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RECALL IN WASHINGTON: A TIME FOR REFORM

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Recall is the electoral process by which an elected officer is removed before the expiration of the term of office.[1] All but 10 states provide for the recall of public officers,[2] but Washington is the only state whose constitution provides that recall by the electorate must be for cause.[3] Concern over abuse of the recall process in Washington has prompted a call for legislative reform.

Washington Supreme Court Justice Utter proposed legislative reform of the recall laws in a recent concurring opinion in *Bocek v. Bayley*.[4] That opinion, in which Justice Stafford joined, dealt not with the substance of the present recall laws but rather with the reluctance of the judiciary to assert itself in preventing misuse of the recall

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1. Ch. 146, [1913] Wash. Laws 454, *codified in* WASH. REV. CODE ch. 29.82 (1963), *as amended,* (Supp. 1973).

2. The 10 without provisions for recall are Alabama, Delaware, Indiana, Kentucky, Maryland, New York, Pennsylvania, Rhode Island, Utah and Vermont. Note, 48 WASH. L. REV. 505 n.6 (1973).

3. WASH. CONST. art. I, §§ 33, 34 (amend. 8). Most state provisions require only a general statement of the grounds on which the demand for recall is based. *See, e.g.,* ARIZ. CONST. art. VIII, § 1; CAL. CONST. art. XXIII, § 1. Alaska requires that recall charges allege lack of fitness for office, incompetence, neglect of duties or corruption. ALASKA STAT. §15.45.510 (1971).

4. Justice Utter stated:

> It makes no sense to affirm that we have recall for cause and then not have at least a prima facie showing of the truth of the allegations made before the courts. The remedy, as suggested in *Cudihee v. Phelps,* 76 Wash. 314, 331, 136 P. 367 (1913), may be for the legislature to more specifically state in the enabling legislation that the courts are to first try the question of whether a prima facie case for recall exists.

81 Wn. 2d 831, 839–40, 505 P.2d 814, 819 (1973).

Appellants in *Bocek* were three school district directors against whom a recall campaign had been commenced by school district voters. The legal issues presented by the case related solely to the sufficiency of the five charges upon which the recall against each board member was based. The court paraphrased the charges:

> The recall charges against the appellants involved allegations of misfeasance and malfeasance while in office, as well as violations of the oath of office, and were essentially as follows: Appellant Bocek was charged with an invasion of privacy in allegedly publishing confidential information of the school district. All three appellants were charged with having held secret meetings in violation of the Open Public Meetings Act (RCW 42.30). Additionally, all three were charged

process.[5] The court has limited the scope of judicial review in recall cases to a facial examination of the recall charges to determine whether the charges state sufficient cause for recall.[6] The supreme court has consistently refused to consider the truth of the charges,[7] or the motives[8] of the petitioners which prompt the recall of elective officers.

Although such a narrow scope of review accords with the court's traditional role of nonintervention in political controversies,[9] the nature of the recall is such that it encourages two abuses which would not occur but for the court's refusal to consider them:

(1) The charges, though adequate on their face as cause for recall, may lack any factual basis whatsoever;

(2) The charge may be entirely unrelated to the dispute; the real political issue or dispute between the recall petitioners and the elective officer may be submerged beneath the rhetoric of the charge.

Recognition of these factors prompted Justice Utter, joined by Justice Stafford, to comment in *Bocek:*[10]

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with refusing to bargain in good faith. Lastly, the three appellants were charged with employing an allegedly unqualified school superintendent.

Id. at 833–34, 505 P.2d at 815–16 (footnotes omitted).

The supreme court found each of the charges sufficient to support a recall and remanded the matter for ultimate decision to the electorate of the Federal Way School District.

5. *Id.* at 838, 505 P.2d at 818.

6. *See, e.g.*, State *ex rel.* Citizens Against Mandatory Bussing v. Brooks, 80 Wn. 2d 121, 124, 492 P.2d 536, 539 (1972).

7. *See, e.g.*, Cudihee v. Phelps, 76 Wash. 314, 136 P. 367 (1913); Skidmore v. Fuller, 59 Wn. 2d 818, 370 P.2d 975 (1962); State *ex rel.* LaMon v. Westport, 73 Wn. 2d 255, 438 P.2d 200 (1968).

8. *See, e.g.*, Roberts v. Millikin, 200 Wash. 60, 93 P.2d 393 (1939); Skidmore v. Fuller, 59 Wn. 2d 818, 370 P.2d 975 (1962).

9. *See, e.g.*, State *ex rel.* Donohue v. Coe, 49 Wn. 2d 410, 302 P.2d 202 (1956) (court lacked jurisdiction, absent statutory grant, to prohibit the secretary of state from certifying an initiative measure to the ballot); State *ex rel.* Case v. Superior Court, 81 Wash. 623, 143 P. 461 (1914) (judicial interference based upon express statutory provisions). In *Donohue*, the court restated the limitation on judicial authority:

> In approaching the question of the power of the secretary and of the courts in determining questions arising incidental to the submission of an initiative measure to the voters, it is to be remembered that we are dealing with a political and not a judicial question, except only in so far as there may be express statutory or written constitutional law making the question judicial. Speaking generally, it may be said that the legislature might have committed wholly to administrative officers all questions arising under the law incidental to the submission of initiative measures to the people, without any right of review in the courts whatever, except, possibly, pure questions of law.

49 Wn. 2d at 417, 302 P.2d at 206, *quoting Case, supra* at 633–34, 143 P. at 464.

10. 81 Wn. 2d at 839, 505 P.2d at 819 (emphasis added).

> I concur in this case only because a majority of this court believe we are bound by *State ex rel. LaMon v. Westport,* 73 Wn.2d. 255, 438 P.2d 200 (1968), and the authority upon which it is based. We there held that courts are limited to examination of the charges stated and cannot inquire into factual matters extraneous to the allegations. Although our proceedings for recall are *theoretically to be for cause,* the interpretation *LaMon* and other cases place on this provision of our constitution means that if a petitioner *phrases the charge 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.*
>
> This procedure readily lends itself to public officials being made subject to recall *where the real issues for dissatisfaction are not publicly stated.* The general public is denied both an opportunity to hear debate on the real issues involved and the opportunity to make an intelligent choice on these issues. I cannot believe this was the intent of the original drafters of our constitution.

In early cases raising the sufficiency of recall charges, the court curbed abuse of the recall process by means of a careful and literal reading of the constitutional recall provisions, and the statutes implementing those provisions. While other states have tolerated mistreatment of public officers through the recall process,[11] the Washington court has interpreted both constitutional and statutory provisions as expressions of an intent to preserve the remedy, while avoiding its abuse.[12]

A more recent trend, typified by *LaMon* and the "other cases," to which Justice Utter referred, evidences a disposition to permit resolution of recalls through the ballot box rather than through the judicial process. This recent trend, abandoning sub silentio the earlier precedents and severely eroding the extent of judicial review, has encouraged a significant increase in the number of recall elections throughout the state[13] and an expansion of the people's power of recall. Such expansion, however, is contrary to the intent of the framers of the constitutional recall provisions who sought to limit application of the recall to

11. *See, e.g.,* State *ex rel.* Topping v. Houston, 94 Neb. 445, 143 N.W. 796 (1913); Good v. Common Council, 5 Cal. App. 265, 90 P. 44 (1907).

12. *See* Cudihee v. Phelps, 76 Wash. 314, 136 P. 367 (1913); Gibson v. Campbell, 136 Wash. 467, 241 P. 21 (1925).

13. A total of 57 recall petitions have been circulated since 1913; 37 of these have been filed in the past 10 years. *See* Appendix *infra.*

the removal of "wrongdoers" occupying elective office.[14] The abuse of the recall, initially thwarted by adoption of the constitutional provisions, has thus emerged as a problem.

Other commentators[15] who have examined the law of recall in Washington agree with Justice Utter that new legislation is necessary to redirect use of the recall so that it will function as intended in the Washington political and governmental system. The purpose of this article is threefold: (1) to trace the history of recall in Washington, including the enactment of our present recall statutes and their fundamental principles; (2) to examine the reasons behind the apparent judicial retreat from those principles; and (3) to propose amendments to the present recall statutes to implement the constitutional intent.[16]

I. DEVELOPMENT OF THE RECALL IN WASHINGTON

Provisions for the recall of public officers did not appear in the Washington constitution until 1912 when a constitutional recall referendum, proposed by the state House of Representatives, was passed by the voters.[17] The constitution of 1889 provided two devices for removal of officers: (1) impeachment of the governor, state officers and members of the judiciary;[18] and (2) judicial removal, for cause, of all state officials not subject to impeachment.[19] These devices are procedurally cumbersome and thus largely ineffective: Impeachment be-

14. *See* discussion of legislative intent in Part I *infra*. "Wrongdoers occupying elective office" contemplates officers who commit malfeasance or misfeasance during a term of office, or violate their oaths of office. *See* discussion in Part III-A *infra*.

15. *See* Note, 48 WASH. L. REV 503, 511 (1973) and Note, 8 GONZAGA L. REV. 831, 845 (1972).

16. The most material of these proposed amendments include: (1) the specification of the constitutional grounds for recall; (2) the specification of the particularity with which recall charges must be stated in the recall petition; (3) the grant of jurisdiction to the courts to determine whether recall charges have a prima facie basis in fact. *See* Part III *infra*.

17. Ch. 108, §1, [1911] Wash. Laws 504.

18. WASH CONST art. V, § 2, provides:
The governor and other state and judicial officers, except judges and justices of courts not of record, shall be liable to impeachment for high crimes or misdemeanors, or malfeasance in office, but judgment in such cases shall extend only to removal from office and disqualification to hold any office of honor, trust or profit, in the state. The party, whether convicted or acquitted, shall, nevertheless, be liable to prosecution, trial, judgment and punishment according to law.

19. WASH. CONST. art. V, §3, provides:
All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law.

fore the state legislature has been used against a Washington state officer only once;[20] judicial removal has infrequently been used to rid a public office of a wrongdoer[21] and seldom before that officer was convicted of a crime relating to his public duties.[22] Since the constitutional removal provisions were not self-executing, it was left to the legislature to set forth the specific acts of official misconduct that would permit courts to declare an office forfeited by its elected occupant.[23]

Despite the lack of a constitutional recall provision prior to 1912, recall of locally elected officers in Washington was not unknown. A number of city charters provided for recall by the electorate.[24] These recall provisions failed to include limitations on the grounds for recall and thus left officers removable at public will. Recall petitioners were required only to state in their petitions the basis of their disagreement with the elected officer in question. The constitutionality of such recall provisions was upheld in 1909 as an inherent power of the people absent some constitutional limitation.[25]

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20. In 1909 the state House of Representatives voted to impeach John H. Shively, then State Insurance Commissioner by a 90 to 0 vote. WASH. H.R. JOUR. 68 (EX. Sess. 1909). Thereafter, Shively was acquitted in the state Senate although more than a majority voted to convict. WASH. S. JOUR. 834–48 (EX. Sess. 1909).

21. *See, e.g.*, State *ex rel.* Knabb v. Frater, 198 Wash. 675, 89 P.2d 1046 (1939); State v. Miller, 32 Wn. 2d 149, 201 P.2d 136 (1948); Directors of School Dist. No. 302 v. Libby, 135 Wash. 233, 237 P. 505 (1925).

22. *See, e.g.*, State *ex rel.* Zempel v. Twitchell, 59 Wn. 2d 419, 367 P.2d 985 (1962); State *ex rel.* Carroll v. Simmons, 61 Wn. 2d 146, 377 P.2d 421 (1962).

23. The legislature enacted WASH. REV. CODE § 42.12.010 (1963), which provides:

> Every office shall become vacant on the happening of either of the following events before the expiration of the term of such officer. First, the death of the incumbent; second, his resignation; third, his removal; fourth, his ceasing to be an inhabitant of the district, county, town or village for which he shall have been elected or appointed, or within which the duties of his office are to be discharged; fifth, *his conviction of an infamous crime, or of any offense involving a violation of his official oath; sixth, his refusal or neglect to take his oath of office, or to give or renew his official bond, or to deposit such oath or bond within the time prescribed by law;* seventh, the decision of a competent tribunal declaring void his election or appointment; eighth, *whenever a judgment shall be obtained against such officer for breach of the condition of his official bond.* [Emphasis added.]

In addition, the legislature has declared that any officer violating the provisions of the code of ethics for municipal officers, WASH. REV. CODE ch. 42.23 (Supp. 1973), shall forfeit his right to hold office. *Id.* § 42.23.050.

24. *See, e.g.*, EVERETT CITY CHARTER § 281 (1890); CHARTER OF THE CITY OF SEATTLE art. XVIII, § 11 (1907).

25. Hilzinger v. Gillman, 56 Wash. 228, 105 P. 471 (1909). However, the same was not true of the initiative and referendum, which were not within the power of the people prior to their incorporation into the state constitution in 1912. *See* Ruano v. Spellman, 81 Wn. 2d 820, 823, 505 P.2d 447, 449 (1973).

These early recall provisions were intended to empower the public to remove their elected officers at will as a demonstration of their disagreement with public policy on particular issues, just as the people now have the right to overrule the legislature by exercise of the referendum and the initiative.[26] As the Washington court noted in *Stirtan v. Blethen*:[27]

> It cannot be questioned that the recall and its usual concomitant, the referendum, are wholesome means to the preservation of responsible popular government. They embody a principle as old as the English constitution. The frequent appeals of the English ministry from a vote of Parliament to a vote of the people on a given measure, requiring the members of Parliament to stand for reelection upon that measure as an issue . . . is obviously but a recall as to the personnel of the government and a referendum as to the given measure.

However, unlike its "concomitant, the referendum," recall at will not only permitted recall petitioners to influence the decisions to which they objected, but it also penalized public officers for taking a position contrary to that of the recall petitioners. The recall provided the majority of the voters with both a device for expressing their political sentiments, and a weapon to brandish against the elected officer who disagreed with a vociferous political group. Thus, the recall had the potential of wreaking destruction when wielded by a mob or demagogue.

The danger that a public officer might bend his personal conviction to a group's clamor to avoid an end to his political career was recognized, but not alleviated, by the court in *Hilzinger v. Gillman*:[28]

> The whole scheme or system of the charter makes it apparent that the right of recall of elective officers was reserved to the people, to be exercised at any time the public interest was thought to require it. . . . Like the British ministry, an elective officer under the charter is at all

26. In Yelle v. Kramer, 83 Wn. 2d 464, 476, 520 P.2d 927, 934 (1974), the supreme court explains:
> By the referendum initiated either by a petition signed by the required number of registered voters or by direction of the legislature itself, the electorate either approves or rejects an act of the legislature. By the initiative the electorate may propose and enact legislation whether it amends existing legislation or enters an entirely new field.

27. 79 Wash. 10, 14, 139 P. 618, 620 (1914).
28. 56 Wash. 228, 233–35, 105 P. 471, 473–74 (1909).

> times answerable to the people for a failure to meet their approval on measures of public policy . . . .
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> . . . .
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> . . . Whether the interests of the city will be better subserved by a ready obedience to public sentiment than by a courageous adherence to the views of the individual officer . . . is a political and not a legal question.

Although the court in *Hilzinger* found the curbing of recall at will to be beyond judicial power, the legislature in 1911 attempted to alleviate the danger with a referendum proposing a limitation on the people's power of recall.[29] The referendum, approved by the voters in 1912, added to the state constitution the present provisions for the recall of elective officers.[30] A careful examination of the history of the referendum clearly indicates that the legislature intended to distinguish the people's right to legislate by initiative from their power to remove an elected officer by recall election, and to end recall at will of elective officers.

The recall amendment to the state constitution was introduced in the House as a constitutional referendum, House Bill 62 (H.B. 62).[31] As initially introduced, H.B. 62 did not require that recall be predicated upon alleged acts of misfeasance or malfeasance while in office or upon a violation of the oath of office.[32]

Following its first reading, H.B. 62 was referred to the House

29. Ch. 108, [1911] Wash. Laws 504.

30. The referendum became the eighth amendment to the state constitution. WASH. CONST. art. I, §§ 33, 34.

31. WASH. H.R. JOUR. 56 (1911). The proposed amendment contained two sections: the first section dealt with the nature of the recall and set forth formulas for the number of signatures necessary to place a recall on the ballot; the second section directed the legislature to enact laws to render the recall operative. H.B. 62, 12th Sess., WASH. H.R. BILLS (1911).

32. Section 1 of H.B. 62 initially provided:

> Every elective public officer in the State of Washington is subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state, from which he was elected whenever a petition demanding his recall, setting forth the reasons for such demand, signed by not less than twenty-five per cent. of the qualified electors in the state, or political subdivision of the state, from which he was elected, the percentage required to be computed from the total number of votes cast for all candidates for his said office to which he was elected at the preceding election, is filed with the officer with whom a petition for nomination, or certificate for nomination, to such office must be filed under the laws of this state, and the same officer shall call a special election as provided by the general election laws of this state, and the result determined as therein provided.

H.B. 62, 12th Sess., WASH. H.R. BILLS (1911).

Committee on Constitutional Reform, which after some dispute reported the bill out of committee on January 25, 1911.[33] The minority members of the committee recommended to the floor that the recall referendum go to the people in its original language, without specifying the grounds for recall.[34] The majority of the committee, however, recommended to the floor of the House that the language of H.B. 62 be amended in numerous ways.

In its crucial recommendation dealing with the requirement of specific grounds for recall, the committee majority recommended that the words "setting forth the reasons for such demand" be stricken from Section 1, and recommended the addition of the phrase "reciting that such officer has committed some act or acts of malfeasance while in office, or who [*sic*] has violated his oath of office, stating the matters complained of."[35] After extended debate, the committee majority's proposal was incorporated into the recall referendum.[36]

At stake in this episode of legislative history was the scope of the constitutional recall provisions. The language stricken by the House committee was similar to the recall language in the Everett City Charter, which the state supreme court had construed in *Hilzinger v. Gillman*[37] as permitting recall at will. The newly inserted reference to malfeasance while in office was clearly taken from the removal provisions of the state constitution,[38] which language had been construed prior to 1911 as contemplating criminal activity by the elective public officer before the commencement of judicial removal proceedings.[39]

33. WASH. H.R. JOUR. 190 (1911).

34. The committee minority view was expressed in a letter which stated:

Mr. Speaker:

We, a minority of your committee on constitutional revision, to whom was referred House Bill No. 62, entitled, "An act to amend article one (I) of the constitution of the State of Washington, authorizing and empowering the voters to call a special election at any time to recall and discharge any elective public officer and to elect his successor, by adding thereto at the end of said article one (I) two new sections, which shall be numbered sections 33 and 34 of said article one (I)," have had the same under consideration, and we respectfully report the same back to the House with the recommendation that it do pass.

WASH. H.R. JOUR. 191 (1911).

35. *Id.* at 190.

36. *Id.* at 191.

37. 56 Wash. 228, 105 P. 471 (1909).

38. *See* WASH. CONST. art. V, § 3.

39. *See* State *ex rel.* Whitney v. Friars, 10 Wash. 348, 39 P. 104 (1894). Pierce's Code of Washington Criminal Laws at the time of the enactment of the recall referendum contained a crime "malfeasance in office," now codified as WASH. REV. CODE § 42.20.080 (1963).

The overlapping character of the recall and judicial removal provisions of the state constitution is also evidenced by the inclusion in the recall referendum of the phrase "violation of his oath of office."[40] All oaths of office in Washington include the obligation to faithfully discharge the duties of the particular office.[41] A failure to comply with the oath constitutes nonfeasance in office, which is a misdemeanor, as it was in 1911.[42]

The conclusion is inescapable that the drafters of the constitutional recall provisions deliberately sought to eliminate recall at will and permit recall only for cause. By requiring that recall petitions recite acts previously construed as sufficiently wrongful to invoke criminal penalties, the framers obviously intended to prevent recall elections from reflecting on the popularity of the political decisions made by elective officers. The passage of the committee majority's amendment to H.B. 62 served to check the previously unfettered power of the people to recall their elective officers at will.[43]

A final piece of evidence from the eighth amendment itself further documents the conclusion that its drafters consciously proposed a limit on the people's power to recall. The eighth amendment states:[44]

> The legislature shall pass the necessary laws to carry out the provi-

40. WASH. REV. CODE § 42.12.010 (1963), the judicial removal statute, specifically makes conviction "of any offense involving a violation of his official oath" grounds for the forfeiture of an elective office.

41. *See, e.g.*, WASH. REV. CODE § 43.01.020 (1963), which provides that elected state officers take the following oath:

> I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the state of Washington, and that *I will faithfully discharge the duties of the office of (name of office) to the best of my ability*. [Emphasis added.]

42. WASH. REV. CODE § 42.20.100 (1963), taken from § 82 [1854] Wash. Terr. Laws 90, provides:

> Whenever any duty is enjoined by law upon any public officer or other person holding any public trust or employment, their willful neglect to perform such duty, except where otherwise specially provided for, shall be a misdemeanor.

For applications of this statute to particular officers' misconduct, see State v. Sefrit, 82 Wash. 520, 144 P. 725 (1914); State v. Twitchell, 61 Wn. 2d 403, 378 P.2d 444 (1963).

43. The cases involving the right to recall decided immediately before and immediately after the recall amendment was adopted, substantiate the conclusion that the recall amendment was not a grant of power, but instead a limitation upon the people's right to recall. Although the supreme court had held that the people's power to recall elective officers at will was an inherent power (*see* note 25 *supra*), the court held *after* the passage of the amendment that the right to recall officers at will pursuant to city charter was limited and preempted by the amendment which imposed recall for cause only. *See* State *ex rel.* Lynch v. Fairly, 76 Wash. 332, 136 P. 374 (1913).

44. WASH. CONST. art. I, § 34 (emphasis added).

> sions of section thirty-three (33) of this article, and to facilitate its operation and effect without delay: *Provided, That the authority hereby conferred upon the legislature shall not be construed to grant to the legislature any exclusive power of lawmaking nor in any way limit the initiative and referendum powers reserved by the people.*

The proviso expressly maintains intact the people's powers of initiative and referendum.

Why was it necessary to mention the referendum and initiative powers in a constitutional provision governing recall? As previously suggested,[45] the courts had recognized that recall at will served the dual function of removing a politically unpopular elective officer and voicing disapproval of an unpopular but otherwise legal decision or act in which the elective officer had participated. The constitutional draftsmen of the eighth amendment clearly sought to end this dual function of recall, and to limit the recall solely to the removal of wrongdoers from elective office, while leaving to the people the separate political remedies of initiative and referendum by which to voice their disapproval of particular governmental decisions. To accomplish this separation, the constitutional framers limited the recall of elective officers to those instances in which charges of a criminal nature had been filed, but at the same time clearly stated that the diminution of recall at will would in no way diminish the people's power of initiative or referendum.

Any doubt that the amendment was intended to limit recall to charges of wrongful conduct was dispelled by the passage of the recall enabling legislation, now R.C.W. ch. 29.82.[46] In Section 1 of the enabling act, the legislature repeated the constitutional requirement that recall charges recite acts of misfeasance or malfeasance in office, or violation of the oath of office, and then added the phrase "or has been *guilty* of any two or more of the acts specified in the Constitution as grounds for recall."[47] The use of the word "guilty" evidences the

45. *See* text accompanying note 27 *supra*.
46. Ch. 146, [1913] Wash. Laws 454.
47. WASH. REV. CODE § 29.82.010 (1963) provides in full:
Whenever any legal voter or committee or organization of legal voters of the state or of any political subdivision thereof shall desire to demand the recall and discharge of any elective public officer of the state or of such political subdivision, as the case may be, under the provisions of sections 33 and 34 of article 1 of the Constitution, he or they shall prepare a typewritten charge, reciting that such officer, naming him and giving the title of his office, has committed an act or acts

legislative intent to limit the grounds for recall to charges of serious, wrongful conduct, not for participation in unpopular decisions.

Section 1 of the act also expanded on the express words of the constitutional amendment dealing with the language of the charges themselves. While the eighth amendment provided only that the charges need "state the matters complained of," the enabling act provided that the recall charges "shall state the act or acts complained of in concise language without unnecessary repetition."[48] The language added by the statute clearly was taken from the criminal code of 1881[49] which sets forth the specificity required for a criminal indictment or information.[50] Thus, the legislature again pronounced that the recall should be viewed in a criminal context and not as simply a device for expressing disapproval of an elective official's legal but unpopular conduct.

II. RECALL AND THE COURT

The record of legislative and constitutional intent to limit the people's right to recall makes it difficult to rationalize, in terms of legal scholarship, the abrupt judicial departure in recent years from the clear constitutional and statutory language governing recall. The opinions of the supreme court for more than 50 years observed the distinctions between recall at will and recall for cause.[51] However, the court in *Danielson v. Faymonville*[52] in 1967, by liberally con-

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of malfeasance, or an act or acts of misfeasance while in office, or has violated his oath of office, or has been *guilty* of any two or more of the acts specified in the Constitution as grounds for recall, which charge shall state the act or acts complained of in concise language, without unnecessary repetition, and shall be signed by the person or persons making the same, give their respective post office addresses, and be verified under oath that he or they believe the charge or charges to be true. [Emphasis added.]

48. WASH. REV. CODE § 29.82.010 (1963).

49. *Now codified as* WASH. REV. CODE § 10.37.050(6) (1963).

50. In Gibson v. Campbell, 136 Wash. 467, 475, 241 P. 21, 24 (1925), the court noted that there was "no difference in the thought expressed by the two statutes." Thereafter, in State *ex rel.* Walter v. Houghton, 165 Wash. 220, 224, 4 P.2d 1110, 1111 (1931), the court clearly pronounced the standard of criminal charge specificity as being applicable to recall charges:

[U]nder our recall statute, the charges must be set out in language as specific and definite as the language of a criminal information.

51. *See* Cudihee v. Phelps, 76 Wash. 314, 136 P. 367 (1913); Gibson v. Campbell, 136 Wash. 467, 241 P. 21 (1925); Skidmore v. Fuller, 59 Wn. 2d 818, 370 P.2d 975 (1962).

52. 72 Wn. 2d 854, 435 P.2d 963 (1967).

struing the recall charges in determining their sufficiency, appears to have abandoned this distinction and embarked upon a new course favoring the recall. This change in judicial attitude toward the recall has enhanced the potential for its abuse through the filing of false but legally sufficient charges.[53] The conflicts between the older and the more current decisions concerning recall appear to reflect differences in the governmental philosophies held by the past and the present members of the court.

A. Pre-Danielson

The pre-*Danielson* cases clearly begin with a view of the eighth amendment contrary to that expressed in the more recent cases: the eighth amendment is not a grant, but a limitation upon the people's inherent power to recall elective officers.[54] Thus, discussing that amendment in *Cudihee v. Phelps,* the court noted:[55]

> The people speaking in the manner provided by law, may discharge their public officers for any cause, or without any cause, as their laws may provide. . . . While it seems true that, under this constitutional provision, an officer is to be removed for cause only . . . .

Again in *Gibson v. Campbell,*[56] the court emphasized that the eighth amendment limited the power to recall elective officers at will and noted that the legislature and constitutional drafters required specific charges of misconduct to be made in the recall petition in order to protect against the "vicious" and to preserve the "salutary" purposes of recall.[57] Recall, although political, was viewed as a serious and drastic remedy like its constitutional counterparts, impeachment and judicial removal for cause.[58]

The view of recall expressed in these older cases is consistent with the intent of the legislature in the drafting of the eighth amendment to the constitution and its enabling legislation. In addition, the court's

53. The enhanced potential for abuse was recognized by Justice Utter in his concurring opinion in *Bocek*. *See* text accompanying note 10 *supra*.
54. Hilzinger v. Gillman, 56 Wash. 228, 105 P. 471 (1909).
55. 76 Wash. 314, 330–31, 136 P. 367, 373 (1913).
56. 136 Wash. 467, 241 P. 21 (1925).
57. *Id.* at 474, 476, 241 P. at 24.
58. *See, e.g.,* Gibson v. Campbell, 136 Wash. 467, 241 P. 21 (1925). It is no coincidence that all three sanctions against elective officers—judicial removal, impeachment and recall—deem malfeasance in office as grounds. *See* notes 18 & 19 *supra*.

strict adherence to criminal rules of sufficiency conformed to the view that the eighth amendment was intended both to limit recall and to act as a check on irresponsible recall charges.

B. Recent Trend

The recent decisions of the court reason from the premise that the recall provisions of the state constitute a right of the people created by the constitution. These decisions classify recall as one of a plebescite trinity which also includes the powers of referendum and initiative.[59] The issue of "cause" for recall is then less important to the court than the encouragement of citizen participation in government through the ballot box.

This recent view is evidenced in the court's remark in *State* ex rel. *Citizens Against Mandatory Bussing v. Brooks,* that "Our constitution *establishes* a very broad right of the electorate to recall elective public officials."[60] Indeed, at least one member of the court, Chief Justice Hale, has classified the powers of recall, initiative and referendum to be virtually coextensive powers of self-government:[61]

> The Eighth Amendment was and is one of a trinity of devices, along with the initiative and the referendum, designed to insure insofar as political institutions and popular political genius permits, a fair measure of self-government during an era when, for nearly a century, there have developed seemingly inexorable forces tending to remove the powers of government farther and farther from the governed.

Moreover, approval of recall at will is suggested by the court's decision in *Danielson*—after 54 years of judicial silence on the subject—to liberally construe language of the charges in favor of the recall petitioners.[62] Thus, the present court now regards the eighth amendment as a grant of the power of recall at will to the people so long as the charges include some allegation of impropriety.[63]

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59. *See* State *ex rel.* Citizens Against Mandatory Bussing v. Brooks, 80 Wn. 2d 121, 492 P.2d 536 (1972), and text accompanying notes 60 & 61 *infra.*

60. 80 Wn. 2d 121, 123, 492 P.2d 536, 538 (1972) (emphasis added).

61. *Id.* at 132, 492 P.2d at 543–44 (Hale, J., concurring in part; dissenting in part) (citations omitted).

62. Danielson v. Faymonville, 72 Wn. 2d 854, 859, 435 P.2d 963, 966 (1967). *See also* Bocek v. Bayley, 81 Wn. 2d 831, 505 P.2d 814 (1973).

63. The extent to which the court has gone in finding a charge constitutionally sufficient is evidenced in *Danielson,* in which the recalling petitioners alleged that a

The court's recent position, however, as expressed in *Danielson,* forfeits the restraints and balance previously built into the recall process. To regain that desirable balance which was intended, it is now necessary that the legislature clarify the grounds for recall and expand the court's role as a check against abuse of the recall process.

An examination of the charges which the court has found sufficient in recall cases demonstrates the need for reform. The litany of the charges rarely changes. Legislative officers are accused frequently of "vote swapping" simply because the supreme court, without more than facial examination, has found such a charge to justify a recall election.[64] Public executives are accused of knowingly hiring incompetent subordinates because the court has repeatedly (albeit reluctantly) declared this charge to justify a recall election.[65] Moreover, the charges may allege acts in terms which are libelous, such as "fraud"[66] or "conspiracy."[67]

Petitioners can level such charges with confidence that the self-imposed limits of judicial inquiry will not require the petitioners to offer judicial proof of the charges. Thus, petitioners are able to accomplish what the original drafters of the constitutional amendment intended to prevent: use of the recall simply as a device to express disapproval of an elective officer's legal but unpopular conduct. As the

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water district commissioner had committed malfeasance and misfeasance in office by circulating a petition for creation of a new water district, which act the petitioners alleged was in conflict with the commissioner's duty to operate and maintain the existing system. Justice Hill stated in dissent:

> [I]t is neither misfeasance, malfeasance, nor a violation of his oath of office for Mr. Danielson to advocate that one area in a public utility district can be better served by organizing a water district of its own. . . .

72 Wn. 2d at 863, 435 P.2d at 969. However, the majority reached an opposite conclusion by reading into the charge the unwarranted inference that a new water district would have an adverse financial effect on the old water district:

> [F]or a commissioner in office to advocate the establishment of an independent water district, in competition with the existing public utility facilty, is patently inconsistent with his duty . . . since the establishment of a competing water district . . . would lead to a loss of customers, reduced revenues, and would affect the financial stability of the district. . . .

Id. at 860, 435 P.2d at 967 (emphasis deleted).

64. *See* Pybus v. Smith, 80 Wash. 65, 141 P. 203 (1914); State *ex rel.* Nisbet v. Coulter, 182 Wash. 377, 47 P.2d 668 (1935); State *ex rel.* Walter v. Houghton, 165 Wash. 220, 4 P.2d 1110 (1931); Roberts v. Millikin, 200 Wash. 60, 93 P.2d 393 (1939).

65. *See* Morton v. McDonald, 41 Wn. 2d 889, 252 P.2d 577 (1953); Danielson v. Faymonville, 72 Wn. 2d 854, 435 P.2d 963 (1967); State *ex rel.* LaMon v. Westport, 73 Wn. 2d 255, 438 P.2d 200 (1968); State *ex rel.* Citizens Against Mandatory Bussing v. Brooks, 80 Wn. 2d 121, 492 P.2d 536 (1972); Bocek v. Bayley, 81 Wn. 2d 831, 505 P.2d 814 (1973).

66. *See* State *ex rel.* Walter v. Houghton, 165 Wash. 220, 4 P.2d 1110 (1931).

67. *See* Skidmore v. Fuller, 59 Wn. 2d 818, 370 P.2d 975 (1962).

constitutional drafters made clear, disapproval of an elective officer's legal conduct is to be accomplished by the initiative or referendum process. It is time for the legislature to reform the recall process to facilitate its proper use as a device to remove elective officers for adequate cause only.

III. A PROPOSED LEGISLATIVE REMEDY

Reform of the recall process does not require a constitutional amendment; the necessary reform is a matter for legislative action. To amend the recall laws for the purpose of (1) implementing the constitutional grounds for recall and (2) establishing the court's jurisdiction to prevent election fraud by filing of patently false charges in a recall, R.C.W. § 29.82.010 should be repealed and its subject matter set forth in three separate statutory provisions. R.C.W. § 29.82.160, the jurisdictional provisions of the chapter, should also be repealed and replaced by a specific grant of judicial jurisdiction. In addition to these amendments to the recall law, a new procedural framework should be adopted to clarify the means by which recall charges are filed and reviewed by the courts. The following subsections contain proposals for new provisions in the recall chapter together with comments upon the specific purposes of each proposed provision.

A. Grounds for Recall

While the present text of R.C.W. § 29.82.010[68] sets forth the constitutional grounds for recall, it leaves largely unresolved the issue whether the act or acts upon which the charges are predicated must occur during the term of office which the elective officer is presently serving. This question has not been answered specifically by the Washington courts, although language in *Gibson v. Campbell*[69] suggests that recall is restricted to acts of misconduct committed by the elective officer during the term of office being served when the charges are filed.[70] In those instances where an officer's wrongful con-

68. *See* note 47 *supra*.
69. 136 Wash. 467, 241 P. 21 (1925).
70. In *Gibson*, one ground for the court's finding the recall charges insufficient was that "[i]t appears that the sheriff is serving his second term of office. There is nothing in the charges to show *whether the acts complained of were committed during his first or second term in office*." *Id.* at 472, 241 P.2d at 23 (emphasis added).

duct has prompted judicial removal, some jurisdictions have limited the application of removal provisions to acts committed in the officer's present term[71] while other jurisdictions permit removal for acts committed in any term.[72] The latter view is premised upon the view that judicial removal is not penal in nature, a view shared by the Washington Supreme Court.[73] Recall, however, should not be permitted to encompass matters occurring in past terms of office since the electorate has had an opportunity to consider those acts in choosing to re-elect the incumbent to office. Policy considerations should preclude recall petitioners from resurrecting campaign issues from previous elections by filing recall charges predicated upon acts committed during prior terms of office.

The statute proposed to replace R.C.W. § 29.82.010 reads:

> The grounds for recall under the provisions of sections 33 and 34 of article 1 of the Constitution shall be an act or acts of malfeasance in office, misfeasance in office, or a violation of the oath of office, committed by any elective public officer of the state or of any political subdivision thereof during the term of office which he or she is presently serving. For the purposes of this chapter:
>
> (1) "Malfeasance in office" means an unlawful act committed willfully by any elective public officer;
>
> (2) "Misfeasance in office" means the fulfillment of a statutorily imposed duty in an unlawful or improper manner by any elective public officer;
>
> (3) "Violation of the oath of office" means the willful neglect or failure by an elective public officer to perform faithfully a duty imposed by law.

The proposed statute sets forth a specific definition of "malfeasance in office": the commission of a willful, unlawful act for which the law provides a criminal penalty.[74] This definition conforms to the meaning of that term at the time the constitutional recall provisions were adopted by the state legislature.[75]

71. *See, e.g.*, State *ex rel.* Stokes v. Probate Court, 22 Ohio St. 2d 120, 258 N.E.2d 594 (1970); State v. Scott, 35 Wyo. 108, 247 P. 699, 711 (1926); *see also* Annot., 42 A.L.R.3d 691 (1972); *cf.* State *ex rel.* Austin v. Superior Court, 6 Wn. 2d 61, 66, 106 P.2d 1077, 1079 (1940) (Robinson, J., dissenting).

72. *See, e.g.*, Newman v. Strobel, 236 App. Div. 371, 259 N.Y.S. 402, 404 (1932).

73. State *ex rel.* Zempel v. Twitchell, 59 Wn. 2d 419, 430, 367 P.2d 985, 992 (1962).

74. *See* note 39 *supra*.

75. *See* text accompanying notes 38–50 *supra*.

"Misfeasance in office," as defined in the proposed statute, includes the improper acts of public officers which have been committed in the course of their official conduct. Although traditionally misfeasance was considered a less aggravated form of impermissible, official conduct than malfeasance, misfeasance in office was punishable at common law by criminal penalty.[76]

A " violation of the oath of office," as defined in the proposed provisions, includes violation of the public trust imposed by oath on public officers to perform their duties faithfully.[77] A violation of this trust would include either the neglect of duties or the failure to perform such duties. Such violations constituted nonfeasance and were punishable by criminal penalty and removal at the time of the passage of the recall provisions.[78]

B. Initiating the Recall

The proposed provisions of R.C.W. § 29.82.020[79] parallel the present provisions of R.C.W. § 29.82.010 and make no change in the present means of preparing recall charges. However, the proposed provisions do modify the oath which must accompany the charges themselves. The proposed statute would require persons submitting the charges to have knowledge of the facts upon which the stated grounds for recall are based, rather than simply a belief that the

76. At common law misfeasance in office occurred when an official committed a breach of a positive statutory duty or improperly performed a discretionary act with improper or corrupt motives. Commonwealth v. Peoples, 345 Pa. 576, 28 A.2d 792 (1943); Robbins v. Commonwealth, 232 Ky. 115, 22 S.W.2d 440 (1929); Commonwealth v. Green, 205 Pa. Super. 539, 211 A.2d 5 (1965).

77. *See* note 41 *supra.*

78. WASH. REV. CODE § 42.20.100 (1963). *See also* note 40 *supra.*

79. The provisions proposed (new language italicized; deleted language indicated by ellipsis periods) for WASH. REV. CODE § 29.82.020 read as follows:

> Whenever any legal voter or committee or organization of legal voters of the state or of any political subdivision thereof shall desire to demand the recall and discharge of any elective public officer of the state or of such political subdivision, as the case may be, under the provisions of sections 33 and 34 of article 1 of the Constitution, he, *she,* or they shall prepare a typewritten charge, reciting:
>
> *(1) the name of the officer;*
>
> *(2) the title of the office;*
>
> *(3) the grounds for holding a recall election;*
>
> . . . which charge shall . . . be signed by the person or persons *preparing* the same, give their respective post office addresses, and be verified under oath that . . . *the persons bringing such charges have knowledge of the facts upon which the stated grounds for recall are based.*

Compare the language of the present statute at note 47 *supra.*

charges are true. The purpose of this amendment is to discourage frivolous, scurrilous and baseless charges against a public officer made solely for the purpose of harassing that officer in the performance of his elective duties. The proposed change in the oath to accompany recall charges permits the state to initiate a perjury action against persons who knowingly file false recall charges.[80] Such penalties are necessary to protect the integrity of the recall process and to emphasize that recall is a serious and drastic process by which wrongdoers in elective office are removed, not simply a process by which their unpopular decisions are reversed.

C. *Petition for Recall—Sufficiency of Grounds*

The proposed provisions of R.C.W. § 29.82.030 clarify the present language of R.C.W. § 29.82.010, which states in pertinent part:

> [T]he charge shall state the act or acts complained of in concise language, without unnecessary repetition . . . .

The proposed statute provides:

> The grounds for recall to be recited in a petition for recall are sufficient if it can be understood therefrom that the act or acts charged therein are clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. The provisions of this section shall bear the same judicial construction as R.C.W. § 10.37.050(6).

The language of the present R.C.W. § 29.82.010 has been found by the supreme court to parallel the language of the information and indictment sufficiency provisions of the criminal code of 1881 (now codified as R.C.W. § 10.37.050(6)) which was in existence at the time of the passage of recall enabling legislation.[81] As noted in *Gibson v. Camp-*

80. *See* WASH. REV. CODE § 9.72.030 (1963). Presently, one who knowingly files a false recall charge is guilty of a gross misdemeanor predicated upon the criminal libel statute, WASH. REV. CODE § 9.58.010 (1963). However, a defendant in such a case has the defense of qualified privilege. State v. Wilson, 137 Wash. 125, 241 P. 970 (1925). *Cf.* CAL. ELEC. CODE § 29214 (West 1961).

81. *See* Gibson v. Campbell, 136 Wash. 467, 241 P. 21 (1925); State *ex rel.* Walter v. Houghton, 165 Wash. 220, 4 P.2d 1010 (1931).

bell,[82] it was undoubtedly the intent of the legislature to incorporate the specificity standards for criminal charges into the recall provisions by the addition of the above language.[83] The proposed statute would simply incorporate this judicial determination into the statute to resolve any questions as to legislative intent.

D. Ballot Synopsis—Preparation

The present provisions of R.C.W. § 29.82.020 call for a quasi-judicial determination of the validity of recall charges by either the state Attorney General, the Chief Justice of the Washington Supreme Court or a local prosecuting attorney, depending upon the subject of the recall charges.[84] The purpose of the proposed amendment is to end

82. 136 Wash. 467, 241 P. 21 (1925).

83. Referring to WASH. REV. CODE §§ 29.82.010 and 10.37.050(6), the court stated:

> There ought to be observed, however, the striking similarity between the statute enacted in 1913 to carry out the provisions of the constitutional provision for recall and § 2055 of the criminal code.
>
> The recall statute says: "which charges shall state the act or acts complained of in concise language, without unnecessary repetition." Section 2055 of the criminal code requires an indictment or information to contain "A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." *It will be seen that there is no difference in the thought expressed by the two statutes.*

136 Wash. at 475, 241 P. at 24 (emphasis added).

84. The full text of WASH. REV. CODE § 29.82.020 (Supp. 1973) provides:

> If the recall is demanded of a state-wide elected official, the attorney general shall determine within fifteen days of the filing of the charge whether or not the acts complained of in the charge are acts of malfeasance or misfeasance while in office, or a violation of the oath of office, as specified in the Constitution. If the recall is demanded of a member of the State Senate or House of Representatives and the legislative district of said member lies wholly within one county, the determination shall be made by the prosecuting attorney of such county within fifteen days of the filing of the charge. If the member's legislative district extends into two or more counties, the attorney general shall make the determination within the aforesaid time. If the recall is demanded of any other official, the prosecuting attorney of the county in which the person subject to recall resides shall make such determination within fifteen days of the filing of the charge: *Provided,* That if the recall is demanded of the attorney general, the determination shall be made by the chief justice of the supreme court of the state of Washington within fifteen days of the filing of the charge. Upon determination that the recall charges meet the constitutional requirements, the attorney general or the prosecuting attorney, as the case may be, shall, within thirty days of the filing of the charge, formulate a ballot synopsis of such charge of not to exceed two hundred words, which shall set forth the name of the person charged, the title of his office, and a concise statement of the elements of the charge, and shall notify the persons filing the charge of the exact language of such ballot synopsis, and attach a copy thereof to and file the same with the charge, and thereafter such charge shall be desig-

this practice[85] which does little more than delay the issuance of recall petitions and/or delay court challenges of invalid or insufficient recall charges.[86]

Under present law, litigation over the sufficiency of the charges rarely involves the two parties to the controversy, namely the persons making the charges and the officer being subjected to recall. Instead the prosecuting attorney or the attorney general becomes the defendant in a mandamus action either by the public officer, in the event that the prosecutor declares the charges are sufficient,[87] or by the persons filing the charges should the prosecutor declare the charges insufficient.[88] Such lawsuits are undesirable because they do not bring the real parties of the controversy before the court. The proposed statute would end the quasi-judicial function of the prosecuting attorney or the attorney general as the case may be, and simply call for the preparation of a ballot synopsis in all instances within 15 days of the filing of otherwise valid recall charges.

E. Ballot Synopsis—Notice to Elective Official

The only proposed modification to the current statute [89] is to create a 15-day hiatus between the time that the ballot synopsis is prepared

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nated on all petitions, ballots and other proceedings in relation thereto by such synopsis.

85. The proposed WASH. REV. CODE § 29.82.040 (amending *id.* § 29.82.020 (Supp. 1973)) reads:

> When charges demanding the recall of a public officer are filed, the officer with whom the charge is so filed shall, within fifteen days of the filing of the charge, formulate a ballot synopsis of such charge not to exceed two hundred words, which shall set forth the name of the person charged, the title of the office, and a concise statement of the elements of the charge, and shall notify the elective officer against whom such charge or charges have been made, and the persons filing the charge, of the exact language of such ballot synopsis, and attach one copy thereof to and file the same with the charge, and thereafter such charge shall be designated on all petitions, ballots and other proceedings in relation thereto by such synopsis.

86. It is noteworthy in this context that in Claussen v. Peddycord, 69 Wn. 2d 224, 417 P.2d 453 (1966), the supreme court declared that the quasi-judicial function of reviewing recall charges did not violate the constitutional separation of powers doctrine since the review of recall charges by nonjudicial officers was subject to an ultimate judicial determination should the parties feel aggrieved.

87. *See, e.g.*, Bocek v. Bayley, 81 Wn. 2d 831, 505 P.2d 814 (1973).

88. *See, e.g.*, State *ex rel.* Citizens Against Mandatory Bussing v. Brooks, 80 Wn. 2d 121, 492 P.2d 536 (1972).

89. The text of the current statute, WASH. REV. CODE § 29.82.030 (Supp. 1972), provides:

and served upon the elective officer and the persons filing the recall charge, and the commencement of circulation of the recall petitions.[90] It is during this period that an elected officer feeling aggrieved by the charges, or persons filing charges who disapprove of the language of the ballot synopsis, should seek judicial relief from the superior court.

Under present law, actions to enjoin or compel recall election may be brought both before and after the circulation of the recall petitions. An action commenced by the officer following the circulation of recall petitions has a serious flaw: should the plaintiff prevail in challenging the sufficiency of one or more, but less than all, of the charges, the victory is hollow because the Washington court has consistently held that a recirculation of the petitions is not required even though certain charges thereon are declared insufficient.[91] To end such futile actions

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Upon being notified of the language of the ballot synopsis of the charge, the persons filing the charge shall cause to be printed on single sheets of paper of good quality twelve inches in width by fourteen inches in length and with a margin of one and three-fourths inches at the top for binding, blank petitions for the recall and discharge of such officer. Such petitions shall be substantially in the following form:

WARNING

Every person who signs this petition with any other than his true name, or who knowingly signs more than one of these petitions, or who signs this petition when he is not a legal voter, or who makes herein any false statement, shall be fined, or imprisoned, or both.

Petition for the recall of (here insert the name of the office and of the person whose recall is petitioned for) to the Honorable (here insert the name and title of the officer with whom the charge is filed).

We the undersigned citizens of (the State of Washington or the political subdivision in which the recall is invoked, as the case may be) and legal voters of the respective precincts set opposite our respective names, respectfully direct that a special election be called to determine whether or not (here insert the name of the person charged and the office which he holds) be recalled and discharged from his office, for and on account of (his having committed the act or acts of malfeasance or misfeasance while in office, or having violated his oath of office, as the case may be) in the following particulars: (here insert the synopsis of the charge); and each of us for himself says: I have personally signed this petition; I am a legal voter of the State of Washington in the precinct and city (or town) and county written after my name, and my residence address is correctly stated.

90. The proposed WASH. REV. CODE § 29.82.050 (amending WASH. REV. CODE § 29.82.030 (Supp. 1973)) reads (new language italicized):

Fifteen days after being notified of the language of the ballot synopsis of the charge, the persons filing the charge shall cause to be printed on single sheets of paper of good quality, twelve inches in width by fourteen inches in length, and with a margin of one and three-quarters inches at the top for binding, blank petitions for the recall and discharge of such officer. Such petitions shall be substantially in the following form: [see balance of present statute].

91. *See* Morton v. McDonald, 41 Wn. 2d 889, 252 P.2d 577 (1953).

The rule is that, at this stage of the proceedings, the recall petitions having been

and to prevent insufficient charges from being circulated to the public, actions challenging recall charges should be brought in the 15-day period prior to the circulation of recall petitions.

F. Enforcement Provisions—Jurisdiction—Appeals

Subsections (1), (2) and (3) of the proposed statute[92] restate the court's present jurisdiction in reviewing charges.[93] Subsections (1) and

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circulated, signed, and canvassed, only the complete failure of all the charges to meet the statutory requirements can justify enjoining the holding of the election; one charge meeting the statutory requirement is sufficient.

Id. at 892, 252 P.2d at 578; *accord,* Danielson v. Faymonville, 72 Wn. 2d 854, 435 P.2d 963 (1967).

92. The proposed statute, WASH. REV. CODE § 29.82.060 (amending WASH. REV. CODE § 29.82.160 (1963)) reads:

Any person aggrieved by the filing of recall charges or by the failure thereafter of an election official to perform duties in relation to the recall, may petition for relief to the superior court of the county constituting or containing any political subdivision in which the recall is invoked. In reviewing such petition, the superior court shall have the jurisdiction to consider the following grounds:

(1) The sufficiency or specificity of such recall charge or charges;

(2) The sufficiency or specificity of the ballot synopsis of such recall charge or charges;

(3) The issuance of a writ of mandamus to compel the performance of any act required of a public officer or to prevent the performance by any such officer of any act in relation to recall not in compliance with law;

(4) The existence or lack of facts establishing prima facie the truthfulness of such recall charge or charges *provided,* That any person challenging any such recall charge pursuant to this subsection four (4) shall have the burden of proof by clear and convincing evidence.

The supreme court shall have like original jurisdiction in relation to state officers and revisory jurisdiction over the decisions of the superior courts; *provided,* That any proceeding pursuant to subsections (1), (2) and (4) of this statute shall be commenced within fifteen days from the time that notice is given of the preparation of a ballot synopsis of such recall charge or charges and, *further provided,* That any proceeding pursuant to subsection (3) of this statute shall be commenced within ten days from the time the cause of complaint arises.

Actions brought pursuant to this statute shall be considered an emergency matter of public concern, take precedence over other cases and be speedily heard and determined. Any proceeding to review a decision of any superior court shall be begun and perfected within fifteen days after its decision in a recall election case and shall be by the supreme court considered an emergency matter of public concern and speedily heard and determined.

93. The current statute, WASH. REV. CODE § 29.82.160 (1963), provides:

The superior court of the county constituting or containing any political subdivision in which the recall is invoked shall have original jurisdiction to compel the performance of any act required of any public officer or to prevent the performance by any such officer of any act in relation to the recall not in compliance with law.

The supreme court shall have like original jurisdiction in relation to state

(2) permit the court to test the legal sufficiency of either recall charges or ballot synopses in accordance with the court's past decisions.[94] Subsection (3), in accordance with the current statute and past court decisions, grants the court power to compel correction of ministerial errors. In such instances, the court has in the past enjoined recall elections where the petitions contained the names of more than one officer,[95] where the petitioners failed to obtain the appropriate number of signatures within the statutory time limits[96] and where the petitioners failed to file a campaign finance statement required by law.[97]

Subsection (4) of the proposed statute would expand the jurisdiction of the courts to include the power to make factual determinations with regard to recall charges. In keeping with the suggestions of Justice Utter, subsection (4) would permit superior courts to consider:

> The existence or lack of facts establishing prima facie the truthfulness of such recall charge or charges *provided,* That any person challenging any such recall charge pursuant to this subsection four (4) shall have the burden of proof by clear and convincing evidence.

While this expansion of court jurisdiction would mark a departure from judicial tradition, it would not be inconsistent with the purposes behind the recall provisions[98] nor with the court's own recognition of the legislature's power to grant the court jurisdiction.[99]

In accordance with judicial tradition, the supreme court, while implicitly recognizing that an election result may be indirectly affected

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officers and revisory jurisdiction over the decision of the superior courts: *Provided,* That any proceeding to compel or prevent the performance of any such act shall be begun within ten days from the time the cause of complaint arises and shall be considered an emergency matter of public concern and take precedence over other cases, and be speedily heard and determined. Any proceeding to review a decision of any superior court shall be begun and perfected within fifteen days after its decision in a recall election case and shall be by the supreme court considered an emergency matter of public concern, and speedily heard and determined.

94. *See* Cudihee v. Phelps, 76 Wash. 314, 136 P. 367 (1913); Thiemans v. Sanders, 102 Wash. 453, 173 P. 26 (1918); Skidmore v. Fuller, 59 Wn. 2d 818, 370 P.2d 975 (1962); Bocek v. Bayley, 81 Wn.2d 831, 505 P.2d 814 (1973).

95. *See* McCush v. Pratt, 113 Wash. 7, 192 P. 964 (1920).

96. *See* Tabor v. Walla Walla, 77 Wash. 579, 137 P. 1040 (1914); Rominger v. Nellor, 97 Wash. 693, 167 P. 57 (1917) (insufficient number of signatures due to withdrawal of signatures); Mills v. Nickeus, 81 Wash. 409, 142 P. 1145 (1914).

97. *See* State *ex rel.* McCauley v. Gilliam, 81 Wash. 186, 142 P. 470 (1914).

98. See discussion of legislative history surrounding the recall provisions in Part I *supra.*

99. *See* text accompanying note 103 *infra.*

by a court decision, has declared that factual disputes pertaining to election issues should not be litigated by the courts but decided by the people.[100] Thus, it is not surprising that when first construing Section 14 of the 1913 recall act in *Cudihee v. Phelps,*[101] the court limited the scope of its own jurisdiction.

In *Cudihee,* the appellant, the King County Sheriff, sought to have recall charges against him quashed on numerous grounds, one of which was that the charges were untrue. The court deferred to the people and refused to consider the merits of the charges:[102]

> 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 involving the question of the calling of the election, but the trial of the question of whether such cause actually exists, and as to whether the officer shall be discharged, is to be had before the tribunal of the people and decided by them at the polls.

The *Cudihee* court did not, however, exclude the possibility that the jurisdiction of the court could be expanded to make such determinations. The court noted specifically that jurisdiction over the truth of the charges simply had not been expressly granted:[103] "Express constitutional and statutory provisions may make such questions triable in the courts, but we have no such provisions."

Both of these propositions enunciated in *Cudihee* have received support from the supreme court in virtually every case involving a recall campaign.[104] In no instance, however, has the court suggested or intimated that should the legislature grant it the power to make a prima facie determination of the truth of recall charges, that such jurisdiction would be inappropriate.

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100. *See* Ford v. Logan, 79 Wn. 2d 147, 151, 483 P.2d 1247, 1249 (1971); State *ex rel.* O'Connell v. Cramer, 73 Wn. 2d 85, 436 P.2d 786 (1968); State *ex rel.* Donohue v. Coe, 49 Wn. 2d 410, 302 P.2d 202 (1956); State *ex rel.* Griffiths v. Superior Court, 92 Wash. 44, 159 P. 101 (1916).

101. 76 Wash. 314, 136 P. 367 (1913).

102. *Id.* at 331, 136 P. at 373.

103. *Id.* at 331, 136 P. at 374. In *Cudihee,* the court also noted that the legislature had the power to convert the issue from a political to a judicial one:

> While it seems true that, under this constitutional provision, an officer is to be removed for cause only; yet, the question being purely a political one, *unless expressly provided otherwise by statute or constitution,* it is manifest that the tribunal before which the sufficiency of the cause is to be tried is that of the people.

Id. at 330–31, 136 P. at 373 (emphasis added).

104. *See, e.g.,* Gibson v. Campbell, 136 Wash. 467, 241 P. 21 (1925); Skidmore v. Fuller, 59 Wn. 2d 818, 370 P.2d 975 (1962).

Indeed, in the context of election fraud, the legislature has recognized the need for judicial intervention in the electoral process. In R.C.W. § 29.04.030 the legislature granted the courts jurisdiction to prevent and correct both election frauds and election errors.[105] This jurisdictional grant has been accepted without question by the court.[106]

A recall election predicated upon charges which are without factual foundation is clearly an election fraud; it is no different than an attempt by a candidate to seek an elective office for which he lacks statutory qualifications. In both instances the voting public is directed to make a choice where in fact no choice exists. In the instance of the unqualified candidate, his candidacy is void; a vote for him is a wasted vote.[107] The same holds true for the recall of an elected officer falsely charged with wrongful acts; a vote against him is more than simply unfair to him, it represents an effort to distract, thwart and

105. WASH. REV. CODE § 29.04.030 (Supp. 1973) provides:

> Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county shall, by order, require any person charged with error, wrongful act or neglect to forthwith correct the error, desist from the wrongful act, or perform the duty and to do as the court orders or to show cause forthwith why the error should not be corrected, the wrongful act desisted from or the duty or order not performed, whenever it is made to appear to such justice or judge by affidavit of an elector that:
>
> (1) An error or omission has occurred or is about to occur in printing the name of any candidate on official ballots; or
>
> (2) An error other than as provided in subsections (1) and (3) of this section has been committed or is about to be committed in printing the ballots; or
>
> (3) The name of any person has been or is about to be wrongfully placed upon the ballots; or
>
> (4) A wrongful act other than as provided for in subsections (1) and (3) of this section has been performed or is about to be performed by any election officer; or
>
> (5) Any neglect of duty on the part of an election officer other than as provided for in subsections (1) and (3) of this section has occurred or is about to occur.
>
> An affidavit of an elector under subsections (1) and (3) above when relating to a primary election must be filed with the appropriate court no later than the second Friday following the closing of the filing period for nominations for such office and shall be heard and finally disposed of by the court not later than five days after the filing thereof.

106. *See* State *ex rel.* Kurtz v. Pratt, 45 Wn. 2d 151, 157, 273 P.2d 516, 520 (1954), wherein the court states:

> If we should refuse to act in the instant matter, we would be remiss in our duty as members of the court of last resort of this state, in that we would disregard the responsibility relative to the protection and orderly conduct of elections tendered to us by the legislature in its enactment of Rem. Rev. Stat., § 5202 [now WASH. REV. CODE § 29.04.030].

107. *See* State *ex rel.* Peters v. Superior Court, 70 Wash. 662, 127 P. 310 (1912).

obstruct an elected officer's attempt to perform his public duties. In each instance it is the voters who suffer. Holding false elections erodes the confidence of the people in the ballot box. Those persons who seek to shape issues by filing recall actions should utilize a more appropriate remedy, the initiative or the referendum, whereby the issues raised can be clearly presented through public debate.[108]

In addition to expanding the jurisdiction of the courts, the proposed statute, while retaining previously existing legal remedies, would permit an elected officer to obtain prompt and meaningful judicial relief following the preparation of a ballot synopsis. By making the elected officer the party moving for judicial intervention, the statute provides its own check against abuse in two ways: first, it is unlikely that elective officers who are aware that charges against them have a foundation in fact will seek judicial relief; and second, a judicial determination that the charges are prima facie sufficient obviously would be detrimental to any public officer and therefore should make an officer reluctant to seek judicial review. The wording of the proposed statute is such that while the relief of testing the prima facie truth of charges is available, as a practical matter its exercise will be limited to those instances in which charges are so utterly frivolous, scurrilous or false that the charged official may seek judicial relief with little fear of an adverse result.

On the other hand, persons bringing recall charges will be aware that should their charges be utterly without factual basis, they will be subject to test in court, again reducing the likelihood that such charges will in fact be filed. To the extent that this would occur, the constitutional intent of limiting recall to charges for cause would be served.

IV. CONCLUSION

A resolution of the conflicts in judicial recall cases and the reinstatement of the constitutional standards of recall cannot await a change of perspective in the supreme court. Recall should not serve as a device to remove politically unpopular elective officers, or to voice disapproval of unpopular but otherwise legal decisions or acts in which elective officers have participated. Use of the recall process

108. Paget v. Logan, 78 Wn. 2d 349, 474 P.2d 247 (1970).

should be limited solely to removal of a wrongdoer from elective office. It is appropriate that the legislature heed Justice Utter's message and, through amendments to the enabling legislation, redirect use of the recall so that it functions as intended in the Washington governmental system.

APPENDIX

A survey of the recall records in the possession of the 38 elected county auditors in Washington, and the King County Department of Records and Elections, produced the following statistics:

Total number of recall petitions filed in the following 10 year periods:

1913–1923	3
1923–1933	2
1933–1943	8
1943–1953	0
1953–1963	7
1963–1974	37
	57**

The number of officers against whom recall petitions have been filed:

School officials	23
Mayors	8
City Council members	15
County officers	9
State legislators	0***
P.U.D. Commissioners	9
Justices of the Peace	2
	66**

Total number of elective officers whose recall has been voted upon 56

Total number of officers recalled 31

** The disparity between the number of recall petitions filed and the number of officers against whom recall petitions have been filed suggests that some petitions contained the names of more than one officer. Although such petitions are procedurally invalid, McCush v. Pratt, 113 Wash. 7, 192 P. 964 (1920), such petitions apparently went unchallenged.

*** *But see* Roberts v. Millikin, 200 Wash. 60, 93 P.2d 393 (1939) (challenge of recall charges against state senator). The recall petition litigated in this case was filed with the King County Auditor and apparently escaped the notice of the county's tabulator.