

Both parties should fear the recall

By David A. Carrillo and Brandon V. Stracener | August 17, 2021

Some commentators are expecting a major shift in California's direction if Governor Gavin Newsom is recalled. That's possible; when Arnold Schwarzenegger replaced Gray Davis there was some bipartisanship and some resulting policy shifts. But in 2003 Republicans and Democrats were closely matched, at 35.3% and 43.6% of registered voters respectively; in 2021 Democratic voters are 46.2% — nearly double the 24.1% Republican voters. Along with some other facts of California life, that shift suggests a more complex set of possible scenarios than a reductive California-turns-red-or-stays-blue narrative. And that presents grave risks for both Democrats and Republicans in any recall outcome.

The first issue is the calendar. Many observers assumed that the pre-election timeline would take the full time allotted and calculated the likely election date with those numbers. Doing so put the election date sometime in November. But some actors used less than their allotted time, and others waived their time altogether. The result: a September election date two months before most assumed it would happen.

A shorter-than-anticipated timeline could happen again if the recall succeeds. The conventional wisdom is that the replacement governor (who we'll call "Governor GOP" to avoid endorsing anyone) will be sworn in 38 days after the election; the source is the secretary of state's [website](#), which implies that a new governor would take office 38 days after the election. This results from county elections officials having 30 days after the election to complete the official canvass, and the secretary of state has eight days to certify those results: "On the 38th day after the election, if the recall is successful, the Secretary of State will certify the election results, and the new governor would take the oath of office and assume the position for the remainder of the term (through January 2, 2023)." In that scenario Governor GOP gets sworn in immediately upon certification, and 38 days after the September 14 election falls on October 22.

The 38-days timeline is suspect because the county election officials may not need the full 30 days. The ballots will be simple and few: the recall is a special election, it's the only thing on the ballot, and off-cycle contests like this are typically low-turnout elections. And with the spotlight on the recall, officials will have every incentive to move quickly. Counties might certify their results within a week, and the secretary of state may need just a day or two to certify the results. The upshot: California might have a new governor by the end of September.

That scenario has consequences for both parties. Even if the recall succeeds, Gavin Newsom will remain governor until certification. Democrats chagrined by losing the governorship might think that at least 38 days remain for Governor Newsom to make an orderly exit and close some doors, for example by filling every vacant state judicial position. But a faster-than-expected certification might prevent that, forcing Newsom out in just a week or so and likely foreclosing many opportunities in the rush. Yet Republicans should also fear the calendar. Counties impacted by California's dreadful wildfires could see delayed counts — imagine the litigation if a fire burns a county storehouse full of ballot boxes. Just one county can hold up the entire process, and in that time Governor Newsom retains full powers. Looking to vacant judicial positions again as an

example, in the last three months of a governor's term the 90-day period for vetting candidates doesn't apply, so anyone with an active application is eligible for appointment. A motivated governor can sign many bills and make many appointments in a month, and more if that time is extended by mishap.

The legislature is a major factor in the aftermath of a successful recall. The 2021 legislative session is scheduled to adjourn on September 10, 2021; in theory it will not reconvene until January 3, 2022. But on "extraordinary occasions" California constitution article IV, section 3(b) permits the governor to convene a special legislative session to legislate "on subjects specified in the proclamation." An event occurring only the second time in California's history (a gubernatorial recall) or the first time ever (a recall during a pandemic) might be extraordinary enough. Rather than assuming office in a quiet Sacramento with no legislators around for months, Governor GOP could walk into the teeth of a special legislative session of veto-proof majorities in both chambers. In that session the legislature could, for example, abolish the new governor's executive order power by repealing the Emergency Services Act. Yet Democrats should not count on their famously fractious clans to unite and fight. Remember that in 2020 the pandemic frightened this legislature away from the state capitol for months, and Democratic legislators are equally likely to be paralyzed by indecision or by fear of voter retribution for overly partisan behavior. Or the legislature could decide to simply wait out Governor GOP until the November 2022 election.

Don't forget the state agencies, which have broad policy-making and policy-executing power over most aspects of daily life in California. The governor has appointment and policy-directing powers over those agencies. Here again California's structure cuts both ways: director-level positions typically require legislative confirmation, so the legislature might try to stymie Governor GOP by holding up appointments. But Governor GOP could still direct policy, for example by ordering prisons to start transferring released inmates to federal agents for immigration offenses. And although a governor can't fire the constitutional executive officers (attorney general, secretary of state, etc.) because they are directly elected, that may not help Democrats: the last time a governor and attorney general clashed the California Supreme Court sided with the governor. Expect much litigation here.

Finally, the courts can present problems for both parties if the recall succeeds. Democrats might think that the many bench officers appointed by Governor Jerry Brown will coalesce into a liberal paladin to defend the realm against Governor GOP. But California's courts are far less partisan than their federal counterparts. The California Supreme Court is well-known for deciding by consensus, and every California judge remembers that in 1986 the voters ejected three state high court justices for perceived pursuit of a partisan agenda. But while Democrats should not expect the state's courts to stonewall a Republican agenda, neither should Governor GOP assume that a silent majority of conservative justices will arise or that the state courts will meekly avoid conflict. Governor Schwarzenegger learned that lesson when the California Supreme Court rejected his argument that a governor's emergency powers permitted him to unilaterally furlough state workers.

Both parties should view the recall's risks with serious concern. Governor Newsom could survive the recall but be politically weakened, or be emboldened by beating it with a clear mandate; Governor GOP could win a plurality by a narrow margin, but be weakened by earning far fewer

votes than Governor Newsom. And for the record: we oppose this recall election. California already faces existential problems without adding needless political strife. This special election is estimated to cost over \$200 million — during a pandemic, an epic drought, the hottest year on record, and colossal wildfires. And we'll have another gubernatorial election next year, with primary elections only months away. Stand together Californians, or we shall surely fall apart.

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