SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2254-09T1

THE COMMITTEE TO RECALL ROBERT MENENDEZ FROM THE OFFICE OF U.S. SENATOR,	:	
Appellant,	:	Civil Action
v.	:	On Appeal from the Final Determination of the
NINA MITCHELL WELLS, ESQ., SECRETARY OF STATE, and ROBERT F. GILES, DIRECTOR OF THE DIVISION OF ELECTIONS,	:	Secretary of State
Respondents.	:	

BRIEF ON BEHALF OF RESPONDENTS SECRETARY OF STATE AND DIRECTOR OF THE DIVISION OF ELECTIONS

PAULA T. DOW
ACTING ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625
Attorney for Respondents
(609) 984-1053
donna.kelly@dol.lps.state.nj.us

LEWIS A. SCHEINDLIN
Assistant Attorney General
Of Counsel

DONNA KELLY
Assistant Attorney General
JASON POSTELNIK
Deputy Attorney General
On the Brief

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PRELIMINARY STATEMENT

By way of this appeal, appellant is seeking to compel the use of the State's electoral process in an effort to recall a New Jersey United States Senator. Reliance is placed upon the "New Jersey Uniform Recall Law," N.J.S.A. 19:27A-1, which literally includes the office of United States Senator as an office subject to the recall process. It is further asserted that denial of access to the State recall process is tantamount to a violation of the First Amendment rights of freedom of speech and to petition the government. Appellant is correct that this is a matter of constitutional dimension. However, this case does not turn on the First Amendment; the controlling authority is the Supremacy Clause of the United States Constitution.

As fully argued below, the election of federal elective officials, such as a United States Senator, is a matter of exclusive federal jurisdiction, as provided for in the United States Constitution and corresponding federal statutes. These provisions set forth, among others, the qualifications for office, the electoral requirements, as well as the limited circumstances upon which a Member of Congress can be removed. Pointedly, there is no explicit federal provision that authorizes a state recall election for a United States Senator. Nor is there any reasonable basis upon which to construe any implicit authority for a state to

initiate a recall proceeding against a United States Senator. Furthermore, if such proceeding were instituted, it would well contradict federal provisions regarding the timing of elections for United States Senator as well as the length of term of such office.

Quite simply, in the absence of specific federal authorization for the recall of a United States Senator, no state can so provide. While the non-enforceability of a state constitutional or statutory provision is not to be taken lightly, under these circumstances, the Supremacy Clause of the United States Constitution compels no other conclusion.

Therefore, the final administrative agency determination of the Secretary of State to decline to accept for consideration appellant's Notice of Intention to Recall, which would have necessarily set in motion the State's recall process, should be affirmed.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

This is an appeal from the Secretary of State's Final Administrative Agency Determination that appellant's Notice of Intention to Recall Robert Menendez from the office of United States Senator ("Notice of Intention to Recall") could not be accepted for filing or review. Appellant is the "Committee to Recall Robert Menendez from the office of United States Senator" (the "Committee"). Named as respondents, in their official capacities, are Nina Mitchell Wells, the former Secretary of State of New Jersey, and Robert F. Giles, Director of the New Jersey Division of Elections. The Secretary of State is the statutory recall election official for certain elective officials, including the office of United States Senator, pursuant to N.J.S.A. 19:27A-3 and N.J.S.A. 19:13-3, -7. The Division of Elections, which is the administrative agency that assists the Secretary of State on election matters, is the office which receives the statutory notices of intention to recall, pursuant to N.J.S.A. 19:27A-7.

The Committee forwarded an initial Notice of Intention to Recall, with a proposed recall petition, to the Division of Elections on September 25, 2009 (PA002). This Notice of Intention to Recall listed Suzanne M. Kimble, RoseAnn Salanitri, and

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[1] The facts and procedural history of this matter are intertwined and therefore have been combined for the sake of clarity.

Adrianne S. Knobloch as the members of the Committee who would serve as the representatives of the sponsors and signers of a recall petition, pursuant to N.J.S.A. 19:27A-3. On October 5, 2009, Director Giles sent a letter advising the Committee that the Notice of Intention to Recall was under legal review. (PA003). On November 10, 2009, the Committee filed a second Notice of Intention to Recall, substituting Committee member RoseAnn Salanitri with Daryl Haggerty. (PA006-009).

On December 2, 2009, the Committee filed a Complaint in Lieu of Prerogative Writ in the Superior Court, Law Division, seeking to compel respondents to either accept or reject the Notice of Intention to Recall. The Committee claimed that respondents had failed to so respond, as required by N.J.S.A. 19:27A-7.

On January 11, 2010, the Secretary of State issued the Final Administrative Agency Determination from which the Committee now seeks relief. That determination provided that neither the Notice of Intention to Recall nor the proposed recall petition could be accepted because "...the qualifications and election of a Member of the United States Senate is a matter of exclusive jurisdiction of federal authority and...neither the United States Constitution nor federal statute provide for a recall proceeding for a federally-elected official." (PA011). A copy of this Determination was forwarded to the Committee on that same date. (PA010).

On January 13, 2010, the Committee filed an application for emergent relief with the Appellate Division seeking temporary injunctive relief ordering the Secretary of State to accept the Notice of Intention to Recall and seeking expedited review of the Committee's appeal of the Secretary of State's Final Administrative Agency Determination. (PA012-015).

On January 14, 2010, the Attorney General, on behalf of the respondents, moved to dismiss the Law Division matter on the ground that it was moot in light of the Final Administrative Agency Determination, pursuant to R. 2:2-3(a)(2).

On the same date, the Honorable Jack M. Sabatino, J.A.D., entered an Order directing the Committee to file a Notice of Appeal and a Case Information Statement. The Order further provided that the Committee "may file a motion for emergent relief and/or a motion to accelerate the appeal, and a supporting brief." (PA016-017).

On or about January 15, 2010, the Committee filed the instant Notice of Appeal, Case Information Statement, and supporting brief and appendix appealing the Secretary of State's January 11, 2010 Final Administrative Agency Determination, as well as seeking preliminary injunctive relief.[2]

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[2] Although the caption of the brief states appellant is also seeking accelerated disposition of the appeal, no such argument is advanced in the brief.

Having filed this appeal, appellant voluntarily dismissed the Law Division matter on January 22, 2010.

The Attorney General submits this brief in opposition thereto. For the reasons set forth below, the Secretary of State's determination should be upheld.

ARGUMENT

POINT I

UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, THE ELECTION AND TERM OF OFFICE OF A UNITED STATES SENATOR ARE MATTERS EXCLUSIVE TO FEDERAL JURISDICTION. ACCORDINGLY, INASMUCH AS THERE IS NO AUTHORITY FOR A STATE TO INITIATE A RECALL PROCEEDING AGAINST A UNITED STATES SENATOR, ANY SUCH PROVISION IS INOPERATIVE.

The final determination of an administrative agency concerning a legal issue is subject to de novo review on appeal. See In re Taylor, 158 N.J. 644, 660 (1999) (citation omitted). Here, the Secretary of State's determination was premised upon well-established principles of federalism. It is indisputable that federal jurisdiction is controlling regarding a federal elective office, such as the office of United States Senator, and currently, neither the United States Constitution nor any federal statute sanctions a recall proceeding against this official. Consistent with this overarching federal authority, the Secretary of State properly determined that she could not accept for consideration the subject Notice of Intention to Recall, or proposed recall petition, in spite of the fact that there are State law provisions to the contrary.

The State law provisions are as follows. The New Jersey Constitution provides for the recall of federally elected officials and provides in pertinent part:

> The people reserve unto themselves the power to recall, after at least one year of service, any elected official in this State or representing this State in the United States Congress. The Legislature shall enact laws to provide for such recall elections. Any such laws shall include a provision that a recall election shall be held upon petition of at least 25% of the registered voters in the electoral district of the official sought to be recalled....
> [N.J. Const. art. I, par. 2, sec. b; (emphasis added)]

Pursuant to the State Constitution, the Legislature enacted the Uniform Recall Election Law (the "UREL"), N.J.S.A. 19:27A-1, et seq., in part, so that "the people of this state shall have the power to recall, after at least one year of service in the person's current term of office, any United States Senator or Representative elected from this State...." N.J.S.A. 19:27A-2 (emphasis added). The UREL provides that a Notice of Intention to Recall a specific elected official, and a proposed recall petition, shall be filed with the appropriate recall election official. N.J.S.A. 19:27A-5. The petition is to indicate whether the recall election is to be held at the next general election or at a special election. N.J.S.A. 19:27A-6(f), -13a(2). If the proposed petition is approved by the recall official, it may be circulated for signatures within a specified time period. N.J.S.A. 19:27A-10. If the requisite number of signatures are obtained, the recall election is to be conducted. It is a two-part election: the voters are to vote "yes" or "no" on the recall; and at the same time are

to vote for a successor, in the event the majority of the voters cast a "yes" vote in favor of the recall. N.J.S.A. 19:27A-15b, c and d and -16.

If viewed in a vacuum, one could conclude that a United States Senator must be subject to these State recall provisions. Such analysis, however, would be remiss as one must necessarily consider the federal scheme for the election of a United States Senator. To begin with, the United States Constitution prescribes the qualifications and term of office for a United States Senator. To hold this office, a person must be at least 30 years old, a citizen of the United States for at least nine years, and an inhabitant of the State when elected. U.S. Const. art. I, §3, cl.3. The term of office is six years. U.S. Const. art. I, §3, cl.1; U.S. Const. Amend. XVII.

The United States Constitution further prescribes the electoral requirement for this office in the Election Clause as follows:

> The times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.
> [U.S. Const., art. I, §4, cl.1; (emphasis added)]

So authorized by the United States Constitution, Congress has enacted detailed legislation regarding the time and manner of

these elections. The election for members of the United States Senate must be held:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.
> [2 U.S.C. §1; (emphasis added)]

If a vacancy occurs in the United States Senate, the 17th Amendment of the United States Constitution provides, in relevant part:

> Whenever vacancies happen in the representation of any State, the executive authority of such State shall issue writs of election to fill such vacancies; provided, that the Legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancy by election as the Legislature may direct.
> [U.S. Const. Amend. XVII.]

Notably, there is no reference, or even a suggestion, in either the United States Constitution or federal statute that a state is authorized to hold a recall election against a sitting United States Senator. The plain wording of these enactments simply could not support such a conclusion. See State v. Gelman, 197 N.J. 475, 482 (2008).

To the contrary, the above-noted provisions of the United States Constitution and Congressional enactments evince a rather comprehensive electoral scheme that underscores federal authority

over these federal elections, free from state constraints. The extent of this authority is reinforced by the Constitutional provision that, "Each house shall be the judge of the elections, returns and qualifications of its own members...." U.S. Const. art. I, §5, cl.1.

It is further instructive that the United States Constitution does provide that each house of Congress is authorized to "... determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member." U.S. Const. art. I, §5, cl.2. The grounds for expulsion are not set forth in the Constitution or by congressional enactment; but the key here is that such expulsion is a matter for each house, not the electorate of a state. To reiterate, there is no specific provision in the original provisions of the United States Constitution permitting a recall election, nor in the 17th Amendment of the United States Constitution, which transferred the power of the selection of the United States Senator for each state from its legislature to the popular vote.

The absence of explicit federal authority for a recall proceeding for a United States Senator raises the question as to whether such omission can be interpreted as an implicit grant of authority to the states to so provide. The answer to this question lies in whether a state recall provision can survive analysis under the Supremacy Clause of the United States Constitution, which

provides that the federal "...Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl.2. "It is basic to this constitutional command that all conflicting state provisions be without effect." Maryland v. Louisiana, 451 U.S. 725, 746 (1981) (citing McCulloch v. Maryland, 17 U.S. 316, 427 (1819); Hines v. Davidowitz, 312 U.S. 52 (1941)).

While there are no reported federal decisions squarely on point, there are two persuasive United States Supreme Court decisions that confirm the paramount and exclusive authority of federal law over state law regarding the election of members of Congress. In United States Term Limits v. Thornton, 514 U.S. 779 (1995), the United States Supreme Court considered whether an amendment to the Arkansas Constitution imposing term limits upon its federal elective representatives was permissible under the United States Constitution. The Court concluded that the amendment was invalid because it disqualified candidates for United States Congress who were otherwise eligible under the United States Constitution. Id. at 829. In this regard, the Court ruled that the eligibility requirements for congressional office are exclusively prescribed by the United States Constitution and that the states have no reserved power to supplement these requirements

under the Tenth Amendment. Id. at 800-01. Rather, the United States Constitution grants Congress the power to override state regulations by establishing uniform rules of federal elections. Id. at 832-833. Although the issue of recall of a Member of Congress was not before the Court, it did note, in passing, that the Framers of the United States Constitution specifically rejected a proposal to allow states to recall their federal representatives, further evidencing an intent to secure federal supremacy over federal-elective offices. See Thorton, supra, 514 U.S. at 810, n.20 (citing 1 Records of the Federal Convention of 1787, pp. 20, 217 (M. Farrand ed-1911).

In a concurring opinion, Justice Kennedy explained that the exclusivity of federal eligibility requirements for federal office was important to the fundamental principle of federalism. This exclusivity preserves the separate and distinct sovereignty of the national government by barring state encroachment into its composition. See id. at 838-845 (Kennedy, J., concurring).

In the subsequent opinion of Foster v. Love, 522 U.S. 67 (1997), the United States Supreme Court struck down a Louisiana statute requiring "open primaries" for Congressional candidates; with such elections being held the month before the regularly scheduled November election. Under this scheme, all Congressional candidates were listed on the ballot, and all registered voters, regardless of party, were permitted to vote. If no candidate won

a majority of the votes at the October primary, the two top vote-getters would run in November. If, however, a candidate did obtain a majority of the votes, that candidate would be deemed elected to that office and there would be no election for that office in November. Id. at 70. In striking down the statute, the United States Supreme Court held that it conflicted with the above-noted Congressional enactments concerning the timing of Congressional elections, 2 U.S.C. §1 (United States Senate) and §7 (United States House of Representatives), which the United States Constitution plainly provides is a matter of the final prerogative of Congress, not the individual states. Id. at 71-72.

The Court explained that the Election Clause of the United States Constitution, U.S. Const. art. I, §4, cl.1, "invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices." Id. at 69 (internal citations omitted). The Clause grants Congress "the power to override state regulations by establishing uniform rules for federal elections, binding on the States." Ibid. (citing Thornton, supra, 514 U.S. at 832-833). Thus, regulations made by Congress in this regard are "paramount" to those made by the States and if they are in conflict, the state regulation "ceases to be operative." Ibid. (citation omitted). In short, the Constitution gives Congress the "final say." Id. at 72.

The clear and unequivocal federal authority regarding the election of a United States Senator leads to no other reasonable conclusion, but that subjecting such official to a recall election cannot withstand federal Constitutional or statutory scrutiny. Furthermore, the adverse effect on proper adherence to the federal scheme is quite apparent if such state proceedings were allowed. First, it could have the potential effect of shortening the Constitutionally-mandated length of term of office for a United States Senator. U.S. Const. art. I, §3, cl.1. Such direct contradiction of a federal constitutional requirement is not permitted under the Supremacy Clause.

Second, recall of a United States Senator is in further conflict with those Constitutional provisions which exclusively bestow upon each house the authority to be the judge of the elections and qualifications of its members as well as determining the grounds for expulsion of its members. Third, the application of a state recall proceeding to a United States Senate election would conflict with 2 U.S.C. §1 regarding the timing of such federal elections. Pursuant to N.J.S.A. 19:27A-6(f), a recall committee could call for a recall election to be held at a general election in a non-federal year or on a special election day.

The bottom line is that an election for the office of United States Senator can only be held: 1) at the regularly-prescribed time which would correspond with the expiration of the

six-year term (2 U.S.C. §1); or 2) upon the issuance of a gubernatorial writ to fill a vacancy. U.S. Const. Amend XVII. A recall election does not come within either situation, as it is intended to be held prior to the expiration of the incumbent's term. N.J.S.A. 19:27A-2. Nor can it be considered to be an election to fill a vacancy as the incumbent remains in office during the recall election. Indeed, under N.J.S.A. 19:27A-10(c), a recall does not proceed if the incumbent resigns.

To reiterate, the State's power to regulate the election of a United States Senator is a contingent one. The power may be exercised over federal elections only insofar as Congress has declined to exercise its power to regulate those elections. Foster v. Love, supra, 522 U.S. at 68. Furthermore, Congressional mandates are paramount. To the extent that state regulations may be read to conflict with those rules, they are inoperative. Id. at 69 citing Ex parte Siebold, 100 U.S. 371, 384, 25 L. Ed. 717 (1879).

For these reasons, therefore, the Secretary of State properly determined that the State recall proceeding could not be applied to the federal elective office at issue here.

POINT II

THE SECRETARY OF STATE'S REFUSAL TO ACCEPT FOR CONSIDERATION APPELLANT'S NOTICE OF INTENTION OF RECALL IS NEITHER A RESTRICTION ON FIRST AMENDMENT RIGHTS NOR A VIOLATION OF THE SEPARATION OF POWERS DOCTRINE.

Appellant's claims regarding First Amendment rights and the separation of powers doctrine are misplaced. Regarding the former, the Secretary of State's refusal to accept for consideration the Notice of Intention to Recall was soundly based on the limited determination that the State recall mechanism could not be initiated for the office of United States Senator. Her determination cannot be stretched to conclude that her action impermissibly restrains appellant's First Amendment rights of free speech and to petition the government. Appellant and any one of its Committee members are free to petition and collect signatures in support of any public or governmental issue. Indeed, appellant is free to petition Congress to enact legislation to so allow for a recall election of a Member of the United States House of Representatives or United States Senator.

As articulated above, however, no state can unilaterally entertain a recall proceeding against a United States Senator without explicit federal authorization. At this point in time, there is simply no nexus between the right to petition and the use of a state electoral mechanism to recall a United States Senator, particularly when the Framers of the United States Constitution

specifically rejected extending recall power to the states. See Thornton, supra, 514 U.S. at 810, n. 20 (citing 1 Records of the Federal Convention of 1787, pp. 20, 217 (M. Farrand ed. 1911)).

As to the separation of powers doctrine, appellant's claims also miss the mark. The Secretary of State is sworn to uphold the United States Constitution and is thus obliged to abide by the Supremacy Clause in carrying out her assigned duties, (see N.J.S.A. 41:1-1,) as so advised by the Attorney General, who is the State's chief law enforcement officer. See N.J.S.A. 52:17A-4. The separation of powers doctrine, contrary to appellant's view, does not forbid such determination. See United States v. Morrison, 529 U.S. 598, 616, n. 7 (2000) ("No doubt the political branches have a role in interpreting and applying the Constitution,...") (citing United States v. Nixon, 418 U.S. 683, 703 (1974)). See also Knight v. Margate, 86 N.J. 374, 388-89 (1981) ("...the doctrine of the separation of powers was never intended to create, and certainly never did create, utterly exclusive spheres of competence."). Therefore, while it is without question that the Judiciary is the final arbiter of the law, ibid., the Secretary of State's refusal to entertain the Notice of Intention to Recall, so required by the Supremacy Clause, was not an improper intrusion upon the powers of the judicial branch of government.

Nor does appellant's ripeness claim hold any merit. The Secretary of State properly issued a determination that the Notice

of Intention to Recall could not be accepted for filing, and appellant has challenged this determination. As the central issue in this case is a matter of law, no additional facts are required for appropriate resolution. See K. Hovnanian Companies of North Cent. Jersey, Inc. v. New Jersey Dept. of Environmental Protection, 379 N.J. Super. 1, 10 (App. Div.), certif. denied, 185 N.J. 390 (2005) (citation omitted). This case is further ripe for disposition because the Secretary of State has acted by way of her January 11, 2010 determination; this is not a situation of "threatened" action.

Similarly, appellant's "judicial restraint" argument must fail because the final agency decision at issue is definitive. The Secretary of State has left no doubt but that she will not accept for consideration a notice of intention to recall a United States Senator, nor a proposed recall petition, consistent with the controlling federal electoral scheme. See Suburban Trails, Inc. v. New Jersey Transit Corp., 800 F.2d 361, 365-366 (3d Cir. 1986) (citation omitted).

Appellant's argument that the Secretary of State should have allowed the "wheels to be set in motion" for a potential recall election of a United States Senator must be rejected out-of-hand as a matter of law and in the public interest in preserving the integrity of the electoral process. Appellant's argument plainly misperceives the Supremacy Clause of the United States

Constitution. Furthermore, to allow a recall petition to be circulated, knowing it to be contrary to controlling federal mandates, could well adversely impact upon public confidence in the State's electoral process.

[Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303, (E. & A. 1878)]

This extraordinary relief is appropriate only where the applicant demonstrates each of the following: (1) the applicant has "a reasonable probability of ultimate success on the merits"; (2) the legal rights underlying the applicant's claim are settled; (3) the preliminary injunction sought is "necessary to prevent irreparable harm"; and (4) the "relative hardship to the parties" weighs in favor of granting the relief sought. See Crowe, supra, 90 N.J. at 132-34.

Appellant's application for emergent relief is fatally deficient because appellant has no prospect whatsoever of satisfying the first prong of the applicable standard - a reasonable probability of ultimate success on the merits - because, as set forth in Points I and II, the law overwhelmingly supports the Secretary of State's Final Administrative Agency Determination. Likewise, to the extent the legal rights underlying appellant's claims are settled, they are settled in the State's favor. The remaining prongs are also not satisfied because there can be no irreparable harm or hardship where there is no legal basis for the alleged burden. Given the prevailing authority, appellant cannot meet the standard for a stay and the Secretary of State should not be preliminarily enjoined to initiate the State's recall process, in clear violation of federal authority.

CONCLUSION

For the foregoing reasons, the Secretary of State's Final Administrative Agency Determination dated January 11, 2010 refusing to accept for consideration the Notice of Intention to Recall a United States Senator was proper and should be affirmed.

Respectfully Submitted,

PAULA T. DOW
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: _____
Donna Kelly
Assistant Attorney General

DATED: February 1, 2010