

You want to recall John McCain? Good luck, it will be impossible

by JOSHUA SPIVAK

Since his brain cancer diagnosis, John McCain (R-Ariz.) has once again found himself in the center of the political maelstrom for his deciding vote on the health care bill. While Republican leaders have generally limited criticism, one of the most incendiary members of Congress, Louie Gohmert (R-Texas), has now called for McCain to be recalled and removed by Arizona voters, presumably to be replaced by a newly-elected Republican. This wouldn't be the first time that McCain has been threatened with a recall, but for Gohmert and any McCain opponent, they may have to face a serious hurdle. A recall of a U.S. senator may not just be difficult, the Supreme Court may kill the idea.

There has never been a recall of a federal official, though at least nine states, including Arizona, provide for the recall of their senators and representatives. There have been many threats to recall senators and representatives over the years, from Joseph McCarthy (R-Wis.) in the 1950s, to Frank Church (D-Idaho) in the 1960s, to McCain and threats against Kent Conrad (D-N.D.), Mary Landrieu (D-La.) and Robert Menendez (D-N.J.) today. While the practical implication of getting enough signatures to get a recall on a ballot has always been a barrier, the legal challenges may be insurmountable.

The recall against Church was killed by a federal district court. But even more important to look at is the Menendez recall attempt, which is the only one that led to a significant high court decision that point out the legal hurdles to a McCain recall. In 2010, the New Jersey Supreme Court ruled 4-2 that Menendez, as well as all other federal officials, are not subject to a recall. The New Jersey Supreme Court is the highest court to ever rule on the constitutionality of a federal recall. Arizona's Supreme Court could rule differently, but if the U.S. Supreme Court gets involved, as they would likely do if a recall was allowed in the state, New Jersey's ruling may provide ammunition for McCain or other opponents of the recall.

The argument for a federal recall is one that has a long history behind it. The Articles of Confederation included such a provision, though it was apparently never exercised. The idea was debated at the Constitutional Convention, and the famed Virginia plan provided for a recall of the members of the first house of the legislature, who were slated to be directly elected by the people. But the recall idea was killed very early in the convention. The lack of a recall was frequently cited by the anti-federalists in their opposition to the Constitution, but of course they failed. There were attempts to add a recall to the Constitution years after the convention and in the early 20th century during the debates around the adoption of the 17th Amendment, but they all failed.

Perhaps the biggest challenge is not the history but a more recent case, the U.S. Supreme Court's 1995 decision striking down term limits for federal officials. In that ruling, both the decision and the dissent, authored by Justice Clarence Thomas, specifically note that federal officials are not subject to the recall. Proponents of a McCain recall can point out some history in their favor, including a letter written by George Washington to his nephew that suggests that recalls are allowed for senators.

They could also note that two of the six New Jersey Supreme Court justices, as well as a state appellate court panel, were persuaded by the arguments in favor of a federal recall. But that is likely not enough to succeed. The fact that both sides in the term limits decision rejected a recall law, as did the Constitutional Convention all those years ago, suggests that any attempt against McCain is a waste of time.

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