

You're fired! Voter recall of elected officials in Rhode Island, 0617 RIBJ, RIBJ, 65 RI Bar J., No. 6, Pg. 17 /\*\*/ div.c1 {text-align: center} /\*\*/

## **You're fired! Voter recall of elected officials in Rhode Island**

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This past Election Day provided the setting for an unusual campaign. Citizens stationed outside precincts in a Providence neighborhood engaged voters in a discussion about their incumbent City Councilman, when neither his name nor the office he held was on the ballot. In the weeks leading up to Election Day, the councilman sued his constituents in Superior Court (and appealed to the Supreme Court) to enjoin their Election Day activities.<sup>[1]</sup> When his claim for judicial relief was denied, the councilman hit the campaign trail, discouraging his constituents from speaking to the volunteers or signing the petitions on which his name appeared.<sup>[2]</sup> The incumbent in question is in the middle of a four-year term, and his constituents canvassed signatures to authorize a special election to decide whether he should be recalled from office.

The Election Day campaign yielded more than 1,800 signatures.<sup>[3]</sup> In March, 2017, the Board of Canvassers certified petitions containing 2,383 signatures, and a recall election is currently scheduled for May 2, 2017.<sup>[4]</sup> To the best of the knowledge of the Rhode Island League of Cities and Towns,<sup>[5]</sup> this effort will make history if it succeeds, as previous recall campaigns in Rhode Island have been generally rare and uniformly unsuccessful.

While the political consequences (if any) will be local, the Constitutional and policy issues this campaign raises may help answer several questions about the form of representative democracy that prevails in the State of Rhode Island. When voters elect someone to a fixed term of office, by what measures (if any) should the official be held accountable prior to the next election? If voters are granted the authority to retract their approval mid-term, should this power be plenary, or should it be limited to specific types of official misconduct? When voters exercise this power, what boundaries (in terms of timing or thresholds of petition signatures) should be imposed? If the current Providence recall campaign succeeds, will it be a victory for the voters, or the opening of a Pandora's box of a "permanent campaign" that makes it impossible for elected officials to govern in a community's long-term interest?

To help understand these issues, this article first will review the recall election process in Rhode Island, describing notable prior (failed) efforts and governing municipal and State law. It will then offer a brief overview of experience and laws in other states. Finally, it will discuss how the different forms of recall law advance public policy goals, suggesting ways to improve our current

structure.

## I. Recalls in Rhode Island

### A. Attempted Recalls

The closest any Rhode Island community came to recalling an elected official probably happened in Exeter in December, 2013. At that time, the Rhode Island Firearms League aimed their sights at four Exeter Town Council members who had passed an ordinance regulating the issuance of concealed weapons permits by the Town Clerk.<sup>[6]</sup> To support their efforts, the Firearms League established a political action committee with the pretentious name of "We the People," which poured several thousand dollars of ammunition into their campaign. When the people of Exeter spoke, the recall effort failed by a roughly two-to-one margin.<sup>[7]</sup>

Other recall efforts in Rhode Island did not even reach the ballot. In 2014, a group of Woonsocket voters filed an initial affidavit seeking the recall of two City Council members because of their vote in favor of all-day kindergarten, but the proponents failed to collect sufficient signatures to require a recall vote.<sup>[8]</sup> In Tiverton in 2015, citizens targeted three Town Council members for a range of issues, including a vote concerning development of a mall.<sup>[9]</sup> The effort ended when the proponents failed to collect enough signatures necessary to put it on the ballot. Also in 2015, citizens began the process to recall the North Smithfield Town Administrator for his claimed "lack of leadership" and support of a controversial charter school, but their effort also failed due to a lack of signatures.<sup>[10]</sup> The League of Cities and Towns is unaware of any other efforts in recent history.<sup>[11]</sup>

Rhode Island voters amended Article IV, Section 1 of its Constitution to permit recall elections of the State's general officers with the introduction of four-year terms in the 1994 election. The Constitution does not provide for the recall of members of the General Assembly. There is no reported instance of a recall petition of a Rhode Island general officer reaching a significant stage of progress.

### B. Rhode Island laws governing recall elections

As displayed in a chart at the end of this article, the charters of nineteen Rhode Island cities and towns permit recall of certain local legislators, administrators and other elected officials under widely varying procedures and requirements.<sup>[12]</sup> The Providence Home Rule Charter, whose provisions were tested in Superior Court in October and likely will be again this spring, contains the following typical combination:

The time window for recalling a Providence Mayor or City Council member opens after the official has been in office for at least six months, and closes a year before the conclusion of their four-year terms.<sup>[13]</sup> To start the process, a resident must present a declaration of intent with the

signatures of 300 (City Council) or 1,000 (Mayor) signatures of qualified City electors for the position in question.<sup>[14]</sup> Once the signatures are verified, the proponents have 120 days in which to collect signatures of 15% of the City's qualified electors (Mayor) or 20% of the qualified electors of the council member's ward.<sup>[15]</sup> If these signatures are verified, a special election will take place within 60 days on the specific question of whether the incumbent be removed from office.<sup>[16]</sup> If the majority of votes cast favor removal, the incumbent will be deemed removed upon certification by the board of canvassers.<sup>[17]</sup> The resulting vacancy will then be filled with a special election.<sup>[18]</sup> The City Council has the authority to adopt legislation to implement the Charter provisions,<sup>[19]</sup> but has not exercised that authority to date.

Following the pattern of other Rhode Island municipalities, the Providence recall process does not limit the reasons voters may choose to recall their elected officials; instead, elected officials are effectively "employees at will" – subject to recall for any reason (or no reason at all) should the voters meet all the procedural requirements of timing, signatures and votes. While the Providence Home Rule Charter does not explicitly address the issue of whether a recalled official can run in the special election to fill the seat he or she has vacated, the Supreme Court has decided this issue. In *Gelch v. State Board of Elections*,<sup>[20]</sup> then-Mayor Buddy Cianci filed papers to be a candidate in a special mayoral election to fill the vacancy created by his first criminal conviction while in office. The Supreme Court interpreted Section 206 of the Providence Home Rule Charter to render Cianci ineligible to serve as Mayor for the remainder of that four-year term.<sup>[21]</sup>

Other cities and towns offer variations on this general theme. Exeter (the target of the Rhode Island Firearms League) has one of the lowest signature requirements at 10% of eligible voters, while Richmond and West Warwick are distinctive by permitting recall petitions at any time.<sup>[22]</sup> On the other hand, Cranston and North Kingstown have a narrow time window, limiting petitions to a one-year interval after the first six months and before the last six months of an office holder's two-year term.<sup>[23]</sup> All of Rhode Island's cities and towns that authorize recall contain the same "employee at will" feature found in Providence. In this way, the recall process, which depends on the will of the voters, is less restrictive than impeachment or other ways to remove a sitting elected official from office.<sup>[24]</sup>

Unlike local recall provisions, Article IV, Section 1 of the Rhode Island Constitution limits recall petitions to instances where the elected official has engaged in actual or possible misconduct, as documented by a felony indictment, a misdemeanor conviction, or an Ethics Commission probable cause finding. The window of eligibility opens after the general officer has been in office for six months, and closes twelve months before the expiration of his or her term. The Constitution does not have a recall provision for General Assembly members.<sup>[25]</sup>

## II. Recalls in other states

### A. National experience with recalls

Recall laws date back to the Massachusetts Bay Colony and the Articles of Confederation.  
[26] More recently, numerous state and local governments began enacting voter recall laws in the Progressive Era, beginning with the city of Los Angeles, and the states of Michigan, and Oregon.  
[27] Today, there are major internet compilations of recall election data, namely the Recall Elections Blog<sup>[28]</sup> and Ballotpedia.<sup>[29]</sup> These sources reported a total of around 200 recall efforts involving 340 officials in 31 states in 2016, led by California (58 officials targeted), Colorado (32) and Michigan (31). Forty-five officials (including sixteen mayors) were recalled from office nationally in 2016, and ten more officials resigned before the recall vote took place.<sup>[30]</sup>

The great majority of recall efforts nationally are directed at local officials. Only two governors have been recalled: Lynn Frazier of North Dakota in 1921 and Gray Davis in California in 2003. Governor Evan Meacham of Arizona was impeached in 1988 while a recall petition was underway, and Governor Scott Walker of Wisconsin survived a recall effort in 2012.<sup>[31]</sup> During 2011-13, seventeen state legislators faced recall votes, of which eight were removed from office.  
[32]

## B. Recall laws in other states

Recall laws vary widely across the country in many of the same ways they vary among Rhode Island cities and towns. In contrast to Rhode Island's local rules, several states have enacted measures to discourage purely political recalls, such as requiring the petitioners to list the general grounds on which they base their petition,<sup>[33]</sup> limiting recalls to specific permitted grounds (usually involving malfeasance),<sup>[34]</sup> or requiring a court to review whether the stated charges are legally sufficient or, in some states, supported by clear and convincing evidence.<sup>[35]</sup>

## III.

### Policy considerations and recommendations

The wide range of recall procedures and requirements reflects diverging views of the goals and purpose of this voter prerogative. At one end of the spectrum, voters can recall elected officials throughout most of their term for any reason. This vision was advanced during the Progressive Era, along with voter initiatives and referenda. The latter two Progressive reforms have generated controversy in such states as California, where critics contend the process can be hijacked by big money interests, and can place valuable civil rights at risk.<sup>[36]</sup>

Locally, the Exeter recall effort, which targeted Town Council members for their vote on a single gun-related measure, fits this mold. Critics of this type of "extreme accountability" worry that it can prevent elected officials from making difficult or long-term decisions, as officials find themselves engaged in a "permanent campaign" rather than having an opportunity to act as statesmen and states -women. Rhode Island's voters accepted this line of thinking by extending

the governor's term of office from one year to two years in 1912, and to four years in 1994. There also are dynamic considerations, as the volume of recall efforts in other states appears to expand over time. For example, according to Ballotpedia,<sup>[37]</sup> California had a total of eleven recall efforts between 1913 and 1996, twelve during 1997-2008, but 243 in the last eight years.

At the other end, states such as Minnesota require that recall petitions be supported by proof of malfeasance as found by a judge in an evidentiary hearing, eliminating recalls based on political differences. This approach embodies the philosophy of Edmund Burke, a distinguished member of the British Parliament in the eighteenth century, who once famously declared "your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion."<sup>[38]</sup> Mike Burk, the aptly named Chair of the Tiverton Democratic Town Committee, echoed Edmund's view of representative democracy when he wrote a letter to the editor making this argument against the recall of sitting Republican town council members: While our Town Charter allows a recall for no reason, recalls should not be about disagreements over decisions made (or not), how quickly (or slowly) a decision is made, or because a councilor is bombastic and brash. As a representative democracy, we elect councilors every two years and trust them to make decisions based on the public good. If we don't like their behaviors or decisions, we can vote against them the next time around.<sup>[39]</sup>

Extreme Burkeanism has its own problems. The Minnesota model, which requires judicial determinations of malfeasance before permitting a recall petition to go to the voters, create hurdles that might be impossible for ordinary citizens to surmount. In this regard, the Rhode Island Constitution's list of permitted bases for recall of general officers (felony indictment, a misdemeanor conviction, or an Ethics Commission probable cause finding) has the advantage of self-authentication, providing voters with threshold conditions that can be objectively verified without protracted court proceedings.

While nobody is asking for this writer's advice, he would recommend adjusting the current procedures to achieve a better balance of these goals. When an elected official engages in misconduct, there should not be any time limits (either after the start or before the end of a term of office) to recall the official. Providence residents remember the agony of Plunderdome, in which a sitting mayor remained in office through years of a high-profile racketeering investigation, trial and conviction, leaving behind a stain the City is still removing fourteen years after he left City Hall for federal prison.

In contrast, the pot shots misfired by the Firearms (minor) Leaguers in 2013 exposed the havoc that outside groups with ideological agendas can wreak upon local government. For purely political or ideological recalls, time boundaries make sense; indeed, one can question whether any such recalls are necessary or appropriate when a public official must win re-election every two years.

The current recall effort in Providence might not provide a perfect "test case" to consider these issues. While the councilman's argument to the court and to the voters has been that his election entitles him to four years in office barring a Cianci-style conviction and imprisonment, the recall proponents are not litigating a single vote (as in Exeter) or a general grievance of voter

dissatisfaction (as in Tiverton). Instead, the Providence petitioners have based their campaign on specific instances of actual or potential malfeasance, namely the councilman's arrest and indictment on multiple counts of embezzling more than \$127,000 from a nonprofit youth sports organization and misappropriation of campaign funds.<sup>[40]</sup> The specificity and gravity of the case for this recall help to explain the dramatic collection of 1,800 signatures in a single day (and 2,383 altogether) in a district in which the incumbent won his most recent election with 1,955 votes.<sup>[41]</sup> As this article goes to press, the City Council set an election date of May 2, 2017.<sup>[42]</sup> With that said, there may be more legal challenges along the way in this unproven area, and perhaps a spirited campaign from the incumbent to hold onto his seat if and when the matter comes to a popular vote.

#### IV. Conclusion

Rhode Island pays a price every time an elected official squanders the public trust, and that price increases when the official in question refuses to step down unless or until imprisonment or some other legally required removal is complete or at least imminent. This lack of self-restraint may result from the official's personality or calculations of self-interest, but usually is publicly justified as the continued acceptance of an obligation to complete a term of office established by law following a free and fair election. The recall process offers a solution to this problem by using democratic elections to hold elected officials more accountable. Because the recall process has not yet been successful in Rhode Island, we do not completely know whether it improves accountability, creates chaos, or achieves some combination of the two. The current recall laws and ordinances at the state and local level strike a balance between Progressive and Burkean models of representative democracy, but those procedures could be improved by developing one set of (Progressive or broader) rules for cases of misconduct (especially if it is objectively documented) and a second set of (Burkean or stricter) rules for recalls arising from political or policy-based considerations.

For these reasons, the actions of a few thousand voters in a Providence neighborhood may foster a lively discussion of how democracy works (or should work) in the Ocean State. Stay tuned.

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Notes:

[1] See *Jackson v. Haugen*, PC-2016-4909, PC-2016-4910; *Jackson v. Haugen*, SU-16-0318, SU-16-0319.

[2] Author's discussions with participants.

[3] See NPR report, <http://ripr.org/post/collecting-signatures-election-day-organizers-say-jackson->

recall-effort-well-under-way.

[4] See Providence Journal, March 4, 2017, p. A1 and Providence Journal, March 14, 2017, p. A2.

[5] I appreciate the assistance of Peder Schaefer, Associate Director of the Rhode Island League of Cities and Towns and Dan Beardsley, soon to be Director Emeritus, who generously shared their vast knowledge and research.

[6] At the time of the recall vote, the officials in question were midway through a 2-year term. All four sought re-election the following year. Two of them were successful, while two of them were not.

[7] See Westerly Sun, December 18, 2013, viewable at <http://www.thewesterlysun.com/news/state/3166412-129/exeter-defeats-recall-attempt-for-gun-changes.html>; Jon Marcus, *R.I. Town Recall Over Gun Rights Rejected*, *Time Magazine*, December 15, 2013, viewable at <http://nation.time.com/2013/12/15/r-i-town-recall-over-gun-rights-rejected/>.

[8] See “*Petition Filed To Recall Two Woonsocket City Council Members*, available on ABC6-TV website at <http://www.abc6.com/story/24960812/petition-filed-to-recall-two-woonsocket-city-council-members>.

[9] The council member’s opponent in the previous election wrote a letter to the editor discouraging the recall effort. See <http://www.heraldnews.com/article/20150908/OPINION/150906990>.

[10] See <http://www.valleybreeze.com/2015-07-01/woonsocket-north-smithfield/recall-petition-will-likely-fall-short#.WEsVL1xG6VC>.

[11] In 2008 some Lincoln citizens contemplated a recall of their Town Administrator, however it is uncertain whether the Town charter permitted a recall.

[12] The following table provides summary information about Rhode Island cities and towns that allow recalls of elected officials. Except for Providence and Central Falls (which have appointed school boards), these communities also allow recall of elected school committee members:

[13] Prov. Home Rule Charter § 208.

[14] *Id.*, § 208(a).

[15] *Id.*, § 208(b).

[16] *Id.*, § 208(c, d).

[17] *Id.*, § 208(e).

[18] *Id.*, § 208.

[19] *Id.*, § 208(f).

[20] In *Gelch v. State Board of Elections*, 482 A.2d 1204 (R.I. 1984).

[21] *Id.*, 482 A.2d at 1210-11.

[22] See n. 12.

[23] *Id.*

[24] Under Section 206 of the Providence Home Rule Charter, a sitting elected official becomes ineligible to remain in office for such reasons as resignation, moving out of the district or city, conviction of a felony (with all appeals exhausted) or is otherwise permanently incapable of performing his or her duties of office. As a result, former Mayor Cianci remained eligible to serve after his Plunderdome conviction because he still had a pending appeal; instead, it was his leaving the City to go to prison that triggered his removal from office.

[25] Article XI of the Rhode Island Constitution provides for impeachment, but this power is assigned to the General Assembly and is limited to the possible removal of executive and judicial officers.

[26] Joshua Spivack, "What is the history of recall elections?," viewable on the History Network's web page at <http://historynewsnetwork.org/article/1660>~~http://historynewsnetwork.org/article/1660~~.

[27] Los Angeles enacted the nation's first recall ordinance in 1903, and Michigan and Oregon enacted the first state laws in 1908. "Recall of State Officials," (last updated March 8, 2016), viewable at <http://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx>.

[28] See <http://recallelections.blogspot.com/>.

[29] See <http://www.ballotpedia.org/Recall>~~www. ballotpedia.org/Recall~~.

[30] *Id.*

[31] See n. 17, *supra*.

[32] *Id.*

[33] See, e.g., Ariz, Const. Art 8, § 2; Col. Const. Art. XXI, § 1



[34] In Georgia, for example, OCGA § 21-4-3(7) defines six types of malfeasance that can support a recall. The list does not include dereliction of duty or policy disagreements. Before the recall petition goes to the voters, a court must review (and approve) its legal sufficiency. OCGA, § 21-4-6.

[35] See n. 20, *supra* (Georgia law – legal sufficiency). See also Minn. Stat. Ann., § 351.14-23 (clear and convincing evidence for recall of county officials).

[36] See, e.g., John E. McDonough, “Taking the law into their own hands,” *Commonwealth Magazine*, Fall, 2002, viewable at <http://commonwealth-magazine.org/politics/taking-the-laws-into-their-own-hands/>.

[37] See n. 18, *supra*.

[38] Edmund Burke, Speech to the Electors of Bristol, November 3, 1774.

[39] Letter from Mike Burk, *Fall River Herald News*, September 8, 2015, viewable at <http://www.heraldnews.com/article/20150908/opinion/150906990>. The Tiverton Democratic Chair’s last name does not have an “e” at the end, so any family relationship to the British statesman is well-hidden.

[40] *Providence Journal*, November 4, 2016, viewable at <http://www.providencejournal.com/news/20161104/recall-effort-against-providence-city-councilman-kevin-jackson-to-move-forward>.

[41] See n. 4, *supra* and Rhode Island Board of Elections website for 2014 local election results, viewable at <http://www.elections.ri.gov/elections/preresults/>.

[42] See n. 4, *supra*.

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