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# ELECTIONS The Recall Act of 1989: Provide Specific Grounds for Recall

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# ELECTIONS

## *The Recall Act of 1989: Provide Specific Grounds for Recall*

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| CODE SECTIONS: | O.C.G.A. §§ 21-4-1 to -21 (new) |
| BILL NUMBER: | SB 37 |
| ACT NUMBER: | 688 |
| SUMMARY: | The Act replaces the Recall Act of 1979, which was struck down by the Georgia Supreme Court in 1988. The supreme court declared the original Act unconstitutional because it did not provide specific standards of misconduct supporting the recall of an elected official. The new version provides standards and guidelines governing the recall of any elected public official who, while holding public office, acts in a manner adverse to public administration. The Act also provides for the judicial review of a recall petition. |
| EFFECTIVE DATE: | July 1, 1989 |

*History*

A 1978 amendment to the Georgia Constitution authorized the General Assembly to enact a law regarding the recall of elected public officials from office.[1] The amendment directed the General Assembly to provide for procedures and grounds for "recall of public officials who hold elective office."[2] The General Assembly enacted the original version of the recall statute in 1979.[3] The statute did not contain specific grounds necessary to sustain recall, but did require that an application for recall identify specific reasons supporting the recall.[4]

The 1988 decision of *Mitchell v. Wilkerson* overturned the recall statute on the ground that it violated the state constitution by allowing the recall of a public officer without specific statutory guidelines.[5] The

1. *See* GA. CONST. art. II, § 2, ¶ 4; telephone interview with Andrew J. Whalen, attorney of record for a Fayetteville city councilwoman in Mitchell v. Wilkerson, 258 Ga. 608, 372 S.E.2d 432 (1988), (Mar. 20, 1989) [hereinafter Whalen Interview].

2. GA. CONST. art. II, § 2, (¶) 4.

3. 1979 Ga. Laws 1612.

4. *Id.*

5. Mitchell v. Wilkerson, 258 Ga. 608, 372 S.E.2d 432 (1988).

Georgia Supreme Court held in *Mitchell* that the plain language of the constitutional provision required that the recall statute enumerate specific grounds for a public official's recall.[6] The court found this requirement to be an expression of the people restricting their right to recall public officials by limiting the grounds available for recall.[7]

After the *Mitchell* decision, the public was essentially without power to remove public officials who abused the responsibilities of their office. In 1988, public interest in the involvement of several Gwinnett County Commissioners in the misuse of public funds influenced the General Assembly to modify the recall statute.[8]

*SB 37*

The Act defines the grounds for recall in a two-part test. First, the Act states that an elected official is subject to recall if the official's conduct "adversely affects the administration of his or her office *and* adversely affects the rights and interests of the public."[9] Second, one of five additional grounds must also be found.[10] These grounds include: 1) act(s) of malfeasance; 2) violation of the oath of office; 3) act of misconduct; 4) failure to "perform duties prescribed by law"; or 5) willful misuse, misappropriation, or conversion, "without authority, public property or public funds entrusted to or associated with the elective office to which the official has been elected or appointed."[11] The Act also provides for judicial review of a recall petition and additional procedures with respect to recall petitions.[12]

The original bill did not contain specific grounds for recall.[13] Limitations on the grounds for recall included only that an official's conduct adversely affects the administration of the office and the interests of the public.[14] Criticism of the bill focused on its failure to meet the requirements of the Georgia Supreme Court in the *Mitchell* decision.[15] The concern was

6. *Id.* at 608, 372 S.E.2d at 433. The Georgia Supreme Court found that the constitution mandated that the General Assembly provide specific grounds for recall. Justice Weltner, in dissent, found the power to determine the grounds for recall to be within the "substantial right" of the people. *Id.* at 609, 372 S.E.2d at 434.

7. *Id.* at 609, 372 S.E.2d at 433.

8. Telephone interview with Senator Donn M. Peevy, Senate District No. 48 (Mar. 20, 1989) [hereinafter Peevy Interview]. The Gwinnett County Commissioners were accused of excessive spending on business trips to New York. This alleged misuse of public funds led to the public cry for a new recall statute. *Id.*

9. O.C.G.A. § 21-4-4(c) (Supp. 1989) (emphasis added).

10. *Id.*

11. O.C.G.A. § 21-4-3(7)(B)(i)—(v) (Supp. 1989).

12. O.C.G.A. § 21-4-6 (Supp. 1989).

13. SB 37, as introduced, 1989 Ga. Gen. Assem.

14. *Id.*

15. Whalen Interview, *supra* note 1.

that a public official could be recalled based merely on his or her discretionary performance in office.[16]

A Senate floor amendment, subsequently passed by a unanimous vote, added five specific grounds for recall: 1) act(s) of malfeasance; 2) violation of oath of office; 3) act of misconduct; 4) incompetence; and 5) failure to perform prescribed duties.[17] These grounds were revised in the final version of SB 37.[18] The Senate floor amendment also expressly prohibits "discretionary performance of a prescribed duty" as a ground for recall.[19]

The House Committee on Governmental Affairs then removed the ground of incompetence and added a special provision for judicial review.[20] Judicial review is limited "solely to a review of the legal sufficiency of the recall ground or grounds and fact or facts upon which such ground or grounds are based as set forth in such recall application."[21] This provision gives jurisdiction over the recall to the superior court adjoining the county in which a recall petition has been filed in which sits the judge who has the greatest number of years presiding in the superior court and who resides outside the county in which the recall petition arises.[22] If the reviewing court determines that the grounds for recall are insufficient, a discretionary appeal is available. Conversely, if the recall grounds are found sufficient, the recall petition may continue.[23]

The Association County Commissioners of Georgia and the Georgia Municipal Association recommended the provision for judicial review in a proposed draft of the Recall Act.[24] The Senate rejected the provision and did not include judicial review in the original bill or in the floor amendment compromise.[25] Judicial review was criticized as unnecessary protection for public officials.[26] Proponents of its passage, however,

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16. *Id.*

17. SB 37 (SFA), 1989 Ga. Gen. Assem.

18. SB 37 (HCS), 1989 Ga. Gen. Assem.

19. SB 37 (SFA), 1989 Ga. Gen. Assem.

20. SB 37 (HCS), 1989 Ga. Gen. Assem.

21. *Id.*

22. *Id.*

23. *Id.*

24. The Association County Commissioners of Georgia (ACCG) and the Georgia Municipal Association (GMA) proposed a draft for The Recall Act of 1989 (available in Georgia State University College of Law Library). The lobbyists for the ACCG and GMA were key figures in the implementation of the five grounds for recall in the compromise bill. They argued that the original bill was too broad and would still allow the removal of public officers for performance of their discretionary duties. The grounds contained in the Senate bill are similar to statutes in other states. Whalen Interview, *supra* note 1.

25. *See* SB 37, as introduced, 1989 Ga. Gen. Assem.; SB 37 (SFA), 1989 Ga. Gen. Assem.

26. Peevy Interview, *supra* note 8. Criticism of the judicial review provision is based on the theory that the recall process is best left as an election process and not complicated with such judicial matters. Under such a theory, judicial review should be provided for elsewhere, not in the recall laws. *Id.*

claim the assurance of judicial review will prevent unjustified claims against public officials and to some degree protect the officials' use of private funds in defense of such claims.[27]

The final version of SB 37 included a fifth ground for recall which replaced the ground for incompetence deleted by the House Committee on Governmental Affairs.[28] That ground, added by a Senate amendment, relates to the misuse of public funds or property.[29] The addition of this ground provides the public with a specific tool to remove public officials involved in claims similar to those in which the Gwinnett County Commissioners were involved, namely, the misuse of public funds.[30]

The judicial review provision was also revised in the final version. That version limited the extent of review to the "legal sufficiency of such alleged fact or facts as to form and not as to truth."[31]

Based on the requirements in *Mitchell*, the 1989 Recall Act should now withstand state constitutional inspection because of the additional requirement that recall be supported by one of five specified grounds necessary for the recall of a public officer.[32] The Recall Act of 1989 provides the people with the power to remove public officials who are acting adversely to the interests of the public, and it also provides officials with adequate protection from recall petitions based merely on the officials' participation in unpopular decisions.

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27. Whalen Interview, *supra* note 1. The concern behind the judicial review provision is that some officeholders might be recalled simply because they are involved in controversial matters. The judicial review process will insure the public officer receives due process before a recall election is called. *Id.*

28. O.C.G.A. § 21-4-1 (Supp. 1989).

29. *Id.*

30. Peevy Interview, *supra* note 8.

31. O.C.G.A. § 21-4-6(d) (Supp. 1989).

32. Whalen Interview, *supra* note 1.