

**SUMMARY**

The issue of governors' removal of prosecutors has been in the news recently, in Wisconsin and in other states. A key factor in these situations is whether a governor's power over a district attorney can be based on policy rather than on misconduct tied to prejudice or harm to the community.

The Wisconsin Statutes provide that the governor can remove district attorneys "for cause." But the definition of "for cause" is not clear, particularly whether "neglect of duty," often included in the definition, encompasses discretionary acts, opinions, or judgments, even if those proved erroneous.

The author suggests an answer to the question of the breadth of the Wisconsin governor's removal powers by examining Wisconsin's constitution, statutes, and case law and comparable sources of law in other states and nations.

BY STEVEN M. BISKUPIC**Policy or Prejudice?****Examining the
Historical Roots
of the Governor's
Power to Remove a
District Attorney**



The drafters of the Wisconsin Constitution wanted district attorneys to be accountable to the voters at the county level. But the state constitution also gave the governor the right to remove an individual district attorney. What happens if the governor's view differs from the views of a county's voters?

In 1848, Wisconsin made the then-radical decision to have district attorneys locally elected instead of appointed. At the time, only a few states provided for the direct election of county prosecutors. All other states relied on appointment, usually by governors but sometimes by judges or legislative bodies. The federal system used appointment as well, with federal prosecutors nominated by the president and confirmed by the U.S. Senate.¹

In contrast, the Wisconsin constitutional convention favored prosecutorial selection and oversight primarily via election, and one proposal even suggested that district attorneys should face election every year to give voters maximum oversight. Election every other year eventually was agreed upon.²

Yet at the same time, the 1848 state constitution provided that the governor, acting alone, could remove any district attorney at any time. When questioned during debate as to whether this provision gave the governor too much power, the drafters of this section of the constitution said that removal would be limited to situations constituting “for cause,” but they otherwise purposely left the removal power vague. Thereafter, the legislature defined *cause* for removal as “inefficiency, neglect of duty, official misconduct, or malfeasance in office.”³

These were common and well-understood terms of the mid-19th century, with one notable exception: whether the phrase “neglect of duty” encompassed discretionary acts, opinions, or judgments, even if those proved erroneous. The distinction was important because if discretionary acts were at issue, then a governor could remove a district attorney based on the governor's disagreement with

how a district attorney handled a particular case or cases or over a political difference with a local district attorney on whether and how to prosecute certain kinds of cases.

In short, the issue would determine whether the governor's power over a district attorney could be based on policy rather than on misconduct tied to prejudice or harm to the community. This distinction has become relevant of late as governors around the country, as well as in Wisconsin, have been pressed to review the performance of local prosecutors.⁴

A Brief History of Elected Prosecutors

According to Michael J. Ellis in “Origins of the Elected Prosecutor,” Mississippi was the first state to provide for elected prosecutors, in 1832. Before then, every state in the U.S. and every other country in the world relied on the direct appointment of prosecutors, usually by the chief executive.⁵

Mississippi's move to an elected prosecutor was fueled by voter discontent about the seemingly unchecked power of an appointed prosecutor, who was seen as beholden to the patronage system that provided the appointment (usually the governor) and who sometimes did not even live in the jurisdiction that was to be served. Mississippi's decision to elect local prosecutors was subject to intense criticism in that state as well as around the country. One judge called it a move toward “mobocracy.”

Nonetheless, between 1832 and 1847, five other states (Ohio, Maine, Indiana, Iowa, and New York) followed suit and passed laws providing for the election of prosecutors. The switch to elected prosecutors soon became part of a growing progressive movement seeking to empower voters over entrenched



political machines at all levels of government. By 1900, all but four states (Connecticut, Delaware, New Jersey, and Rhode Island) provided for elected local prosecutors.⁶

At the Wisconsin constitutional conventions beginning in 1846, there appeared little doubt that Wisconsin would join the forefront of the movement that favored the county-wide election of local prosecutors rather than appointment by the governor. The only recorded debate was over the length of the term: whether it should be one year or two years. Two years ultimately was agreed upon and that was the established norm until 2005, when the Wisconsin Constitution was amended to provide for a four-year term beginning in 2008.⁷

In addition, despite concerns of delegates regarding potential overreach of executive power, the Wisconsin Constitution provided that the governor alone may directly remove certain county officials, including the district attorney, if the removed official receives “a copy of the charge and an opportunity to be heard.” The constitution did not mention any grounds for such removal

of these particular county officials, but the convention debate, as noted above, suggested that the drafters assured convention delegates that removal would need to be for “cause.”⁸

Removal for Cause

Removal for cause was common among the states at the time and was considered necessary to ensure that during a term of office, a public official was not harming the public in performance of the official’s duties, while at the same time providing the public official with an early sort of civil service protection against arbitrary firing. Removal procedures in America dated to before the Revolutionary War and were initially applied to appointed officeholders. As the number of elected positions grew in popularity, removal standards were applied to those positions as well.⁹

Beginning immediately after the enactment of the Wisconsin Constitution, the state legislature, following a model from New York, provided “cause” for removal of specific public officials throughout the statutes, usually within the same specific statutes creating a particular public position. Eventually,

however, the legislature consolidated these separate removal powers into chapter 17 of the statutes.¹⁰

The justifications for removal set forth by the legislature were these commonly used, though not always uniformly understood, terms: “inefficiency, neglect of duty, official misconduct and malfeasance.” Inefficiency was understood to be waste or misappropriation of public money. Malfeasance and misconduct included intentional bad acts (“misbehaviors”), usually though not always in violation of the law.¹¹

Neglect of Duty

“Neglect of duty,” however, was a somewhat nebulous catch-all phrase that before 1848 had been used for hundreds of years in English common law. The term encompassed a wide variety of acts including failure to show up for work or being drunk on duty but also more nuanced conduct, such as a post-master inadvertently allowing money to be stolen from a misdirected letter or the failure of a sheriff to properly execute a writ. Besides removal, neglect of duty (as well as malfeasance) usually exposed the officeholder to financial liability and sometimes to simultaneous criminal charges.¹²

At common law, “neglect of duty” by an officeholder was thought to include two main provisions: first, a failure to perform one’s sworn duties; and second, a resulting harm to the public good. Yet “sworn duties” often were not always

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well defined under the law and harm to the public good sometimes meant harm to the local community and other times harm to a distinct individual. Courts around the country routinely struggled to define the phrase in concrete fashion, and Wisconsin has been no exception.¹³

Wisconsin courts have sometimes defined “neglect of duty” as akin to a neg-

allegedly allowing the lynching of two Black inmates at the county jail.¹⁴

According to the Wisconsin Supreme Court, the Wisconsin statutes grant broad, “almost limitless” discretion to the district attorney in determining whether and how to pursue criminal cases in their respective jurisdictions. District attorneys can decide whether

of duty” in the context of district attorney discretion. But courts in other states have done so, again with conflicting results. For example, in New York and Nevada, courts have held that the exercise of discretion by a district attorney (usually in declining to prosecute a case) cannot justify a “neglect of duty” finding. In Arkansas, though, the court held that a district attorney engaged in neglect of duty when he charged misdemeanors when felony charges were warranted; and in Massachusetts, a court found neglect of duty when the district attorney declined to seek an arrest warrant for a fugitive.¹⁶

The New York court’s holding in *People v. Kurminsky* might be a significant guide for Wisconsin because the removal provisions enacted by the early Wisconsin legislatures were modeled after the New York laws. In *Kurminsky*, which involved the prosecutor’s decision to dismiss charges for violation of liquor laws, the

ligence standard. Other times, the courts have conflated “neglect of duty” with malfeasance and suggested that there can be no official “neglect of duty” without some improper intent on the part of the officeholder. The first reported case of “neglect of duty” in the state was in 1861 and involved an unsuccessful attempt to remove the Milwaukee County sheriff for


to charge a case, including how many counts, whether to later dismiss or engage in plea bargaining, and (if there is a conviction), what sentencing recommendations to make.¹⁵

Discretionary Acts and Policies

Wisconsin courts, however, have not had occasion to directly construe “neglect

The Wisconsin Constitution clearly intended voters to have the primary say over the performance of the district attorney.

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court held that a prosecutor committed no neglect of duty when he made a good-faith determination that the evidence was not sufficient to proceed with the criminal case. The court noted that while the state constitution provided that the governor “shall remove” any prosecutor who fails to “faithfully” prosecute a case once it has been charged, “faithfulness” to a case sometimes meant that dismissing a case was appropriate. The court held that it would be a “foolish thing” to require a prosecutor to pursue every possible case.¹⁷

New York’s view of “neglect of duty” also was grounded on the principle that policy differences alone should not justify removal for cause, particularly for officeholders whose positions were separately created apart from the core responsibilities of the governor. Otherwise, the prosecutor position would be converted to one equivalent to serving “at the pleasure” of the chief executive, essentially an at-will position.¹⁸

That was the federal model that existed in 1848 and is still in place today. Federal prosecutors are appointed by the president upon the advice and consent of the U.S. Senate for a term of four years. Yet, the president retains the sole discretion to remove a federal prosecutor before four years have expired or to keep the prosecutor in office after the end of a four-year term.¹⁹

National Debate Over Executive’s Historical Removal Powers

Recent scholarly debate over executive removal powers at the national level has focused on two often competing federal constitutional principles, both of which also are present in the Wisconsin Constitution. The first is the consolidation of “executive power” within the duties of the chief executive (the president or the governor), including the obligation to “take care that all laws are faithfully executed.” The U.S. Supreme Court has

held that these provisions create a presumption that holders of “inferior offices” owe a duty to carry out the prerogatives of the chief executive. If the inferior officers fail to do so, the chief executive has the power to hold them accountable by removing them from office.²⁰

The second constitutional principle is the authority of the legislature to create duties of executive officeholders independent of the chief executive. This position finds support in the “necessary and proper” clause of the Article I legislative power in the federal constitution, as well as in many of the writings of James Madison. In Wisconsin, this principle is buttressed by provisions of the Wisconsin Constitution providing for the direct election of executive officers, including positions such as the attorney general, secretary of state, and treasurer (who would be at-will appointments in the cabinet of a U.S. president).²¹

The two principles clashed in the 2020 case of *Seila Law LLC v. Consumer Financial Protection Bureau*, in which a challenge came to Congress legislating that the head of the Consumer Financial Protection Bureau was only removable for “inefficiency, neglect, or malfeasance.” In that case, the Supreme Court held that the executive powers of the U.S. Constitution required that the president have the authority, regardless of cause, to remove the head of an agency exercising extensive regulatory functions over the financial industry.²²

Still, the Wisconsin Supreme Court recently cautioned against applying the arguments of this national debate too strictly to the Wisconsin governor’s removal powers. In a case involving the governor’s authority to remove a member of the board of the Department of Natural Resources, the court noted that by the time of the enactment of the Wisconsin Constitution in 1848, the drafters were well aware of the various options available on defining the boundaries of the executive’s powers and were free to deviate (and at times did so deviate) from the national model.²³



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Letting the Voters Judge Discretionary Decisions

The Wisconsin Supreme Court's caution is particularly applicable to construing the governor's removal power over a district attorney for the exercise of discretionary or policy decisions.

First and foremost, the Wisconsin Constitution clearly intended voters to have the primary say over the performance of the district attorney. When the constitution was created, appointment by and service to the governor

was the norm nationally for district attorneys. The drafters of the Wisconsin Constitution, however, wanted to shift that allegiance to the voters on the ground that local voters should decide whether a district attorney is applying the criminal laws too strictly or too leniently.

Second, the weight of the historical evidence establishes that "cause" for removal of a district attorney did not apply to opinions, judgments, or discretionary acts. That was the position in New York,

which Wisconsin sought to copy.

Third, broadening the concept of "cause" to encompass discretionary decisions would convert the elected district attorney into one serving "at the pleasure" of the chief executive. That was the federal model in 1848 (and remains so today). Had the drafters of the Wisconsin Constitution sought to emulate the federal model, they easily could have done so. Instead, they chose to let voters decide. **WL**

ENDNOTES

¹Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 Yale L.J. 1528 (2012).

²See Milo Quaipe & Joseph Schafer, *The Attainment of Statehood*, Wisconsin Historical Publication Collections, V. 29, Constitutional Series, V. 4 (containing Journal and Debates of Constitutional Convention of 1847-48) at 275 (State Historical Society, 1928).

³See Wis. Const., art. VI, § 4; Wis. Stat. § 17.001. The provision of the Wisconsin Constitution empowering the governor to remove a district attorney was debated on Dec. 27, 1848. Quaipe & Schafer, *supra* note 2, at 274-75.

⁴See, e.g., Gary Fineout, *DeSantis May Remove Another Florida Prosecutor from Office*, Politico (Mar. 1, 2023), www.politico.com/news/2023/03/01/desantis-remove-florida-prosecutor-00085003. The recent Wisconsin history on the removal of a district attorney by the governor is as follows. In 1996, Governor Tommy Thompson removed the Lincoln County district attorney after the district attorney was charged with disorderly conduct for shoving a referee at a high school basketball game. See *District Attorney Shoves Referee, Loses Job*, Chicago Tribune (Aug. 22, 1996), www.chicagotribune.com/news/ct-xpm-1996-08-22-9608220182-story.html. In 2010, Governor Jim Doyle began removal proceedings against the Calumet County district attorney after the district attorney sent sexually explicit text messages to a domestic abuse victim; the DA then resigned. See *Sexting Wisconsin DA Kratz to Resign*, CBS News (Sept. 27, 2010), www.cbsnews.com/news/sexting-wisconsin-da-ken-kratz-to-resign/. In 2022, Governor Tony Evers declined to remove the Milwaukee County district attorney after a citizen petition contended that a faulty bail recommendation led to the murder of six people when Darrell Brooks drove a vehicle through a holiday parade in Waukesha. See Todd Richmond, *Evers Attorney: Complaint Over Milwaukee Prosecutor Invalid*, AP News (June 11, 2022), <https://apnews.com/article/wisconsin-milwaukee-2c5136aeb375180d85fbd364d9461>. Evers' decision relied upon a legal opinion by attorney Matthew J. Fleming, who wrote, in part, that the petition failed to establish the district attorney's direct involvement in the alleged neglect of duty and, further, that the question of bail was one that involved other officers of the court besides the district attorney. The Fleming analysis noted that there were no published Wisconsin court decisions dealing with the removal of a district attorney. See Letter from Matthew J. Fleming to Off. of Legal Counsel (Jan. 11, 2022), www.wispolitics.com/wp-content/uploads/2022/01/220111LegalCounsel.pdf.

⁵Ellis, *supra* note 1, at 1537-39.

⁶*Id.* at 1541; see also *id.* appendix (listing year-by-year shift to elected prosecutors).

⁷See Wis. Const. art. VI, § 4(1)(c); 2007 Wis. Act 158.

⁸See *supra* note 3.

⁹Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, Columbia L.R. 1, 38-39 (2022) [hereinafter *The Three Permissions*].

¹⁰See *Ekern v. McGovern*, 154 Wis. 157, 142 N.W. 595, 627-30, 40 (1913) (discussing Wisconsin's reliance on New York's removal

statutes and excerpting 1849 removal statute); Wis. Stat. § 17.16(2) (1941) (current version at Wis. Stat. § 17.001).

¹¹*Id.*; see also *The Three Permissions*, *supra* note 9, at 27-52 (reviewing historical definitions of inefficiency, neglect of duty, and malfeasance).

¹²See *The Three Permissions*, *supra* note 9, at 37-45 and cases cited therein; *Bolan v. Williamson*, 1 Brev. 181 (S.C. 1802) (postmaster neglect); *Kellogg v. Schulyr*, 4 N.Y. 173, 180 (N.Y. Ct. App. 1850) (sheriff's failure to properly execute writ); *Judge of Hickman Cnty. Ct. v. Moore*, 2 Busch 108 (Ky. Ct. App. 1867) (drunk jail guards); *Warner v. Columbus Developmental Ctr.*, No. 83AP-1107, 1984 WL 5733 (Ohio Ct. App. May 3, 1984) (unpublished) (chronic absenteeism and tardiness). For criminal exposure in Wisconsin for neglect of duty, see also Wis. Stat. section 348.29 (1953) (potential criminal liability for neglect of duty) and Wis. Stat. section 946.12(1) (criminal liability for intentional failure to perform duty).

¹³*The Three Permissions*, *supra* note 9, at 32.

¹⁴See *State v. Lombardi*, 8 Wis. 2d 421, 99 N.W.2d 829 (1960) (removal of sheriff for failure to pursue drunk-driving case); *State ex rel. Dinneen v. Larson*, 231 Wis. 207, 286 N.W. 41 (1939) (discussing proof of corrupt motive in malfeasance and neglect of duty charge against sheriff); *Ekern*, 154 Wis. 157, 142 N.W. 595, 627-30 (removal of insurance commissioner for neglect of duty while engaging in political activity); *Larkin v. Noonan*, 19 Wis. 82 (1865) (alleged neglect of duty by sheriff for allowing lynching); *Daily Milwaukee News* 1 (Feb. 11, 1862) (same); *Goodrich v. Compound Sch. Dist. No. 5*, 2 Wis. 102 (1853) (attempt to remove town clerk for neglect of duty in tax collection); see also *Kohlmetz v. Fabyan (In Re Est. of Kohlmetz)*, 113 Wis. 2d 160, 169, 336 N.W.2d 176 (1983) (defining dereliction of duty by an attorney the same as inexcusable neglect).

¹⁵Wis. Stat. § 978.05(2) (2021); *State v. Conger*, 2010 WI 56, ¶¶ 19-20, 325 Wis. 2d 664, 797 N.W.2d 341.

¹⁶See *Jones v. Eighth Judicial Dist.*, 219 P.2d 1055 (Nev. 1950); *Speer v. State*, 198 S.W. 113 (Ark. 1939); *Attorney General v. Tufts*, 132 N.E. 322 (Mass. 1921); *People v. Kurminsky*, 52 N.Y.S. 609 (1898). ¹⁷*Kurminsky*, 52 N.Y.S. at 610-11. The New York laws were sufficiently nuanced that the courts even debated whether the removal of a city bell ringer was appropriate. *People ex rel. Belch v. Bearfield*, 35 Barb. 254 (N.Y. 1861).

¹⁸*Three Permissions*, *supra* note 9, at 21 n. 118, 42-43.

¹⁹See 28 U.S.C. § 541.

²⁰*Three Permissions*, *supra* note 9, at 3-5, 66-67; *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197-98 (2020); see also Wis. Const. art V, §§ 1, 4 (the executive power is vested in the governor, who "shall take care that the laws be faithfully executed.").

²¹*Seila Law*, 140 S. Ct. at 2226-27 (Kagan, J., dissenting); see also Wis. Const. art. VI, §§ 1-3 (creating elected executive branch positions separate and apart from the governor and whose duties are to be defined by the legislature).

²²*Seila Law*, 140 S. Ct. at 2197.

²³*Kaul v. Prehn*, 2022 WI 50, ¶¶ 43-46, 402 Wis. 2d 539, 976 N.W.2d 821. **WL**