws make it unclear whether Price can be appointed to replace herself, or whether she (and Thao) can run in their own replacement races. Under the pre-2022 Elections Code and Alameda County's pre-Measure B law, the answer to both was an unambiguous "no."^[9] The answer would be the same for recalled state

officials, who are barred from replacing themselves.^[10]

The new law for recalled local officials leaves troubling procedural gaps. It keeps the old provision in section 11381 that “No person whose recall is being sought may be a candidate to succeed himself or herself at a recall election.”^[11] And the new section 11382 provides that “[t]here shall not be an election for a successor in a recall of a local officer” — but local laws in both Oakland and Alameda *require* a replacement election. Those sections say nothing about who can run in a *replacement* election, which is no longer fairly part of the *recall* election because the two are now held separately, perhaps years apart. That makes it unclear whether the local replacement race is an ordinary special election vacancy that is “filled according to the law.” Worse, both charters are silent about barring recalled officials from replacing themselves.^[12]

The upshot is that these recalled local officials might be eligible to replace themselves. There’s scant law on this. One decision during the Gray Davis recall in 2003 arguably supports self-replacement eligibility here: it rejected the idea that the recall and the successor election are the same process, holding that the recall election is only the yes-or-no vote on the incumbent and that it “cannot be contended that the incumbent is, in effect, on the same ballot as the potential successors.”^[13] Another case, decided on the statutory scheme for state officials, upheld a bar on Governor Newsom running in his replacement race.^[14] But both decisions were before the 2022 revision, so their effect now is uncertain.

Self-replacement may sound novel, but California once had such laws and other states permit recalled officials to run to replace themselves — and some have succeeded. For example, the mayor of Fall River, Massachusetts, did so in 2019, losing the recall and winning the same-day replacement race.^[15] In the early days of the recall, California localities allowed self-replacement, and Oakland once did too.^[16] So it’s not the bare fact of allowing self-replacement that’s the problem here — it’s that no one knows if that’s on the table now.

Answering the reappointment question for Price may have statewide implications.

There doesn't seem to be any provision in Alameda's charter that bars reappointing Price. But again, there are examples from other states. This year in Oregon three Kings City councilmembers were recalled, and one of the ousted officials was chosen as a replacement for one of the other seats (a court challenge is pending).^[17] The appointment provision matters because many offices in California (school boards, for example) require replacement by appointment.^[18] If Alameda County sets an example allowing self-replacement by appointment, that could cause exactly the type of chaos that the original local recall law avoided.

Conclusion

Local voters in California have dealt a major blow to the progressive prosecution movement, but only time will tell if this marks its end. What is clear now is that long-standing well-established recall procedures are in a jumble. Thank the legislature for much of this unnecessary recall process confusion and the open questions about replacements, and thank your local officials for adding some extra complications. At least these "reforms" failed to protect incumbents from voter rejection of their policies. And that's the ultimate point here: the fact that recalls are almost always policy-driven means that it's difficult for any procedural changes to hide an official from voter wrath. The recall is meant to empower voters root out those elected officials they consider unsatisfactory, and it's very good at its job.

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1. See Ronayne "California Democrats again seek to alter recall laws," Associated Press (June 27, 2021) for a look at the 2017 changes. ↑
2. Elections Code § 11004 defines a "local officer," and general local recall election procedures are in Elections Code §§ 11200 to 11242. The problematic provision here is § 11382, which provides: "There shall not be an election for a successor in a recall of a local officer pursuant to Chapter 3 (commencing with Section 11200). If a majority of the votes on a recall proposal for a local officer are 'Yes', the officer is removed and the office shall be vacant until it is filled according to law." ↑

3. Carrillo, Spivak, Kaliss & Madnick, *California's Recall is Not Overpowered* (2022) 62 Santa Clara L. Rev. 481, 494-95 (recall has not been effective as a partisan weapon; instead it is most successful at validating existing public policy); Spivak & Carrillo, *California's latest stupid reason for attacking recall elections*, SFGate (Sept. 4, 2022). ↑
4. See Spivak & Duvernay, *Sucks to be you, general law cities!*, The Recorder (Sept. 1, 2022) discussing the difference between charter and general law cities. ↑
5. If the recall occurs within the last year of office, the city council president or an appointee (if the president declines) holds the position for the rest of the term. For some reason, while the city council president would then be allowed to run for election for a new term, an appointee mayor would be specifically barred from doing so. ↑
6. Spivak & Carrillo, *How Alameda Become Mired in a Recall Rules Roulette*, The Recorder (Apr. 23, 2024). ↑
7. Elec. Code § 11382 ("There shall not be an election for a successor in a recall of a local officer pursuant to Chapter 3 of Division 11 of the Elections Code (commencing with Section 11200). If a majority of the votes on a recall proposal for a local officer are "Yes", the officer is removed and the office shall be vacant until it is filled according to law."). ↑
8. Elec. Code § 11384 ("If a majority of the votes on a recall proposal are "Yes", the officer sought to be recalled shall be removed from office upon the qualification of the officer's successor."). ↑
9. Former Elec. Code § 11381(c) ("No person whose recall is being sought may be a candidate to succeed himself or herself at a recall election nor to succeed any other member of the same governing board whose recall is being sought at the same election."); Alameda County Charter § 62 ("The

name of the person sought to be recalled shall not appear on the ballot as a candidate for the office.”). ↑

10. Cal. Const., art. II, §15(c) (“If the majority vote on the question is to recall, the officer is removed and, if there is a candidate, the candidate who receives a plurality is the successor. The officer may not be a candidate, nor shall there be any candidacy for an office filled pursuant to subdivision (d) of Section 16 of Article VI.”). ↑
11. Elec. Code § 11381(c). ↑
12. Alameda County Charter § 60 (“Whenever a vacancy occurs in an elective County office, other than a member of the Board of Supervisors or Board of Education, or the office of Superintendent of Schools, the Board of Supervisors shall fill such vacancy, and the appointee shall hold office until the election and qualification of his successor. In such case there shall be elected at the next general election an officer to fill such vacancy for the unexpired term, unless such term expires on the first Monday after the first day of January succeeding said election. A vacancy on the County Board of Education or in the office of Superintendent of Schools shall be filled at the time and in the manner and for the term now or hereafter provided by general law.”). ↑
13. *Partnoy v. Shelley* (S.D.Cal. 2003) 277 F.Supp.2d 1064, 1074. ↑
14. *Clark v. Weber* (C.D.Cal. 2021) 557 F.Supp.3d 1010. ↑
15. Rios, *Majority of Fall River Voters Opt For Recall, But Mayor Still Wins Election*, WBUR, (Mar. 13, 2019) (61.45% of voters cast ballots to remove Mayor Jasiel Correia, but in the five-person replacement race, Correia came in first with 35.4%). ↑
16. The earliest recall laws in California used a snap election method (similar to

Wisconsin and as used in the UK and Canada) and the official facing the recall was automatically included on the ballot. Modesto seems to be the first city to use the “yes/no” ballot question rather than a new election. Bird & Ryan, *The Recall of Public Officers: A Study of the Operation of the Recall in California* (1930) at 66. Oakland was the first city to combine the recall question and replacement vote into a one-day procedure and, at the time, allowed the official to replace themselves. *Ibid.* at 68, 71. ↑

17. Sherman, *King City’s appointment of recalled city councilor is challenged in court*, Tigard Life (Aug. 21, 2024). ↑
18. Section 11302(b)(4) does bar reappointing an official who resigns in the face of a recall, but that seems inapplicable here. Section 11203(a) covers vacancies arising before the election: “if a vacancy occurs in an office after a recall petition is filed against the vacating officer, the recall election shall nevertheless proceed.” ↑