Two state officials will shape the recall election

Overview

March 17, 2021 was the deadline for proponents seeking Governor Gavin Newsom's recall to submit verified signatures to certify a recall election.[1] Assuming the proponents have met the requirements (which seems likely) Governor Newsom will face a recall election.[2] Lieutenant Governor Eleni Kounalakis and Secretary of State Shirley Weber will play key roles in that recall election, because California law provides limited instructions and broad discretion for their duties. This means that these two state officials will make decisions that could greatly shape the election process and the race for a potential successor.

Analysis

The road ahead

If all requirements are met, the gubernatorial recall election likely will occur at the end of 2021. County election officials currently have 30 business days (until around April 29) to verify signatures.[3] The Secretary of State then has 10 days (to May 10) to tally the counties' results and determine whether the proponents submitted sufficient signatures to initiate a recall election.[4] If there are enough signatures, county election officials must offer a signature-withdrawal period; petition signatories have 30 business days (until June 21) to withdraw their name from the recall petition.[5] After the signature-withdrawal period ends, counties have 10 more business days (to July 5) to report the number of rescinded signatures to the Secretary of State.[6] The Secretary of State then must "promptly" determine whether enough verified signatures remain to initiate a recall election.[7] July 5 is a Monday, and we assume for this timeline that the verification happens by the tenth business day, which falls on Friday, July 16.

If enough verified signatures remain, the state Department of Finance gets 30 business days (to August 16) to estimate how much the election will cost.[8] The Joint Legislative Budget Committee then has another 30 business days (to September 27) to review and comment on the estimate.[9] Only then is the recall certified — requiring Lieutenant Governor Kounalakis to set a recall election date within the next 60–80 days from September 27. If this entire process plays out, the recall will occur between November 26 and December 16. But note that accounting for business days and holidays can extend that window: including those, we estimate that the 60–80 day window is December 17 to January 6, 2022. And note that some of those actors may not use the full time permitted — so the certification could happen much sooner.

The Secretary of State's authority

The Secretary of State has discretion to determine recall procedures. The detailed Elections Code procedures for primary elections do not apply to recall elections.[10] Instead, recall elections are conducted "in substantially the same manner provided by law for a regular election of the office."[11] The term "substantially" — combined with the irregular nature of recalls — gives the Secretary of State wide latitude to set recall election procedures.

In the recall election the California electorate will consider two questions: a yes/no question of whether Governor Newsom should be recalled, and a single-choice selection of replacement candidates for governor if the recall is successful. A governor is removed from office if a majority of voters say "yes" to the recall.[12] Voters may select a replacement candidate even if they vote to retain the current governor.[13] That all voters, including those voting "no" on recall, may vote on a possible replacement (and therefore likely will consider the replacement options before them) increases the importance of how those possible replacements qualify.

The process for qualifying those replacement candidates is where the Secretary of State's discretionary authority lies: she decides what qualifying requirements apply to the replacement candidates. Generally, qualifying as a candidate for a statewide

election requires some combination of petition signatures and filing fees. And ordinarily the procedures for qualifying are defined by statute. But the statutory procedures for a recall are terse and vague, providing few clear guidelines for qualifying replacement candidates. The result is that the secretary of state has broad discretionary authority to employ any set of reasonable requirements.[14] Only a few hard limits apply: for example, a governor cannot qualify as a replacement candidate for their own recall election.[15]

Even if Secretary Weber confined herself to replicating existing options within the Elections Code, she can choose from two possible qualifying procedures: for primary party candidates, or for independent candidates.

In the 2003 Gray Davis recall election, Secretary of State Kevin Shelley employed the primary party procedure. That required prospective replacement candidates to submit 65 signatures from fellow party members and either a $3,500 filing fee, 10,000 additional signatures in lieu of the fee, or a combination of signatures and a pro-rated amount of the filing fee.[16] But Shelley instead could have applied the requirements for independent candidates to the 2003 gubernatorial recall. That would have required replacement candidates to submit the signatures of 1% of all registered California voters.[17] In 2003, that was around 149,956 valid signatures;[18] as of February 2021, that number would be 221,544 signatures (for 22,154,304 registered voters).[19] Choosing the independent candidate procedure would make it much harder for replacement candidates to qualify.

Courts will give Secretary Weber wide leeway in any challenge to the requirements she chooses for replacement candidates. In 2003, the California Supreme Court upheld Shelley's minimal requirements approach, noting that the secretary of state's interpretations of California's election laws "are entitled to substantial judicial deference."[20] As long as Secretary Weber issues requirements that "serve practicality and avoid[] constitutional concerns," those requirements likely will be upheld.[21] This means that Secretary Weber could simply repeat the 2003 primary candidate procedures. Or she could decide that because 2003 was such a circus, the independent candidate procedures should apply.

The Lieutenant Governor's role: scheduling the election

Ordinarily, the governor is responsible for calling a recall election.[22] But the California constitution assigns these responsibilities to the lieutenant governor when the governor is the recall target.[23] Here, that responsibility will fall to Lieutenant Governor Kounalakis.

The California constitution provides two possible date ranges within which the lieutenant governor must set the recall election date. The lieutenant governor may either order the election held within 60–80 days after the secretary of state certifies the signatures, or consolidated with the next regularly scheduled election if that election occurs within 180 days.[24] But California's next regularly scheduled election is the June 7, 2022 statewide primary — well beyond the 180-day period that permits consolidation. Consequently, if this recall petition is certified, Lieutenant Governor Kounalakis must schedule the recall election within 60–80 days of certification. Yet even that scheduling window could affect who may appear as a replacement candidate for California's chief executive.

The qualification sprint for replacement candidates

The 20-day window within which Lieutenant Governor Kounalakis must set the recall election presents challenges for replacement candidates. State law requires replacement candidates to file a declaration of candidacy and nomination papers 59 days before the recall election (and prospective candidates cannot file declarations before certification), and the secretary of state must certify the names of the candidates to be placed on the ballot by the 55th day before the election.[25] Nomination papers include signatures, and that's separate from a declaration of candidacy — but both are due within 59 days of the recall.[26] That makes the range to qualify between one day (60 – 59 = 1) and twenty-one days (80 – 59 = 21).[27] A decision that gave replacement candidates a one-day window to file declarations, nomination papers, and signatures would create enormous time pressure.

An expedited timeframe will magnify the effect of how difficult Secretary Weber makes it for replacement candidates to qualify. If immediately upon certification

Lieutenant Governor Kounalakis schedules the election as soon as possible, and Secretary Weber requires that replacement candidates comply with the independent candidate procedure described above, potential candidates could have just one day to collect over 200,000 signatures.[28] That scenario might lead to no qualified replacement candidates, leaving only a blank line for write-in candidates.[29]

On the other hand, if Lieutenant Governor Kounalakis schedules the election for 80 days after certification, and Secretary Weber issues minimal qualification standards, prospective candidates would have 21 days to qualify. That could have the opposite effect: encouraging a tidal wave of replacement candidates. That describes the 2003 gubernatorial recall, where 135 candidates qualified in 16 days of registration — including then-Lieutenant Governor Cruz Bustamante, a porn star, a sumo wrestler, a bounty hunter, and eventual winner Arnold Schwarzenegger.[30] The tsunami of candidates in 2003 created a host of issues ranging from the practical (Sonoma election officials were forced to develop a multi-card ballot)[31] to the comical (*New York Times* reporters questioned who *wasn't* running in the "circus" election).[32]

Conclusion

Secretary Weber and Lieutenant Governor Kounalakis have more than ministerial roles in a gubernatorial recall election. Their decisions on how to exercise their discretionary powers over the election's procedures and timing could have outcome-determinative impacts on the number of replacement candidates voters will have to assess as part of the recall election. We express no opinion here on how those powers should be exercised.

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1. California Sec. of State, *Recall of Governor Gavin Newsom: REVISED Calendar of Events* (Nov. 17, 2020). ↑

2. Cal. Const., art. II, § 14(b) (submitting enough verified signatures and

ensuring that valid signatures come from at least five counties). ↑

3. Elec. Code §§ 9031(b), 11106, 11107. ↑
4. Elec. Code § 11108(a). ↑
5. Elec. Code § 11108(b). ↑
6. Elec. Code § 11108(c). ↑
7. Elec. Code § 11108(c). ↑
8. Elec. Code § 11108(d). ↑
9. Elec. Code § 11108(e). ↑
10. Elec. Code § 8000. ↑
11. Elec. Code § 11328. ↑
12. Cal. Const., art. II, § 15(c); Elec. Code § 11384. ↑
13. See Partnoy v. Shelley (2003) at 1079 (invalidating Elec. Code § 11382, which barred voters who elected to retain the current governor from voting for a potential replacement candidate). ↑
14. See *Burton v. Shelley* (Aug. 7, 2003) 03 Cal. Daily Op. Serv. 706, 2003 WL 21962000, at *1. ↑
15. Cal. Const., art. VI, § 15(d); Elec. Code § 11381(c). ↑
16. California Sec. of State, *Statewide Special Election — FAQs About Recalls, October 7, 2003* (click "Who can run as a replacement candidate?"). Elec. Code § 8062(a)(1) (candidates are required to collect "not fewer than 65 nor more than 100" signatures to appear on the ballot); Elec. Code § 8103(a)(1) (filing fees are set at "two percent of the first-year salary" of the office sought (2% of the governor's $170,000 salary is $3,500); Elec. Code § 8106(a)(3) (filing fees may be waived or pro-rated by submitting additional signatures). ↑

17. Elec. Code §§ 8300, 8400, 8550(f). ↑

18. See Cal. Sec. of State, *Odd-Numbered Year Report of Registration: February 10, 2021* at 1. ↑

19. See Cal. Sec. of State, *Report of Registration: August 8, 2003* at 1. ↑

20. *Burton*, 2003 WL 21962000 at *1. The Supreme Court of California reasoned the deference was "especially great" where "the Secretary of State conformed to policies consistently followed by his two predecessors . . . who represented both major political parties." *Ibid.* ↑

21. *Ibid.* ↑

22. Cal. Const., art. II, section 15(a); Elec. Code §§ 11109, 11110. ↑

23. Cal. Const., art. II § 17. ↑

24. Cal. Const., art. II, § 15; Elec. Code § 11100. ↑

25. Elec. Code § 11381(a): "For recalls of state officers, the nomination papers and the declaration of candidacy shall, in each case, be filed no less than 59 days prior to the date of the election and not before the day the order of the election is issued. The Secretary of State shall certify the names of the candidates to be placed on the ballot by the 55th day prior to the election." ↑

26. Elec. Code § 8400 (emphasis added): "Nomination papers for a statewide office for which the candidate is to be nominated shall be *signed by voters of the state* equal to not less in number than 1 percent of the entire number of registered voters of the state at the time of the close of registration prior to the preceding general election." ↑

27. See Cal. Const., art. II, § 15(a) (requiring an election to be scheduled within 60–80 days after a recall petition is certified); Elec. Code § 11381(a) (requiring nominating petitions to be filed with the Secretary of State no later than the 59th day before the election). ↑

28. Assuming, as the California Supreme Court did in *Burton*, that Elections Code section 11381(a) applies to both nomination papers *and* signatures. ↑

29. Elec. Code § 11322(b). ↑

30. *Calif. Recall Ballot Will Have 135 Names*, AP News (Aug. 14, 2003). ↑

31. *135 Candidates to Compete in California Recall Vote*, Voice of America (Aug. 15, 2003). ↑

32. Lyman, *The California Recall: The Candidates; California Voters Wonder: Is Anyone Not Running?*, N.Y. Times (Aug. 16, 2003). ↑