

_____	)	Supreme Court of New Jersey
THE COMMITTEE TO RECALL	)	Docket No. 065,803
ROBERT MENENDEZ FROM THE)	
OFFICE OF U.S. SENATOR,	)	<u>On Appeal From:</u>
	)	Superior Court of New Jersey
Plaintiff-Respondent,	)	Appellate Division
v.	)	Docket No.: A-2254-09T1
)	
NINA MITCHELL WELLS, ESQ.,)	
SECRETARY OF STATE, and)	
ROBERT F. GILES, DIRECTOR	)	<u>Civil Action</u>
OF THE DIVISION OF)	
ELECTIONS,)	
)	
Defendants-Respondents,)	
	)	<u>Sat Below:</u>
and)	
	)	Hon. Edwin H. Stern, P.J.A.D.
UNITED STATES SENATOR	)	Hon. Ronald B. Graves, J.A.D.
ROBERT MENENDEZ,	)	Hon. Jack M. Sabatino, J.A.D.
)	
Indispensable Party-)	
Petitioner)	
_____)	

SUPPLEMENTAL BRIEF
ON BEHALF OF RESPONDENT THE COMMITTEE TO RECALL ROBERT MENENDEZ
FROM THE OFFICE OF U.S. SENATOR

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PRELIMINARY STATEMENT

The New Jersey Constitution emphasizes that “[a]ll political power is inherent in the people.” N.J. Const., Art. I, Sec. 2(a). The United States Supreme Court has repeatedly held likewise. The founding documents of our nation, from the Declaration of Independence to the United States Constitution to writings by the Founders, are unanimous in support of this principle. The three-judge panel of the Appellate Division was also unanimous in deferring to and respecting the “political power” of the people of New Jersey. The Attorney General of New Jersey has now deferred to that political power as well, and dropped her opposition to the recall effort.

Yet Petitioner Menendez insists that the New Jersey Constitution is wrong, the Appellate Division is wrong, and the people of New Jersey are wrong. Under his view, a U.S. Senator could be locked up in jail and yet the people would be powerless to recall and replace him. Or he could be physically or mentally incapacitated, and the people would lack the power to recall and replace him. Or he could be in one scandal after another, and the people could do nothing. He could refuse to cast another vote for New Jersey, and even promise to cast every future vote against New Jersey, and yet the people would somehow be powerless. This is not the law, and should not become the law through the judicial activism urged by Petitioner Menendez.

A sovereign power is not helpless to recall and replace an agent acting on her behalf, and the people are the sovereign under the U.S. and N.J. Constitutions. The U.S. Supreme Court has repeatedly held this; George Washington confirmed it; and the checks and balances central to the U.S. Constitution require respect for it. Denying the power of the sovereign people would be contrary to every modern trend in favor of greater accountability and transparency in government, as encouraged by rulings by the U.S. Supreme Court.

In this case, the sovereign people have not yet decided whether to recall Senator Robert Menendez, and it is premature for this Court to deny a right that has not yet been exercised. It is not known if enough signatures will be gathered or if the Senator may resign because of this or for other reasons, or if he would win a recall election if held, or then win an election to replace himself. Judicial restraint is far preferable to judicial activism here, particularly when other states have similar recall rights for their people. The Appellate Division properly disposed of this action based on a lack of factual development, and this Court should do likewise. If the sovereign people decide not to recall Senator Menendez, then there is no case or controversy for this Court to resolve.

Petitioner Menendez's premature attempt to deny this political power to New Jerseyans runs afoul of many precedents

of the U.S. Supreme Court as well as basic elements of our republic. Representatives are "public servants" and the master -- the sovereign people -- does inherently have the power to recall her servants. The New Jersey Constitution provides this essential "check and balance" of recall, and this Court should exercise judicial restraint in upholding it.

ARGUMENT

"Governments are instituted among Men, ***deriving their just powers from the consent of the governed.***" Declaration of Independence (emphasis added). This should not be viewed as some archaic platitude, as though it were no longer relevant in an era of sound bites and the internet. Quite the contrary, the unfettered role of the public in our government is becoming increasingly important, as the U.S. Supreme Court just emphasized less than four months ago. Citizens United v. Federal Election Commission, 130 S. Ct. 876, 898 (2010).

The U.S. Constitution embraces checks and balances on governmental power in all its various forms. The President and federal judges can be removed from office - the equivalent of a recall - by Congress as it acts in its capacity as representatives of the people. The U.S. Supreme Court held, 9-0, that even the President is subject to legal process brought by an ordinary citizen. Clinton v. Jones, 520 U.S. 681 (1997).

No federal official is above the all-important checks and balances, including those provided by the people themselves.

Yet Petitioner Menendez claims that U.S. Senators have a special privilege unlike any other federal official, prohibiting their removal and replacement. No incapacity or offense, no matter how devastating or outrageous, can justify the removal of a U.S. Senator, under Petitioner's view. New Jersey can be stuck for six years with a "representative" who had a debilitating stroke on Election Day, and nothing can be done by his constituents to restore their adequate representation.

Petitioner Menendez insists that the people cannot revoke their consent, once granted. If the people had no power to revoke consent, then what was the justification for the Declaration of Independence, which lists specific reasons why consent was being revoked, and the subsequent American Revolution? Of course consent can be revoked. When a representative no longer has the consent of the people he claims to govern, and where the law provides the peaceful means of recalling him, then it is best to settle the issue this way, rather than force the people to be "represented" poorly or not at all.

Petitioner Menendez is not yet facing a recall election, much less voted out by one. Yet he seeks a declaration of unconstitutionality that would disenfranchise New Jersey voters

by revoking their right to petition, although their own Constitution expressly establishes this right. Petitioner fails to recognize that a recall process provides a vital safety valve to help ensure the responsiveness and peaceful operation of a democratic system of government.¹

I. PETITIONER MENENDEZ SEEKS INVALIDATION OF THE POLITICAL POWER OF THE PEOPLE, LEAVING NO OTHER MEANS FOR ADDRESSING GROSS MISCONDUCT OR LACK OF REPRESENTATION.

This Court need look no further than the prolonged scandal of U.S. Senator Harrison Williams of New Jersey to recognize that a power of recall is essential for the people to defend their right to adequate representation. A U.S. Senator, like any other official, can become incapacitated due to a medical problem such as a debilitating stroke. Or Senators can be convicted and sent to jail, as Harrison Williams was in the early 1980s. Senators are capable of doing or saying things that highly offend their constituents, such as belonging to the Ku Klux Klan or supporting enemies of American interests in the Middle East. A Senator, like any celebrity, can behave badly in a personal way that causes a public scandal, as the Tiger Woods

¹The Respondent Committee to Recall Robert Menendez from the Office of U.S. Senator (the "Committee") presented four compelling reasons to reject Petitioner's arguments in the Committee's opposition to the Petition for Certification, and incorporates them by reference here while expanding on them.

episode illustrates. Senators have constitutional rights to behave as they like, but they do not have a constitutional right to be a U.S. Senator. That is a privilege, and it is subject to the political power of the people. The New Jersey Constitution properly protects that power through the mechanism of a recall, in order to ensure full and continuous representation of the people in Congress.

Yet Senator Menendez seeks to deprive his constituents of their political power, not merely in his case but in all possible scenarios. New Jersey has been through a time when our U.S. Senator, Harrison Williams, was scandalized, then indicted, then convicted, and then sentenced, during which he insisted on remaining in power. Indeed, most congressmen who have been convicted in modern times and sent to jail did not resign, and New Jersey U.S. Senator Harrison Williams denied New Jerseyans the legitimate representation to which they were entitled for over two years. And if the breakdown in representation is due to a medical condition, the official may lack the capacity to resign even if he would have intended to do so.

A. Without a Power of Recall, New Jerseyans Were Denied Their Constitutional Right to Adequate Representation for Over Two Years when Harrison Williams Was U.S. Senator.

The scandal, indictment, conviction and sentencing to jail of U.S. Senator Harrison Williams deprived the people of New Jersey of effective representation in the U.S. Senate for over

two years. Yet Petitioner Menendez, by seeking to invalidate the power of recall, says the people should remain powerless and unable to obtain effective representation during such a scandal.

The ABSCAM ("Arab Scam") investigation was a sting operation in the late 1970s that became a massive public scandal beginning February 1980, impugning the reputation of Harrison Williams and the entire State he purportedly represented. *Charles Babcock, "FBI 'Sting' Snares Several in Congress," Washington Post A1 (Feb. 3, 1980) ("Sources said the subjects of the investigation include Sen. Harrison A. Williams Jr.").* More than a year after the scandal broke in the news, a jury found Williams guilty on all counts on May 1, 1981.²

But Harrison Williams remained in the U.S. Senate as the "representative" of New Jersey during that entire time, and for nearly another year as well. Without a recall mechanism, the New Jersey people were deprived of effective representation for over two years. Harrison Williams refused to resign despite his utter lack of public credibility and his inability to give his attention to representing New Jersey rather than defending himself. Even after he was sentenced to jail he would not resign. On August 24, 1981, the Ethics Committee of the U.S. Senate acted to defend its own reputation by voting unanimously

²

<http://bioguide.congress.gov/scripts/biodisplay.pl?index=w000502>
(viewed 5/7/10).

for his expulsion due to conduct that it found to be "ethically repugnant."³ But Harrison Williams still insisted on remaining in office for more than six additional months, continuing to deprive New Jerseyans of effective representation. Williams even sued the Senate to delay and block its efforts at expulsion. On February 17, 1982, a federal court sentenced Williams to three years in prison, yet he still refused to resign. Only when other members of the U.S. Senate - who represented their States and not New Jersey - made it clear that he would face expulsion did Williams resign on March 11, 1982.⁴ A power of recall is essential for the people to protect their interests during such a process, either to hasten the resignation or compel more timely removal and replacement.

A congressman caught in the same scandal never resigned at all. Michael J. Myers took a \$50,000 bribe from an undercover FBI agent in August 1979. He was not expelled by Congress until October 1980, which means that his district lacked effective representation for more than a year. His district was then completely without representation in the House of

³ *Id.*

⁴

http://www.senate.gov/artandhistory/history/common/expulsion_cases/140HarrisonWilliams_expulsion.htm (viewed 5/7/10).

Representatives for three months until after the next general election, when a successor congressman was sworn in.⁵

Mores recently, Ohio Congressman James Traficant was stripped of his right to vote in the House due to his conviction in 2002, which completely denied his district representation as he continued to remain in office for months until the House removed him by expulsion in July 2002. But even that did not restore representation to his district. Because Traficant never resigned, his district in Ohio was left without representation until the next general election and the subsequent swearing in of his successor in January 2003.⁶

Petitioner Menendez may distance himself from these examples of the need for a power of recall, but he seeks to invalidate the political power of the people in all such cases, not just his own. Petitioner Menendez is not limiting relief to his own situation, but is trying to strike down the protection in the New Jersey Constitution against lack of representation. In addition to the above examples, unexpected medical infirmities can interfere with the ability to serve, yet Petitioner Menendez would also deprive the people of their

⁵ "Abscam Score: Government Ahead, 4-0," U.S. News & World Report (Dec. 15, 1980).

⁶ <http://www.ohiohistorycentral.org/entry.php?rec=1782> (viewed 5/7/10).

ability to obtain representation in the event of a debilitating physical or mental incapacity.

It is inevitable, the course of human events, that a future U.S. Senator will, for medical, emotional, personal, legal, or ideological reasons, cease to represent his constituents and fail to do his job. If and when that happens again, New Jerseyans can ensure continuation of their rightful representation by exercising their constitutional power of recall. The most fundamental elements of our constitutional republic are its many checks and balances, and the power of recall is the only check and balance that the people have against a U.S. Senator who no longer represents them. As illustrated by the examples above, the other remedy of expulsion is not a remedy available to a Senator's constituents and is not effective in obtaining timely representation for those constituents. The power of recall is the only viable option.

B. The Omission of the Basic Right of Recall from the U.S. Constitution Does Not Imply any Denial of It.

The U.S. Constitution is a brief, elegant document that intentionally omitted many fundamental rights of the people. The Founders omitted the Bill of Rights from the original Constitution because they thought it was unnecessary to include the obvious. The original Constitution contains a right to

trial by jury for federal crimes, but that does not imply a denial of this right for state crimes. The right of the people to freedom of association is also undeniable and yet cannot be found expressly anywhere within the four corners of the Constitution.

The Radical Republicans claimed in 1867 that the President lacked an absolute right to remove certain subordinates from office, because such power was not in the Constitution, and Congress passed the Tenure of Office Act to require Senate approval before removal. Like the power of the people to recall representatives, powers of executive removal had been discussed but rejected for inclusion in the Constitution. As Petitioner Menendez does here, the Radical Republicans insisted that the omission of this power meant that it did not exist, and they impeached President Andrew Johnson for acting otherwise. But ultimately the U.S. Supreme Court confirmed that the Radical Republicans were wrong, and the "power to remove ... is an incident of the power to appoint." Myers v. United States, 272 U.S. 52, 161 (1926).

When dealing with the powers of a sovereign - the people - it is impractical to try to list every one of her rights. There is nothing expressly written in the Constitution about the right to lobby congressmen, or burn the flag, or form political parties. These and many other rights are too obvious to clutter

up a document as magnificent and eloquent as the U.S. Constitution. See, e.g., Vasan Kesavan & Michael Stokes Paulsen, "The Interpretive Force of the Constitution's Secret Drafting History," 91 Geo. L.J. 1113, 1210-11 (2003) (noting that many constitutional provisions were rejected as "superfluous" or "unnecessary"; the power of "Congress to grant charters of incorporation" was expressly rejected for inclusion in the Constitution, yet was then voted into law by many congressmen who had participated in the Constitutional Convention).

Sovereign immunity - the right of the sovereign people to be free from judgments against them as taxpayers unless they waive their immunity - is nowhere in the Constitution but is based on "universal consent and recognition." United States v. Thompson, 98 U.S. 486, 489 (1879). Like the right of recall, it would be inartful to give sovereign immunity the same priority in the Constitution as, for example, the right of habeas corpus. But despite its omission, sovereign immunity has been applied time and time again by the U.S. Supreme Court in denying relief to litigants who have suffered real harm from government. The omission of sovereign immunity in the Constitution is not a basis for denying its inherent existence.

The power of recall is another inherent right of the sovereign people that need not, and would not, be expressly

included in the Constitution. Its omission in the document cannot imply its waiver by the people.

II. THE U.S. SUPREME COURT EMPHASIZES THAT "THE PEOPLE ARE SOVEREIGN," AND THIS SOVEREIGN NEVER WAIVED THE RIGHT TO RECALL.

"In a republic ... the people are sovereign." Citizens United v. FEC, 130 S. Ct. at 898 (citing Buckley v. Valeo, 424 U.S. 1, 14-15 (1976)). No one can seriously dispute that both the New Jersey and U.S. Constitutions protect the role of the people as the sovereign. See also United States v. Automobile Workers, 352 U.S. 567, 593 (1957) ("Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen.") (Douglas, J., dissenting, joined by Chief Justice Warren and Justice Black).

A waiver of sovereignty is disfavored, and recognized only if it "'unequivocally expressed its intent'" to waive it. Seminole Tribe v. Fla., 517 U.S. 44, 55 (1996) (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)). A master gives up his inherent power to fire a servant, for example, only by a clear waiver to that effect. There is no "unequivocally express" waiver by the people of their power to fire their public servant.

A. George Washington's Letter Confirms the Power of Recall.

George Washington confirmed the power of recall shortly after presiding over the Constitutional Convention in 1787:

The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own choosing; and whenever it is executed contrary to their Interest, or not agreeable to their wishes, **their Servants can, and undoubtedly will be, recalled.**⁷

Letter from George Washington to Bushrod Washington, dated Nov. 10, 1787 (quoted in full in *The Writings of George Washington from the Original Manuscript Sources 1745-1799*, Section 29:311 (Ed. by John C. Fitzpatrick) (emphasis added).

Washington's letter is crystal clear: "whenever" the public servants act contrary the "wishes" of the people, they "can, and undoubtedly will be, recalled." Given the climate of the times and the skepticism of the Americans toward establishing federal power, it is implausible that Washington meant anything other than what he said. U.S. Senators can be recalled by the sovereign people "whenever" necessary. The sovereign people did not waive this fundamental nature of the master-servant relationship.

Confronted with this clear affirmation of the sovereignty of the people by none other than George Washington, Petitioner

⁷<http://etext.virginia.edu/etcbin/toccer-new2?id=WasFi29.xml&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=233&division=div1> (viewed 4/13/10).

Menendez tries to distinguish it in two ways. Both attempts fail. First, he argues that "recalled" means "not reelected." (Pet. Reply in Support of Cert. at 12). This is disproven by Washington's express reference to "whenever". Reelection is scheduled a distant six years subsequent to a Senator's election, when he may or may not even be a candidate again. Washington is plainly not referring to that event. Rather, he is confirming the power of the sovereign people to recall a U.S. Senator "whenever [the authority of the people] is executed contrary to their Interest, or not agreeable to their wishes." The timing of the power of recall is linked by Washington to the acts of the public servant, not to the distant timetable for reelection.

Failing in that attempt to rewrite Washington's letter, Petitioner Menendez then argues that it should essentially be ignored. (*Id.*) But that approach fails as well. The letter was written less than two months after the completion of the Constitutional Convention where the U.S. Constitution was drafted, and over which Washington presided. This letter makes clear that the consent granted by the people to their representatives is not irrevocable.

B. Inherent in the Power To Elect Is the Power To Recall.

Nearly a century later, the Radical Republicans were wrong in insisting that the President lacked power to remove

subordinates, as explained in Part I.B above. The power to give or delegate implies the power to take away. Time and time again logic has prevailed in courts as they recognize that the power to grant implies the power to revoke. For example, the U.S. Supreme Court held that when Congress delegates an authority to tax to states, it has the inherent power to revoke that authority:

When Congress authorized the states to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked. Its sovereign power to revoke the grant remained unimpaired, the grant of the privilege being only a declaration of legislative policy changeable at will. Cf. Dodge v. Board of Education, 302 U.S. 74. Hence, as in the case of the recall of other gratuities (Frisbie v. United States, 157 U.S. 160, 166; Cummings v. Deutsche Bank, 300 U.S. 115, 122-124), the withdrawal of this privilege invaded no rights protected by the Fifth Amendment.

Maricopa County v. Valley Nat'l Bank, 318 U.S. 357, 362 (1943).

Petitioner Menendez argues that the reference in the Constitution to a fixed term of six years for Senators somehow ties the hands of the sovereign people to terminate the arrangement earlier. If that were true, then every contract having a fixed duration could not be terminated earlier. The law is the opposite: specifying a contractual duration does not preclude a right of early termination as needed. The predecessor to the people as sovereign in colonial times was the King as sovereign, and he revoked many of the colonial charters whenever he saw fit to do so, regardless of their term. For a

third example, in copyright law there is always an "inalienable authorial right to revoke a copyright transfer." N.Y. Times Co. v. Tasini, 533 U.S. 483, 496 n.3 (2001).

Menendez's argument confuses "consent", which the people do grant on Election Day, with "irrevocable consent," which they do not grant to congressmen. See Letter from George Washington, quoted supra Point II.A. The people did consent for Senator Menendez to represent them, but at no time did the people declare that consent to be irrevocable.

III. THE RECALL PROVISION IS CONSTITUTIONAL UNDER THE SEVENTEETH AMENDMENT.

The Seventeenth Amendment was added in 1913 as part of the Progressive Movement, and Petitioner Menendez has expressly conceded that this Amendment did not take any power away from the people: there is "no reason to conclude that the Seventeenth Amendment in any way affects a state's ability to recall a U.S. Senator." (Pet. for Cert. at 12). Obviously the progressives ratified the Seventeenth Amendment in order to empower the People. "[T]he Progressive movement's agenda for reform at the turn of the 20th century [was] advanced as a means of ... restoring electoral power to the voters." Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 226-27 (1999)

(Rehnquist, C.J., dissenting) (citing numerous authorities). A power of recall is part and parcel of that empowerment.

This Court's own precedents likewise militate in favor of greater enfranchisement through recall. See N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178, 190, cert. denied, 537 U.S. 1083 (2002) (interpreting election laws "to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot ... and most importantly to allow the voters a choice on Election Day") (citing Catania v. Haberle, 123 N.J. 438, 448 (1990), (quotations omitted)). The recall power fits these rulings perfectly.

IV. U.S. TERM LIMITS V. THORNTON - BY CONFIRMING THE INVIOLOATE POLITICAL POWER OF THE PEOPLE - MILITATES IN FAVOR OF THE POWER OF RECALL.

U.S. Term Limits v. Thornton, the narrow 5-4 invalidation of term limits for congressmen, was grounded in affirming the power of the people to elect and repeatedly reelect whomever they like. 514 U.S. 779 (1995). It was an endorsement of the sovereign power of the people. But that same rationale supports the right of the people to recall. More power to the voters means an ability to recall too.

The U.S. Term Limits decision was in 1995, and there has been much development in election jurisprudence since then. But one trend is unmistakable: the force towards more democratic

participation by the public, often at the expense of incumbents. Choosing sides against democracy and greater citizen involvement rarely withstands the tide of history.

The decision in January of this year by the U.S. Supreme Court in the high-profile Citizens United case is illustrative of the trend in favor of fewer restrictions on democracy. There the Supreme Court cast aside dicta from prior cases, and overturned precedents relying on them:

These considerations counsel in favor of rejecting Austin, which itself contravened this Court's earlier precedents in Buckley and Bellotti. "This Court has not hesitated to overrule decisions offensive to the First Amendment." Citizens United, 130 S. Ct. at 912 (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 500 (2007) (Scalia, J.)). The U.S. Supreme Court will find support in U.S. Term Limits for affirming the democratic power of recall, and will not be restrained by any poorly reasoned dicta to the contrary. See Citizens United, 130 S. Ct. at 912 ("For the reasons above, it must be concluded that Austin was not well reasoned.").

V. PETITIONER MENENDEZ DOES NOT SUFFER ANY COGNIZABLE HARM FROM THE PETITION TO RECALL, AND HE LACKS STANDING TO

ARGUE ON BEHALF OF NEW JERSEY NOW THAT IT HAS DROPPED ITS OBJECTIONS.

Now that New Jersey has dropped its opposition to the recall, Menendez lacks standing to assert objections on its behalf. There are no costs to be borne by Menendez in connection with collecting signatures on the recall petition. If sufficient signatures are gathered, then it would be the State of New Jersey - not Menendez - who bears the election-related costs. Menendez does not suffer any cognizable harm to complain at this point. He may not like being criticized by people who support his recall, but that is not a judicially cognizable injury.

Menendez's only "harm" is the possibility that he may need to spend more money in campaign expenditures in order to remain in office. But if it were a right to minimize campaign expenditures, then Citizens United and a whole slew of U.S. Supreme Court precedents would not have come out in favor of the people in their challenges to incumbents. Obviously the U.S. Supreme Court is less concerned with the alleged "rights" of incumbents than with the rights of the people, and applicable precedents require ruling in favor of the people here.

CONCLUSION

The State of New Jersey has a proud heritage of leadership in our nation. The headquarters of the Continental Army that won the American Revolution was in Morristown. The Battle of Trenton - not far from where this case is being decided -- was the turning point in the war that made our freedom a possibility. In the 19th and 20th centuries, New Jersey became the wellspring of productivity for the entire world with Thomas Edison's prodigious achievements and Bell Labs' discovery of the transistor. It is only fitting that New Jersey should take the lead in confirming the sovereignty of the people, and their right to recall their Senators.

For the reasons presented in the various filings already submitted to this Court and in this supplemental brief, this honorable Court should allow the petition to recall to proceed. The decision below should be affirmed.

Respectfully submitted,

Andrew L. Schlafly
Attorney for Respondent Committee

BY: _____
Andrew L. Schlafly

Dated: May 8, 2010