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Constitutional Law—Recall of Public Officers: Discretionary Acts Cannot Be a Sufficient Basis for Recall—State ex rel. Citizens Against Mandatory Bussing v. Brooks, 80 Wn. 2d 121, 492 P.2d 536 (1972)

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CONSTITUTIONAL LAW—RECALL OF PUBLIC OFFICERS: DISCRETIONARY ACTS CANNOT BE A SUFFICIENT BASIS FOR RECALL—*State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wn. 2d 121, 492 P.2d 536 (1972).

Citizens Against Mandatory Bussing, a corporation composed of voters in Seattle School District No. 1, sought to recall all seven members of the Seattle School Board. As the first step in the recall process,[1] charges against each of the directors were filed with the King County Department of Records and Elections.[2] When the election officials refused to prepare a ballot synopsis,[3] the corporation commenced an action for a writ of mandamus in superior court. That court denied

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1. WASH. REV. CODE §§ 29.82.010 *et seq.* (1965) is the statutory authority for the recall in Washington. The constitutional basis for the statute is found in Article I, §§ 33 and 34 of the Constitution of the State of Washington. These sections were added to the Constitution by amendment VIII, adopted by the Legislature (ch. 108, § 1 [1911] WASH. LAWS 504) and approved by the people in November, 1912.

The recall process is initiated by filing charges with the state attorney general or the county prosecuting attorney, depending upon whether the constituency of the subject official embraces one or more counties. The officer with whom the charges are filed, after determining that the acts complained of constitute misfeasance, malfeasance or a violation of the oath of office, must prepare a synopsis of the charges which will be placed on the recall petitions and, if sufficient signatures are gained, on the ballot in the recall election.

After the ballot synopsis is issued, the persons seeking the recall have 270 days in which to gather the signatures required for the recall of a statewide official and 180 days in which to gather the signatures required for any other official. The required number of signatures varies from 25-35% of the votes cast for the subject position in the immediately preceeding election. In no case will a recall election be held within six months of the scheduled re-election of a person serving a two year term or within ten months of such times for a person serving a four or six year term, nor will such recall election be held if the normal re-election of the person charged intervenes between the issuing of the synopsis and the filing of the requisite signatures. After it has been determined that the proper number of valid signatures has been collected, a special election will be called. The call must be made within fifteen days after the canvass of the signatures is complete, and the election must be held between 45 and 60 days after it is called. The recall of the officer is effective upon the completion of the canvass of the votes, if a majority of the voters support recall of the officer.

2. WASH. REV. CODE § 29.82.020 (1971). The person responsible for determining the sufficiency of recall charges was changed by action of the Washington Legislature in 1971. Ch. 205, § 1 [1971] WASH. LAWS 1st Ex. SESS. 950. Prior to this change, the charges were filed with and the determination made by the secretary of state, county auditor or city clerk, depending upon whether a state, county or city official was the subject of the charges. The responsibility under the amended procedure lies with the attorney general or the county prosecuting attorney, depending upon whether the constituency of the subject office embraces more than one county.

3. WASH. REV. CODE § 29.82.020 (1971). The same official who has the responsibility for determining the sufficiency of the charges (either the attorney general or the prosecuting attorney) is required to prepare the ballot synopsis.

the writ on the ground that none of the charges was legally sufficient to support recall. On appeal, the Washington Supreme Court reversed in part and remanded. *Held:* The charges directed at the mandatory bussing plan are insufficient because they alleged only acts within the proper exercise of discretion of the members of the School Board, and thus did not allege acts of misfeasance, malfeasance or a violation of oath of office.[4] The charges not directed at the mandatory bussing plan per se, however, did allege acts that would constitute misfeasance, malfeasance or a violation of oath of office and therefore are legally sufficient.[5] *State ex rel. Citizens Against Mandatory Bussing v. Brooks,* 80 Wn. 2d 121, 492 P.2d 536 (1972).

In 1971 and 1972 mandatory bussing became a political and legal controversy of constitutional dimensions. Nationally it produced legislative proposals to limit the jurisdiction of the federal courts and generated arguments contrasting the ultimate power of Congress to that of the United States Supreme Court. It gave rise to controversy in connection with every appointment considered, attempted, and made to the Supreme Court. It even stimulated proposals to amend the Con-

4. Seven charges were filed against each member of the School Board. Charges 1, 4, 5, 6 and 7 were directed at the mandatory bussing plan. *Brooks,* 80 Wn. 2d at 125, 492 P.2d at 539. In capsule form, the charges were:

1. That the members conspired to break down the neighborhood school concept, to destroy the rights of parents to supervise their children, and to make useless and obsolete school structures and facilities within the district.
4. That the members conspired to bus white students within the district, using race as the criteria for determining who would be bussed.
5. That the members conspired to bus nonwhite students within the district, again using race as the criteria for the bussing.
6. That the members conspired to deny transportation, and thus deny equal treatment, to all students not participating in the mandatory bussing program.
7. That the members conspired to not use their best judgment with regard to the fiscal effects of the mandatory bussing program.

The mandatory bussing plan which caused this controversy involves reassignment of students from schools with large proportions of nonwhite students in Seattle's Central Area to schools with small nonwhite populations in the city's North End. Under the plan, reciprocal reassignment of white students to Central Area schools is made. As the name implies, the transfer is mandatory and bus transportation to the distant schools is provided.

5. These were charges 2 and 3 which, briefly, were:

2. That the members knowingly retained the Superintendent of the school district despite knowledge that he is unqualified to carry out the duties of that position as evidenced by the steady decline in the quality of education in the district during his tenure.
3. That the members knowingly established and officially imposed segregation of students by race within the district, particularly in the Meany and Madrona schools.

Brooks, 80 Wn. 2d at 125, 492 P.2d at 539.

stitution of the United States. It was in this intensely political context that the *Brooks* controversy arose.

I. A HISTORICAL NOTE

Recall was adopted in Washington in 1912 by an amendment to the state constitution.[6] Under that amendment any elected official except a judge of a court of record may be recalled.[7] The process is initiated by filing charges against the official.[8] If the acts complained of constitute malfeasance, misfeasance or violation of oath of office, the official with whom the charges are filed must issue a synopsis of the charge to be used on the recall petitions. If a recall election is held, the synopsis also appears on the ballot.[9]

The Washington recall provisions are similar to those of other states except for the requirement that the acts complained of constitute malfeasance, misfeasance or a violation of oath of office. Other

6. *See* note 1 *supra*. An excellent discussion of the historical roots of the recall process is found in F. BIRD and F. RYAN, THE RECALL OF PUBLIC OFFICERS (1930). Much of the following historical summary is drawn from this source.

Although there was reference to the recall in the Articles of Confederation, and it was discussed in the Federal Convention, recall today is exclusively a state procedure. *See, e.g.*, Gordon v. Leatherman, 325 F. Supp. 494 (S.D. Fla. 1971), *rev'd*, 450 F.2d 562 (5th Cir. 1971).

The impetus for adoption of the recall seems to have come mainly from the leaders of the progressive movement. The first recall provision in the United States was adopted by charter in Los Angeles in 1903. Washington cities also used the charter device to effect the recall of their officers in the years preceding the constitutional amendment. CHARTER OF THE CITY OF SEATTLE, art. XVIII, § 11 (1907). Growing dissatisfaction with the performance of some public officials, encouraged by the platforms of the Socialist, Independence, Prohibition and Progressive parties, led to statewide adoption of the recall. Oregon, in 1908, was the first state to add a recall provision to its constitution. Washington followed in 1912. By 1926 twelve states had statewide recall provisions, and today only ten states do not have provision for recall in some form. (Alabama, Delaware, Indiana, Kentucky, Maryland, New York, Pennsylvania, Rhode Island, Utah and Vermont have no provisions for recall.) Only the twelve states which first adopted recall provisions, plus Alaska, include recall in their constitutions. The remaining states have recall at the municipal level under a state statute, or possess some other limited recall provision.

7. WASH. REV. CODE § 29.82.010 (1965); WASH. CONST. art. I, § 33. In the other twelve states having constitutional provisions, recall is variously made applicable to elected officials, other public officers, members of the state judiciary, and even to judicial decisions.

8. WASH. REV. CODE § 29.82.010 (1965).

9. WASH. REV. CODE § 29.82.020 (1971). Once the ballot synopsis is issued, the party making the charge is responsible for gathering signatures on the recall petition. If sufficient signatures are obtained within the time set by the statute (note 1, *supra*), an election is held in which the electorate has the opportunity to vote the official out of office. WASH. REV. CODE §§ 29.82.060, .130 (1965).

states which have recall provisions require the petition to contain no more than a general statement of the grounds on which the demand for recall is based.[10] Refining the interpretation of this unique requirement in the Washington amendment has been the focus of over half of the recall cases at the appellate level.[11] These cases raise questions which are the focal points for consideration of the *Brooks* case: what charges are sufficient to support recall and to what extent will a court look beyond the face of the charges in determining their sufficiency?

These precise questions were before the court in *Cudihee v. Phelps,*[12] the first recall case to reach the state supreme court after ratification of the constitutional amendment. In *Phelps,* the plaintiff sought to enjoin the county auditor from taking any action on a recall petition pending a judicial determination of the truth of the charges. In upholding the lower court's denial of an injunction, the supreme court limited the role of the judiciary in the recall process to determining the sufficiency of the statement of the allegations. The court felt that whether the charges were true and justified recall were political questions to be determined by the people.[13]

A year later in *Pybus v. Smith*[14] the Washington Supreme Court set

10. *See, e.g.,* ARIZ. CONST. art. VIII, § 1; CAL. CONST. art. 23, § 1; ORE. CONST. art. 2, § 18. An exception is Alaska, which requires that recall charges allege lack of fitness for office, incompetence, neglect of duties or corruption. ALAS. CONST. art. XI, § 8.

11. *See, e.g.,* 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.* LaMon v. Westport, 73 Wn. 2d 255, 438 P.2d 200 (1968).

A second unusual feature of the Washington provision is that the constitutional amendment was not self-executing. WASH. CONST. art. I, § 34 empowers the state legislature to pass laws necessary to put art. I, § 33 into effect.

Thus, although the amendment itself simply requires the recall petition to "state the matters complained of . . .", WASH. CONST. art. I, § 33, the statute requires that the charge "state the act or acts complained of in concise language . . . ." WASH. REV. CODE § 29.82.010 (1965). The constitutional language alone is easily susceptible of a construction requiring no more than a general statement. The gloss added by the statute has been the subject of discussion in a number of the recorded cases. *See* note 21 *infra.*

12. 76 Wash. 314, 136 P. 367 (1913).

13. The court stated:

> 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. 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 shall be discharged shall be had before the tribunal of the people . . . .

76 Wash. at 330-31, 136 P. at 373.

14. 80 Wash. 65, 141 P. 203 (1914). *Pybus* was an action by the subject of a recall petition, a city councilman, to enjoin the defendant city clerk from calling a recall elec-

the first limits on the sufficiency of recall allegations. The court held that the acts alleged did constitute malfeasance[15] but failed to define that term. The court concluded that although the alleged acts[16] may not have been misdemeanors under the common law of Washington, they were certainly acts of malfeasance. Until 1968, all subsequent decisions defining malfeasance involved acts which were at least misdemeanors.[17]

In 1968, in *State ex rel. LaMon v. Westport*[18] the court posited two elements which must be present to constitute a sufficient allegation: first, the charges must allege acts of malfeasance or misfeasance; secondly, the allegations must be sufficiently definite.[19] In defining malfeasance the *LaMon* court relied on *State v. Miller*[20] in which the

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tion. The superior court sustained a demurrer to allegations that the charges made against plaintiff were not sufficient in law to warrant recall. The supreme court affirmed.

15. *Id.* at 69, 141 P. at 204. The cases use the terms malfeasance and misfeasance interchangeably. Although the words clearly have distinct dictionary definitions, there is no practical difference for purposes of recall since a charge may allege acts of either type. *See, e.g.,* Thiemens v. Sanders, 102 Wash. 453, 173 P. 26 (1918) (the petition alleged the acts were misfeasance, and the court found the charges sufficient although in fact the acts were malfeasance).

16. The plaintiff, a city councilman, was charged with bargaining with other councilmen as to how he would vote on various issues before the council, thus violating his duty to use his own judgment in voting on each issue.

17. In Thiemens v. Sanders, 102 Wash. 453, 173 P. 26 (1918), the court concluded that a gross misdemeanor is malfeasance, and in State *ex rel.* Nisbet v. Coulter, 182 Wash. 377, 382, 47 P.2d 668, 670 (1935), held that "the violation, by a public officer, of a penal statute affecting the conduct of his office constitutes malfeasance . . . ."

Another issue in *Nisbet* was whether the defendant's exchange of his vote on one question for that of another director on a different question was misfeasance. Noting the parallel fact situation in *Pybus,* the court held such bargaining to be misfeasance, whereas in *Pybus* the bargaining had been malfeasance. This interchange may be explained by the earlier holding in *Thiemens. See* note 15 *supra.* The *Nisbet* court seems to have eliminated any useful distinction between these two terms in the recall context.

The *Pybus* vote-swapping fact situation was before the court again in Roberts v. Milliken, 200 Wash. 60, 93 P.2d 393 (1939), and in Skidmore v. Fuller, 59 Wn. 2d 818, 370 P.2d 979 (1962). In those cases the court concurred with *Pybus* that such acts were malfeasance.

18. 73 Wn. 2d 255, 438 P.2d 200 (1968).

19. The test for definiteness set out in *LaMon* was that "recall charges are sufficiently specific if they are definite enough to allow the charged official to meet them before the tribunal of the people." 73 Wn. 2d at 259, 438 P.2d at 203. The same test was phrased more generally in Gibson v. Campbell, 136 Wash. 467, 475, 241 P. 21, 24 (1925), where the court observed that the charges must be expressed with practically the same definiteness as criminal charges. The *Brooks* court applied the test as stated in *LaMon.* 80 Wn. 2d at 124, 492 P.2d at 539.

20. 32 Wn. 2d 149, 201 P.2d 136 (1948). A state law, REM. REV. STAT. § 9958 (1933) (now codified as WASH. REV. CODE § 43.09.260 (1970)) directed the attorney general to institute legal action against any public officer or employee known to have committed malfeasance, misfeasance or nonfeasance with regard to financial affairs while in office. *Miller* was an action by the state to recover sums of money wrongfully

terms "malfeasance" and "misfeasance" were seen as "comprehensive terms which include any wrongful conduct affecting the performance of official duties."[21] Adoption of this definition in *LaMon* was supported by the suggestion in *Pybus* that something less than a misdemeanor could be malfeasance. The *LaMon* court felt that this liberal definition of malfeasance was necessary if the purpose of the recall process was to be effectuated.[22] A fair paraphrase of the test for sufficiency after *LaMon* is that recall charges must allege wrongful acts and must be definite.

II. THE IMPACT OF *BROOKS*

Although *LaMon* equated malfeasance with wrongful acts, it did virtually nothing in terms of meaningfully defining those words. The *Brooks* court has given some depth to the *LaMon* definition of malfeasance by holding that discretionary acts of public officials are not wrongful.[23] As a consequence of the *Brooks* holding, discretionary acts of a public official are not a basis for recall insofar as those acts are an appropriate exercise of discretion by the official in the perform-

received by the defendant, a county clerk, through the concurrent employment of his wife in the county auditor's office.

21. State *ex rel.* LaMon v. Westport, 73 Wn. 2d 255, 259, 438 P.2d 200, 202-03 (1968), *citing* State v. Miller, 32 Wn. 2d 149, 201 P.2d 136 (1948).

22. A basic assumption of the writer is that the recall provisions in Washington have dual purposes. The primary purpose is to make public officials more immediately responsible to the electorate by providing a means for removing the official prior to the next election. It is this purpose that the *LaMon* court referred to when it said:

> [Appellants] argue that (defining malfeasance as wrongful acts) makes an elected official too readily amenable to recall. In effect, appellants challenge the political wisdom of the recall provisions. Although for students of government there may be some room for academic discourse on this matter, the people have, through the constitution, validly determined that the powers of the governing shall be so limited.

73 Wn. 2d at 259, 438 P.2d at 203.

The second purpose of the Washington provisions is to ensure that public officials are not harried with groundless attempts to recall them. This is the reason for the malfeasance requirement, and is the subject of discussion at notes 29-37 and accompanying text *infra*.

23. The court's conclusion that implementation of a mandatory bussing plan was within the scope of discretion of the Board was based in part on Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). *Brooks*, 80 Wn. 2d at 127, 492 P.2d at 540. *Swann* is best known as the case in which the Supreme Court upheld a court-ordered desegregation plan which included provisions for mandatory bussing of school children to achieve racial balance. The *Swann* Court held that where the segregation of schools was imposed by law, the federal courts had the power to order bussing as a means of desegregation. The *Brooks* court concluded from this that it must be within the discretion of the School Board to order bussing to achieve desegregation within a school system.

ance of his duties.[24] By making it clear that sufficient charges must allege acts which are objectively wrongful by reason of being either illegal or an abuse of discretion, the *Brooks* decision has come one step closer to providing the term "malfeasance" with a workable definition. In applying the term "malfeasance," the courts must now identify which official acts are discretionary. Because of the great number of public officials subject to recall and the differing scopes of discretion, this determination must be made on a case by case basis.[25]

The real benefit to be derived from *Brooks* is in the treatment future litigants may expect in the courts. In determining that some of the charges alleged discretionary acts while others did not, the *Brooks* court stripped away the petitioners' conclusory verbiage and objectively examined the characteristics of each alleged act.[26] Charges which in substance objected only to the Board's discretionary decision to adopt a bussing plan were deemed insufficient.

The court, by exempting discretionary acts of public officials from the scope of recall, has made a positive contribution toward increased predictability and clarity in this area of the law. The desirability of this development cannot be gainsaid. However, the value of the *Brooks* court's contribution has been lessened by its refusal to ascertain whether any existing facts supported the truthfulness of the allegations.

As a result of this refusal, the court has merely outlined a formal procedure which, if followed, will ensure that the charges made will be sufficient in law to justify the initiation of the recall process, regardless of whether the charges are patently frivolous or made in abject bad faith. A petitioner desirous of recalling a particular official for any reason need only fabricate an act which is illegal or an abuse of discretion and allege that the official committed it. The allegation

24. *Brooks*, 80 Wn. 2d at 128, 492 P.2d at 541.

25. Any attempt to give a precise definition of which acts of public officials are discretionary would be misleading. A definition narrow enough to be workable would be ruled by exceptions, while a definition that could encompass all discretionary acts would be so broad as to be worthless. However, courts faced with deciding whether acts are discretionary should have little trouble finding precedent to guide their decisions.

26. Judge Hale's approach to the problem, as expressed in his separate opinion (concurring in part, dissenting in part), seems more in tune with typical recall cases prior to *Brooks*. He suggests looking at the words in which the charges are framed without regard to either the substance of the charges or to the fact that they are largely rhetorical window dressing. Using this approach, Judge Hale would have found all the charges sufficient, thus vindicating what he saw as the "reserved political right to recall the Seattle School Board for the reasons asserted." *Brooks*, 80 Wn. 2d at 132, 492 P.2d at 543.

itself need have no basis in fact and need bear no relation to the real reason for seeking the recall.[27] While it may be undesirable or impracticable to require that the petitioners' motive for seeking recall coincide with the allegations on the petition, it is certainly reasonable to protect against abuse of the recall by requiring that there be some basis in fact for the allegations.[28]

Brooks' failure to require that there be some facts supporting the truthfulness of the charges ignores the legislative intent of Washington's recall provisions. The recall provisions in Washington are unique in requiring the allegation of acts of misfeasance, malfeasance or violation of oath of office.[29] Seen in contrast with provisions of other states, this requirement must have been intended to have some effect on the recall process beyond a mere drafting exercise.

In those states in which the recall is intended to be a purely political process, that intent is manifest in the wording of the constitution. California, for example, provides that only a general statement of the charges is necessary, and excludes the sufficiency of the charges from review by the courts.[30] It follows that the Washington legislature envisioned a more limited right to recall. The misfeasance, malfeasance or violation of oath of office requirement of the Washington constitution expresses that limitation. This limitation implies that a public official

27. Although its recall is essentially a purely political process, California has several statutory provisions designed to prevent abuse of the recall. One of these enables the officer whose recall is being sought to justify his conduct in a statement which may appear on the ballot along with the charges against him. CAL. ELECTIONS CODE § 27212 (West 1961). Another provision imposes a substantial fine and/or jail sentence as punishment for wilfully misrepresenting the contents, purport or effect of a recall petition. CAL. ELECTIONS CODE § 29214 (West 1961). It is probable that the latter provision would be violated in a case like *Brooks,* where the petition that is circulated does not contain the charges that the public identifies with this particular recall movement.

28. *See* section entitled "A Partial Solution" *infra.*

29. *See* note 10 and accompanying text *supra.*

30. CAL. CONST. art. 23, § 1. *See also,* COLO. CONST. art. XXI; MICH. CONST. art. 2, § 8; WIS. CONST. art. 13, § 12. An early Nebraska court, while upholding the essentially political character of the recall, identified some of the dangers which may have motivated the Washington legislature to adopt a more limited form of recall. In State *ex rel.* Topping v. Houston, 94 Neb. 445, 143 N.W. 796, 800 (1913) the court said:

> The policy of the recall may be wise or it may be vicious in its results. We express no opinion as to its wisdom with respect to the removal of administrative officers. If the people of the state find after a trial of the experiment that the provisions of the statute lead to capable officials being vexed with petitions for their recall, based upon mere insinuations or upon frivolous grounds, or because they are performing their duty and enforcing the law, as they are bound to do by their oath of office, or lead without good and sufficient reason to frequent costly and unnecessary elections, they have the power through their Legislature to amend the statute so as to protect honest and courageous officials.

is not to be subjected to recall merely because the people are dissatisfied with his performance. Recall is to be used only to remove him for performing wrongful acts. This is materially different from simply requiring the allegation of wrongful acts, especially if there is no substance to the allegations and they do not constitute the real reason for the recall. The practical result of *Brooks*—reducing the malfeasance element to a mere formalistic requirement—appears to conflict with the ostensible purpose for inclusion of this requirement.[31]

Thus the failure of the *Brooks* court is in not inquiring whether there is any factual basis for the charges. It remains for the court to find an effective means to enforce the limitation expressed in the constitutional amendment.

III. A PARTIAL SOLUTION

To preserve the integrity of the recall in the limited form that must have been intended, the court must do more than give superficial consideration to the form of the charges. A partial solution is for the court to look beyond the face of the charges and refuse to find them sufficient unless it determines that the charges are made with a good faith belief that they are true. The good faith element could be satisfied by proving that the charges have some basis in fact. If there is such a basis for the charges, good faith may be presumed. The voters then can determine whether the charges are true.

Judicial inquiry as to the existence of a good faith belief in the truth of the charges is offered only as a partial solution, since such an inquiry does not go to the question of motive. Thus it would still be pos-

31. The pleadings in *Brooks* illustrate the extent to which the statement of allegations has been reduced to a mere formality. In *Brooks*, two of the charges were found to be legally sufficient. One charged that the School Board had knowingly and willfully retained the Superintendent of Schools despite knowledge that he was unqualified to carry out the duties of that position. The other alleged that the Board members knowingly had established and officially imposed segregation by race within the school district. Similar charges had been held sufficient in Morton v. McDonald, 41 Wn. 2d 889, 893, 252 P.2d 577, 579 (1953) (the charges in *Morton* were that plaintiff had appointed a water commissioner who was not qualified or able to discharge the duties of that office, and that plaintiff had also permitted houses of prostitution to operate openly in the city) and *LaMon*, 73 Wn. 2d at 256-57, 438 P.2d at 201-02 (the *LaMon* charges alleged appointment of unqualified officials and a knowing violation of a city ordinance pertaining to the work of the City Council). Apparently, the attorney for Citizens Against Mandatory Bussing consulted these cases to ensure that the allegations would pass the cursory scrutiny of the court.

sible for a petitioner to allege a relatively insignificant abuse of discretion that would satisfy both the *Brooks* requirement of malfeasance and the proposed inquiry into good faith, but which would bear no relation to the real reason the recall is sought. For instance, the real motive for the recall could be to frustrate programs which are entirely within the discretion of the official.

In an effort to meet the problem of motive, a court *could* require that recall charges state the real reason that the recall of the official is being sought. However, such a requirement would be extremely unsatisfactory. First, the problems of proof and evidence would be overwhelming. Secondly, it is highly questionable whether an organization such as Citizens Against Mandatory Bussing should be precluded from attempting to recall public officials who have abused their discretion simply because the organization is more interested in preventing bussing than it is in stopping the commission of the acts alleged as the basis for the recall.

Thus on the basis of both policy and practical considerations, it would be undesirable to impose a good faith requirement to the extent of looking at the motive behind the charges. On the other hand, the proposed limited requirement of a good faith belief in the truth of the charges would increase the integrity of the recall process in Washington. Such a requirement also seems to be a logical extension of the *Brooks* definition of malfeasance.[32] In summary, the test for recall allegations would require that the petitioner allege definite wrongful acts which he in good faith believes the official has committed. The people still would have the right to determine the truth of the charges.

Although courts have meticulously avoided inquiry into the substance of recall charges, that avoidance may not have been justified.[33] In *Roberts v. Milliken* the court summarized the general refusal to look beyond the face of the charges: "[I]f the courts are without power to inquire into the truth of the charges, they are, with much greater reason, without power to inquire into the motive of the persons filing

32. Since the test for sufficiency requires the allegation of a wrongful act, a court imposed requirement that the allegation be made with a good faith belief in its truth is not a particularly drastic innovation. If a good faith test is applied, the inquiry which the court makes beyond the face of the charges will be effective insurance that a recall proceeding will not be based on frivolous charges. *See* note 22 *supra.*

33. For a discussion of the history of the court's position on this question, *see* note 12 and accompanying text *supra.*

the charges."[34] This result, which seemed so obvious to the court that it felt no need to substantiate it with either legal authority or logical argument, is not a necessary result. The *Roberts* court cited the enforcement section of the recall statute[35] as being the exclusive source of judicial authority to intervene in a recall proceeding.[36] However, this section is directed solely at the court's power to compel and restrain actions of public officials charged with ministerial duties under the statute. The imposition of a requirement that the charges be made in good faith would not conflict with either the constitutional or the statutory language. Moreover, to the extent that the person making the charges must verify under oath that he believes the charges are true, the court already has a statutory mandate to consider the good faith element.[37]

CONCLUSION

The recall process in Washington before *Brooks* was fraught with vagueness and uncertainty. By exempting the discretionary acts of public officials from the scope of recall, the *Brooks* court gave additional meaning to the previously obscure definition of malfeasance. Armed with a more meaningful definition, the court disregarded the subjective conclusions in the petitioner's allegations and objectively

34. 200 Wash. 60, 67, 93 P.2d 393, 396 (1939). In *Roberts* the plaintiff sought to enjoin the county auditor from issuing a ballot synopsis, alleging that the charges were false and had been made solely for the purpose of injuring his good name and reputation. The court relied on Cudihee v. Phelps, 76 Wash. 314, 136 P. 367 (1913), in declining to inquire into the truth of the charges. The injunction was denied.

The imposition of a good faith test as an element to be considered in deciding the legal sufficiency of recall charges also could have caused a different result in Skidmore v. Fuller, 59 Wn. 2d 818, 370 P.2d 975 (1962). In *Skidmore,* two of the charges held sufficient for recall purposes were related to and contained paraphrases of a newspaper article. The appellant urged the court to read the charge in conjunction with the article as published, alleging that the paraphrase was inaccurate and misrepresented the true import of the article. The court declined, saying that it would not inquire into the truth of the matters alleged in the charge. *Skidmore,* 59 Wn. 2d at 825, 370 P.2d at 979.

35. WASH. REV. CODE § 29.82.160 (1965). This section gives jurisdiction to the superior court to compel and enjoin acts of public officers who are involved in implementing the recall process when such acts are not in compliance with law.

36. 200 Wash. at 67, 93 P.2d at 396.

37. WASH. REV. CODE § 29.82.010 (1965). However, possible sanctions for swearing falsely do not give adequate protection. The duty to look at the good faith of the person making the charges may not, in the context of making a false oath, arise until a complaint is made and proceedings can be commenced under the perjury statute. WASH. REV. CODE ch. 9.72 (1965). The imposition of an independent good faith test by the court would be a satisfactory solution for that problem.

determined which of the charges alleged acts of malfeasance. The court clearly felt that its action was within the limited judicial role which is traditional in recall cases.

The shortcoming of *Brooks* lies in its refusal to look beyond the face of the recall charges in determining their sufficiency. The test for sufficiency has become formalized to the point that charges which bear no relation to the actual purpose of the recall campaign might be approved by the court without question. An inquiry into whether the charges are made with a good faith belief in their truth at least would insure that the petition is not circulated on the basis of frivolous accusations.

It is proper here to question the direction of the development of recall law in Washington. That question necessarily involves a policy decision as to what one believes to be the purpose of the recall. If the purpose is to reserve to the people the complete right to recall a public official whenever his official actions offend a sufficient number of voters, then the constitution needs to be amended to make clear that the recall is a purely political process. If, on the other hand, the power of the electorate to undo an election is to be limited to some category of wrongful acts, the positive step of redefinition taken by *Brooks,* combined with the good faith requirement which a subsequent court might impose, should insure that the recall process as intended is enforced more effectively.

G.V.T.