Election Processes

Legislators Eye Changes to State's Direct Democracy Traditions

California enjoys a strong tradition of democracy in practice. California citizens have the power to recall elected officials, seek referendums on laws that have been passed, and enact laws via the ballot initiative process.

BACKGROUND

Article II of the California Constitution gives the people of California the power to propose laws, and even constitutional amendments, without the support of the Legislature or the Governor. In essence, citizens can write and submit their own proposed laws (initiatives), circulate initiative petitions for signatures, and if enough signatures are collected, qualify their initiatives for the ballot to be voted upon by Californians.

Under the same article of the Constitution, citizens of California have the authority to conduct recall elections. Recall is the power of voters to remove elected officials before their terms expire. It has been a fundamental part of California's governmental system since 1911 and has been used from time to time by voters to remedy dissatisfaction with their elected representatives.

The process for recalling an elected official is similar to that of an initiative. Once a notice of intention to recall has been submitted, the proponents must prepare a recall petition for circulation and signatures. The number of signatures needed generally must be equal to at least 20% of the last vote for the office. Importantly, California allows the recall of a statewide elected official to be placed on the ballot if it collects signatures equaling at least 12% of the votes cast in the previous election for that office. Those signatures also must come from at least five different counties.

In addition to the recall process, the California Constitution provides for a referendum process through which voters have the power to approve or reject statutes, or parts of statutes, with certain exceptions.

LEGISLATIVE COMMITTEES EXAMINE LOCAL AND STATE RECALL PROCESS

Last year's statewide gubernatorial recall election sparked a debate about California's 110-year-old recall processes, and whether there are sufficient checks and balances to ensure fair democratic elections in today's age. The California Assembly Elections and Senate Elections and Constitutional Amendments committees have since held two joint informational hearings to discuss California's statewide recall process and whether reforms should be made.

As noted by the committees, California's recall process allows an elected official to be recalled and replaced by someone who receives fewer votes than the elected official. To be clear, the recall election is a two-part process: first is the question of whether the incumbent should be retained or recalled; and second is the question of who should replace the recalled official. The replacement is the person who receives the highest number of votes on the second question.

To put this in perspective, if the 2021 gubernatorial recall had succeeded, Governor Gavin Newsom, who received more than 7.7 million votes in the 2018 gubernatorial election, would have been replaced by someone who received less than half that number of votes in the 2021 recall. It should be noted that such a result, while possible, is not inevitable.

During the informational hearings, the committees acknowledged the value that California's recall process holds for the public and the positive potential of a recall process. However, the committees intended to evaluate the need for updates to the manner in which the recall processes and procedures are carried out in the state. In particular, one of the key concerns raised during the hearings is the ability for parties that lose elections to use recalls as a backdoor to relitigate results. Recall elections are disruptive to governance and costly to the state. The unusual polarization of our era raises concerns that these processes, once reserved for exceptional circumstances, can be abused. Even so, in California's history, there have been exactly six successful recalls of officials, one of which was for a statewide official. That one statewide recall was for Governor Gray Davis in 2003.

Although the committees have not made any decisions or

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taken any actions related to election recalls, the informational hearings do demonstrate a renewed motivation to update and revise California's recall process, indicating that there is a potential for legislation or other state action on the issue.

CALIFORNIA'S REFERENDUM PROCESS

The California referendum process is an important tool that provides the voters a limited opportunity to review and approve certain legislative statutes. It is a "do-over," placing the voters in the shoes of the Legislature. Under current constitutional law, once a referendum petition has qualified, the law is suspended before it can take effect. Next, the voters consider the same question as the Legislature: "Should this measure become law?" If a majority of voters vote "no," the law does not take effect.

Procedurally, from the date a bill passes, a proponent has 90 days to request and receive a circulating title and summary from the Attorney General; print petitions; gather signatures equaling at least 5% of the votes cast for all candidates for Governor at the previous gubernatorial election; and file the petitions with county officials. Once a petition is filed, county elections officials have 8 working days to determine a raw count of signatures and report their results to the Secretary of State. Once the statewide total reaches the required number of signatures, the referendum qualifies for the ballot.

Counties determine referendum supporters have gathered enough valid signatures by a random sampling of 3% or 500 signatures, whichever is greater, and subsequently report those results to the Secretary of State. If the statewide random sample projects more than 110% of the necessary number of signatures will be valid, the referendum qualifies for the ballot. If the statewide total is less than 95% of the necessary number of signatures, the referendum fails to qualify for the ballot. If the statewide total falls between that 95%–110% margin, counties are required to perform a full check of signatures and report those results to the Secretary of State within 30 days. The results of the full count then determine whether the referendum qualifies for the ballot.

Once the referendum is on the ballot, the law is suspended before it can take effect. The voters then consider the question: "Should this measure become law?" The law is repealed if voters cast more "no" votes than "yes" votes on the referendum in question. A "no" vote means the voters say "no" to the statute in question, and a "yes" vote means voters say "yes" to the statute in question.

In an attempt to change a "no" vote to a "yes" vote, Senator Bob Hertzberg (D-Van Nuys) introduced legislation in 2021 proposing to swap the meaning of a "yes" and a "no" vote on referendums. Currently, a referendum that qualifies for the ballot repeals a law at issue if more "no" votes are cast than "yes" votes. SCA 1 (Hertzberg; D-Van Nuys) and SB 443 (Hertzberg; D-Van Nuys) attempted to upend this process by changing the meaning of a "yes" vote and a "no" vote, providing that a referendum is successful only if it receives more "yes" votes than "no" votes. The measures would have presumed that the proposed statute in question is poised to take effect and voters are deciding whether to exercise a veto. But in a referendum, voters are not acting as a check on an already-approved legislative measure, like a Governor; they are in fact acting as the Legislature. This is the appropriate role for voters. Making the change in SCA 1 and SB 443 means that voters would debate the appropriateness of the legislative action, rather than the merits of the proposed law. This philosophical argument is distracting from the key question: should the proposed statute become law?

Proponents claimed that voters fail to understand that rejecting a statute required a "no" vote on the referendum. But no evidence was presented to support the notion that voters had this misunderstanding. Further, no evidence was presented that the current process leaves voters confused. Instead, it would make sense that changing a referendum process that has been in place for more than 100 years would create more confusion than leaving that process in place. Qualifying a referendum for the ballot is already a time-sensitive and costly endeavor. Changing the process in this way further limits the ability for groups targeted by the Legislature to seek relief.

SCA 1 was double joined with SB 443, meaning its passage was contingent upon the passage of SB 443. Together, these bills would have changed the vote on a referendum so that a "no" vote would mean "yes," and a "yes" vote would mean "no," thus reversing established California voter practice. SCA 1 was ordered to the Senate inactive file at Senator Hertzberg's request in the final days of the 2021 legislative session. SB 443 is eligible to be considered in the Assembly in January 2022.

CALIFORNIA'S INITIATIVE PROCESS

California's initiative process gives Californians the power to propose statutes and to propose amendments to the California Constitution. Generally, any subject that is proper for the Legislature can become an initiative measure; however, each initiative measure must focus on one subject area.

An initiative measure may be placed on the ballot after it has been drafted and submitted to the Attorney General with a written request that a circulating title and summary of the chief purpose and points of the proposed initiative measure

be prepared. It is important to note that because the Attorney General is an elected position and the Attorney General historically takes strong political positions, there is a growing debate about whether the Attorney General is the appropriate authority to draft an unbiased circulating title and summary for all petitions.

Initiative proponents are allowed a maximum of 180 days from the date the official summary is released to circulate petitions, collect signatures, and file the signed petitions with county elections officials. The number of valid signatures required depends on whether the initiative is proposing a new law or a change in the California Constitution. An *initiative statute* must receive signatures equaling at least 5% of the total votes cast in the previous gubernatorial election. An *initiative constitutional amendment* must receive signatures equaling at least 8% of the total votes cast in the previous gubernatorial election.

Interestingly, legislation introduced in 2021 would have drastically increased the cost of bringing an initiative to voters by requiring any citizen-backed initiative to pay employees an hourly rate to collect signatures for ballot initiatives, referendums and recall petitions, as opposed to piece-rate signature gathering. If the change had gone into effect, the cost of signature gathering in California would have increased dramatically, thus excluding low-funded citizen initiatives from the ballot process. SB 660 (Newman; D-Fullerton) would have denied access to the initiative process to citizens who cannot afford to pay for employees to gather signatures by making it significantly more expensive and difficult to run a recall, referendum or initiative. This bill was vetoed by the Governor.

CALCHAMBER POSITION

California's direct democracy process includes initiatives, referendums and recalls in order to allow voters the opportunity to engage and address their government without the intermediation of the Legislature. Any changes to this process should be done in a balanced manner to ensure that it does not disenfranchise, confuse or eliminate that process for any voter.

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