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The Use and Abuse of Recall: A Proposal for Legislative Recall Reform

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I. INTRODUCTION

In 1988, recall assumed a central role in the Arizona political process. Arizona voters expressed their overwhelming disapproval of Governor Evan Mecham. Mecham’s tenure in office was punctuated by a variety of controversial activities¹ making it difficult even for

1. Some of the controversy has centered around his comment that “blacks themselves refer to their children as pickaninnies.” Other indiscretions included his statement that Martin Luther King’s holiday should be cancelled “because he should not be elevated into that category.” *Mecham: Vote Me Out Or I Stay*, Dallas Times Herald, Jan. 31, 1988, at A1, col. 2. Many of the Mecham offenses have been parodied in the comic strip, *Doonesbury*. See Trudeau, *Doonesbury*, Nov.-Jan. 1987-88 *passim*.

party loyalists to support him.²

In a well organized recall drive, supporters of Mecham's ouster gathered 388,988 signatures, nearly twice the necessary minimum.³ Mecham Recall Committee founder Ed Buck told a rally: "We may be a ragtag group of volunteers, but we're no dummies." "I think we are a real illustration of democracy in action," said Naomi Howard, another recall committee leader.⁴

While recall in Arizona was being used for its intended purpose—permitting the voters to correct an electoral mistake—recall statutes also have been abused. For example, mayors in Nebraska's cities and villages need not worry about overstaying their welcome; if the voters tire of them they will simply recall them from office. Sherilyn Moore, the mayor of Ashland, a small town approximately twenty miles from Lincoln, recently faced a recall drive.⁵ The sponsor of the recall petition was the former mayor of Ashland, Max D. Barnes, who refused to announce any reasons for the recall. When she learned of the campaign against her, Moore commented that "it's very unfair to people such as myself to have this process started and sit here not knowing why."⁶ The signature drive ended a month later with 297 signatures submitted. Thirty-five of the signatures were found to be invalid, dropping the number below the 271 necessary to hold a recall election. Moore said that she was relieved at the results and now will turn her attention back to city business.⁷ Moore is just one of the seemingly endless number of local government officials who have been the target of recall drives in Nebraska.

The recall frenzy⁸ in Nebraska began in early 1987 when Omaha Mayor Mike Boyle was recalled. Overwhelmingly reelected to his post in 1985, Boyle was regarded as a likely Democratic contender for governor.⁹ The proponents of the recall, a group called "Citizens for a Mature Leadership," argued that his erratic behavior, including outbursts of temper and a vendetta against his own police department, embarrassed the city. In particular, they focused on the Mayor's dismissal of the police chief after he refused to sign discipline papers

2. The state Republican Party chairman, Burton Kruglick stated: "There is no question that this is damaging to the party." *Arizona Governor Blasts Political Opportunists*, The Boston Globe, Jan. 10, 1988, at 2, col. 2.

3. *388,988 Signatures Filed for Arizona Governor's Recall*, The Boston Globe, Nov. 3, 1987, at 5, col. 3.

4. *Id.*

5. *Regional News/Nebraska*, United Press International, Jan. 18, 1988.

6. *Id.*

7. *Regional News/Nebraska*, United Press International, Feb. 10, 1988.

8. Carr, *Voters Target Nebraska Local Officials in Recall Frenzy*, Dallas Morning News, Aug. 9, 1987, at A6, col. 1.

9. Robbins, *Omaha Mayor Battling on the Eve of Recall*, N.Y. Times, Jan. 13, 1987, at A16, col. 1.

against officers involved in the drunk driving arrest of Boyle's brother-in-law.¹⁰ But even members of the committee who sought his recall acknowledged that "[Boyle's] administration had run the city well."¹¹

The Mayor's supporters asked that such mistakes be overlooked. However, even the local paper, The Omaha World Herald supported an ouster.¹² When asked why he had not resigned rather than face recall, the Mayor stated: "The only reason I stand for it is because if I let them win, the result would be anarchy. If a mayor looked cross-eyed at somebody, somebody would start a recall. I've just got to stand up to it."¹³ But his efforts were unsuccessful, and right or wrong, fifty-six percent of nearly 100,000 ballots were cast in favor of removal.¹⁴

For all of 1987, the voters of Nebraska had the final say. In 1987, recall efforts were mounted against almost forty public officials.¹⁵ There had been only eleven recall attempts in 1985 and 1986 combined. The recall frenzy has created some unusual politics. For example, a town council member in Loup City escaped his own recall when he was appointed to replace a recalled mayor.¹⁶ In Wymore, the mayor faced a recall over his appointment of a utilities department employee. Apparently, he chose not to campaign during the recall drive, stating that he did not want to change the will of the voter. Nevertheless, he kept his post.¹⁷

Similarly, two mayors were recalled in a thirty-seven day period in Alliance, Nebraska. Mayor Dick Vellaha was recalled in December 1987 for "misusing city stationery and facilities, for harassing the police department, failing to conduct meetings in a dignified and orderly manner and for actions bringing ridicule to the city."¹⁸ His successor, Duane Worley, was recalled in January 1988 based on allegations that he had not honored a request to lower electricity rates.¹⁹ Richard Robb, a car salesman, is the current mayor, a purely ceremonial job

10. *Omaha Votes To Oust Its Mayor Over Conduct*, N.Y. Times, Jan. 14, 1987, at A15, col. 1.

11. Robbins, *Removal of Omaha Mayor Stirs Pride and Sadness*, N.Y. Times, Jan. 15, 1987, at A14, col. 1.

12. "We believe a pattern of conduct exists that justifies a vote for the recall of Mayor Boyle." *Pattern of Mayor's Conduct Justifies Vote to Recall Him*, Omaha World Herald, Jan. 11, 1987, at 1A, col. 1.

13. Robbins, *supra* note 9.

14. Omaha has population of approximately 340,000 people.

15. Carr, *supra* note 8.

16. *Id.*

17. *Id.*

18. Regional News/Nebraska, United Press International, Nov. 13, 1987.

19. Day, *Town 'Polarized' By Divisive Recall Elections*, Associated Press, Feb. 13, 1988.

that pays only \$575 per year.²⁰ "I think the key word for Alliance at this point is 'polarized,'" said Kevin Horn, executive director of the Alliance Chamber of Commerce.²¹

The rash of recalls has resurrected the political debate over democratic government. "What we're saying here is that maybe the public isn't always right," explained Robert Sittig, a political science professor at The University of Nebraska-Lincoln. "That's a tough thing to do in a democratic society, but even the public makes a mistake sometimes."²²

This comment will focus on the conflict between the will of the electorate and the smooth functioning of government. The comment will suggest reforms that will ease the tension between the desires of the people and the need for an effective, efficient government. The first section will review the history of the recall. While recall certainly has not paved the way to a democratic utopia as its most ardent supporters once suggested, it has served, on some level, to create a body of elected officials who are more responsive to the concerns of the public at large.

The second section will analyze state recall statutes. In so doing, this paper will explore whether recall has gone beyond its effective role of permitting the electorate to remove from office self-serving and unfaithful public servants. Furthermore, it will assess the threat that unrestrained recall will bring effective government to a virtual standstill. The third section will analyze the recall reform bills considered by the Nebraska Legislature. The final section of the paper will include suggestions for recall reform, including a model recall statute. These proposals will attempt to reinforce recall as a potent political device while limiting its susceptibility to abuse.

II. HISTORY

A. Colonial America

The ideas of direct participation in government and of recall are not entirely new to the American political process. Early American colonials exercised direct democracy in the form of town meetings. The meetings were comprised of all the town men who dealt with issues by consensus.²³

This tradition of direct democracy led to a movement for recall provisions in both the Articles of Confederation and the United States Constitution. An early draft of the Articles of Confederation con-

20. *Id.*

21. *Id.*

22. Carr, *supra* note 8.

23. See generally Swan, *The Use of the Recall in the United States*, in *THE INITIATIVE, REFERENDUM & RECALL* (W. Munro ed. 1912).

tained a recall provision.²⁴ Moreover, the framers considered including a recall provision in the Constitution. Some Federal Convention delegates opposed the final draft of the Constitution because it failed to include the recall.²⁵ However, the recall was a hotly debated topic,²⁶ with every state convention engaged in the recall controversy. For example, at the New York State Convention, Alexander Hamilton and John Livingston fought vehemently over the recall, particularly the recall of senators.²⁷

B. Progressive Era Politics

Modern recall, along with its sisters, the referendum and initiative, form the great triumvirate of popular government. The reformers of the Progressive Era initiated the three reforms at the local government level because they believed that government representatives failed to serve the public as mandated by the Constitution.²⁸ The Progressives perceived that the allegiance of their public officials lay at the feet of party bosses and political machines rather than with the public at large.²⁹ And it was true that local governments of the late nineteenth and early twentieth century America seemed controlled not by the electorate, but by a few large corporations of the newly industrialized United States. Against this backdrop, the great triumvirate was conceived to reform the political process by bringing "the people" back into the process of lawmaking.³⁰ "The people," reasoned the Progressives, would be the guardians of the public interest and would not seek to further purely private, corporate interests.³¹

The initiative and referendum were called a supplement to representative democracy because they enabled the people to participate directly in the legislative functions of the local government. The recall, meanwhile, functioned as a type of guarantee to the people that they would not be forced to live with their mistakes:

In particular, the recall express[ed] the idea that a public office is so vitally

24. Proposed Article V of the Articles of Confederation stated: "For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday of November in every year with a power reserved in each state to recall its delegates, or any of them, at any time within the year and to send others in their stead for the remainder of the year." *Id.* at 298 n.2.

25. Luther Martin of Maryland was one such delegate. *Id.*

26. For a discussion of the "pros" and "cons" of recall, see *infra* notes 28-58 and accompanying text.

27. Swan, *supra* note 23, at 298 n.2.

28. See generally, F. BIRD & F. RYAN, *THE RECALL OF PUBLIC OFFICERS*, ch. 1 (1930).

29. *Id.*

30. See generally R. HOFSTADTER, *THE AGE OF REFORM FROM BRYAN TO FDR* 257-68 (1955).

31. F. BIRD & F. RYAN, *supra* note 28, at 8.

affected with the public interest that when its occupant ceases to perform his duties to the interests of the community his official tenure may be terminated. The recall is based on the theory that the people must maintain a more direct and elastic control over their elected officials.³²

However, the reforms were not only for the benefit of the political process. It was hoped that by permitting "the people" to be a part of the workings of the political process, "the people" could become more productive citizens as well.³³

But not everyone supported these political reforms. Those who opposed recall condemned it as leading to the destruction of democracy. Some were convinced that an uneducated electorate would commit political suicide by arbitrarily calling for recall.³⁴ And even if the actual workings of the representative government were not completely impaired by the will of the people, the government would no longer represent a majority. Instead, a minority of citizens would demand recall elections. Because of this, some feared that "only a small percentage of the voters [would] take the trouble to register their will" by voting.³⁵ Finally, the opposition insisted that these elections not only would constitute minority rule but also would be very expensive and time consuming. To many citizens, the general elections alone were too expensive and disruptive to everyday life. The potential for even more elections was just too much.³⁶

The City of Los Angeles adopted the first recall provision in 1903.³⁷ Like so many cities of the day, Los Angeles was controlled by special interests. In particular, city politics were dominated by the Southern Pacific Railroad.³⁸ Because the Progressives were determined to end the control that the Railroad had over the city, they made an effort to revise the city charter to require greater responsiveness by the city's politicians. Under the tutelage of Dr. John R. Haynes,³⁹ a noted local

32. Swan, *supra* note 23, at 298.

33. Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1348 (1985).

34. D. WILCOX, GOVERNMENT BY ALL THE PEOPLE 247-55 (1912).

35. *Id.* at 235.

36. Even now, people are concerned with the cost of special elections. For example, Nebraska is debating provisions that would allow a majority of a board (such as a school board) to face recall without a quorum of the board in office in order to keep special election costs to a minimum.

37. While recall was not officially incorporated into government documents until 1903, it had been a part of the national platform of the Socialist Labor Party in both 1892 and 1896.

38. See generally R. HOFSTADTER, *supra* note 30.

39. F. BIRD & F. RYAN, *supra* note 28, at 24.

Dr. Haynes came to Los Angeles in 1887 from Philadelphia. A busy man of abundant means, broad culture, and wide acquaintance, with many interests in life in addition to a large medical practice, he nevertheless found time to go into politics, not through any desire for public office, but for the promotion of certain measures which he believed would place government more firmly in the hands of the people.

government reformer, the city council called an election to select a board of freeholders to carry out this objective.⁴⁰

The board, along with the press, undertook the considerable task of educating the public on the initiative, the referendum, and the recall. While the initiative and the referendum were somewhat familiar political institutions, the recall was

something new The supporters of the innovation point out that there is now no way in which people themselves can secure the removal of any official before the expiration of his time no matter how bad his record might be. This plan is yet to be approved by the people and it is impossible to say how it will work until it is tried. It is not likely that there will be frequent removals of officials by this method, but the very fact that they could be so removed would doubtless have a salutary influence.⁴¹

As proof of this supposed "salutary influence," supporters noted that the recall could be used as a constant "reminder of pre-election promises," encouraging officials to retain a candidate's state of mind.⁴²

Nevertheless, the recall faced opposition because of its feared pervasive influence. Unlike the referendum and the initiative, the people realized that the recall was not purely a legislative operation. The recall was not a method of instituting desirable laws; it could subject elected officials to the continuous and arbitrary will of the people. Moreover, repeated recalls could slow, if not stop, an effective government. Because no elected official would be immune from recall, some believed that recall could affect all facets of government and lead to chaos.⁴³

But the board of freeholders never had the opportunity to submit its new charter to the people. The California Supreme Court determined that the board of freeholders was an illegal body because the city charter allowed for its own change only at two year intervals by an amendment process.⁴⁴ Thus, in 1902, a new and legal charter revision commission was founded to propose amendments to the city charter.⁴⁵ Although not a member of this new commission, Dr. Haynes was able to secure approval for the inclusion of the initiative, the referendum, and the recall.

The battle for voter support was waged in the press where editori-

40. *Id.* at 23-24.

41. The Los Angeles Herald, Oct. 3, 1900, quoted in F. BIRD & F. RYAN, *supra* note 28, at 27 n.6.

42. Munro, *Introductory*, in THE INITIATIVE, REFERENDUM & RECALL, *supra* note 23, at 46.

43. See generally D. WILCOX, *supra* note 34, at 169-76.

44. *Blanchard v. Hartwell*, 131 Cal. 263, 63 P. 349 (1900). Specifically, the court said that "the payment of the expenses of a board of freeholders elected by a city already having a freehold charter, to prepare a new charter, will be enjoined since such city can only change the charter by the procedure provided for making amendments." *Id.*

45. F. BIRD & F. RYAN, *supra* note 28, at 28.

als either praised direct democracy or warned against the general havoc that would ensue if the general electorate possessed the power of recall. Those who supported it preached that the "intended purpose [of recall] was to render public officials more mindful of their position as 'trustees and servants of the public' by making them continuously, rather than periodically, responsible to the popular will."⁴⁶ Recall opponents argued that it would be used for personal and partisan purposes by petty factions. The voters eventually approved the recall amendment by a four to one margin.⁴⁷

At last, it seemed, the right to elect had a complement—the right to recall.⁴⁸ When the Los Angeles city council voted to award the city's printing contract to an anti-union newspaper with an overly expensive bid, the recall had its first public trial.⁴⁹ City labor leaders successfully recalled a councilman who had voted for the award despite the large concentration of unionized laborers in his district. The recall found such favor with the citizens of California that twenty-five other municipalities introduced recall provisions into their charters by 1911.⁵⁰

In 1908, Oregon became the first state to add a recall amendment to its constitution. One year later, the citizens of Junction City, Oregon recalled their mayor. Within seven years, seventeen recall elections had been held.⁵¹ The recall became instantly popular, and ten other states followed Oregon's lead in less than a decade.⁵²

The history of the recall provision in the Arizona Constitution demonstrates the popularity of the recall in the first quarter of the twentieth century. In 1910, at the Arizona Constitutional Convention, the drafters of the state constitution adopted the initiative, the referendum, and the recall. The recall provision provided for the removal of judges as well as other officials. President Taft threatened to veto Arizona's admission to the United States unless the judicial recall provision was removed from its constitution.⁵³ Similarly, Congress passed

46. *Id.* at 93.

47. *Id.* at 32 n.11. 9,779 votes were cast in favor of the recall, and 2,469 against it.

48. Swan, *supra* note 23, at 306.

49. F. BIRD & F. RYAN, *supra* note 28, at 227.

50. Among them were San Francisco, Pasadena, Fresno, San Bernadino, San Diego, and Santa Monica. See *infra* note 53.

51. J. BARNETT, *THE OPERATION OF THE INITIATIVE, REFERENDUM AND RECALL IN OREGON* 201 (1915). At the time, many incorrect statements were given about the frequency of the use of recall. For example, the Governor stated: "There has never been an official recalled in this state." Governor's Message, Oregon Sen. J. 1030 (1913), reprinted in J. BARNETT, *supra*, at 202 n.1.

52. CAL. CONST. art. II, § 13; ARIZ. CONST. art. VIII, pt.1 § 1; COLO. CONST. art. XXI, § 1; IDAHO CONST. art. VI, § 6; NEV. CONST. art. II, § 9; WASH. CONST. art. I, § 33; MICH. CONST. art. II, § 8; KAN. CONST. art. IV, § 3; LA. CONST. art. X, § 26 (formerly art. IX, § 9); N.D. CONST. art. III, § 1.

53. H. LAMAR, *THE FAR SOUTHWEST 1846-1912, A TERRITORIAL HISTORY* 504 (1966).

a resolution requiring Arizona to remove the provision before becoming a state.⁵⁴ Arizona complied, but soon after it was admitted to statehood, the Arizona Legislature passed an amendment providing for judicial recall.⁵⁵

Despite its immediate popularity, the recall movement came to a virtual standstill by 1924.⁵⁶ Nevertheless, today all but nine states have some form of recall,⁵⁷ however limited it may be. No state that adopted the recall has since abandoned it, perhaps because many voters would be skeptical of an elected official's attempt to take the removal power away from the people.⁵⁸

III. A LOOK AT RECALL STATUTES

Recall statutes vary widely but generally take the same three-part form. First, voters interested in seeking a recall must circulate a petition.⁵⁹ Second, election officials review the petition within a statutorily- or constitutionally-required period of time and determine whether the petition has the requisite number of legally sufficient signatures.⁶⁰ Finally, if the election officials determine that the petition and signatures are sufficient, a recall election is held.⁶¹ In addition, many recall statutes require that the elected official be in office a specified length of time before a recall petition may be circulated.⁶² Similarly, these statutes require that public officials not be subject to recall within a certain time period before the expiration of their term.⁶³

A. Types of Recall Statutes

1. *No Specific Restrictions*

Recall provisions fall into three general categories. The first type

54. S. CON. RES. 8, 37 Stat. 42 (1911).

55. Other states such as Alaska, ALASKA STAT. § 15.45.470 (1988); Idaho, IDAHO CODE § 34-1701 (1972); Kansas, KAN. STAT. ANN. § 25-4301 (1986); Louisiana, LA. REV. STAT. ANN. § 18:1300.1 (Supp. 1988), and Washington, WASH. REV. CODE ANN. § 29.82.010 (1982) specifically exclude judges from recall.

56. The LaFollette campaign of 1924 had Progressive orientation but the recall was largely ignored. *See generally* R. HOFSTADTER, *supra* note 30, at 257-68.

57. Alabama, Delaware, Indiana, Kentucky, Maryland, New York, Pennsylvania, Utah, and Vermont.

58. This does not mean that legislators are unwilling to initiate recall reform. *See infra* notes 110-19 and accompanying text.

59. *See, e.g.*, FLA. STAT. § 100.361(1)(a) (1985).

60. *See, e.g.*, NEV. REV. STAT. § 306.035 (1987).

61. *See, e.g.*, NEB. REV. STAT. § 32-1405 (1988). *But see* ARIZ. CONST. art. VIII, pt. 1, § 4, which provides for a special election that includes candidates' names along with the targeted official's name. If the targeted official does not receive the most votes, he or she is no longer in office, and the candidate with the most votes is declared the new officer.

62. *See, e.g.*, ALASKA STAT. § 15.45.490 (1982).

63. *See, e.g.*, KAN. STAT. ANN. § 25-4305 (1986).

of recall provision does not place specific restrictions on the reason for the recall.⁶⁴ Under this standard, a public official may be recalled for any reason. This type of statute envisions recall as a purely political process that permits voters to register their will when a public official's actions are unpopular. One journalist went so far as to suggest that these recalls are begun "on an emotional whim as often as not."⁶⁵

Recall battles under this type of statute have been waged over a variety of interesting issues. For example, in 1924, Mayor Bridegroom of Azusa, California nearly was recalled because he made "hilarious comment[s] regarding the 'annual parade of the Portuguese Society during the Pentecostal Celebration.'"⁶⁶ "In 1981, the mayor of Paradise, California, had a recall filed against him because he ordered parking banned on the city's main thoroughfare during the city's annual Gold Nugget Day's Parade."⁶⁷ Particularly in California, it seems that every high-profile official is a target for recall, whether arbitrary or not.⁶⁸

2. Clear Statement Requirement

The second type of recall statute differs from the first only in that it requires a brief but clear statement of the reason for the recall.⁶⁹ The reason must be based upon acts or conduct of the official while in office. As with states in the first category, the reasons for recall are not reviewable by the courts.⁷⁰

Westpy v. Burnett,⁷¹ a New Jersey Superior Court decision, provides a good example of the second type of recall provision and of a court's hands-off, no-review policy. In *Westpy*, the targeted officials claimed that the recall statement did not properly specify the reason for the recall. The statement read as follows: "[T]he conduct of the mayor and two councilmen 'resulted in the usurpation of the functions of the manager and the passage of ordinances of questionable legal validity which are not in the best interests of the people of the

64. Currently, Nebraska's recall statute does not provide for any statement showing cause. NEB. REV. STAT. §§ 32-1401 to -1408 (1988).

65. *Officials on a Tightrope*, ECONOMIST, April 16, 1983, at 46.

66. F. BIRD & F. RYAN, *supra* note 28. Such ethnic jokes are not tolerated in the late 1980s either. Governor Evan Mecham, Republican, Arizona, was the target of a recall drive based in part on a variety of ethnic jokes and slurs. *See supra* note 1.

67. Price, *Recall at the Local Level*, 72 NAT'L CIVIC REV. 200, 204 (April 1983).

68. For example, San Francisco Mayor Dianne Feinstein faced an unsuccessful recall attempt, *see It Could Happen Only In San Francisco*, U.S. NEWS & WORLD REPORT, May 9, 1983, at 17, and Chief Justice Rose Bird was not re-elected following a strong campaign against her. *See Wold & Culver, The Defeat of the California Justices; The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE, April-May 1987, at 348, 349.

69. *See, e.g.*, MO. ANN. STAT. § 78.260 (Vernon 1987).

70. *See, e.g.*, CAL. CONST. art. II, § 14(a).

71. 82 N.J. SUPER. 239, 197 A.2d 400 (1964), *aff'd*, 41 N.J. 554, 197 A.2d 857 (1964).

community' . . ."⁷²

In analyzing the validity of the recall petition, the court remarked:

The courts throughout the United States have generally adopted the view that the power granted to electors of a municipality to remove certain public officers through recall procedure is political in nature and that it is for the people, and not the courts, to decide the truth and sufficiency of the grounds asserted for removal. In most states, statutory and charter provisions as to recall are liberally interpreted in favor of the electorate. This liberality is also extended to the usually required statement or general statement "of the grounds upon which the removal is sought."⁷³

Based on this reasoning, the court concluded that this recall petition did not warrant judicial interference.

Other state courts also have adopted this political deference to recall elections. In *Abbey v. Green*,⁷⁴ the Supreme Court of Arizona upheld a recall petition filed against a state judge which stated as one of the grounds for removal that "he is not worthy of belief."⁷⁵ Removing itself from the political debate, the court concluded that "[i]t was the evident purpose [of the drafters] to permit the electorate to get rid of an obnoxious and unsatisfactory officer with whom, for any or no reason whatever for that matter, they may have become displeased."⁷⁶

Moreover, in *Wallace v. Tripp*,⁷⁷ the Michigan Supreme Court overruled its previous interpretation of the recall provision which had permitted limited review. The court explained:

In 1926, in *Newberg v. Donnelly*, this Court upheld the constitutionality of the . . . [recall provision], and read into it additional limitations: 'The reason or reasons assigned must be based on some act, or failure to act which, in the absence of a sufficient justification, would warrant the recall.' Without even noting that both the Constitution and the statute clearly indicated that the voters had the power to determine what reasons would warrant the recall, the Court itself proceeded to hold certain acts described on the petition before it as not 'a sufficient justification.' We cannot find any constitutional warrant for this assumption of a power clearly reserved by the Constitution to the people.⁷⁸

The court concluded that "Michigan's Constitution and statute require a clear statement of reasons for recall Beyond this, the Constitution reserves the power of recall to the people."⁷⁹ Thus, the Michigan court revested the power of the recall entirely with the people.

72. *Id.* at 242, 197 A.2d at 401-02.

73. *Id.* at 246, 197 A.2d at 404.

74. 28 Ariz. 53, 235 P. 150 (1925).

75. *Id.* at 62, 235 P. at 154.

76. *Id.* at 63, 235 P. at 154.

77. 358 Mich. 668, 101 N.W.2d 312 (1960).

78. *Id.* at 677, 101 N.W.2d at 313-14 (citation omitted)(quoting *Newberg v. Donnelly*, 235 Mich. 531, 534, 209 N.W. 572, 574 (1926)).

79. *Id.* at 680, 101 N.W.2d at 315.

3. *Recall for Misconduct: The Washington Example*

The third type of recall provision specifies that an official may be recalled only for misconduct. For example, the Montana recall statute strictly defines the permissible grounds for recall. Officials may be recalled only for "physical or mental lack of fitness, incompetence, violation of [the official's] oath of office, official misconduct, or conviction of felony offense."⁸⁰ The Montana Supreme Court declared that recall is a "special, extraordinary, and unusual proceeding" and should not be used except in extreme circumstances.⁸¹

Another example of strict recall provision is the Washington Constitution, which provides that voters may recall an official for misfeasance or malfeasance during office, or for some violation of the official's oath.⁸² Similarly, a Florida statute lists seven different kinds of misconduct that warrant recall.⁸³

In those states which require a showing of cause, the whim of the electorate takes a backseat until the courts determine that the grounds for recall are sufficient. Requiring a showing of cause protects the targeted official against arbitrary recall campaigns. Supporters of this strict form of recall claim that judicial review does not destroy the political integrity of the recall.⁸⁴ However, the opponents of "recall for misconduct" fear that judicial intervention infringes on the political process.⁸⁵ Furthermore, critics underscore that the "cause requirements" draw hazy distinctions due to the lack of a clear definition for words like "misfeasance." They argue that excessive judicial intervention is certain when definitions are vague.

The history of the recall provision in Washington traces the changing role of judicial review of recall allegations when state recall provisions require a showing of cause. Washington is one of only a few states that require an allegation of misconduct.⁸⁶ Moreover, Washington incorporated the provision into its constitution. "These requirements indicate that the drafters of Washington's recall provision

80. MONT. CODE ANN. § 2-16-603(3) (1987).

81. *State ex rel. Palmer v. Hart*, 201 Mont. 526, 530, 655 P.2d 965, 967 (1982).

82. WASH. CONST. art. I, § 33 (Amend. 8). The Washington Constitution is the only constitution that requires a showing of cause for recall. Other states have cause requirements, but the requirements are by statutory authority.

83. FLA. STAT. ANN. § 100.361(1)(b) (West 1982) ("The grounds for removal of elected municipal officials shall, for purposes of this act, be limited to the following: malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, and conviction of a felony involving moral turpitude").

84. See generally Cohen, *Recall in Washington: A Time For Reform*, 50 WASH. L. REV. 29 (1974); See also, *Brocek v. Bayley*, 81 Wash. 2d 831, 505 P.2d 814 (1973) (en banc) (Utter, J. concurring), *overruled*, *Cole v. Webster*, 103 Wash. 2d 280, 287, 692 P.2d 799, 804 (1984).

85. See *infra* text accompanying notes 110-19.

86. See, e.g., WASH. REV. CODE ANN. § 29-82.10 (1985 & Supp. 1988).

wanted to prevent recall elections from reflecting on the popularity of the political decisions made by elected officers.”⁸⁷ In other words, the drafters believed that the recall should not be used as an opportunity to air opposition to a single issue; such single-issue orientation should be reserved for the referendum or the next regular election. While the 1913 Legislature approved the drafters’ language by enacting the “recall for misconduct” provision into a constitutional amendment, it failed to define the operative words: “misfeasance;” “malfeasance;” and “violation of the oath of office.”⁸⁸ Thus, the words have been interpreted and reinterpreted by the state’s courts.

*Cudihee v. Phelps*⁸⁹ was the first recall case to reach the Washington Supreme Court after ratification of the recall amendment. In upholding the lower court’s denial of an injunction, the Washington Supreme Court limited the role of the judiciary in the recall process to determining the sufficiency of the statement of allegations.⁹⁰ Such an interpretation by the judiciary made Washington’s requirement of misconduct meaningless. The *Cudihee* court concluded that while the state constitution permitted the court to deny a recall based on a lack of cause, recall had to be reserved as a right of the people’s political process:

It may be that the courts have jurisdiction to determine the sufficiency of the statement of the allegations made as cause for removal if presented in a proper proceeding . . . but the trial of the question of whether such cause actually exists, and as to whether the officer is to be discharged is to be had before the tribunal of the people⁹¹

Adjusting its interpretation of the recall amendment just one year later, in *Pybus v. Smith*, the Washington Supreme Court set boundaries for the sufficiency of the recall allegation.⁹² Pybus, a council member, was accused of bargaining with other council members concerning how he would vote, thereby violating his duty to vote according to his own good judgment. Rather than letting the people decide the merits of the allegation, the court determined that the act did, in fact, constitute malfeasance.⁹³

Unlike *Cudihee*, the *Pybus* court intervened in the manner suggested by the constitution, yet still failed to define the terms by which it was making its decision. Nevertheless, subsequent decisions used *Pybus* as a starting point, and most concluded that malfeasance in-

87. See *Chandler v. Otto*, 103 Wash. 2d 268, 271, 693 P.2d 71, 72 (1984)(citing 4 E. McQUILLAVY, MUNICIPAL CORPORATIONS § 12.2516 (3d rev. ed. 1979)).

88. See *id.* at 271, 693 P.2d at 73.

89. 76 Wash. 314, 136 P. 367 (1913).

90. See generally Note, *Constitutional Law—Recall of Public Officers: Discretionary Acts Cannot Be A Sufficient Basis For Recall*, 48 WASH. L. REV. 503, 506 (1973).

91. 76 Wash. 314, 331, 136 P. 367, 373 (1913).

92. 80 Wash. 65, 141 P. 203 (1914).

93. *Id.*

volved acts which were at least misdemeanors.⁹⁴ Thus, even though *Pybus* failed to define the constitutional language, the holding provided support for later interpretations.

In 1968, the Washington Supreme Court, in *State ex rel. LaMon v. Westport*,⁹⁵ created a two-part test for determining the sufficiency of the recall allegations. The court held that the charges must allege "malfeasance" or "misfeasance," and that the charges must be definite. By itself, this holding did not lead to new definitional enlightenment. But the *LaMon* court cited *State v. Miller*⁹⁶ to give more precise meaning to the terms "misfeasance" and "malfeasance." The *Miller* court stated: "[They] are comprehensive terms and include any wrongful conduct that affects, interrupts, or interferes with the performance of official duty."⁹⁷ While this definition also was plagued by a lack of precision, it provided a basic standard for determining the sufficiency of recall allegations.

Four years later, in *State ex rel. Citizens Against Mandatory Bussing v. Brooks*,⁹⁸ the court limited the *Lamon* definition of "malfeasance" by concluding that discretionary acts of a public official cannot be considered a sufficient basis for recall. The rule created by *Brooks* provides for decision making on an *ad hoc* basis and assumes that judicial review will not destroy the integrity of the recall process but will protect the system from abuse.

The foregoing cases, "in trying to interpret the right of recall, developed a narrow scope of review based on the court's traditional role of nonintervention in political controversies."⁹⁹ The court created case-by-case review, which necessarily requires some court intervention, but limited the definitions so that voters and targeted officials alike would be aware of exactly what reasons were a sufficient basis for a recall petition. In spite of the revisions, through the early 1970s

94. See *Thiemens v. Sanders*, 102 Wash. 453, 458, 173 P. 26, 28 (1918)(Thiemens, as chairman of the board of city commissioners, conspired to have certain land that he owned purchased by the city for construction of the courthouse, thereby making him guilty of a crime under Washington law).

95. 73 Wash. 2d 255, 438 P.2d 200 (1968), *overruled*, *Cole v. Webster*, 103 Wash. 2d 280, 692 P.2d 799 (1984).

96. 32 Wash. 2d 149, 201 P.2d 136 (1948). In *Miller*, the court determined that a public auditor's employment of his wife constituted misfeasance and was actionable by the Attorney General's office. While *Miller* involved public officials, it was not a recall case.

97. *Id.* at 152, 201 P.2d at 138.

98. 80 Wash. 2d 121, 492 P.2d 536 (1972), *overruled*, *Cole v. Webster*, 103 Wash. 2d 280, 692 P.2d 799 (1984). In *Brooks* the court held that the busing plan was within the discretion of the school board based on *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971), a famous busing case in which the United States Supreme Court stated that implementation of busing was within the discretion of the school board. See *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wash. 2d 124, 129, 492 P.2d 536, 541 (1972).

99. *Chandler v. Otto*, 103 Wash. 2d 268, 271, 693 P.2d 71, 73 (1984)(citations omitted).

very few recall petitions had been found unsatisfactory by the courts. In practice, the provisions requiring misconduct appeared no more restrictive than those allowing recall for any reason as long as the reasons were clearly stated.

In an effort to further restrict recall, the Washington Legislature amended its recall provisions on two separate occasions. The 1976 amendment added language that required a "detailed description, including the approximate date, location and nature of each act complained of."¹⁰⁰ The second amendment, in 1984, added several new requirements. First, it required a petitioner to "verify under oath that he or she has knowledge of the alleged facts upon which the stated grounds for recall are based."¹⁰¹ Second, it codified the case law definition of "misfeasance," "malfeasance," and "violation of the oath of office."¹⁰² Third, it required the petitioner to file the petition with a clerk who prepares a ballot synopsis and determines the sufficiency of the charges.¹⁰³ Finally, the amendment described the duties of the superior court in determining the sufficiency of the allegations.¹⁰⁴ The amendment required the superior court to review the ballot synopsis and to hear arguments concerning the sufficiency of the allegations. However, the 1984 amendment clearly stated that "the court shall not consider the truth of the charges but only their sufficiency."¹⁰⁵

These legislative amendments enabled the Washington Supreme Court to decide cases in accordance with legislative intent. In *Chandler v. Otto*, the court stated: "We believe the changes indicate a legislative intent to place limits on the recall right, i.e. to allow recall for cause yet free public officials from the harassment of recall elections grounded on frivolous charges or mere insinuations."¹⁰⁶

After these amendments, it seemed certain that judicial intervention not only was justified, but required. Finally, with the support of the legislature, the court's role in the political process was clearly delineated.

In a case decided the same day as *Chandler*, the court in *Cole v. Webster*,¹⁰⁷ assumed its new power to review petitions and held a recall petition to be legally insufficient. In defending its dismissal of the charges, the court noted that

these specificity requirements leave intact the inherent right of the people to

100. WASH. REV. CODE ANN. § 29.82.010 (1975).

101. WASH. REV. CODE ANN. § 29.82.010 (1984).

102. See, e.g., *State v. Miller*, 32 Wash. 2d 149, 151, 201 P.2d 136, 138 (1948) ("Misfeasance means the performance of a duty a public officer in an improper manner").

103. *Id.*

104. *Id.* at 152, 201 P.2d at 138.

105. WASH. REV. CODE ANN. § 29.82.010 (1984) (amended 1976 and 1984).

106. *Chandler v. Otto*, 103 Wash. 2d 268, 274, 693 P.2d 71, 74 (1984).

107. 103 Wash. 2d 280, 691 P.2d 799 (1984).

recall elected officials for cause. The only burden is that recall must be based on specific and definite charges. This is not a cumbersome burden when one considers the harassment to which public officials can be subject if charges need only be general in nature.¹⁰⁸

The *Cole* court then obligatorily reminded that the recall is a political process:

Our holding does not mean that courts have the authority to look at the truthfulness of the charges. . . . However, we believe the legislature intended to limit the recall right by allowing courts to review the sufficiency of charges as a matter of law and decide whether the facts, if true, establish a *prima facie* act of misfeasance, malfeasance or violation of the oath of office.¹⁰⁹

The history of judicial review in the Washington recall process emphasizes the striking contrast between recall as a purely political process, where any or no reason is sufficient, and recall that injects the judiciary into the political process. While the Washington Supreme Court stressed that only the electorate can determine the truthfulness of the charges, the charges may never be brought before the people if the courts find that they are legally insufficient. Under this system, the voters may recall subject to close judicial scrutiny, a combination which can blur the distinction between the political and judicial processes. However, this blurring should not necessarily be viewed as negative. Perhaps judicial incorporation into the model is nothing more than a modification of the recall process made necessary by the increasingly complex nature of the representative process.

Indeed, politics are more complex and affect more people than ever before. The representative system requires growth and change due to the unprecedented growth of our society. The same growth which created the demand for recall in the early twentieth century also fuels the movement for narrowing and distinguishing the requirements of the recall process. When the recall statutes are refined and redeveloped, recall will be an available political tool that cannot be abused by the electorate.

B. Nebraska: A Need for Change

Due to what has been termed "recall frenzy," the Nebraska Legislature considered two recall reform bills during the 1988 session.¹¹⁰ At present, Nebraska's recall statute has no provisions that require a statement of the allegations against the targeted official.¹¹¹ The lack of a "cause" requirement has been cited as the root of the recall frenzy. According to Cynthia Johnson-Howard, legal counsel to the

108. *Id.* at 285, 692 P.2d at 803 (citation omitted)(citing WASH. CONST. art. I, §§ 33, 34).

109. *Id.* at 287, 692 P.2d at 804.

110. L.B. 1166, 90th Leg., 2d Sess. (1988); L.B. 1167, 90th Leg., 2d Sess. (1988)(these bills were indefinitely postponed, however, similar legislation has been introduced in the first session of the ninety-first Legislature).

111. *See* NEB. REV. STAT. § 32-1403 (1988).

Committee on Government, Military and Veteran's Affairs for the State of Nebraska, the bills' purposes are to make recalls less arbitrary and to remove the recall as an alternative to the referendum.¹¹² The recall, she explained, is not the time to let the official know how the voters feel about an issue.¹¹³ The new measures, if successful, will restrict the recall process and will remove recall from its single-issue orientation.

Specifically, the new bills provide additional requirements for recall petition papers, qualifications for those who circulate the petition, and penalties for those petitioners who fail to comply with the statute.¹¹⁴ In addition, the bills propose a requirement for a one hundred word statement indicating a reason or reasons for the recall. "The statement shall include an example or examples of the action or behavior for which the official is sought to be recalled."¹¹⁵ Explicitly stating that discretionary acts should not form the basis for a recall attempt, the bills also include a requirement that "[i]n no case shall any vote cast by any official as a member of any governing body . . . be included as a reason for a recall attempt."¹¹⁶ Such a showing of cause indeed will remove the referendum-like qualities from the recall process.

Despite Nebraska's move to make recall more difficult, its lawmakers still balk at allowing the judiciary to assume any affirmative role in the process. As Ms. Johnson-Howard stated in describing the benefits and concerns of including a causation requirement and its potential for appeal to a state court:

In deciding which course to take on this issue, the committee needs to consider that the further you go towards the simplistic solution, the less you affect the system as it is functioning now (this may be a pro or a con, depending on how you look at it). On the other hand, the more you tend toward a more legalistic solution—which has the advantage of truly making petition drives more accountable, the more you risk involving the judiciary system in the process.¹¹⁷

The bills attempt to address this fear of the "evil" judiciary interfering with the political process. Rather than judicial review, the bills provide for "filing clerk review."¹¹⁸ The filing clerk will review the sufficiency of the allegations with an appeal of the filing clerk's determination to the Secretary of State. Such a process ignores the judiciary as the mediator among various interests and presumes that a

112. Telephone Interview with Cynthia Johnson-Howard, Legal Counsel to the Committee on Government, Military and Veteran's Affairs for the State of Nebraska (Jan. 21, 1988)[hereinafter Interview].

113. *Id.*

114. L.B. 1167, § 3, 90th Leg., 2d Sess. (1988).

115. L.B. 1166, § 1, 90th Leg., 2d Sess. (1988).

116. *Id.*

117. Memorandum from Cynthia Johnson-Howard to the Committee on Government, Military and Veteran's Affairs for the State of Nebraska (Nov. 24, 1987).

118. L.B. 1166, § 1, 90th Leg., 2d Sess. (1988).

filing clerk effectively can guard the targeted official's interests. As a result of the fear of involving the judiciary in the political process, the Nebraska bills have given too much power to an individual who may lack the expertise to analyze the application. Unlike the clerks, the courts regularly deal with questions of factual and legal sufficiency. Furthermore, a court, as a tribunal, will provide a fairer forum than a single-member panel composed only of the filing clerk or the Secretary of State.¹¹⁹

IV. BEYOND NEBRASKA: WHAT REFORMS ARE NECESSARY?¹²⁰

To ensure that recall remains the pillar of representative democracy without destroying a public official's ability to work effectively, legislative reforms of the recall process are necessary. First, all recall statutes should require a strong showing of cause related to the public servant's official duties and specifically exclude acts of discretion associated with the office.¹²¹ Such a showing of cause should be reviewable for sufficiency in the state courts.¹²² Second, signature requirements should be changed so that recalls are neither too difficult nor too simple to bring about.¹²³ Third, legislatures should impose a requirement of good faith knowledge concerning the truth of the allegations asserted, made valid through a sworn statement.¹²⁴ Finally, statutory reform should include mandatory criminal sanctions imposed on petitioners¹²⁵ who knowingly circulate a recall petition with false allegations.¹²⁶

By protecting the targeted official along with the electorate, recall reform will protect the system of representative government as a whole. The ultimate aim of recall reform is to protect the smooth functioning of government without ignoring the interests of the voters. Removing the threat of arbitrary recalls will better ensure that an official's primary focus will be on the effective administration of government.

A. Role of the Judiciary

In a majority of states with recall statutes, the judiciary has demon-

119. Similar legislation is pending and further amendments may include tightening the "cause" requirements with judicial review.

120. *See infra* Appendix.

121. *See infra* Appendix § 17-020.

122. *See infra* Appendix § 17-150.

123. *See infra* Appendix § 17-050.

124. *See infra* Appendix § 17-030(3).

125. The term "petitioner" is used interchangeably with the term "sponsor" used in the Appendix.

126. *See infra* Appendix § 17-030(3).

strated a marked reluctance to assert itself in preventing abuse of recall by the electorate.¹²⁷ While recall is part of the political process, the judiciary should be allowed to ensure that the interests of the people are not in conflict with the interests of the targeted public official and, therefore, of the smooth functioning of government. When the judiciary summarily dismisses intervention as an encroachment on the political process, it denies its role as a mediator between competing interests. By reviewing the sufficiency of recall allegations, a court is not necessarily lawmaking or threatening the delicate balance of the separation of powers.

Of course, many state courts are stymied by the vague language of recall statutes. When a legislature does not require a showing of cause, a court cannot broadly interpret recall provisions without being accused of lawmaking. But simply because a court may not have the power to intervene, does not mean that abuse of the recall does not exist. Because recall is subject to abuse, and because the court often is unable to act to exercise review, reform that will create safeguards is necessary.

A universal requirement of a showing of cause with appeal to the state's superior court will force the courts to review the sufficiency of the allegations. Such a reform will make recall a more effective tool of democracy. It will provide for the removal of public officials who no longer meet the expectations of office without subjecting effective public servants to the harassment and expense of battling recall campaigns. When recalls are used for their intended purpose, government works more effectively for the people, but when public officials are constantly concerned with arbitrary recall campaigns, the workings of a representative government may be brought to a standstill.

Determining what allegations are sufficient may be difficult. The courts also need guidelines indicating what *should* be considered sufficient cause. The few states which already require a showing of cause have concluded that an official may be removed for a variety of often vague reasons including "misfeasance," "malfeasance," "violation of the oath of office," and "incompetence."¹²⁸

These vague terms are difficult to define and may allow recall for any reason if interpreted to their extremes. However, normal exercises of discretion should not constitute sufficient cause.¹²⁹ If the voters do not like a given discretionary act, they may vote the official out of office at the next regular election. Thus, an action such as a particular vote on an issue could not be declared an act of incompetence

127. See, e.g., *supra* notes 80-109 and accompanying text.

128. *Id.*

129. See *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wash. 2d 121, 492 P.2d 536 (1972), *overruled*, *Cole v. Webster*, 103 Wash. 2d 280, 692 P.2d 799 (1984).

sufficient to warrant recall.¹³⁰

On the other hand, if the petitioner can demonstrate that the official acted in contravention to the good of the people she or he represents, or that the official has broken the law while in office,¹³¹ then the courts should find cause, and recall should be allowed. Furthermore, by specifically excluding discretionary acts,¹³² single issues rarely will constitute sufficient cause. Instead, a petitioner must demonstrate that an official has repeatedly violated promises and has offended the electorate in order to meet the cause requirement.¹³³

Some critics suggest that a review of the sufficiency of recall petition allegations wastes the court's time. They recommend that the municipal clerk could manage the same review because a determination of the truth of the allegations ultimately will be the public's responsibility. The difficulty with permitting the clerk to determine sufficiency is that such review fails to provide the same protection to the targeted official that the judiciary would provide.¹³⁴

Unfortunately, sometimes a showing of cause is not enough to protect a public official from abuse. In order to further protect the targeted official, some critics would have a court determine whether the allegations themselves are true.¹³⁵ When the court reviews the truth of the allegations, the electorate will be almost entirely removed from the recall process. If a court determines that the allegations are true, then having a recall election seems merely obligatory—only semantically distinct from judicial removal. However, by allowing the people to determine the truth of the allegations and by allowing them

130. See *infra* Appendix § 17-020(2).

131. See *infra* Appendix § 17-020 for definitions of "misfeasance," "malfeasance," and "violation of the oath of office." Furthermore, the model statute uses the word "includes" in order to bring in actions that may not be illegal *per se* but could be considered an act in contravention of the good of the people.

132. For example, an attempted recall of San Francisco Mayor Diane Feinstein in April 1983 was based on a single issue: possession of handguns. Feinstein pushed through an ordinance banning possession of guns. While the law never went into effect because the courts determined that only the state may regulate handguns, it provided ample basis for a recall drive. *Anyone for Mayor-baiting?*, *ECONOMIST*, April 16, 1983, at 45-46.

133. Governor Evan Mecham of Arizona, provides a good example of repeated offenses (including a six-count felony indictment) leading to a recall election. The Governor was ultimately impeached before the recall election occurred. *Mecham Is Eager For Trial In Senate*, *The Dallas Morning News*, Feb. 7, 1988, at 41A, col. 1.

134. See *supra* notes 110-119 and accompanying text.

135. In *Brocek v. Bayley*, 81 Wash. 2d 831, 505 P.2d 814 (1973) (Utter, J., concurring), overruled, *Cole v. Webster*, 103 Wash. 2d 280, 692 P.2d 799, 804 (1984), Judge Utter stated that "if a petitioner phrases a cause correctly, a vote on recall will occur regardless of whether actual cause on the issues stated exists and whether there is in fact, any truth to the charge. . . . I cannot believe that this was the intent of the original drafters."

to register their assessment of the allegations by voting, the legislature rightfully permits an informed, educated electorate to control its representative government. The risk that a showing of cause or of sufficiency of the allegations does not afford elected officials enough protection is simply a risk that a democracy must take in order to ensure that the people are not deprived of their effective participation in the workings of the government.¹³⁶

B. Signature Requirements

The signature requirements vary from state to state and can affect the ability of the voters to recall officials. For example, the Washington statewide recall statutes require that petitions contain legally sufficient signatures equal to at least twenty-five percent of the votes cast for all candidates who ran for the targeted official's office in the prior election.¹³⁷ However, Washington requires thirty-five percent for some local officials. The North Dakota Constitution requires that a recall petition be signed by at least twenty-five percent of the number of voters in the last gubernatorial election in the district from which the targeted officer is to be recalled.¹³⁸ And in Georgia, the signature requirement for some state officers is fifteen percent of the registered voters at the most recent general election for the office held by the targeted official.¹³⁹ For other state officers and local officials in Georgia, the signature requirement increases to thirty percent.¹⁴⁰ Louisiana will not permit a statewide recall with less than one-third of the total electors in the voting area for which the recall is petitioned, and if the area has less than one thousand voters, the requirement increases to two-fifths.¹⁴¹

Differences in the signature requirement can either prohibit a recall or greatly simplify the process of removing a public official through recall. A signature requirement that is too high will prohibit the electorate from bringing about a recall election. But if a signature requirement falls below an acceptable floor, recall campaigns may too easily and arbitrarily turn into harassing and expensive recall elections. Overzealous recall can impede the smooth functioning of government.

The most permissive signature requirement permits a recall with

136. *But see* Robbins, *Omaha Mayor Battling on Eve of Recall Vote*, N.Y. Times, Jan. 13, 1987, at A16, col. 4 (quoting Sam Jenson). "The problem with letting the electorate decide is that the people most likely to vote are the people who think [the targeted official] is a bad person."

137. WASH. REV. CODE ANN. § 29.82.060(1) (1965).

138. N.D. CONST. art. III, § 10.

139. GA. CODE ANN. § 21-4-4(a)(1) (1982).

140. *Id.* § 21-4-4(a)(2).

141. LA. REV. STAT. ANN. § 18:1300.2(B) (West Supp. 1988).

only five percent of the voters' signatures.¹⁴² At the opposite extreme, some statutes require forty percent of the voters to register their assent.¹⁴³ In states that base the signature requirement on the number of people who voted in a given election, a light voter turnout allows a sufficient number of signatures to be obtained with relative ease. States basing the signature requirement on the number of registered voters have the strictest signature requirement because the number of registered voters is inevitably higher than the number of actual voters in any election.¹⁴⁴

In order to ensure a recall drive that is fair to both the electorate and the targeted public official, all recall statutes should base the signature requirements on a percentage of registered voters, not on a percentage of people voting in a given election.¹⁴⁵ If the signature requirement is too low, a minority will control the elections. Because recall was originally instituted by the Progressives in an effort to end minority control of representative government, to oversimplify the process would violate the intent of its creators.¹⁴⁶ In the same manner that turn-of-the-century public representatives were beholden to the will of the large corporation, public officials who are subject to easy recall are beholden to the will of varying minority factions. While this proposal will increase the difficulty of getting a recall election in some locales, it will decrease the likelihood that a public official will be harassed by a small minority of the electorate.

C. Good Faith Requirement

Because most statutes do not look to the sufficiency of the allegations, petitioners are not held accountable for statements that they make on the recall petition. Petitioners should be held accountable, and statutes should require that petitioners not only identify themselves,¹⁴⁷ but also that they certify under the penalty of perjury that the facts they are alleging are, to the best of their knowledge, true.¹⁴⁸ If a petitioner knowingly rests a recall campaign on false allegations, she or he will be guilty of a misdemeanor, punishable by criminal sanctions.

Reducing the likelihood of a recall petition based on false allega-

142. *E.g.*, FLA. STAT. ANN. § 100.361(1)(a)(6) (1983).

143. *E.g.*, KAN. STAT. ANN. § 25-4311 (1986).

144. *See generally* Fossey, *Meiners v. Bering Strait School District and the Recall of Public Officers: A Proposal For Legislative Reform*, 2 ALASKA L. REV. 41, 46 (1985).

145. *See infra* Appendix § 17-050 which provides for signatures from twenty percent of all registered voters in a given area. Twenty percent will not be prohibitive yet will demand hard work from petitioners.

146. *See supra* notes 1-22 and accompanying text.

147. *See infra* Appendix § 17-030(1)(a).

148. *See infra* Appendix § 17-030(3).

tions ensures the integrity of the recall. Once a recall petition that is based on false allegations is circulated, it becomes difficult, if not impossible, to determine how many of the signatures were obtained based on the false allegations.¹⁴⁹ While several current statutes permit the targeted official to respond to allegations on the recall ballot,¹⁵⁰ such a statement will not combat already ingrained perceptions of misdeeds.¹⁵¹

Requiring that motives of recall petitioners be reviewed would be difficult, but legislative reform that would require good faith knowledge of the facts on which the allegations are based is reasonable. The least that we can expect from those who seek to recall a properly elected official is an honest belief in their own allegations.

Thus, the requirement of a sworn statement by the petitioner, combined with the ability of the state courts to review the sufficiency of the allegations, will decrease the likelihood of abuse of recall. Recall petitioners will be required to stand behind their allegations. Targeted public officials can request review of the allegations in the state superior court. Because there will be a heavy burden on the public official to prove that she or he should not withstand the recall election, the political process will not be encumbered by overzealous intervention by the judiciary.¹⁵² Furthermore, the public will be entrusted with the most important duty of all— voting on their belief in the truth of the allegations asserted.

V. CONCLUSION

Recalls of local government officials are more and more common. Increasingly, citizens are using recall campaigns both to rid themselves of an unwanted official and to threaten an official without actually removing him or her from office. While recalls are a healthy sign of a dynamic representative democracy, such power in the hands of the electorate is not without its disadvantages. Impassioned voters can use recall as an arbitrary means of harassment, stifling the proper workings of government.

In order to maintain recall as a useful tool of democracy without threatening the proper and necessary workings of government, recall must be reformed. A recall must be based on a sufficient showing of cause with a right of appeal to the state court. Recall statutes should impose sanctions on those who knowingly file recall petitions based on false allegations. Moreover, signature requirements should be based

149. See generally Fossey, *supra* note 144.

150. See, e.g., NEV. REV. STAT. § 306.060(1) (1987).

151. See *infra* Appendix § 17-040(1).

152. See generally Fossey, *supra* note 144, at 68.

on the number of registered voters in a given area, not on the number of people voting in a previous election.

While recall is important for democracy, it can be abused. These proposals, in the first instance, will prevent unnecessary recall campaigns. Second, the reforms will provide targeted officials, like Ashland Mayor Sherilyn Moore,¹⁵³ with the substantive allegations against them. It is important that voters maintain their populist sentiments, but not at the expense of destroying representative government.

The right of recall is a privilege that protects the voters from living with costly electoral mistakes. Recall reform is necessary to protect elected officials from the arbitrary exercise of that privilege.

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153. *Supra* notes 5-7 and accompanying text.

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VI. APPENDIX¹⁵⁴Legislative Proposal: Article 17. Recall¹⁵⁵

Sec. 17-010. RECALL. Every public official who is elected or appointed to an elected municipal office may be recalled by the voters after the official has served the first 6 (six) months of the term for which he or she was elected or appointed. An official may not be subject to recall within 6 (six) months of the expiration of his or her term in office.

Sec. 17-020. GROUNDS FOR RECALL. (1) Grounds for recall are misfeasance, incompetence or violation of the oath of office during the term of office that the official is presently serving:

(a) Misfeasance includes an unlawful act committed willfully by an elected public official;

(b) incompetence includes mental or physical incapacity of an official to perform the duties of office for a period of no less than 45 (forty-five) days;

(c) violation of the oath of office includes the willful neglect or failure of an official to perform faithfully a duty required by statute.

(2) Performance of a lawful discretionary act in accordance with the official's oath of office does not constitute a basis for recall.

Sec. 17-030. APPLICATION FOR RECALL PETITION. (1) An application for a recall petition shall be filed with the municipal or village clerk and shall include:

(a) the signatures and resident addresses of at least 5 (five) registered municipal voters who will sponsor the petition;

(b) the address to which all correspondence relating to the petition may be sent; and

(c) a statement in 200 (two hundred) words or less of the grounds for the recall, stated with specificity.

(2) No county recorder, justice of the peace, registration officer or other person authorized by law to register electors and no person other than a qualified elector shall be allowed to sponsor a petition.

(3) Each sponsor of an application for a recall petition shall certify under penalty of perjury that the sponsor believes the charges set forth in the application for the recall petition are true. Knowingly

154. This model statute is a combination of various state recall statutes including those of Alaska, Arizona, California, Nebraska, and Washington. The numbers do not intentionally correspond to any particular state statute. *See generally* Fossey, *supra* note 144, at 71-75.

155. This is a proposal for reform of municipal recall. Reform for statewide offices would be substantially the same except that the filings would be made with the Secretary of State's office and not the municipal or village clerk, and the signature requirement for a statewide recall would be 15 (fifteen) percent of all registered voters in the state.

submitting a false statement in an application for a recall petition shall be punishable as a Class I misdemeanor.

(4) Additional sponsors may be added by amending the application to include their names. Each additional sponsor shall be required to comply with subsections (1), (2) and (3) of this section.

Sec. 17-040. RECALL PETITION. (1) If the municipal or village clerk determines that an application for recall petition meets the requirements of §§ 17-020 and 17-030, the clerk shall send, within 24 (twenty-four) hours, by certified mail, a copy of the application for recall petition to the targeted official along with a notice informing the official that the official may submit to the clerk a rebuttal statement of 200 (two hundred) words or less no later than 10 (ten) days after receipt of the petition's statement of grounds.

(2) When the 10 (ten) day rebuttal period has passed, the municipal clerk shall prepare a recall petition. All copies of the petition shall include:

- (a) the name of the targeted official;
- (b) the office of the targeted official;
- (c) the 200 (two hundred) word statement of the grounds for recall as set out in the application for recall;
- (d) the official's rebuttal statement if one was submitted in accordance with the subsection (1);
- (e) the date the petition is issued by the clerk;
- (f) notice that the signatures must be secured within 30 (thirty) days;
- (g) spaces for each signature, the printed name of each signer, the date of the signature, and the residence and mailing address of each signer;
- (h) a statement, with a space for the sponsor's sworn signature and date of signing, that the sponsor personally circulated the petition, that all signatures were affixed in the presence of the sponsor, and that the sponsor believes the signatures to be those of the persons whose names they purport to be and that such sponsor has not received and will not receive (either directly or indirectly) any compensation for circulating such petition or for procuring signatures thereto; and

(i) space for indicating the number of signatures on the petition.

(3) Copies of the petition shall be provided to each sponsor by the clerk. The city clerk shall keep a sufficient number of such blank petitions on file for distribution.

Sec. 17-050. SIGNATURE REQUIREMENTS. (1) The signatures on a recall petition shall be secured within 30 (thirty) days after the date the clerk issues the petition. The statement provided under § 17-040(2)(h) shall be completed and signed by the sponsor. All signatures shall be in ink.

(2) The clerk shall determine the number of signatures required on a petition and inform each sponsor. The number of signatures shall equal 20 (twenty) percent of the registered voters in the municipality.

(3) All signatures must be legible or accompanied by a legibly printed name.

(4) A signer may withdraw his or her signature upon filing an affidavit affirming the affiant's intention to withdraw his or her signature with the clerk before certification of the petition. Any signature so withdrawn shall not be counted in determining the legal sufficiency of the petition.

Sec. 17-060. SUFFICIENCY OF PETITION. (1) The copies of the petition shall be assembled and filed as a single document. Within 10 (ten) days after the date a petition is filed the municipal or village clerk shall:

(a) certify on the petition whether it is sufficient; and

(b) if the petition is insufficient, identify the insufficiency and notify the sponsors within 24 (twenty-four) hours of the determination of the insufficiency at the address provided in § 17-030(1)(b) by certified mail.

(2) An insufficient petition may be amended once to correct the insufficiency within 10 (ten) days after the date on which the petition was declared insufficient.

Sec. 17-070. NEW RECALL PETITION APPLICATION. If an application is deemed insufficient and if the application is not amended as required by § 17-060(2), a new application for a petition to recall the same official may not be filed sooner than 6 (six) months after a previous petition is rejected as insufficient.

Sec. 17-080. REAPPORTIONMENT. If, due to reapportionment, the boundaries of the district change, the recall procedure and special election shall apply to the registered voters in the new district.

Sec. 17-090. SUBMITTING THE PETITION. (1) If a recall petition is declared sufficient by the municipal or village clerk, the clerk shall submit it to the governing body at the next regular meeting or at a special meeting held before the next regular meeting.

(2) The municipal or village clerk will notify the targeted official that the recall petitions are sufficient by certified mail the same day as the meeting of the governing body to which the recall petitions will be submitted.

Sec. 17-100. ELECTION. (1) If the targeted official does not resign within 7 (seven) days of notice of the sufficiency of the recall petitions, and if a regular election occurs within 75 (seventy-five) days but not sooner than 30 (thirty) days after submission of the petition to the governing body, the governing body may provide for the recall vote at the regular election.

(2) If no regular election occurs within 75 (seventy-five) days, the

governing body shall hold a special election on a recall question within 60 (sixty) days but not sooner than 30 (thirty) days after a petition is submitted to the governing body.

Sec. 17-110. FORM OF RECALL BALLOTS. A recall ballot shall include:

(a) the grounds for the recall election as stated in 200 (two hundred) words or less on the recall petition;

(b) the rebuttal statement of the targeted official if one is provided in accordance with § 17-040(1);

(c) the following question: "Shall (name of person) be recalled from the office of (name of office)? Yes [] No [] Please mark the appropriate box with an 'X' mark."; and

(d) the statement: "A 'Yes' vote means that you are in favor of removing (name of person) from the office of (name of office) for the remainder of his or her term of office. A 'No' vote means that you would like (name of person) to remain in the office of (name of office)."

Sec. 17-120. EFFECT OF RECALL ELECTION. (1) If a majority favors recall, the office becomes vacant upon certification of the recall election.

(2) If the targeted official is not recalled, such official may continue in office, subject to further recall as provided in §§ 17-010 to 17-130.

Sec. 17-130. NEW RECALL PETITIONS. If a targeted official is not recalled, no recall petition shall be filed against that official within 6 (six) months after the recall election failed to remove him or her from office.

Sec. 17-140. ELECTION OF SUCCESSOR. (1) If the voters recall an official, the municipal or village clerk shall conduct an election for a successor to fill the unexpired term. The election shall be held at least 15 (fifteen) but not more than 45 (forty-five days) from the date of certification of the recall election.

(2) Nominations for a successor may be filed until 7 (seven) days before the last date on which a first notice of the election must be given. Nominations may not be filed before the certification of the recall election.

(3) The recalled officer may not seek re-election for the unexpired term of the office from which he or she was recalled.

Sec. 17-150. JURISDICTION OF THE COUNTY COURT. (1) Any person aggrieved by the filing of recall charges or by the failure of an election official to perform duties in relation to the recall, may file an action in the County Court for the county in which the recall petition was filed. On hearing such action, the Court shall consider the following:

(a) the sufficiency or specificity of such recall charge or charges; and

(b) the issuance of an injunction to compel performance of any act required of the municipal or village clerk or other elected official in relation to recall, or to prevent the performance of an act by the municipal clerk or other elected official in relation to recall.

(2) Any actions pursuant to subsection (a) of this statute shall be commenced no later than 10 (ten) days from the date that the targeted official received a copy of the statement of grounds for recall from the municipal or village clerk pursuant § 17-040(1). Any action pursuant to subsection (b) of this section shall be commenced within 10 (ten) days from the time the complaint arises.