1992 WL 12043704 (Alaska A.G.)

Office of the Attorney General

State of Alaska
File No. 16918-0004
August 24, 1992

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PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

Re: Sufficiency of Grounds Alleged For Recall of Governor Walter Hickel and Lt. Governor John "Jack" Coghill

***1** Charlotte Thickstun
Director
Division of Election

C/o Charles E. Cole
Attorney General
State of Alaska
Department of Law
P. O. Box 110300
Juneau, Alaska 99811

Dear Ms. Thickstun:
By letter dated August 12, 1992, the Attorney General requested me to review the sufficiency of grounds reflected in the applications for recall of both the Governor and Lt. Governor. The grounds stated for recall are as follows:

For Governor Walter J. Hickel:

Walter J. Hickel is unfit for office. His unfitness is demonstrated by lapses of memory and publicly admitted mistakes which far exceed the normal bounds of sound judgment. He has used the Office of Governor to intimidate individuals who challenged the legitimacy of his nomination and election. He has used the Office of Governor to promote a gas pipeline which would benefit him personally.

Walter J. Hickel is incompetent. His incompetence is demonstrated in his selection of nominations for Boards and Commissions and his negotiation of contracts and agreements such as the rejected Exxon settlement which are not in the best interests of the majority of Alaskans.

For Lt. Governor John "Jack" Coghill:

John "Jack" Coghill is incompetent. His incompetence is demonstrated by his public acknowledgement that he has not even read the Election Laws, as well as contradictory public statements regarding his involvement and knowledge of the recall process.

John "Jack" Coghill is unfit for office. His unfitness is demonstrated by his unethical and unprofessional conduct as indicated by his totally unfounded public accusations of criminal activity of recall staff; and, he has used the Office of Lieutenant Governor in an attempt to intimidate individuals who challenged the legitimacy of his nomination and election.

The recall applications concerning both Governor Walter Hickel and Lt. Governor John "Jack" Coghill do not state grounds for recall sufficient to meet the requirements of AS 15.45.500(2). The applications are not substantially in the required form. [1] Consequently, you, as Director of Elections should deny certification of both applications.

DISCUSSION

1. **The Director of Elections must review the sufficiency of the asserted grounds for recall as part of the recall application certification process**.

Article 11, § 8 of the Constitution of the State of Alaska provides as follows:
SECTION 8 - RECALL: All elected public officials in the State, except judicial officers, are subject to recall by the voters of this State or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by the legislature.

***2** Delegates to the Constitutional Convention held at Fairbanks prior to statehood left establishment of the grounds and procedures for recall to the legislature. The recall provision submitted by committee for debate specified the grounds for recall as malfeasance, misfeasance, nonfeasance, or conviction of a crime involving moral turpitude. The delegates debated whether any limitations upon the right of recall were appropriate. [2] Delegate V. Fischer [3] asked the proponents of the recall measure if, assuming the grounds for recall were stricken, the legislature could, at a later time, establish grounds for recall. [4] Thereafter, Delegate Fischer, moved to delete any specification of grounds for recall. [5] The next day the Constitutional Convention adopted Delegate Fischer's amendment. [6] The recall section as amended provided that recall procedures would be prescribed by the legislature without indicating that grounds for recall were necessary. Consequently, it was proposed that the section be amended to provide that the legislature prescribe grounds for recall. [7] This amendment was opposed by some of the delegates including Delegate Fischer who clarified earlier remarks to the effect that the legislature should have the right to prescribe grounds for recall. He stated:
"When I rose yesterday to move the deletion of 5 and 6, I stated that I agreed with Mr. McCutcheon's remarks to the effect that the voters should be able to recall for any reason that the voters deemed proper. If I gave the impression that I felt the legislature should establish the grounds, I may have given the wrong impression. I did not fully intend that .... I feel that the grounds should be left up to the people." [8]

After an exchange of views on the issue, the Convention amended the recall provision so that it would read as it reads now - that is, the legislature was required to prescribe grounds for recall. [9] Indeed, as Delegate Fischer himself noted almost 20 years later, recall at will was discussed and rejected as an option by the delegates to the Constitutional Convention. [10]

The statutory scheme governing recall of elected public officers holding state office was promulgated in 1960 and has not since that time undergone substantive revision. There is little legislative history. Decent records of committee hearings and meetings were not kept in earlier years. Nevertheless, it is known that legislative provisions governing recall were drafted in large part by the Alaska Legislative Council and submitted to the legislature together with an explanatory memorandum, dated January 20, 1960. [11] On page 67 of the Legislative Affairs memo, in reference to § 9.75 GROUNDS FOR RECALL, [12] it is explained that the Legislative Council looked to page 151 of the Treatise by Groves, American State Government (Boston 4th Ed. 1953) [13] for the specific grounds for recall. The Legislative Council also noted in its discussion of § 9.79 BASIS OF DENIAL OF

CERTIFICATION [14] that the grounds upon which certification could be refused were based upon specific sections of the recall statute, including § 9.75 GROUNDS FOR RECALL. [15] The original bill was not amended in any respect significant to the recall issue discussed here today. Importantly, the Legislative Council identified the purpose of § 9.95 INSUFFICIENCY OF GROUNDS, APPLICATION OR PETITION [16] as prohibiting post recall efforts to attack the underlying validity of a recall petition. In Meiners v. Bering Strait School District, 687 P.2d 287, 303 (Alaska 1984), the court implicitly acknowledged the obligation of the certifying officer to examine the sufficiency of the charges when it adopted the position that insufficient charges should be excised from a petition while those which are sufficient should be set forth on the ballot. Thus it is clear that the Director of Elections must review the sufficiency of the asserted grounds for recall as part of the recall application certification process.

2. **The Standard of Review**

***3** There is only one Alaska Supreme Court case which deals with the sufficiency of an application for recall of public officials. The case arose in a local public officer context and was governed by a statutory scheme (since amended) set out in the State's Municipal Code in Title 29.

Meiners concerned recall efforts directed against elected school members initiated by a number of disappointed voters residing in the Bering Strait School District. The voters alleged, citing some specifics, that the Board members to be recalled had failed to perform the prescribed duties of their office. Because an REAA [17] was involved, the Director of the Division of Elections, rather than a Municipal Clerk, was required to pass upon the sufficiency of the petition, including the sufficiency of the grounds for recall. There was no pre-circulation review and the recall provisions afforded opportunity for the officials subject to recall to submit a rebuttal of up to 200 words which would appear on the ballot with the stated grounds for recall.

Availability of recall as a remedy for disgruntled voters can vary significantly from jurisdiction to jurisdiction. As the court in Meiners noted, recall, at one end of the spectrum, is viewed as an extraordinary remedy available only in the narrowest of circumstances with great attention being given to limitations imposed by technical requirements. At the other end are jurisdictions who see recall as a political remedy subject only to minimal procedural or technical safeguards. After review of the historical background of our recall provision, the court ruled that recall in Alaska fell into a middle ground between these two extremes. 687 P.2d at 294. The court recognized recall as fundamentally political in nature subject, however, to reasonable statutory constraints. “Statutes relating to recall,” the court said, “should be liberally construed so ‘the people [are] permitted to vote and express their will.”’ Id. at 296 (citations omitted). Recognizing the desirability of judicial restraint in construing the sufficiency of applications calling for recall, the court urged the legislature to more particularly define or otherwise reduce the ambiguities found in our recall statutes. Id. Unfortunately, the legislature has not yet obliged the court in this regard.

The court in Meiners found that two of the three allegations contained in the recall petition stated grounds sufficient for the recall petition to go to the voters. It emphasized that it was not the role of the court to pass upon the truth of the allegations. Instead, it stated “we are in a position similar to a court ruling on a motion to dismiss a complaint for failure to state a claim.” 687 P.2d at 300, fn.18. The allegations were sufficient, the court found because they did include allegations which, if true, represented a failure to perform prescribed duties. The court was reluctant to hold recall petitions to such technical requirements that legal training in drafting recall petitions would be a necessity. The court emphasized that the recall procedures here dealt with recall on the local government level where access to legal specialists would be limited. “Most importantly,” said the Meiners court, “... the statutes offer the target official an opportunity to make a rebuttal, which will be placed on the ballot along side the proponent's statement of charges.” Id. at 301. [18] The purpose of a particularization requirement with regard to the grounds for recall [19] is to afford the officeholder a fair opportunity to defend his conduct. See Id. at p.302.

***4** Assessing the sufficiency of the allegations involved in the Hickel/Coghill recall applications requires reference to a different statutory scheme. While there are a number of similarities with the statutes involved in the Meiners case, there are some distinct and important differences. First, the grounds for recall are different. Second, pre-circulation certification by the

Director of Elections is required before recall proponents collect petition signatures. Third, and most importantly, there is no place on the recall ballot for either the grounds for recall or rebuttal by the targeted official. Finally, the recall involves elected public officials who hold statewide offices. It remains for us to reconcile, in the context of this recall effort, the tensions created by the competing concerns expressed by the court in Meiners: that is minimizing the technical hurdles so that recall efforts are not unreasonably frustrated, while at the same time providing fair opportunity to the officeholder to defend his conduct.

3. **The Requirement of a Prima Facie Case**

The application must contain allegations which are sufficient to constitute a prima facie case for recall under one of the four grounds provided in AS 15.45.510. Prima facie in this context means legally and factually sufficient to constitute a ground for recall. 4 McQuillin, Municipal Corporations § 12.215.35 at 532, fn.13 (3rd ed. Rev. 1992); Meiners at 300, fn.18; Teaford v. Howard, 707 P.2d 1327, 1331 (Wash. 1985). Legally sufficient means that the acts described, which are assumed to be true, constitute lack of fitness, incompetence, neglect of duties or corruption. Meiners at 300, fn.18 and 302. See also Herron v. McClanahan, 625 P.2d 707, 712 (Wash. 1981). Factually sufficient means

> "... that although the charges may contain some conclusions, taken as a whole, they do state sufficient facts to identify to the electors and to the official being recalled acts or failure to act which without justification would constitute a prima facie showing of [the grounds for recall]."

Chandler v. Otto, 692 P.2d 71 (Wash. 1984). See also City Council of Gladstone v. Yeaman, 768 S.W.2d 103, 107 (Mo. App. 1988); Unger v. Horn, 732 P.2d 1275 (Kan. 1987); and Moultrie v. Davis, 498 So.2d 993, 996 (Fla. App. 4 Dist. 1986). [20] While this does not mean that the dates and times of alleged shortfalls in performance must be alleged with specificity, it does require enough information so that the public officer can identify the incident complained of and defend his actions. See, for example, Meiners, 687 P.2d at 291-292, 302. See also Molitor v. Miller, 301 N.W.2d 532, 534 (Mich. App. 1981). Other state courts have ruled that absent facts indicating arbitrary or unreasonable conduct, the discretionary act of a public official cannot be a sufficient basis for recall. 4 McQuillin, Municipal Corporations § 12.251 fn.12 p. 515 (3rd ed. rev. 1992); CAPS v. Alvarado, 832 P.2d 790 (New Mexico 1992); Cole v. Webster, 692 P.2d 799, 802 (Wash. 1984); Tolar v. Johns, 147 So.2d 196, 199-200 (Fla. App. 1962). A mere disagreement with policy is not a legally sufficient basis for recall. See 4 McQuillin Municipal Corporations § 12.251.15 at 519, fn.13 (3rd ed. rev. 1992) and the cases cited therein. We think the Alaska Supreme Court in the context of a recall application under Title 15 would adopt both of the above standards.

4. **Lack of Fitness, Incompetence, Neglect of Duties and Corruption**.

***5** The legislature has not defined any one of the statutory grounds for recall. Lack of fitness, incompetence, neglect of duties and corruption are comprehensive terms. Blacks Law Dictionary [21] and Websters [22] define unfit as unsuitable or not qualified. Incompetence is defined as lack of ability or lack of capacity. Neglect is defined in Websters as implying insufficient attention to something that has a claim to your attention, while corruption is defined as impairment of integrity, virtue or moral principal. Blacks Law Dictionary at page 311 defines corruption as an "... act of an official ... who unlawfully and wrongfully uses his station ... to procure some benefit for himself or others." See e.g., United States v. Williams, 705 F.2d 603, 623 (2nd Cir. 1983), cert. den., 464 U.S. 1007.

None of these definitions are particularly instructive. Nonetheless, each term must be defined in such a way that its application in the context of recall is not so broad as to do violence to the principal that in Alaska a public officer is subject to recall only for cause. At the same time, we must adhere to the notion expressed by our court in Meiners that statutes relating to recall should be liberally construed so that "the people [are] permitted to vote and express their will." 687 P.2d at 296. We should assume, in

the absence of evidence otherwise, that each of these "grounds" were to be afforded a distinct meaning by the legislature. See Faulk v. Estate of Haskins, 714 P.2d 354, 355 (Alaska 1986); Libby v. City of Dillingham, 612 P.2d 33, 39 (Alaska 1980); 2A N. Singer, Sutherland Statutory Construction § 46.06 (5th ed. 1992) (effect given to each word in the statute).

In Cole v. Webster, 692 P.2d 799, 804 (Wash. 1984), the Washington Supreme Court in the recall context defined incompetency as "lacking of qualities necessary to effective independent action," citing Websters Third New International Dictionary 1144 (1961).[23] Mental or physical disability will constitute grounds for recall for incompetency according to the Attorney General of Kansas. 1981 Op. Kansas Atty. Gen. (Jan. 20, No. 1 82-11). For these reasons, we feel that incompetency in the recall context implies lack of physical or mental capacity to perform the duties of the office. The New Mexico Supreme Court defined misfeasance as "performance by an officer in his official capacity of a legal act in an improper or illegal manner. CAPS, 832 P.2d at 791. Similarly, lack of fitness implies conduct which is unsuitable or inappropriate in the sense that it is improper. Neglect of duties implies refusal or unwillingness without sufficient excuse to perform one's duty,[24] while corruption implies an intentional evil or wrongful act.[25] See, e.g., State v. Schultz, 367 A.2d 423, 429 (N.J. 1972); United States v. Ryan, 455 F.2d 728, 734 (9th Cir. 1972); Foster v. United States, 285 F.2d 222, 224 (10th Cir. 1960).

5. **The Allegations Against Governor Hickel**

a. **Lack of Fitness**

***6** Recall proponents advance three separate and distinct claims supporting the allegation that Governor Hickel lacks fitness for office. None of the claims considered individually or collectively meet the legal and factual sufficiency tests outlined in the preceding sections.

I. "HIS UNFITNESS IS DEMONSTRATED BY LAPSES OF MEMORY AND PUBLICLY ADMITTED MISTAKES WHICH FAR EXCEED THE NORMAL BOUNDS OF SOUND JUDGMENT."

This allegation is conclusionary. Unfitness for office implies conduct which is unsuitable or inappropriate in the sense that it is improper. Nothing like that is alleged here. Neither the duration or magnitude of lapses of memory or publicly admitted mistakes is specified. We do not mean to suggest that a single act cannot be the basis of a claim that an elected public official is unfit for office. But such act or acts that constitute the conduct complained of must be set out with sufficient particularity so that the electorate independently may assess whether the targeted official lacks fitness for office and the public officer has a fair opportunity to defend his conduct. How many lapses of memory were involved and when and where did they occur? How many publicly admitted mistakes were there and when and where did they occur? What did the mistakes concern and were they big or little mistakes? How many lapses of memory or publicly admitted mistakes does it take to exceed the "normal bounds of sound judgment?" Even assuming all that is stated is true, does exceeding the "normal bounds of sound judgment" on one or more occasions render you unfit for office or, is this just an opinion of the proponents of recall without any tangible basis in fact? See for example, Moultrie, 498 So.2d at 997 (requirements are not met where the statement in the petition is nothing more than a conclusion or opinion without any tangible basis and fact).

In City of Gladstone, 768 S.W.2d at 103, the court considered a petition for recall which met all statutory requirements except that the statutory grounds alleged for recall contained nothing specific in the way of facts. In rejecting the petition, the Missouri court stated at p.106:

The Residents say no specificity is required by the statute. They claim the reasons for recall will come into focus by the time of the recall election. This approach is not adopted even though, "[I]nitiative, referendum and recall are rights reserved by the people, and as such are to be construed to make effective the reservation of power by the people." State ex rel. Ferro v. Oellermann, 458 S.W.2d 583, 586 (Mo. App. 1970) .... As noted in Meiners v. Bering Strait School District, 687 P.2d 287, 294 (Alaska 1984), recall came into the policy process as a companion to initiative and referendum. Its purpose was to give the voters "a check on the activities of their elected officials above and beyond their power to elect another candidate when the incumbent's term expires." Id. (Footnote omitted) Alaska's high court said recall is a political process and should not have

over-technical shackles put on by the judiciary, but that such interpretations could be avoided by having complete and carefully drawn statutes. Id. at 296. The Meiners opinion did recognize, and this court concurs, that there is a difference between recall and initiative and referendum; namely, in a recall a "particular person's continuance in office is at stake, not just the fortunes of a policy or issue. This is why the recall process includes such things as a statement of grounds ..." Id. at 296 n.7.

***7** In Jenkins v. Stables, 751 P.2d 1187, 1188-89 (Wash. App. 1988), the Washington court quickly disposed of all charges on a recall petition as factually and legally insufficient. The allegations were that a judge committed misfeasance or malfeasance by refusing to grant a continuance, by aiding and abetting in racketeering, by refusing to allow a defendant to have right to counsel, and by allowing a police officer to testify while he was "high on drugs." Id. at 1188. Alaska, like other states which permit recall only for cause, requires some reasonable recitation of specifics so that the public officer can defend himself and the electorate can make informed independent decisions.

II. "HE HAS USED THE OFFICE OF GOVERNOR TO INTIMIDATE INDIVIDUALS WHO CHALLENGE THE LEGITIMACY OF HIS NOMINATION AND ELECTION."

Preliminarily, we observe that this allegation without more, even if true, does not constitute a ground for recall. Secondarily, we note that there are no specifics provided which would inform the electorate or the Governor as to what acts were considered intimidating and who or how many individuals were intimidated when. Allegations that a mayor had "harassed and intimidated the residents of the city" without describing how or when that was accomplished did not provide a basis for recall according to the opinion of the Attorney General for South Dakota. 1983 Opinion South Dakota Attorney General (Feb. 15, No. 83-08). This claim fails to meet either the legal or factual sufficiency tests outlined in section 3.

III. "HE HAS USED THE OFFICE OF THE GOVERNOR TO PROMOTE A GAS PIPELINE WHICH WOULD BENEFIT HIM PERSONALLY."

This allegation without more, even if true, does not constitute a ground for recall. There are tangible and intangible benefits which flow from public service and unless by his action the Governor intends to secure unwarranted benefits, such conduct is lawful and does not under any definition reflect unfitness for office. See AS 39.52.120(a). While the Governor may not use or attempt to use his office for personal gain under AS 39.52.120, that is not what was alleged by the proponents of recall. In any event, minor and inconsequential ethical conflicts are unavoidable and recognized as acceptable under the statutory scheme set forth in the Alaska Executive Branch Ethics Act. See AS 39.52.110. This does not mean that we challenge the truth of the conclusionary language contained in the allegation. It means only that in the absence of any specifics, no one could tell if such conduct rendered the Governor unfit for office. There are no specifics in the allegations which describe the nature of the promotion. Was it the result of intentional conduct? Who was involved? In what respect was the office of the Governor misused? What was the nature of the benefit that was conferred upon the Governor? Under the circumstances, there is no opportunity for the electorate to come to an informed independent conclusion as to the validity of the alleged grounds for recall and certainly no fair opportunity for the Governor to defend against the claims.

b. **Incompetency**

***8** Recall proponents advanced several distinct claims supporting the allegations that Governor Hickel is incompetent. None of these claims, whether considered individually or collectively, state a ground for recall.

I. "HIS INCOMPETENCE IS DEMONSTRATED IN HIS SELECTION OF NOMINATIONS FOR BOARDS AND COMMISSIONS."

This allegation is conclusionary and is neither factually or legally sufficient. No attempt is made to explain in what respects the Governor's selections reflect incompetence. No nominees are identified as representative of this problem and no boards or commissions are named. The Governor has been in office for almost two years and he has nominated hundreds to fill vacancies on the various boards and commissions in this state. The nomination of persons to boards and commissions is committed to the discretion of the Governor. A mere disagreement with the Governor's philosophy is not a legally sufficient basis for recall. See the cases collected, infra, Section 3; see also cases cited in 4 McQuillin Municipal Corporations § 12.251 et seq. (3rd ed. rev. 1992).

II. HIS INCOMPETENCE IS DEMONSTRATED IN HIS NEGOTIATION OF CONTRACTS AND AGREEMENTS SUCH AS THE REJECTED EXXON SETTLEMENT WHICH ARE NOT IN THE BEST INTERESTS OF THE MAJORITY OF ALASKANS."

This claim does not advance a legally or factually sufficient ground for recall. This is another example where the recall proponents appear to disagree with the Governor on a matter of policy or as a matter of opinion. See Moultrie, 498 So.2d at 997. The Attorney General who is appointed by the Governor brings, prosecutes and defends all necessary and proper actions in the name of the state for the collection of revenue. AS 44.23.020. The Governor may or may not participate in the negotiation of settlements and agreements such as the Exxon settlement. Even assuming the Governor did negotiate the settlement, such settlement is committed to the sound discretion of the Executive Branch. Once again, mere disagreement with the discretionary act of a public official is not a legally sufficient ground for recall. A settlement or agreement that is "not in the best interests of the majority of the Alaskans" may or may not reflect incompetence. Other than the "Exxon settlement," the proponents of recall allege no specifics as to the identity of any other "contracts and agreements" which allegedly demonstrate the incompetence of the Governor. This is another instance where the claims are factually insufficient to inform the electorate or the Governor of the basis for recall. Notice of conduct constituting recall to both the electorate and the public official is in accordance with "a basic policy of informed decision-making in a democratic society." In re Wayne County Election Commission, 388 N.W.2d 707, 712 (Mich. App. 1986); City of Gladstone, 768 S.W.2d at 107.

6. **The Allegations Against Lt. Governor Coghill**

a. **The Allegation that Lt. Governor Coghill is Incompetent**

***9** Proponents of recall allege two separate, distinct but nevertheless related claims in support of the statement that John "Jack" Coghill is incompetent. These claims, whether considered individually or collectively, do not state a legally or factually sufficient basis for determining that the Lt. Governor is incompetent.

HIS INCOMPETENCE IS DEMONSTRATED BY HIS PUBLIC ACKNOWLEDGMENT THAT HE HAS NOT EVEN READ THE ELECTION LAWS, AS WELL AS CONTRADICTORY PUBLIC STATEMENTS REGARDING HIS INVOLVEMENT AND KNOWLEDGE OF THE RECALL PROCESS.

The entire allegation, even if true, does not constitute incompetence. No specifics are provided which would indicate when or in what form public acknowledgement occurred, nor is any specificity provided with regard to the "contradictory public statements" concerning his involvement and knowledge of the recall process. An allegation of something akin to mere "administrative incompetence" does not support recall. See Noel v. Oakland County Clerk, 284 N.W.2d, 761, 764 (Mich. App. 1979). Without some specifics concerning the nature and extent of the "contradictory statements," there is no way for the public to independently assess whether incompetence is demonstrated and there is no fair opportunity provided to Lt. Governor Coghill to defend against the allegations. Meiners, 687 P.2d at 302. The allegations fail to meet either the legal or factual sufficiency tests discussed in section 3.

b. **The Allegation that Lt. Governor Coghill is Unfit for Office**

Proponents of recall advance two separate and distinct claims in support of their allegation that Lt. Governor Coghill is unfit for office.

I. "HIS UNFITNESS IS DEMONSTRATED BY HIS UNETHICAL AND UNPROFESSIONAL CONDUCT AS INDICATED BY HIS TOTALLY UNFOUNDED PUBLIC ACCUSATIONS OF CRIMINAL ACTIVITY OF RECALL STAFF."

This allegation fails to meet the legal and sufficiency tests outlined in the preceding sections of this letter. Mere conclusionary allegations of unethical and unprofessional conduct unaccompanied by details sufficient to allow the electorate independently to assess whether a ground for recall has been stated will not meet minimal requirements. Additionally, the failure to provide any detail as to when the conduct complained of occurred, where the conduct complained of occurred, or even what the conduct was or who it was directed against, makes it impossible for the Lt. Governor to defend his conduct. The illustration provided by recall proponents is itself conclusionary and thus insufficient.

II. "HE HAS USED THE OFFICE OF LT. GOVERNOR IN AN ATTEMPT TO INTIMIDATE INDIVIDUALS WHO CHALLENGE THE LEGITIMACY OF HIS NOMINATION AND ELECTION."

This allegation fails to meet either the legal or factual sufficiency tests discussed earlier. This allegation, even if true, does not establish a prima facie case that the Lt. Governor is unfit for office. The failure to provide the identities of the individuals intimidated or to provide details concerning the nature and extent of the attempted intimidation renders it impossible for the electorate to independently assess whether the Lt. Governor should be recalled. Again, the absence of the same details prevents the Lt. Governor a fair opportunity to defend against the alleged misconduct. The proponents of the recall of Lt. Governor Coghill have failed to state grounds sufficient to certify the application for recall.

***10** For all the reasons stated above, the recall applications concerning both Governor Walter Hickel and Lt. Governor John "Jack" Coghill do not state grounds for recall sufficient to meet the requirements of AS 15.45.500(2). The applications are not substantially in the required form. Consequently, you, as Director of Elections should deny certification of both applications.

If you have any questions, please do not hesitate to contact me.
Very truly yours,

Heller Ehrman White & McAuliffe

Harold M. Brown

Footnotes

1 AS 15.45.550(1). We have assumed for the purpose of this opinion that the recall applications meet the requirements of AS 15.45.500(1)(3)(4)(5) and (6).

2 Proceedings of the Alaska Constitutional Convention at 1207-1212 (January 4, 1956).

3 There were two delegates with the last name Fischer. Mrs. F.A. (Helen) Fischer and Victor Fischer were unrelated but both residents of District 18 in Anchorage. Wherever the name Fischer appears, hereafter it should be understood to refer to Victor Fischer.

4 2 Proceedings of the Alaska Constitutional Convention, at 1213 (January 4, 1956).

5 2 Proceedings of the Alaska Constitutional Convention, at 1215 (January 4, 1956).

6 2 Proceedings of the Alaska Constitutional Convention, at 1221-1222 (January 5, 1956).

7 2 Proceedings of the Alaska Constitutional Convention, at 1222 (January 5, 1956).

8 2 Proceedings of the Alaska Constitutional Convention, at 1234 (January 5, 1956).

9 See generally, 2 Proceedings of the Alaska Constitutional Convention, at 1232-1240 (January 5, 1956).

10 See V. Fischer ALASKA CONSTITUTIONAL CONVENTION, 81 (1975).

11 A copy of that portion of the memorandum dealing with the recall provisions of the "Suggested Election Code" is attached hereto as Exhibit A, together with a copy of the relevant sections of the original Bill (HB 252) and relevant sections of the committee substitute (CS for HB 252).

12 The precursor of AS 15.45.510.

13 Boston 4th Ed. 1953; pages 150 through 153 are attached hereto as Exhibit B.

14 Now codified as AS 15.45.550 Bases of Denial of Certification.

15 See Section 9.79, page 67, Exhibit A, attached. "This section specifies the grounds on which the Secretary of State may refuse to certify the application. These grounds are based on §§ 9.71, 9.73, 9.74, and 9.75."

16 Now AS 15.45.710.

17 Regional Educational Attendance Area (REAA) established pursuant to AS 14.08.031 et seq.

18 This is not the case in a Title 15 recall situation.

19 See AS 15.45.500(2) which reads: "The grounds for recall described in particular in not more than 200 words."

20 In Meiners, both the proponents' charges and the school board members' rebuttal would be reflected on the face of the ballot. Under those circumstances, the purpose of the requirement of particularity in AS 29.28.150(a)(3) [now AS 29.26.260(3)], was construed as giving the officeholder a fair opportunity to defend his conduct. We believe that the Alaska court in construing AS 15.45.500(2) in the context of a statewide recall election of the Governor and Lt. Governor would agree that this requirement is just as necessary to an informed independent decision by the electorate as it is to a fair opportunity for rebuttal by the public officer. In so construing the particularity requirement, the Alaska court would be in step with practically all jurisdictions that either require a clear statement of reasons or "grounds" for recall. It would also be consistent with the "middle ground" view adopted by the court in Meiners. See 687 P.2d at 294.

21 Blacks Law Dictionary 1372 (5th ed. 1979).

22 Websters 9th New Collegiate Dictionary 1289 (1989).

23 The grounds for recall in Washington are malfeasance, misfeasance or violation of the oath of office.

24 Neglect of duty is similar to "nonfeasance," a term defined in the recall context by the court in CAPS v. Alvarado, 832 P.2d at 791: "neglect or refusal without sufficient excuse to do that which was an officer's legal duty to do."

25 While neither recall application raised neglect of duty or corruption as a ground for recall, we have considered both in rendering this advice. None of the conduct alleged satisfies any statutory ground for recall. Whether the Director of Elections, however, has the discretion to determine whether the conduct alleged satisfies grounds not specified by the proponents of recall is not clear from the Meiners opinion. See 687 P.2d at 294, fn.14. We do not address that issue in this letter.

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