

# **The Breakfast Club**

## **Constitutional Minute for 20 February 2024**

### **Recall in Virginia**

I've decided to interrupt my series on the word "militia" to bring you an even more timely Constitutional Minute addressing the process of recall in Virginia.

The Virginia Constitution in Article IV, Section 17, outlines a process by which certain elected officials can be impeached and removed from office upon conviction. This includes: "The Governor, Lieutenant Governor, Attorney General, judges, members of the State Corporation Commission, and all officers appointed by the Governor or elected by the General Assembly." Notice that the list omits all local elected officials; they can be removed only through a recall process instead, and so can any state official who is not covered under the impeachment process.

Ballotpedia has a nice page on [Recall in Virginia](#), from which you'll notice much of the following information was taken.

According to [the National Conference of State Legislatures](#), at least 30 states allow recalls for certain officeholders.

Search for the word "recall" in the Virginia Constitution and you'll come up empty-handed. Recall is instead a statutory process.

Virginia Code [§ 24.2-233](#), enacted in 1975, states that "Upon petition, a circuit court may remove from office any elected officer or officer who has been appointed to fill an elective office, residing within the jurisdiction of the court." So it is the court that removes an elected local official, either a judge alone or a jury. That's right, a recalled official can elect a jury trial, otherwise the judge considers the evidence alone and renders a verdict.

The Code also allows localities to set up their own recall provisions and four have: Hampton, Norfolk, Portsmouth and Lynchburg.<sup>1</sup> The process is usually the same or similar while the percentage of signatures required may differ.

### **The Process**

The recall process begins with gathering signatures on recall petitions. Only people who voted in the election in which the official was elected may sign the petition. The Registrar then must certify the signatures; he need only check whether each person who signed did indeed vote in the relevant election. Add up the people who voted for the individual and against the individual and divide by 10 and you have the number of certified signatures that must be obtained. Results of the November election can be found [here](#).

The petition must also “with reasonable accuracy,...detail the grounds or reasons for removal.” Those reasons are found at [§ 24.2-233](#), and include:

“[N]eglect of a clear, ministerial duty of the office, misuse of the office, or incompetence in the performance of the duties of the office when that neglect of duty, misuse of office, or incompetence in the performance of duties has a material adverse effect upon the conduct of the office.” Whether these charges prove difficult or easy to substantiate depends entirely on the judge or jury.

Other acceptable reasons include:

- Conviction of a misdemeanor relating to drugs
- Conviction of a misdemeanor involving a "hate crime" (when the conviction has a material adverse effect upon the conduct of such office).
- Conviction of certain sexual crimes I won't detail here.

After the petition has been submitted to the Clerk of Court:

- The officer subject to the recall must be notified.
- The officer's position can be suspended until the trial (presumably by the judge).
- The Commonwealth's attorney will represent the state in the trial.
- The official subject to the recall has the right to demand a trial by jury.
- The results of the trial may be appealed to the Supreme Court of Virginia.

I couldn't find it explicitly stated, but I presume the subject of the recall can be represented by counsel in either form of trial.

## **Filling vacancies**

If an official is removed, the remaining members of the council or board have 45 days to appoint a qualified voter of the election district in which the vacancy occurred to fill the vacancy until there is a Special Election to allow the voters to select a replacement. If the board cannot agree, or do not act to fill the vacancy temporarily, the judges of the circuit court of the county can appoint someone. The remaining council or board has 15 days after the vacancy occurs to petition the Court for a special election to permanently fill the vacancy, or, if they don't meet the petition deadline the election will be held in conjunction with the next General Election.

## **Why is this important?**

The group of radical Leftists making life difficult for our three new Board members are initiating just such a recall, apparently for all three of them. They will have to gather 378 signatures in District 2, 544 signatures in District 3, and 459 signatures in District 5. If that is accomplished, all that will remain will be to convince the judge or jury the evidence is sufficient to remove the board member(s).

If there is any good news here, it is that I see nothing in the statute preventing recalled officials from immediately running for the same office in the subsequent special election. I've not found an exact example, but a similar situation is the stuff of legend: James Holley was elected the first Black mayor of Portsmouth in 1984 and recalled three years later. He was elected again to that office in 1996 and was recalled a second time in 2010. In addition, one article I read<sup>2</sup> indicated that judges more often than not consider the recall evidence insufficient.

As I write this, the Chair of the Fairfax County School Board is the target of a recall effort for "expressing support of the dissemination of sexually graphic material to minors." Hampton City Councilman Chris Bowman is the target of a local recall for having been found to have solicited a prostitute (he was not charged). Other recalls in Virginia are outlined on this [Ballotpedia page](#).

In 2022, a bill (HB972) was considered in the Assembly which would have made recall a more challenging process by bumping the number of signatures required to 30%. I was referred to 2023, where it was introduced as SB1328 and once again was left in committee. This year, HB265 passed the House and is now in the Senate P&E Committee. It places a 90-day time limit from first to last signature collected but does not change the number of signatures required. Further, it removes discovery from the trial proceedings, which certainly doesn't work in the favor of the accused.

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<sup>1</sup> <https://cardinalnews.org/2023/07/10/some-in-lynchburg-want-to-recall-a-city-council-member-heres-why-thats-so-hard/>

<sup>2</sup> <https://viriniamercury.com/2022/08/09/virginia-weighs-changes-to-fuzzy-recall-system-that-lets-judges-remove-local-officials/>