

From: Lawrence Kestenbaum <kestenbauml@ewashtenaw.org> Thu, Aug 1, 2013 at 1:34 AM

To: Catherine McClary <Mcclaryc@ewashtenaw.org>, Donald Shelton <SheltonD@ewashtenaw.org>, Edward Golembiewski <golembiewskie@ewashtenaw.org>

The Michigan constitution sets up the basic process for recalls of public officials. Article II, Section 8, provides as follows:

- > Laws shall be enacted to provide for the recall of all elective
- > officers except judges of courts of record upon petition of
- > electors equal in number to 25 percent of the number of
- > persons voting in the last preceding election for the office
- > of governor in the electoral district of the officer sought to be
- > recalled. The sufficiency of any statement of reasons or
- > grounds procedurally required shall be a political rather than
- > a judicial question.

For emphasis, I'll repeat that final sentence, in three parts

- > The sufficiency of any statement of reasons or grounds,
- > procedurally required,
- > shall be a political rather than a judicial question.

In plain language, the people have the power to remove a politician from office. The submission of reasons for recall is a procedural, and not a substantive matter. And the targeted official may not impose delay by contesting whether those reasons for recall are "good enough".

When a citizen is aggrieved with a state or local elected official, he or she submits a text which outlines the reasons the official should be removed. The county election commission reviews this text for clarity. If the text meets this minimal standard, the petitioner may proceed to collect signatures to force a recall election.

However, late last year, the Legislature changed this process by enacting Act 417 of 2012.

Under the new law, the county election commission is also charged with determining whether the proposed reasons for recall are "factual".

Little guidance is offered for what constitutes factuality, and how the commission is supposed to decide this.

Presumably, the commission would have to take a position on the truth or falsity of the charges offered.

Moreover, Act 417 provides that, if the commission determines the reasons for recall to be "factual," the targeted officeholder may contest this finding in court, and prohibits the collection of signatures while the case is pending.

This new scheme flies in the face of the Constitution.

The sufficiency of reasons for recall is a political question. It is specifically not a judicial question.

If the election commission and the courts can determine the truth or falsity of reasons for recall, then the power to judge these questions has been removed from the people.

I conclude, therefore, that the new requirement of "factuality" in recall language is unconstitutional on its face. I took an oath to uphold the state constitution. I cannot in good conscience follow this provision of Act 417,

which directly contradicts that constitution.

Accordingly, as a member of the Washtenaw County Election Commission, I will continue to review proposed recall language only for clarity.

I respectfully decline to review any recall language for "factuality."

I will oppose any motion which purports to rule whether or not a proposed recall text is "factual".

The Election Commission is not a court. It should not hold evidentiary hearings or take testimony under oath on the issue of whether proposed recall language is "factual". I will oppose any attempt to do so.

The Washtenaw County Election Commission will meet at 1:00 pm today, Thursday, August 1, at the Board of Commissioners Room, 220 N. Main Street, Ann Arbor.

The main agenda item is the proposed recall of members of the Ann Arbor school board.

This is the first recall petition since the enactment of Act 417, and our first opportunity to respond to this new legal environment.

Lawrence Kestenbaum

Washtenaw County Clerk & Register of Deeds

October [sic] 1, 2013