
The State of Wisconsin

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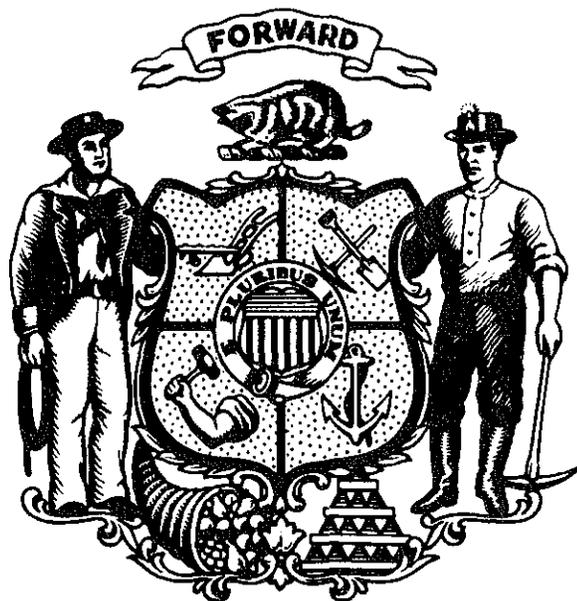
201 North, State Capitol
Madison, Wisconsin 53702

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Dr. H. Rupert Theobald, Chief

THE REMOVAL OF STATE PUBLIC OFFICIALS FROM OFFICE

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THE REMOVAL OF STATE PUBLIC OFFICIALS FROM OFFICE

INTRODUCTION

"The power to remove a public officer is an incident of the sovereign power, and, in the absence of constitutional restraint, the power is implied in all governmental operations. Such power has been held to be indispensable in obtaining the proper administration of public affairs. However, such power should be exercised with caution, and generally, whoever undertakes to remove an officer must show authority therefor. The power of removal rests with the people and may be executive or judicial, or legislative, dependent on the manner in which the people in the specific instance have given or bestowed the power." 67 *Corpus Juris Secundum*, "Officers", Section 118.

Recent events in Wisconsin involving the recall of one judge, the possible removal of another judge for misconduct, possible removal of a judge via legislative address, and the vacation of a legislative seat because of a felony conviction of the legislator, have again made removal of public officials a topic of inquiry.

The methods of removing public officials in Wisconsin are varied. As the above quotation indicates, the removal authority may rest with the executive, legislative or judicial branches or with the people directly. Removal of an appointive official by the appointing authority (for example, the Governor or a board) is perhaps the most common or frequent method. The removal is done either at the pleasure of the appointing authority or for cause, depending on the statutory provisions governing the appointive position. The Governor, being the chief executive, is obviously the major appointing authority and consequently would likely make the most removals. In Wisconsin, the Governor is also authorized to remove for cause certain elected county officials. A discussion of several major cases involving attempted gubernatorial removals are discussed later in this report.

Methods of removing various public officials in which the legislature plays the major role include impeachment, legislative address and interpellation. The legislature may also remove one of its own members by expulsion or by refusal to seat a new member. Additionally, a seat may be vacated for certain statutory causes, such as committing a felony, resignation, residency violations, or death.

Pursuant to a recently ratified constitutional amendment and subsequent implementing legislation, justices and judges may also be removed by the Supreme Court for misconduct or for disability. One such charge of judicial misconduct is presently scheduled for a hearing before a 3-judge panel appointed by the Supreme Court.

The most drastic method of removing public officials at all levels of government is the recall, whereby a certain percentage of the electorate may petition for a special election in an attempt to remove a public official. Two years ago, in an historic recall election, a Dane County judge was removed from office via such a recall.

A number of proposals have been introduced in the 1979 Wisconsin Legislature relating to recall, impeachment and legislative address. The recall proposals introduced through December 15, 1979, require a primary in recall elections; change the procedure for recall of city, village, town and school district officials; abolish nonpartisan primary elections; and revise the method of determining the number of signatures required to recall school district officers. The impeachment proposal removes an obsolete limitation from the impeachment procedure. Two legislative address proposals provide a procedure for determining whether Circuit Judge Christ T. Seraphim should be removed by legislative address of the Legislature and provide for the vote on removal of Judge Christ Seraphim, respectively.

A Listing of Pertinent Constitutional and Statutory Provisions

Constitutional Provisions

- Article IV, Section 6. Qualifications of legislators.
- Article IV, Section 7. Organization of legislature; quorum; compulsory attendance.
- Article IV, Section 8. Rules; contempts; expulsion.
- Article IV, Section 12. Ineligibility of legislators to office.
- Article IV, Section 13. Ineligibility of federal officers.
- Article VI, Section 4. County officers; election, terms, removal; vacancies.
- Article VII, Section 1. Impeachment; trial.
- Article VII, Section 10. Judges; eligibility to office.
- Article VII, Section 11. Disciplinary proceedings.
- Article VII, Section 13. Judges and judges; removal by address.

- Article XIII, Section 3. Eligibility to office.
- Article XIII, Section 10. Vacancies in office.
- Article XIII, Section 12. Recall of elective officers.

Statutory Provisions

- Section 13.26. Contempt.
- Section 13.27. Punishment for contempt.
- Section 13.28. Interpellation of officers.
- Section 13.29. Time for interpellation and procedure.
- Section 13.30. State officers; removal by legislature.
- Section 14.019. Governor's nonstatutory committees.
- Section 14.02. Employes.
- Section 17.03. Vacancies, how caused.
- Section 17.05. Governor may declare vacancies.
- Section 17.06. Removal state officers; impeachment; address.
- Section 17.07. Removals; legislative and appointive state officers.
- Section 17.08. Suspension of receiver of moneys.
- Section 17.09. Removal of elective county officers.
- Section 17.10. Removal of appointive county officers.
- Section 17.16. Removals; definition; procedure; disqualification.
- Section 17.18. Vacancies, United States senator and member of congress; how filled.
- Section 17.19. Vacancies, elective state offices; how filled.
- Section 17.20. Vacancies in appointive state offices; how filled; terms.
- Chapter 750. Court of Impeachment.

REMOVAL OF APPOINTED PUBLIC OFFICIALS

The power to appoint an official generally carries with it the power to remove that same official providing there exist no constitutional or statutory restrictions.

The following explanation of the authority to remove as incident to the power of appointment, is found in 67 *Corpus Juris Secundum*, "Officers", Sec. 118 (b):

"As a general rule, in the absence of any limiting provision of constitution or statute, the power of appointment carries with it, as an incident, the power to remove, where no definite term of office is fixed by law. Moreover, this implied power to remove cannot be contracted away so as to bind the appointing bodies to retain an officer for a definite fixed period. Accordingly, the person having the power of appointment may remove officers or employees appointed by his predecessor."

In a recent Wisconsin Supreme Court decision, *Moses v. Board of Veterans Affairs*, 80 Wis. 2d 411 (1977), the court made the following remarks concerning the removal power provided for in statute Section 17.07:

"In this state the right to remove legislative or appointive state officers is given by statute to the person or body that made the appointment of such officer. This is codified in a removal statute creating certain categories of officers. These categories relate the right to remove an officer with the person or body that made the appointment. One such category is 'state officers appointed by the governor by and with the advice and consent of the senate, or appointed by any other officer or body, subject to the concurrence of the governor'. State officers in this category can be removed from office only 'by the governor at any time, for cause'. Another category is 'other state officers appointed by any officer or body without the concurrence of the governor'. State officers in this category can be removed from office 'by the officer or body that appointed them, at pleasure'. If the petitioner is in the first category, he can be removed only by the governor for cause. But if the second applies, he is removable by the board, at its pleasure."

There generally exists no such implied power to remove an official when the term is fixed by law or when the appointment is for life or good behavior. In such cases, removal can be accomplished only for cause. However, Section 17.07 (4) of the Wisconsin Statutes provides that state officers appointed by the Governor *alone* for a *fixed* or indefinite term, may be removed by the Governor, at pleasure.

Removal at Pleasure

The process for removing an appointee serving at pleasure is rather simple. According to statute Section 17.16 (1), "Removals from office at pleasure shall be made by order, a copy of which shall be filed as provided by sub. (8), except that a copy of the order of removal of a court commissioner, a jury commissioner or family court commissioner shall be filed in the office of the clerk of the circuit court." Many positions, at all levels of government, are subject to removal at the pleasure of the appointing authority (be it one official or a body of officials). Since probable cause does not have to be shown and since no hearing is necessary, removal from office at pleasure tends to be rather noncontroversial. In most cases, the statutes indicate whether the officer is subject to removal at pleasure or for cause.

Removal For Cause

The term "cause" is defined by *Corpus Juris Secundum*, "Officers", Sec. 120: "'Cause' which is sufficient or necessary to authorize a removal from office means legal cause, that is, reasons which the law and sound public policy recognize as sufficient warrant for removal and not merely a cause which the appointing power in the exercise of discretion may deem sufficient."

Furthermore, in some cases a "willfulness" on the part of the official performing the action is required to be proven. The term "willful" as defined in 63 Am Jur 2d, "Public Officers and Employees", Sec. 201, means "knowledge on the part of the officer, together with a purpose to do wrong".

Section 17.16 (2) of the Wisconsin Statutes says that "cause", "unless qualified, means inefficiency, neglect of duty, official misconduct or malfeasance in office". Therefore, inefficiency, neglect of duty, official misconduct or malfeasance in office represent the four grounds for removal of a public official in Wisconsin. The latter three grounds are generally held to imply some type of wrongdoing, some act of omission or commission in the performance of official duties. Inefficiency, on the other hand, refers to the quality of being incapable of doing or unwilling to do the duties required of an officer. The term "willfulness" is not expressly included in the section.

The statutory procedure for removing an officer for cause, as found in Section 17.16 (3) through (8) of the Wisconsin Statutes, is as follows:

(3) Removals from office for cause under this chapter, except as provided in s. 17.14, shall be made as provided in this section, and may be made only upon written verified charges preferred by a taxpayer and resident of the governmental unit of which the person against whom the charges are filed is an officer, and after a speedy public hearing whereat said officer shall have full opportunity to be heard in his defense, personally and by counsel. A copy of the charges and written notice of the time and place for the hearing thereon shall be given such officer by the removing power by delivery to such officer in person or by mailing the same to him at his last and usual post-office address not less than 10 days prior to such hearing. The officer may within 10 days from service of such charges file with the removing power his verified answer thereto. The hearing shall be conducted and investigation made by the removing power with due dispatch, but the governor, in case of charges preferred to him, may appoint a commissioner to conduct the hearing, make the investigation and report the testimony and proceedings to him, and the council of any city having a membership of more than 20, in case of charges preferred to it, may appoint a committee of not less than 5 of its members, to conduct the hearing, make investigation and report the testimony and proceedings to it. Such commissioner or committee shall have the same power and authority as the governor or the council, as the case may be, in the conduct of the hearing on and investigation of such charges.

(4) The removing power may, before acting upon any charges preferred against any officer, require the person preferring the same to execute and deliver to such power a bond in the sum of \$1,000 with one or more sureties to be approved by such power, conditioned for the payment of all costs and expenses actually incurred by the state, county or other unit of which the person charged is an officer and by the removing power in the hearing and investigation of such charges.

(5) The removing power, and in case such power consists of more than one person, each such person is authorized to administer oaths and to issue subpoenas for the attendance of witnesses and the production of evidence, and may make and enforce such orders and rules as are necessary to properly conduct such hearing and may appoint and fix the compensation of a stenographer to take testimony thereat.

(7) No person shall be excused from testifying or from producing evidence on such hearing for the reason that the testimony, documentary or otherwise, required of him may tend to incriminate him, but no person so testifying shall be prosecuted for or on account of any transaction, matter or thing concerning which he may have so testified or produced any documentary evidence, except for perjury committed in giving such testimony.

(8) Removals from office for cause shall be by order, a certified copy of which, together with a complete transcript of the testimony and proceedings at the hearing and a statement of the cause or causes for which removal is made, shall be filed by the removing power as follows:

(a) In the case of a state officer, in the office of the secretary of state.

(b) In the case of other officers, in the office of the clerk of the unit of which the person removed was an officer.

(c) In the case of officers of joint county institutions, in the office of the county clerk of the county wherein the buildings of such institution are located.

Nancy Arnold, a former law clerk for the Wisconsin Department of Justice who recently researched the question of what conduct suffices to justify removal of a public officer, stated in her written memorandum that successful removal proceedings are relatively few in number. She indicated that the reasons for this may be "a reflection of the general high quality of public officers, or of public apathy, or of the difficulty in bringing and concluding such suits in a satisfactory way, or of other factors." Miss Arnold concluded that the difficulty inherent in maintaining removal proceedings is perhaps the major factor in the lack of successful proceedings of this type. Apparently, the difficulties in securing successful removals are partially attributable to the fact that the courts have not clearly defined such key concepts as "burden of proof", "standard of care", and the "purpose" of removal proceedings.

REMOVAL POWERS OF THE GOVERNOR

Although the Governor of Wisconsin has constitutional authority to remove for cause certain elected county officials (Art. VI, Sec. 4) and statutory authority to remove certain appointed state officers [Secs. 17.09 (5) and 17.10 (1)], as well as authority to remove at pleasure, members of his own staff (Sec. 14.02), the primary focus of this section is on the Governor's removal powers of appointed state officials pursuant to statute Sections 17.07 and 17.08.

Historical Background

Before examining the current Wisconsin situation in regard to gubernatorial removal powers, a look at our state's early history is of some interest. According to Mr. James Barnett in a 1905 article titled, "The History of the Office of the Governor of Wisconsin", there existed no provision for removal from office by the Governor in the Organic Law of the Territory. Rather, the removal power was derived from his power of appointment.

The 1848 Wisconsin Constitution gave the Governor authority to remove certain elected county officers for cause (Art. VI, Sec. 4).

The 1849 Wisconsin Statutes provided the basis for the gubernatorial removal power which exists today. Most gubernatorial appointees (with a few exceptions) were removable by the Governor for cause or at pleasure. However, there existed no statutory provision for the removal of elected officials except by impeachment.

The following excerpt, taken from Barnett's article, relates to the removal powers of the Governor during the early years of statehood.

"Several provisions for removals from particular offices may be mentioned. Some officers appointed by the Governor have served 'during the pleasure of the Governor', or 'at the Governor's discretion', or have been removable 'when he shall believe the best interests of the State demand such removal', or 'for cause', or 'upon reasonable notice'. A few officers appointed by the Governor and Senate or by the Legislature have been removable by the Governor alone. For a while the State Librarian, then appointed by the Governor, was removable either by the Governor or by the Legislature. For many years the State Prison Commissioner, elected by the people, was removable by the Governor, but in this case the details of the procedure before the Governor were specified and the Governor was required to file the reasons for his action with the Secretary of State. This is the only case where an elective State officer has been removable otherwise than by impeachment. An anomalous case is that of the Normal School Regents appointed by the Governor and Senate, and later by the Governor alone, who may be removed for cause by a two-thirds vote of the Board."

In addition to his direct authority to remove various officials, since 1849 the governor has been authorized to declare vacant the office of every officer required by law to execute an official bond when such officer breaches the conditions of his bond (Section 17.05 of the 1977 Wisconsin Statutes is the current citation).

Constitutional and Statutory Provisions on the Governor's Power of Removal

The primary constitutional and statutory provisions granting the Governor the power of removal are:

Constitutional Provision

(ART. VI) **County officers; election, terms, removal; vacancies.** SECTION 4. Sheriffs, coroners, register of deeds, district attorneys, and all other county officers except judicial officers and chief executive officers, shall be chosen by the electors of the respective counties once in every two years. The offices of coroner and surveyor in counties having a population of 500,000 or more are abolished. Counties not having a population of 500,000 shall have the option of retaining the elective office of coroner or instituting a medical examiner system. Two or more counties may institute a joint medical examiner system. Sheriffs shall hold no other office; they may be required by law to renew their security from time to time, and in default of giving such new security their office shall be deemed vacant, but the county shall never be made responsible for the acts of the sheriff. The governor may remove any officer in this section mentioned, giving to such a copy of the charges against him and an opportunity of being heard in his defense. All vacancies shall be filled by appointment, and the person

appointed to fill a vacancy shall hold only for the unexpired portion of the term to which he shall be appointed and until his successor shall be elected and qualified.

Statutory Provisions

Section 14.019 (1) (a) Persons appointed to a nonstatutory committee may be removed or replaced, or the committee may be abolished, by the governor at his pleasure.

14.02 Employees. The governor may appoint and fix the compensation of such employes as deemed necessary for the execution of the functions of the office of the governor. The governor may at pleasure remove any of the appointees.

17.05 Governor may declare vacancies. The governor may declare vacant the office of any state officer required by law to execute an official bond whenever a judgment is obtained against such officer for a breach of the conditions of such bond.

17.07 Removals; legislative and appointive state officers.

(2) State officers appointed by the legislature, by that body, at pleasure; or by the governor during the recess of the legislature, for cause.

(3) State officers appointed by the governor by and with the advice and consent of the senate, or appointed by any other officer or body subject to the concurrence of the governor, by the governor at any time, for cause; but the commissioner of banking and state auditor may be so removed only by and with the consent of a majority of the members of the senate.

(4) State officers appointed by the governor alone for a fixed or indefinite term or to supply a vacancy in any office, elective or appointive, except justices of the supreme court and judges, by the governor at pleasure; and all officers appointed by the governor during the recess of the legislature whose appointments are required to be later confirmed by the senate shall be deemed to be appointed by the governor alone until so confirmed.

17.08 Suspension of receiver of moneys.

(1) The governor may summarily suspend from office any appointive state officer who collects, receives or handles public moneys, if it appears to him by reason of action, proceedings, charges or credible information that the officer has in any particular wilfully neglected his duty in connection with such moneys. The suspension shall continue until the final determination of the action or proceedings or of the investigation of such charges or information, or pending any proceedings to remove such officer from office as provided by law for any such neglect of duty, and a competent person shall be appointed, in the manner and by the appointing power prescribed for filling vacancies in such office, to discharge the duties of such officer during his suspension. If it is determined in the action or proceedings or is found upon investigation that the officer has not in any particular wilfully neglected his duty in connection with such moneys, and such fact is certified to the secretary of state by the judge, governor or other officer who conducted such action, proceedings or investigation, the suspended officer, unless he has been removed from office for any cause provided by law, shall thereby be restored to office, if the term for which he was elected or appointed has not expired, and shall thereby become entitled to the emoluments of the office for all of the time he would have served therein had he not been suspended as herein provided.

(2) This section in no manner impairs or restricts the power of the governor or other officer or body to remove any officer from office as provided by law.

17.09 Removal of elective county officers.

(5) OTHER ELECTIVE COUNTY OFFICERS. The sheriff, coroner, register of deeds or district attorney, by the governor, for cause.

17.10 Removal of appointive county officers. Appointive county officers may be removed as follows:

(1) APPOINTED BY GOVERNOR. County officers of any county appointed by the governor, by him, for cause.

A Look At Several Removal Situations

This section summarizes several significant instances involving the removal power or authority of the Governor. Several of the cases cited involve the removal or attempted removal of various public officials by the Governor, while the remaining cases involve the removal of a gubernatorial appointee by an independent state board (Veterans Board) and the Governor's authority to reappoint, during a legislative recess, appointees previously rejected by the Senate.

THE EKERN AFFAIR

In 1913 Governor Francis McGovern attempted to oust Herman L. Ekern from his position as commissioner of insurance on grounds of "political activity" and "misconduct" pursuant to Section 970 of the Wisconsin Statutes. Mr. Ekern's 4-year term had 3 years to run. A hearing was held in the Executive Office on the morning of January 8, 1913, following the serving of a complaint filed by H.C.

Wilbur (the Governor's clerk) on Mr. Ekern for neglect of duty. The hearing was held on less than an hour's notice to Mr. Ekern. After a very brief hearing, and shortly before noon of that same day, Governor McGovern issued an order for the removal of Mr. Ekern from his position. The action was hasty because the next legislative session was about to commence. The removal powers that the Governor possessed during a legislative recess would then be suspended automatically. Statute Section 970 provided that officers, such as the commissioner of insurance, may be removed by the governor for official misconduct, or habitual or wilful neglect of duty upon satisfactory proof at any time during the recess of the legislature.

At the same time that he issued the removal order, Governor McGovern also submitted to the Senate the nomination of Lewis A. Anderson as insurance commissioner to succeed Herman L. Ekern.

Mr. Ekern refused to vacate the office and the Governor's agents attempted to remove Mr. Ekern from his office forcibly. This action failed and Mr. Ekern obtained a temporary court injunction preventing any further violent efforts to remove him.

1. 1913 Senate Hearing on the Attempted Removal of Herman Ekern

Following Governor McGovern's attempt to remove Herman Ekern from his post of commissioner of insurance and replace him with Lewis Anderson, the Senate held a hearing on the matter.

Pursuant to 1913 Senate Resolution 8, introduced by Senator Bosshard, the Wisconsin Senate, sitting as a Committee of the Whole, held hearings relating to the following matters:

"1. The charges made to the governor in the proceedings for removal of the said Herman L. Ekern as commissioner of insurance.

"2. The proceedings had before the governor upon said charges and any proceedings or action thereon had subsequent thereto.

"3. The facts surrounding the appointment of said Lewis A. Anderson, and the proceedings had thereon and subsequent thereto.

"4. All matters relating to any attempt to take possession of said office and to remove said Herman L. Ekern by force or otherwise"

On February 7, 1913, after several days of taking testimony, the Senate adopted a majority report exonerating Mr. Ekern of all charges leveled against him by Governor McGovern. The Senate also voted 24 to 4 not to confirm Mr. Anderson as Ekern's successor. Individual minority reports were submitted by Senators Browne and Kileen, but both were rejected. In their minority reports, the two Senators claimed that the issue was strictly a judicial matter and not within the jurisdiction of the Senate.

It is interesting to note that Governor McGovern did not attend the Senate hearing even though he had been served a subpoena. Governor McGovern, via a letter to the Senate, made the following remarks regarding his refusal to honor the Senate's subpoena to testify:

"In all proceedings relating to the removal of Mr. Ekern as Commissioner of Insurance and the appointment of Mr. Anderson as his successor I acted solely in my executive capacity and in the exercise of what I conceived to be my duty as the governor of this state. It must therefore be apparent to you that it is not competent for the senate or any committee thereof to review the proceedings thus had by a coordinate department of the state government. The responsibility of that department for what has been done is to the people and not to the senate or any of its committees..."

2. *Ekern v. McGovern*, 154 Wis 157 (1913)

The court, ruling in favor of Mr. Ekern, claimed that 1) sufficient notice of a hearing was not granted, 2) the assigned cause for removal was not within the statute, 3) fair opportunity was not offered Mr. Ekern to present his case, and 4) the evidence produced did not make a strong enough case against Mr. Ekern within the statute.

The following summary from the notes following statute Section 17.07 of the 1970 *Wisconsin Annotations* highlights the principle findings of the court:

"The governor may remove the commissioner of insurance for cause. His errors of judgment within his jurisdiction will not be reviewed by the courts. But outside of executive authority, principles of equality before the law render him liable to judicial remedies the same as any other person, except as otherwise provided by law or required by public policy. An officer entitled to hold for a fixed term, subject to removal for cause, is by the common law entitled to protection against danger of forcible removal because he is entitled to due process of law, and that excludes interference except according to established principles of justice. Such established principles secure him the right to reasonable notice of charges, reasonable notice of a hearing, reasonable opportunity to be heard, to know the opposing evidence and oppose it with evidence and to have the final determination grounded on evidence."

GOVERNOR REYNOLD'S APPOINTMENTS

1. *State ex rel. Thompson v. Gibson*, 22 Wis. (2d) 275 (1963)

The case of *State ex rel. Thompson v. Gibson* stemmed from the appointment or reappointment of more than 70 persons to various state offices by Governor John Reynolds between August 6, 1963 and November 4, 1963, a period of time when the Legislature was in a 3-month recess. Governor Reynolds made the appointments during the interim because the Republican-controlled Senate failed to act on his previous appointments during the regular legislative session. The court case specifically involved 5 individuals who were appointed to offices left unoccupied due to the death or resignation of the incumbents and 7 individuals who were appointed to offices occupied by incumbents holding over after expiration of their terms. John Gibson, whom Governor Reynolds appointed state auditor to succeed incumbent J. Jay Kelihier, represented one of the 7 latter individuals.

According to newspaper accounts at the time, the Senate Republican leaders had rejected many of Governor Reynolds' appointments, not because the individuals were not qualified, but because they would be replacing Republicans who, in their estimation, had done a good job. In response to the above action taken by the Wisconsin Senate, columnist Aldric Revell, wrote in the November 14, 1963, issue of the *Capital Times*: "This is the first time in Wisconsin legislative history that such a stand has been taken by the Senate and it is in violation of the law which states that when a term of office is up the governor has the authority to appoint another person with advice and consent of the Senate."

The following is the summary of the issues involved in the case from the foreword to the decision.

"In this action for declaratory judgment, the attorney general sought to have determined the validity of several gubernatorial appointments to various state offices, created by the legislature, to be filled by appointment by the governor, with (or 'by and with') the advice and consent of the senate, during the interim period of the general session when the legislature was in recess for three months. The appointments were not acted on by the senate. The question of validity of the appointments consisted of situations falling mainly into three categories, *i.e.*, (1) those appointed to an office which was unoccupied due to death or resignation of the incumbent, (2) those appointed to office occupied by an incumbent (theretofore duly confirmed by the senate) but holding over after expiration of his term — including occupancy by an incumbent who held over pursuant to a specific statutory holdover clause, and occupancy by another past retirement age and participating in the state retirement program, and (3) appointment to an office in which a prior appointee (incumbent) continued in office although never confirmed by the senate. The basic questions presented for determination were whether the legislature was in recess during adjournment or 'not in session' within the purview of either secs. 17.20 or 14.22, Stats., or both, and whether the governor's power to appoint was or was not restricted to filling vacancies."

The state Supreme Court held that the temporary adjournment of the Legislature from August 6, 1963, to November 4, 1963, constituted only a recess and not a final adjournment. This meant that statute Section 17.20 (2) rather than Section 14.22 was applicable in this case. Section 17.20 (2) applies when the legislature is in recess and there are actual vacancies in appointive offices. 1963 Wisconsin Statutes Section 17.20 (2) read as follows:

"Vacancies occurring during the recess of the legislature in the office of any officer appointed by the governor with the advice and consent of the senate shall be filled by appointment by the governor for the residue of the unexpired term, subject to confirmation by the senate at the next regular session thereof if the term for which the person was so appointed has not expired. Any such appointment subject to confirmation by the senate shall be in full force until acted upon by the senate, and when confirmed by the senate shall continue for the residue of the unexpired term."

Section 14.22, on the other hand, refers to appointments made when the legislature is not in session (as opposed to a recess). 1963 Wisconsin Statutes Section 14.22 read as follows:

"Whenever the governor is authorized to make any appointment to office by and with the advice and consent of the senate, and the legislature is not in session at the time such office should be filled, he may make appointment thereto, subject to the approval of the senate at the next succeeding session of the legislature, and all such appointments shall be valid and effectual from the time when so made until 20 days after such meeting of the legislature as if he possessed the absolute power of appointment." [Note: Please see item 3 below for information relative to recent changes in statute Sections 17.20 (2) and 14.22]

In response to the questions cited above, the court issued the following findings:

1. Those gubernatorial appointees who were appointed or reappointed during the recess of the legislature to an office that was unoccupied due to death or resignation of the incumbent, are legally appointed and serve until their appointments are acted upon by the Senate and rejected.
2. Those gubernatorial appointees who were appointed to an office occupied by an incumbent (who had been confirmed by the Senate) holding over after the expiration of his term, are ineffective

appointments since the legislature was in recess (as opposed to not in session), and the new appointees were not confirmed by the Senate. Therefore, pursuant to 1963 statute Section 17.20 (2) there existed no vacancies in those positions and the holdover incumbents were entitled to continue in office until their successors were duly appointed and confirmed.

3. Where an incumbent has been appointed during a previous interim legislative recess period, but his appointment was never confirmed by the Senate, he holds such office only at the pleasure of the governor and subsequent appointments of a new person operates to remove the former office holder. This new appointment, pursuant to 1963 statute Sections 17.03 and 17.20 (2), created a vacancy in the office and therefore the new gubernatorial selectee was a valid appointment.

2. *State ex. rel. Reynolds v. Smith*, 22 Wis. (2d) 516 (1964)

The case of *State ex. rel. Reynolds v. Smith* concerned the authority of the governor to reappoint two state officials after their appointments had been rejected by the Senate. The appointed individuals involved were Howard Koop, Commissioner of the Department of Administration, and Frank Zeidler, Director, Department of Resource Development, who had initially been appointed by Governor Reynolds in January of 1963. On November 13, 1963, the appointments were rejected by the Senate. Governor Reynolds, however, reappointed the two officials on November 15, while the Legislature was still in session, and again on December 3, during a recess of the Legislature.

On the advice of Attorney General George Thompson, State Treasurer Dena Smith refused to pay the salaries of Mr. Zeidler and Mr. Koop for any period subsequent to November 24, 1963, on the grounds that having been rejected by the Senate, they did no longer hold public office.

The court ruled that the Governor was entitled to make interim or recess appointments after they had been rejected by the Senate. The court noted the argument by Attorney General George Thompson, in representing Mrs. Smith, that once the Senate takes action it should not be necessary for it to act again.

The court, however, in a unanimous decision, ruled that the argument of "continuing rejection" was not correct because such interpretation "could read something into the statutes by implication".

The decision of the court ended with the following determination:

"By the Court.--It is adjudged and determined:

1. That the appointments of Frank P. Zeidler as director or resource development and Howard J. Koop as commissioner of administration made by the governor under date of December 3, 1963, were valid and effective without the consent of the senate when made and, that, if such officers have properly qualified as required by law, they are entitled to hold these offices until acted upon by the senate.

2. That there is no duty on the part of respondent Dena A. Smith, the state treasurer, to pay the salaries of the offices of director of resource development and commissioner of administration to Zeidler and Koop for the period of November 24 to December 3, 1963; but that there is a duty on her part as state treasurer to pay their salaries for the period commencing December 3, 1963, and she is hereby directed to pay such salaries in accordance with this judgment."

3. Other Activities Relating to Executive Appointments

Legislative Council Judiciary Committee's Study of Executive Appointments

At a December 16, 1963, meeting the Legislative Council requested its Judiciary Committee to study the existing appointment procedure.

During the year 1964 the Judiciary Committee held several meetings to discuss the problems relative to executive appointments that Governor Reynolds had encountered and that resulted in the two Supreme Court cases.

The committee examined various key items, such as attempting to define the terms "recess" and "adjournment" and new procedures for executive appointments requiring Senate approval (including the federal system of executive appointment). It considered prohibiting the Governor from reappointing the same person to the same office after Senate rejection, placing a time limitation on both the Governor and the Senate, and other related issues.

Although several drafts were prepared, no legislation was introduced following the committee's meetings. A subcommittee was appointed to consider the committee's suggestions, but the subcommittee did not report back to the council.

Recent Changes In Statute Sections 14.22 and 17.20 (2)

Statute Section 14.22, as we noted earlier, laid down the gubernatorial appointment guidelines to be followed when the legislature was not in session (as opposed to a recess). Statute Section 17.20 (2), on the other hand, contained the gubernatorial appointment guidelines to be followed when the legislature is in recess and there are actual vacancies in appointive offices.

It is interesting to note that Chapter 418, Laws of 1977, repealed statute Section 14.22 and amended statute Section 17.20 (2). One of the changes made in Section 17.20 (2) involved the deletion

of the words "during the recess of the Legislature" and the addition of a provisional appointment. As a result, a vacancy occurring at *any time* (not just during a recess), may be filled by a provisional appointment of the Governor for the residue of the unexpired term, subject to Senate confirmation. An appointment made under this subsection which is withdrawn by the Governor or rejected by the Senate shall lapse. When a provisional appointment lapses, a vacancy occurs. The major impact of this legislation was to eliminate the conflict or confusion which existed over the terms "recess" versus "not in session".

MOSES V. BOARD OF VETERANS AFFAIRS, 80 Wis. 2D 411 (1977)

The case of *Moses v. Board of Veterans Affairs* involved the dismissal of John Moses, Secretary of the Department of Veterans Affairs, by the Board of Veterans Affairs. The principal question facing the Supreme Court was: Who had the statutory right and authority to remove the petitioner as secretary of veterans affairs?

Mr. Moses was appointed director (now secretary) of veterans affairs in November 1961 by Governor Gaylord Nelson. His appointment was approved by the Senate as required by statute Section 15.05 (1) (b). The problem which developed over the removal of the secretary of veterans affairs centered around the language in statute Section 15.05 (1) (b), which provided that departments under the direction of a board shall appoint a secretary to serve at the pleasure of the board, except for the secretary of veterans affairs, who is appointed by the *Governor* with the advice and consent of the Senate for an *indefinite* term.

Chapter 4, Laws of 1977, amended statute Section 15.05 (1) (b) by removing the exception clause relating to the secretary of veterans affairs. The exception had permitted the secretary of veterans to be appointed by the Governor, rather than by the board.

The removal of the exception was sought by the Board of Veterans Affairs after the Attorney General ruled, 65 OAG 229 (1976), that "The secretary of the Department of Veterans Affairs may only be removed from office by the Governor for cause. The board had no authority to discharge, suspend, or take disciplinary action that would prevent the secretary from fulfilling the statutory duties of his office".

On May 20, 1977, the Board of Veterans Affairs dismissed Mr. Moses from his post as secretary of the department.

Only July 13, 1977, the circuit court entered judgment dismissing the writ of certiorari and affirmed the decision of the Board of Veterans Affairs. Mr. Moses then appealed to the Supreme Court.

Although legislation had been enacted deleting the exception that required the secretary of veterans affairs to be appointed by the Governor and approved by the Senate, the Supreme Court made the following ruling:

"This amendment, a mere deletion of an exception, changed the manner of appointment of a secretary of veterans affairs. What the deletion in the appointment statute did not change was the fact that John R. Moses was the secretary of veterans affairs by virtue of an appointment by a governor, confirmed by the senate, as prescribed by the law at the time of his appointment. This was as true on the day the 1977 deletion became effective as it was on the day before. The 1977 amendment changed the method of appointment, but it left the method of removal of a state officer appointed by the governor, by and with the advice and consent of the senate, unchanged. As long as Moses remains an officer appointed by the governor, confirmed by the senate, he remains removable from office only by the governor, for cause.

"The board counters that although Moses was once removable only by the governor for cause, by virtue of the amendment he is now an officer appointed without the concurrence of the governor. To erase the fact that Moses was in fact appointed by a governor, the board asks this court to interpret the word 'officer' in sec. 17.07 'to embrace the term "office."' By that the board means that the determination of which category of 'officer' in sec. 17.07, Stats., to apply should be determined by considering the nature of the 'office' held and that the nature of the office of secretary of veterans affairs changed when the appointment statute was amended.⁹ 'Embrace' is hardly the word to use, for what the board asks this court to do is to change the word 'officer' in sec. 17.07 to 'office,' so that whenever the legislature amended the appointment of an officer the legislature would have ipso facto changed the manner of removal."

THE 1977 REMOVAL OF TWO PERSONNEL BOARD MEMBERS

The most recent removal by a Governor for cause occurred on September 21, 1977, when acting Governor Martin Schreiber, via Executive Order 48 and pursuant to statute Section 17.16 (3), removed two members of the State Personnel Board on charges of inefficiency in the performance of their duties as members of the board.

The removal action was initiated by Governor Patrick Lucey on March 4, 1977, when he requested Attorney General Bronson La Follette to bring formal charges against the two members of the Personnel Board. Later that same month, the Governor appointed Stewart Honeck commissioner to conduct hearings and an investigation on the charges to be preferred by the Attorney General, and report the findings, testimony and proceedings back to the Governor. Mr. Honeck, in his findings of the case, found the Personnel Board negligent in its responsibilities. Therefore, since the two charged individuals were members of the board, they were found to have failed in the performance of their duties by reason of inefficiency to an unacceptable degree. Inefficiency is one of the four grounds for dismissal of a public official pursuant to statute Section 17.16 (2).

1979 Legislation Relating to the Governor's Removal Powers

Several measures introduced in 1979 affect gubernatorial appointments: Senate Bills 113, 273 and 79 (enacted as Chapter 34). However, only one bill (1979 Senate Bill 111) was introduced by December 1, 1979, relating specifically to the removal powers of the governor.

1979 Senate Bill 111, introduced by the Committee on Senate Organization at the request of Governor Dreyfus, is a comprehensive bill containing the Governor's recommendations concerning the administration of state government. One small part of this bill relates to the removal of certain gubernatorial appointees.

Currently, statute Section 17.07 (3) appears to require a showing of "cause" (inefficiency, neglect of duty, official misconduct or malfeasance) before the Governor may remove any officer who serves at his pleasure if the appointment originally required Senate confirmation. This conflicts with Section 15.05 (1), which provides that a secretary of a department shall serve "at the pleasure of the governor" (except for the secretary of regulation and licensing). The Senate bill provides that appointees who serve at the Governor's pleasure, whether or not subject to Senate confirmation, may be removed at any time without a showing of cause.

In addition, a provision requiring that the Governor make a showing of cause and obtain the consent of the Senate to remove the Commissioner of Banking is changed to require that a showing of cause be made (this is the same as the requirement for removal of other commissioners). An obsolete reference to the method of removal of the state auditor is also deleted from the law. The provision is not necessary because the Governor no longer appoints the auditor.

In January 1980, this bill was awaiting further action in the Senate.

REMOVAL POWERS OF THE LEGISLATURE

The Legislature has rather extensive authority or discretion in regulating removals of most public officials. In most instances, when an office is created by state statute, the Legislature possesses the power to initiate or regulate removals, including removals made by the governor or other appointing authorities. Legislative removal powers, however, are not unlimited, for they may be restricted by various constitutional provisions specifying how certain public officials may be removed. Constitutional provisions governing the removal of public officials, which tend to limit the Legislature, include impeachment, legislative address and recall.

This section reviews specific removal powers possessed by the Wisconsin Legislature, including impeachment, legislative address, interpellation, unseating of legislative members and the removal of appointive officials.

Impeachment

Definition

The term "impeachment" is generally defined as a written accusation or list of charges levied against a public official for misconduct in office. The impeachment does not represent a conviction but merely an accusation. In most cases, the lower house of the legislature has the right to impeach and the upper house sits as a court for the trial of the charges.

Wisconsin Constitutional and Statutory Provisions

The Wisconsin Constitution provides for impeachment in Article VII, Section 1.

(Article VII) **Impeachment; trial.** SECTION 1. The court for the trial of impeachments shall be composed of the senate. The assembly shall have the power of impeaching all civil officers of this state for corrupt conduct in office, or for crimes and misdemeanors; but a majority of all the members elected shall concur in an impeachment. On the trial of an impeachment against the governor, the lieutenant governor shall not act as a member of the court. No judicial officer shall exercise his office, after he shall have been impeached, until his acquittal. Before the trial of an impeachment the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to evidence; and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal

from office, or removal from office and disqualification to hold any office of honor, profit or trust under the state; but the party impeached shall be liable to indictment, trial and punishment according to law.

The pertinent statutory provisions on impeachment are stated in statute Sections 17.06 (1), 750.01 and 750.02.

17.06 Removal state officers; impeachment; address. (1) Any civil officer of this state may be removed from office by impeachment for corrupt conduct in office, or for crimes and misdemeanors as provided in section 1, article VII of the constitution; and any supreme court justice or circuit court judge may also be removed from office by address of both houses of the legislature as provided in section 13, article VII of the constitution.

750.01 Administration of oaths. The president and chief clerk of the senate are respectively authorized to administer to any member or officer of the senate any oath or affirmation as a member or officer of the court for the trial of impeachments, and to administer any oath or affirmation to any other person in any proceeding before such court.

750.02 Process and rules. The court for the trial of impeachments is authorized to issue, and enforce obedience to, any summons, subpoena or other process necessary to the exercise of its powers and authority; to provide in what form the same shall be issued, by whom and in what manner it shall be signed and attested, by whom it shall be executed and in what form return thereof shall be made; and make such further provisions and rules as may be necessary or convenient for the discharge of its functions or duties.

Historical Development

The impeachment process has its roots in English legal history. Although the American founding fathers recognized the need to incorporate an impeachment clause to cover such crimes as treason, bribery and other high crimes and misdemeanors, it was not adopted without a struggle in the Constitutional Convention. The following quotation regarding the impeachment process controversy at the Constitutional Convention was taken from the *Congressional Quarterly's Guide to Congress*:

"Under the English system, an impeachment (indictment) was preferred by the House of Commons and decided by the House of Lords. In America, colonial governments and early state constitutions followed the British pattern of trial before the upper legislative body on charges brought by the lower house.

"Despite these precedents, a major controversy arose over the impeachment process in the Constitutional Convention. The issue was whether the Senate should try impeachments. Opposing that role for the Senate, Madison and Pinckney asserted that it would make the President too dependent on the legislative branch. Suggested alternative trial bodies included the 'national judiciary,' the Supreme Court or the assembled chief justices of state supreme courts. It was argued, however, that such bodies would be too small and perhaps even susceptible to corruption. In the end, the Senate was agreed to. Hamilton (a Senate opponent during the Convention) asked later in *The Federalist*: 'Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent?'"

According to the *Guide to Congress*, of the 60 times that impeachment proceedings have been initiated since 1789, only 13 officers have actually been impeached, and there have been only 4 convictions, all of them judges. The 13 impeached officials include 1 president, 1 senator, 1 cabinet official and 10 judges. The high proportion of judges reflects the fact that since federal judges are appointed for life, there is no electoral process for removing them.

A majority of states follow the same general procedure in handling impeachment charges, with the lower house voting a bill of impeachment and the upper house, sitting as a court, trying the impeachment. According to an article, "Judicial Discipline, Removal and Retirement", by Lisa L. Lewis (1976 *Wisconsin Law Review* 563), impeachment can be found in 46 state constitutions. Apparently, the method of removing public officials from office via the impeachment method has not been used frequently in most states; only 5 states had used impeachment within the prior 15 years. One of the reasons why impeachment has not been used extensively is the lack of provision for any compromising of the charges leveled. This was one of the charges made by Chief Justice E. Harris Drew of the Florida Supreme Court (*Mississippi Law Journal*, 1969:8, reprinted in the Arkansas Legislative Council Information Memo 161, "Removal of Judges in Arkansas and the Several States".) as follows:

"Perhaps the most serious fault with the present system is that the charges must be either sustained and the accused found guilty and thereby stripped of his office and disqualified to hold any office of honor, trust or profit under the state or he must be acquitted, there is no middle ground. Impeachment does not embrace the concept of intermediate punishment such as suspension, fine or reprimand. I am convinced that most trials of impeachment could have been prevented had there been an authority with the power to

reprimand, fine or suspend a judge for misconduct in office. I am confident that if there were a commission vested with such power, most cases could be finished before they ever reach a point of requiring severe action."

Impeachment Cases In Wisconsin

The Wisconsin constitutional and statutory provisions on impeachment, printed earlier in this section, provide that any civil officer of this state may be removed from office by impeachment for corrupt conduct in office or for crimes and misdemeanors.

Our records indicate that the Wisconsin Assembly has voted for impeachment on only one occasion, and, consequently, the Wisconsin Senate has conducted only one impeachment trial. On January 26, 1853, W.K. Wilson of Milwaukee presented a petition to the Legislature charging Judge Levi Hubbell of Milwaukee with high crimes, misdemeanors and malfeasance in office. A special committee was appointed by the Assembly to gather information, and a special attorney was appointed to help the committee gather information. The Assembly voted to impeach.

On March 22, 1853, the impeachment charges were read before the Senate. The defense and the Assembly both appointed counsel. Although numerous specifications or charges were made and voted on by the Senate, Judge Hubbell was acquitted after a lengthy trial which began in mid-June and continued into July.

1979 Wisconsin Legislation

As of December 15, 1979, one joint resolution relating to impeachment has been introduced in the 1979 Legislature. 1979 AJR-71, a constitutional amendment proposal introduced on first consideration by Representative Jackamonis, *et al.*, and cosponsored by Senator Offner, *et al.*, deletes unnecessary Latin terms and removes an obsolete limitation from the impeachment procedure. The joint resolution was adopted by the Assembly and is awaiting further action in the Senate.

Section 1 of Article VII of the Wisconsin Constitution still contains the obsolete provision prohibiting the lieutenant governor from acting "as a member of the court" when the Senate conducts an impeachment trial of the Governor. This prohibition had meaning only as long as the lieutenant governor served as Senate president. In the 1979 spring election, the voters of Wisconsin ratified a constitutional amendment authorizing the Senate to elect its president from among its members.

Legislative Address

Wisconsin law authorizes the removal of any justice or judge by joint address of the 2 houses of the legislature; that is, by passage of a joint resolution, the "address" document.

Wisconsin Constitutional and Statutory Provisions

The constitutional provisions concerning address are stated in Article VII, Section 13 of the Wisconsin Constitution; the statutory provisions are in Section 17.06 (2) of the Wisconsin Statutes.

(Article VII) Justices and judges: removal by address. SECTION 13. Any justice or judge may be removed from office by address of both houses of the legislature, if two-thirds of all the members elected to each house concur therein, but no removal shall be made by virtue of this section unless the justice or judge complained of is served with a copy of the charges, as the ground of address, and has had an opportunity of being heard. On the question of removal, the ayes and noes shall be entered on the journals.

17.06 Removal state officers; impeachment; address.

(2) In this section, "address" means a procedure for removal of a judge from office based on a document entitled "Address" which specifies charges against a judge alleging misconduct or that he is not physically or mentally qualified to exercise the judicial functions of his office. A copy of the address containing the charges against him shall be served upon the judge. The judge shall have the opportunity of being heard in his defense and he may be removed from office by address of both houses of the legislature if two-thirds of all members elected to each house concur therein.

Definitions

Attorney General Bronson La Follette, in a May 21, 1968 informal opinion (68-108) sent to Senator Allen J. Busby concerning the possible removal of a judge under Section 17.09 (4) of the Wisconsin Statutes, used the following definition to describe the term "address" when used in a legislative sense:

"A formal request addressed to the executive by one or both branches of the legislative body, requesting him to perform some act. It is provided as a means for the removal of judges who are deemed unworthy longer to occupy their situations although the causes of removal are not such as would warrant an impeachment. It is not provided for in the constitution of the United States; and even in those states where the right exists it is exercised but seldom and

generally with great unwillingness." Blacks Law Dictionary, 4th Ed. and the Bouviers Law Dictionary, Rawles Revision.

The principal characteristic of the address procedure which distinguishes it from impeachment proceedings is that it is a legislative act and does not purport to be of a judicial nature. While the address document must state the charges which allegedly warrant removal from office, and the accused is given an opportunity to respond, no formal trial procedure is specified. A two-thirds vote of all members elected to each house is necessary to effect removal.

Historical Background

The historical background of the term "address", as used in the legislative sense, is somewhat sketchy. Although the United States Constitution does not provide for address, more than half the states in the nation have address available for the removal of unworthy judges.

In Wisconsin, the section on address can be traced back to the Wisconsin Constitutional Convention of 1846. The section relating to address was *originally* proposed in the Wisconsin Constitutional Convention as follows:

"Any judge of the supreme or circuit court may be removed from office by concurrent resolution of both houses of the legislature, if two-thirds of all the members elected to each house concur therein, but no removal shall be made by virtue of this section unless the party complained of shall have been served with a copy of the complaint against him, and shall have had an opportunity of being heard in his defense, and no judge shall be removed for any cause for which he might have been impeached. On the question of removal the ayes and noes shall be entered on the journals." (*The Convention of 1846*, edited by Milo Quaife, Wisconsin Historical Collections, p. 294).

As adopted in the Constitution of 1846, the phrase "by address" was substituted for "by concurrent resolution," while the clause "and no judge shall be removed for any cause for which he might have been impeached" was removed entirely.

The 1848 Convention adopted it as it presently reads, substituting the word "charges" for the word "complaint," and inserting "as the ground of address".

During the constitutional conventions in 1846-48 there was considerable argument over whether the judiciary should be appointed or elected and over the length of terms. In arguing for a longer term for Supreme Court justices, one of the delegates, Mr. Kilbourn, said: "As to the danger of long terms on account of keeping a bad judge, if one were unfortunately elected, in office for a long time, there was a way provided in the bill to remedy that. It was provided that a judge might be removed by the legislature on good cause being shown. It was not necessary that the offense should be an impeachable one. It might be bad habits, incompetency - anything which in the judgment of the legislature made a change expedient. Thus the people would have complete control over the judiciary, and there could be no danger in a term of eight years." (*The Attainment of Statehood*, edited by Milo Quaife, Wisconsin Historical Collections, p. 642).

The constitutional section on address has been amended on two separate occasions. In April 1974 the voters ratified a constitutional amendment to include county and municipal judges under address provision, while in April 1977 the section was again amended to include judges of all courts of records.

Removal of a Wisconsin judge by address has never occurred. Furthermore, there are no constitutional or statutory guidelines to indicate what the next step would be if the procedure were used. The general consensus of the sketchy legal writing on the subject of address is that the address document is directed to the executive who is responsible for filling the vacancy. Thus, it can be presumed that, under Wisconsin law, legislative removal of any judge of record would be addressed to the governor by virtue of his responsibility for filling such vacancies.

1979 Wisconsin Legislation

During the 1979 session of the Wisconsin Legislature, two joint resolutions have been introduced as of January 2, 1980 (1979 Assembly Joint Resolutions 97 and 98), providing for the possible removal of a circuit judge from office by legislative address. The resolutions are awaiting further action in their house of origin.

1979 Assembly Joint Resolution 97, introduced by Representatives Coggs and Clarenbach, provides for a procedure to be used to determine if Circuit Court Judge Christ T. Seraphim should be removed from office by address of the Legislature. The joint resolution provides 3 charges and authorizes the 2 houses to assemble in joint session for a hearing on the matter on March 5, 1980. The Legislative Council would conduct an investigation and assist the Legislature at the hearing. At the hearing, both the Legislative Council and the judge could call and cross-examine witnesses and present evidence. The judge would have the right to counsel. After the conclusion of the hearing, the Legislature would vote on the question of removal pursuant to 1979 Assembly Joint Resolution 98.

1979 Assembly Joint Resolution 98, also introduced by Representatives Coggs and Clarenbach, is conditional upon the passage of 1979 Assembly Joint Resolution 97, which establishes a procedure for a

hearing on charges against Circuit Judge Christ T. Seraphim. Assuming that Joint Resolution 97 is adopted and the hearing is held, the actual vote on removal would be made pursuant to 1979 AJR-98. The judge would be removed only if two-thirds of *all* members of *each* house vote to remove him.

Interpellation

Definition

Interpellation is the questioning of administrative officials concerning his or her official actions or policies that were executed or promulgated by that officer. As a result of such examination, the Legislature is authorized to remove the officer by joint resolution adopted in each house by a majority of the members elected to each house.

Current Statutory Provisions

The statutory provisions for interpellation are stated in Sections 13.28, 13.29 and 13.30 of the Wisconsin Statutes.

13.28 Interpellation of officers. (1) Upon the petition of 6 members of the senate, not more than 4 of whom belong to the same political party, or of 17 members of the assembly, not more than 9 of whom belong to the same political party, any appointive state officer shall appear before that branch of the legislature to which the petitioning members belong, to answer written and oral interrogatories relative to any matter, function or work of such officer, relative to any act, omission or other matter pertaining to the powers or privileges exercised or duties performed by him or by any employe or subordinate of such officer, relative to the manner, conditions or terms of his appointment or of any appointment made by him or relative to any act, omission or conduct unbecoming the position of any such officer. Such petition shall be in writing, shall be accompanied by written interrogatories, shall be signed by the petitioning members and shall be filed with the presiding officer of that branch of the legislature to which such petitioning members belong.

(2) Upon the joint petition of 6 members of the senate, not more than 4 of whom belong to the same political party, and 17 members of the assembly, not more than 9 of whom belong to the same political party, filed with the presiding officer of the senate, requesting an examination of any appointive state officer made subject thereto by sub. (1) before a joint session of the 2 houses of the legislature, such officer shall appear before such joint session and answer written and oral interrogatories as to any matters included in sub. (1).

13.29 Time for interpellation and procedure. (1) Upon the filing of any petition, under s. 13.28, the presiding officer with whom the petition is filed, shall fix a time not later than 20 days after the filing of the petition, for the meeting of that branch of the legislature, or the joint session of the legislature, as the case may be, before which such interrogation and examination shall be held. A notice of such meeting, together with a copy of the written interrogatories, shall be forthwith delivered to the officer named therein.

(2) The legislature may adopt rules to govern such examinations. All proceedings, including all questions and answers, shall be fully recorded and a copy thereof shall be transmitted to the governor within 30 days after the close of the examination.

13.30 State officers; removal by legislature. Any appointive state officer after being examined under ss. 13.28 and 13.29 may be removed by the legislature by joint resolution adopted in each house by a majority of the members elected to such house. The power to remove appointive state officers provided in this section is additional to and shall not be construed as destroying the right of removal by other persons.

Historical Background

There were legislative attempts in 1913 to provide for interpellation of members of commissions and heads of state departments other than constitutional officers, but the first bill for interpellation did not pass until 1915. As enacted, Chapter 406 (AB 97), Laws of 1915, provided for the interpellation of Conservation Commission members only. The major purpose of the original bill was to abolish the offices of state fish and game warden, state Board of Forestry, state Conservation Commission, state Board of Fisheries and the State Park Board, and to create a new state Conservation Commission consisting of 3 members appointed by the governor with advice and consent of the Senate. The section on interpellation (statute Section 1494t-9) was added as an amendment by Senator William M. Bray, Oshkosh.

The section on interpellation provided that upon petition by a specified number of assemblymen or senators, the Assembly and Senate (individually or jointly) could require any member of the Conservation Commission to appear before that body to answer any oral or written questions concerning the official's actions or omissions. The original act did not provide for any removal power as provided in current statute Section 13.30.

Chapter 594, Laws of 1915, renumbered Section 1494t-9 to be Section 62.01 of the statutes.

Chapter 634 (SB 706), Laws of 1917, renumbered Section 62.10 (9) and (10) to be Section 13.23, and Section 62.10 (11) and (12) to be Section 13.24, and amended these sections to extend interpellation of Conservation Commission members to include any appointive state officer.

1921 Assembly Bill 198, introduced by Assemblyman C.E. Hanson, would have provided the Legislature with the power not only to examine public officials, but also to remove them by joint resolution. The April 8, 1921 issue of the *Wisconsin State Journal* said:

"The bill blazes a new legislative trail in the United States. European countries have used interpellation and recall for many years. If Wisconsin adopts the Hanson bill, it will be the first state in the union to reserve the right of examination and removal of appointive officials."

The original bill provided for exclusive legislative control over appointive officials. A Senate amendment, which was adopted, provided for the removal by the governor on the *recommendation of the legislature*. Although it passed both houses of the Legislature, Governor Blaine vetoed the bill on the grounds that it failed to add anything new so far as removal was concerned. The Legislature failed to override the veto.

The Legislature did acquire the power to remove appointive officers by joint resolution (what the original Hanson bill intended to do) with the passage of Chapter 146 (Senate Bill 132), Laws of 1923.

Chapter 146 (SB-132), Laws of 1923, created Section 13.245, which provided that "any appointive officer after being examined under ss. 13.23 and 13.24 may be removed by the legislature by joint resolution adopted in each house by a majority of the members elected to such house. The power to remove appointed state officers provided in this section is additional to and shall not be construed as destroying the right of removal by other persons."

In 1935, five joint resolutions were introduced, all in connection with an investigation of the Board of Control (for state institutions). Two failed and three were approved. Two of those approved adopted rules for the conduct of the interpellation. The third authorized procurement of counsel to interrogate the board.

In 1939, Assembly Resolution 18, introduced by Assemblyman Trego, directed the Conservation Commission to have one or more representatives of the commission appear before the Assembly to provide information. The resolution, however, was withdrawn and returned to the author. 1939 Assembly Resolution 44, introduced by Assemblyman Gruszka and adopted, created a special committee to investigate the Conservation Commission. The concluding resolve of the resolution reads as follows:

"Resolved, by the assembly, That a special committee of the assembly, consisting of five assemblymen, be appointed by the speaker of the assembly to investigate the Wisconsin Conservation Commission and the Wisconsin Conservation Department with respect to its organization and all of its activities of every name, nature and description, including activities of its personnel, such investigation to be upon sworn statements of witnesses and upon written verified charges on any matters pertaining to misfeasance or malfeasance of any individual connected with the said commission or department. Such committee shall begin its investigation promptly after its appointment and shall elect a chairman and secretary. It shall have the power to compel the attendance of witnesses pursuant to sections 13.25 to 13.30 of the statutes and any member of said committee may administer oaths to persons appearing before it to testify. The committee shall avail itself of such stenographic and clerical help as can be supplied from the chief clerk's staff and may employ such other assistance as may be necessary.

"The mention herein of special subjects of investigation shall not be deemed a limitation, but the committee shall have full authority to inquire into any matter relating to the operation, administration, powers and duties of said commission. The committee shall report its findings and recommendations at the earliest possible date to this assembly."

The final report of the special committee created pursuant to Assembly Resolution 44 was printed in the September 1, 1939, *Journal of the Assembly*. The majority report suggested that further investigation would be necessary to determine the truth of the various complaints made against the Conservation Commission. One reason given for the committee's failure to complete its investigation was the refusal of the Legislature to provide necessary funds in the amount of \$500 which had been requested via 1939 Assembly Bill 909. The bill had passed the Assembly but was nonconcurrent in by the Senate. The committee members who wrote the minority report stated that they "found no misfeasance or malfeasance of any name, nature, or description."

On February 20, 1941, 7 state senators submitted a petition pursuant to statute Sections 13.23 and 13.24 requesting Mark S. Catlin, Sr., member of the State Conservation Commission, to appear before the Senate to answer interrogatories relative to the functions, acts, works, or omissions to act of Mr. Catlin. The petition contained 21 separate written interrogatories for Mr. Catlin's response. The interpellation was scheduled for March 12, 1941.

According to the *Senate Journal* of March 12, the Judiciary Committee submitted a report, "Rules and Regulations To Govern Examination Of Officer Interpellated Pursuant To Section 13.23 and 13.24 Of The Wisconsin Statutes". Upon adoption of the report, the Senate proceeded with the interpellation. After the questions contained in the interpellation petition had been read by the chief clerk and answered by Mr. Catlin, the Senate returned to its regular business.

Chapter 659 (AB-830), Laws of 1965, renumbered Sections 13.23, 13.24 and 13.245 to be Sections 13.28, 13.29 and 13.30, respectively. There have been no subsequent changes made in any of the above sections.

Apparently, the right of removal of an appointive officer by interpellation has never been exercised by the legislature.

Other Removals By the Legislature

In addition to removal by legislative address, impeachment, and interpellation, the legislature may remove officials appointed by the legislature itself as statutorily provided. The legislature may also remove one of its own members by unseating or expelling that member.

Additionally, there exist various circumstances by which a public officer (including a legislator) may cause himself or herself to be removed from office. The circumstances or causes that force such a "removal" and thereby create a vacancy are found in statute Section 17.03. They do not really constitute a removal but merely reasons for causing a vacancy. The following are summaries of these other types of removals.

Removal of Legislative and Appointed State Officers

Officers elected by either house of the legislature may be removed by the house that elected them, at its pleasure [Section 17.07 (2)].

State officers appointed by the legislature may be removed by that body at its pleasure [Section 17.07 (2)]. Subsection (2) also authorizes the Governor to remove such appointed officials when the legislature is in recess, for cause.

The commissioner of banking, who is appointed by the Governor with the consent of the Senate may be removed by the Governor for cause only by and with the consent of a majority of the members of the Senate [Section 17.07 (3)].

Unseating a Member of the Wisconsin Legislature

Under the Constitution of our Wisconsin government, each house of the legislature alone has the power to judge the qualifications of its members. The right to act as final judge in the seating of members is an inherent power of the legislature and considered essential for its self-preservation. Each house of the legislature exercises the power to determine the qualifications of its members through two distinct processes. In *seating* members the house may review election returns and qualifications of opposing candidates in an election contest or the house may *vacate* a seat upon discovering that a member has disqualified himself by, for example, moving his residence out of the district which he represents.

A second process for unseating a member is by *expulsion* for misconduct. This power is considered more extreme and requires a two-thirds vote of the members of the house in contrast to the simple majority required in contesting the right to a seat. The two processes also differ as to purpose: an election contest pertains to the need for uniformity in the matter of qualifications, while expulsion pertains to the need to preserve the dignity and promote the efficiency of the legislature.

In cases that are not considered so extreme as to merit outright expulsion, the legislative house may discipline a member by *censuring* him for contempt. This action may be invoked for violation of house rules such as absence without leave and misconduct which may include intemperate speech on the floor of the house as well as misbehavior out of the house chambers. Contempt provisions are found in Article IV, Section 8 of the Wisconsin Constitution and Sections 13.26 and 13.27 of the Wisconsin Statutes.

It is interesting to note that the power of the legislature to unseat members is absolute and the individual legislator has no legal remedy. The reasoning behind this is that the right of an individual to hold public office is offset when the public interest is placed in jeopardy.

One additional point should be noted. While the removal of a legislator from office creates a vacancy, no special election may be called to fill the vacancy until the legislative body actually declares that the vacancy exists. This principle was reaffirmed in the case involving George H. Weissleder, who was elected state senator from the 6th Senatorial District, but who allegedly moved to the 5th District. In 3 OAG 760 (1914), the Attorney General advised that the Senate was the proper body to determine whether a vacancy existed and the Governor should not assume the prerogative of calling a special election to fill an undeclared vacancy. If a person were elected to fill an assumed vacancy, the Senate would have the power to pass upon his credentials and refuse to recognize the right of the newly elected senator to a seat.

1. Contesting the Right to Sit in the Legislature

The authority of each house of the legislature in Wisconsin to judge the qualifications of its members is set forth in Article IV, Sec. 7 of the Wisconsin Constitution:

"Each house shall be judge of the elections, returns and qualifications of its members; and a majority of each shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner under such penalties as each house may provide."

A number of court decisions as well as attorneys general's opinions have held that this section of the Constitution gives each legislative house the sole right to seat or unseat members. According to an Attorney General's opinion, 18 OAG 226 (1929), "Each house of the legislature is sole and final judge of elections and qualifications of its own members by virtue of provisions of sec. 7, art. IV, Wis. Const., and from determination of each house respectively in seating of its members there may be no appeal to or review by any court or other tribunal."

2. Legislative Expulsion

The authority of either house of the legislature to expel a member is found in Article IV, Section 8 of the Wisconsin Constitution: "Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and with the concurrence of two-thirds of all members elected, expel a member; but no member shall be expelled a second time for the same cause."

Although there have been a number of cases in which the Legislature attempted to expel a member, such action was approved in only two instances. One of most tragic instances occurred in the Territorial Legislature in 1842 when Charles C.P. Arndt from Green Bay was shot and killed by James R. Vineyard from Grant County, a fellow member of the Council (as the Senate was then called). Vineyard sent in his resignation, but it was rejected and he was expelled.

The second case occurred in 1917, when Senator Frank Raguse, a Socialist from Milwaukee, was expelled for refusing to retract statements made on the floor of the Senate which were considered disloyal to the government of the United States. 1917 Senate Resolution 19 censured Raguse for contempt and conduct unbecoming to a senator of Wisconsin and provided for his expulsion from the Legislature.

Another interesting situation involved a 1915 Attorney General's opinion [4 OAG 81 (1915)] relative to expulsion, censure and suspension of a legislative member.

The opinion was issued in response to a request from Speaker of the Assembly L.C. Whittet regarding the arrest of Assemblyman Christopher Paulus of Milwaukee for cashing 11 worthless checks in his home city. The Speaker queried the Attorney General as to the advisability of the Assembly taking any action and, if such action be taken, what the proper course of procedure would be.

The Attorney General's opinion stated that although the legislative houses have the right of expulsion and censure, the legislative body should not suspend a member. The opinion concluded with the following remarks:

"There seems to be a good reason why this power should not be exercised by a legislative body. It is not only the defendant that is interested in the matter but the people of his district, and if the member who represents a certain district is suspended from exercising any of the functions of a member then the people of that district are not represented in your body and they cannot elect a man to fill the vacancy for the reason that there is no vacancy. It is different when the member is expelled. In that case a vacancy will exist and it can be filled by the people of the district. On the other hand, if a member is censured by your body it will not deprive the people of his district of a representative for the reason that he can still exercise his functions as an assemblyman."

REMOVAL OF JUDGES BY THE SUPREME COURT

The recent charge of misconduct against a circuit court judge by the state Judicial Commission has brought to the forefront one additional method of removing a judge from office.

1977 Constitutional Amendment Revising the Judicial Branch

One small part of the comprehensive "court reform" constitutional amendment ratified by the electorate on April 5, 1977, subjects judges to reprimand, censure, suspension, and removal for cause or for disability by the Supreme Court pursuant to procedures established by the legislature by law. Judges are still subject to removal by impeachment, address of the legislature, and recall by special election. Article VII, Section 11 of the Wisconsin Constitution, relating to disciplinary proceedings for judges, reads as follows:

"Each justice or judge shall be subject to reprimand, censure, suspension, removal for cause or for disability, by the supreme court pursuant to procedures established by the legislature by law. No justice or judge removed for cause shall be eligible for reappointment or

temporary service. This section is alternative to, and cumulative with, the methods of removal provided in sections 1 and 13 of this article and section 12 of article XIII."

Legislative Implementation of Judicial Disciplinary Proceedings

The 1977 Wisconsin Legislature, pursuant to the directive in the above constitutional amendment to establish disciplinary procedures for judges, enacted Chapter 449, Laws of 1977. Chapter 449, a comprehensive law restructuring the court system, created Sections 757.81 to 757.99, relating to judicial discipline. These sections include the following key provisions:

1. "Misconduct" as defined in statute Section 757.81 (4) includes any of the following:
 - (a) Wilful violation of a rule of the code of judicial ethics.
 - (b) Wilful or persistent failure to perform official duties.
 - (c) Habitual intemperance, due to consumption of intoxicating beverages or use of dangerous drugs, which interferes with the proper performance of judicial duties.
 - (d) Conviction of a felony."

2. A Judicial Commission is created as an independent agency in the judicial branch to consist of 9 members serving 3-year terms. Five of the members are lay persons appointed by the governor with the advice and consent of the Senate; while one trial court judge, one Court of Appeals judge, and 2 members of the State Bar of Wisconsin who are not judges are appointed by the Supreme Court. The major responsibilities of the commission include the following:

- (a) Investigate any possible misconduct or disability of a judge or justice. Misconduct constitutes cause under Article VII, Section 11 of the Wisconsin Constitution.

- (b) Upon finding of probable cause, the commission shall file a complaint with the Supreme Court.

- (c) The commission shall prosecute any case of misconduct in which it files a formal complaint.

3. After the commission has found probable cause, it may opt for a 6-person jury to be presided over by a court of appeals judge; otherwise, the matter shall be heard by a 3-member judicial conduct and disability panel consisting of 3 court of appeals judges who are selected by the Supreme Court.

4. After the hearing is held by either the jury or the panel, the findings, conclusions and recommendations are then filed with the Supreme Court.

5. The Supreme Court reviews the findings, conclusions and recommendations and determine appropriate discipline in cases of misconduct.

6. The Supreme Court may, following the filing of a formal complaint, prohibit a judge from exercising the powers of a judge pending final determination of the proceedings.

7. A judge against whom a formal complaint alleging misconduct has been filed and who has been cleared of any wrongdoing, may be reimbursed for reasonable attorney fees.

The Judicial Commission has promulgated a set of administrative rules cited as Chapters JC 1 to JC 6 of the Wisconsin Administrative Code. The rules were adopted by the commission pursuant to statute Section 757.83 (3) and relate to statute Sections 757.81 to 757.99 for the purpose of properly administering its statutorily assigned duties.

ACTIONS CAUSING A VACANCY IN A PUBLIC OFFICE

The following are the major constitutional and statutory provisions on the causes for vacancy of a public office. Although most of the provisions refer to all public offices, some refer only to legislators.

Constitutional Provisions

Persons who have been convicted of a felony are declared ineligible for office by Article XIII, Section 3 of the Wisconsin Constitution:

"No member of congress, nor any person holding any office of profit or trust under the United States (postmasters exempted) or under any foreign power; no person convicted of any infamous crime in any court within the United States; and no person being a defaulter to the United States or to this state, or to any county or town therein, or to any state or territory within the United States, shall be eligible to any office of trust, profit or honor in this state."

Legislators may vacate their offices by ceasing to reside within the district for which they were elected pursuant to Article IV, Section 6 of the Wisconsin Constitution and as interpreted by an Attorney General's opinion, 10 OAG 660 (1921):

"No person shall be eligible to the legislature who shall not have resided one year within the state, and be a qualified elector in the district which he may be chosen to represent."

A legislator becomes ineligible when he holds an incompatible office such as an official position with the federal government. Article IV, Section 13 provides the following:

Section 13. "No person being a member of congress, or holding any military or civil office under the United States, shall be eligible to a seat in the legislature; and if any person

shall, after his election as a member of the legislature, be elected to congress, or be appointed to any office, civil or military, under the government of the United States, his acceptance thereof shall vacate his seat. This restriction shall not prohibit a legislator from accepting short periods of active duty as a member of the reserve or from serving in the armed forces during any emergency declared by the executive."

Statutory Provisions

Section 17.03 of the Wisconsin Statutes provides that public offices may be vacated by any one of the following events: 1) death of the incumbent; 2) resignation; 3) removal; 4) moving from the state or district; 5) conviction for treason, felony or crime punishable by imprisonment for at least one year; 6) decision of a tribunal declaring void his election or appointment or adjudging him insane; 7) neglect or refusal to take and file an official oath or file a bond if necessary; 8) failure to file an additional bond if necessary; 9) death or declination in writing of a person elected or appointed to fill a vacancy or for a full term before he qualified; 10) on the happening of any event which lawfully creates a vacancy; 11) upon failure of the first annual school meeting of a school district to elect school board members; and 12) the establishment of a new county and town and its related offices.

Recent Legislative Vacancies Caused By A Felony Conviction

In June 1966, Representative Paul Alfonsi, Minority Leader of the Assembly, was charged with bribery. He was found guilty by a jury on July 8 but continued to serve in the Legislature until he was sentenced on July 27, at which time he was required to give up his seat. Representative Alfonsi's conviction was overturned on appeal to the Wisconsin Supreme Court, and he was subsequently retried and acquitted.

In October 1976, Senator James Devitt was convicted by a Milwaukee jury of two counts of false swearing (felony convictions) regarding certain campaign finance irregularities. Senator Fred Risser, President pro tempore and chairman of the Senate Organization Committee, subsequently asked Attorney General Bronson La Follette for a ruling to determine whether or not the Senate had to take any action as a result of Devitt's conviction. According to the opinion (OAG 90-76), "The office of state senator is vacant ipso facto upon conviction of and sentencing for a felony punishable by imprisonment in a state prison, and no further action is required by the state senate to effectuate vacation".

The most recent case involved Representative James Lewis, who pleaded guilty in United States District Court on August 28, 1979, to a charge of perjury before a grand jury which was investigating possible arms sales (laser weapon) to a foreign country. Representative Lewis was sentenced to six months in prison on November 21, 1979. As a result of the sentence, Representative Lewis automatically lost his Assembly seat.

RECALL

Definition

The most extreme form of removal from public office is by the electorate.

The following general definition for recall was taken from 63 *American Jurisprudence* 2d, Section 238:

"Recall is a procedure by which an elective official may be removed at any time during his term, or after a specified time, by vote of the people at an election called for such purpose by a specified number of citizens, and the general control which the legislature has over the subject of the removal of public officers is usually considered sufficient to permit the enactment of a system for their recall. The principle underlying the recall of public officers has been defined as an effective speedy remedy to remove an official who is not giving satisfaction to the public and whom the electors do not want to remain in office, regardless of whether he is discharging his full duty to the best of his ability and as his conscience dictates. Hence, the recall statutes do not contemplate a judicial inquiry into the truth of specific charges of misconduct, but are designed to afford relief from popular dissatisfaction with the official conduct of an officer."

Arguments For And Against Recall

Recall, as we noted earlier, was intended to serve as a safeguard against inefficient, and even corrupt, officials. Proponents granted that if an official commits a crime, he can be removed from office via the impeachment process. However, this remedy is not available if the misconduct falls short of the commission of a crime. Perhaps the greatest value of recall is the fact that its very existence will tend to make public officials more responsible in the exercise of their official duties.

The opponents of recall claim that present laws are adequate to remove officials when necessary and that elections are held frequently enough to provide an opportunity for the electorate to hold an

official accountable. Particularly appalling to many observers is the inclusion of judges under the recall law. They contend that the independence of the judiciary is threatened by recall.

Charles Adrian, in his book, *State and Local Governments* (1976, 4th ed.), summarized the arguments for and against recall in the following manner:

“The principal argument for the recall is that it provides for continuous responsibility, so that the public need not wait in exasperation and frustration until an official’s term comes to an end. It is also argued that with a sword constantly hanging over their heads, public officials will try to remain alert at all times.

“Opponents of the recall point to its costliness: A special election is imperative for its use, since it would be unfair to conduct such an election in connection with other questions (although this is sometimes done). A second objection to the recall is that it is not an attempt to prove charges against an officeholder but is merely an attempt to persuade the electorate, by whatever means, to remove the incumbent. A third objection is that the recall is unnecessary: In all states, improper conduct by public officials is grounds for removal by judicial, legislative, or sometimes gubernatorial action.

“A final objection to the recall centers in the assertion that it serves as a tool for well-organized groups and for political recrimination. Similarly, it is said that the threat of the recall is a constant and legal means for intimidation of public officials who must, in order to defend themselves against its use, follow public whims and sentimentality. Strong leaders with a positive program may find that some interest group will stand in their path, threatening them with a recall action if they seek to carry out a program, even if it is the program upon which they were elected.”

Historical Development

Recall is generally associated in the public mind with the initiative and referendum. Like them, the recall is a product of the “Progressive” movement in the early twentieth century. One of the leading principles of Progressivism was the belief that the voter should be given a greater and more direct voice in the affairs of government. In the recall, with its opportunity for the voters to replace elected officials before the end of their term, the Progressive movement found a typical expression.

Although recall originated in Switzerland and was even discussed by the framers of United States Constitution during their convention, the use of recall in the United States actually began in 1903 with the incorporation of recall provisions into the Los Angeles city charter. Several other cities adopted it shortly thereafter. Wisconsin enacted legislation providing for the recall of city officials in 1911.

In 1908 Oregon became the first state to apply the recall to elected state officials. Between the years 1908 and 1914, at the peak of Progressive success, 9 other states (Arizona, California, Colorado, Idaho, Kansas, Louisiana, Michigan, Nevada and Washington) adopted a state recall provision. Wisconsin added a constitutional recall provision applicable to state officials in 1926.

The use of recall has received considerably less attention and use since Wisconsin adopted its constitutional recall provision in 1926. Most recalls — both before that time and after — have been directed at local officials as opposed to state officers. The only successful use of a recall against a governor occurred in 1921, when North Dakota Governor Lynn Frazier was recalled along with several other state officials.

Recall In Other States

As mentioned above, the development of recall was closely associated with the initiative and referendum, and recall had its origin in the western states of California and Oregon. Fourteen states now have constitutional or statutory provisions providing for recall of *state* officials. An additional 15 states have a recall process available only to *local* government officials.

PROVISIONS FOR RECALL OF STATE OFFICIALS

| State or other jurisdiction | Officers to whom applicable | Established by constitutional provision | Petition requirements* | Also available to all or some local government units† |
|-----------------------------|-----------------------------|---|---|---|
| Alaska..... | All elective officials | * | 25% of voters in last general election in district in which election occurred | * |
| Arizona..... | All elective officials | * | 25% of votes cast in last election for office of official sought to be recalled | * |
| California... | All elective officials | * | State officer: 12% of votes cast in last election for officer sought to be | |

| | | | | |
|----------------|--|-----|--|----|
| | | | recalled; state legislators, members of Board of Equalization, and judges; 20% | |
| Colorado..... | All elective officials | * | 25% of votes cast in last election for office of official sought to be recalled | * |
| Idaho..... | All elective officials except judicial officers | * | 20% of the number of electors registered to vote in the last general election held in the jurisdiction from which the officer was elected | * |
| Kansas..... | All elected public officials in the state except judicial officers | * | 40% of votes cast at the last general election for office of official sought to be recalled | * |
| Louisiana.... | All elective officials except judges of courts of record | * | 25% of voters voting; 40% of voters in districts of less than 1,000 voters | * |
| Michigan..... | All elective officials except judges of courts of record | * | 25% of voters in last election for governor in electoral district of officer sought to be recalled | -- |
| Montana..... | All public officials elected or appointed | (a) | 10% of registered voters at preceding general election is required, except for officials chosen from a district, in which case 15% of the number registered to vote in the preceding election in that district is required | * |
| Nevada..... | All elective officials | * | 25% of voters voting in the jurisdiction electing official sought to be recalled | * |
| North Dakota. | All elective officials | * | 30% of votes cast in last general election for governor | * |
| Oregon..... | All elective officials | * | 25% of votes cast in last election for supreme court justice | * |
| Washington... | All elective officials except judges of courts of record | * | 25%-35% of qualified electors depending on unit of government | * |
| Wisconsin.... | All elective officials | * | 25% of votes cast in last general election for governor | * |
| Guam..... | Governor | * | Petition for referendum: 2/3 vote of legislature or petition of legislature by 50% of voters voting in last gubernatorial election. Referendum election: "yes" votes must total 2/3 of votes cast in last gubernatorial election, and majority vote on issue must be "yes" | -- |
| Virgin Islands | Governor | * | 40% of votes cast for governor in last election | -- |

*In each state where a recall election may occur, a majority of the popular vote is required to recall an official.

1 In addition to those listed, the following states have a recall process available only to local units of government: Arkansas, Georgia, Hawaii, Illinois, Iowa, Maine, Minnesota, Missouri, Nebraska, New Jersey, Ohio, Oklahoma, South Carolina, Texas, and Wyoming.

(a) Allowable under the constitution; provision is statutory.

Source: The Council of State Governments, *The Book of the States, 1978-79.*

Although the use of recall subsided somewhat in recent decades, today there is a apparent resurgence of recalls, particularly at the local level.

Adoption of Recall In Wisconsin

Municipal Recall — The LaFollette Progressives, as was noted above, began to urge adoption of the recall in the early 1900s. In fact, the recall of city officials seems to have been first suggested in the

message of Governor LaFollette to the Legislature of 1905. Although bills were introduced to permit the recall of city officials in the 1905, 1907 and 1909 sessions of the Wisconsin Legislature, it was not until 1911 that a law was enacted (Chapter 635, Laws of 1911) to provide for the removal of city officers and the election of their successors. The act originally created statute Section 94j-1, later renumbered Section 10.44 and subsequently incorporated into current Section 9.20 of the Wisconsin Statutes. The provisions of the initial law called for a primary election to be held when necessary, provided for a 33-1/3 percent voter requirement for recall petitions, required a general statement of the grounds upon which the removal is sought, and permitted removal of a city officer at any time after the officer has actually held the office for six months. Although there existed some question as to whether the statute on municipal recall was legal without constitutional authorization, the statute stood and was used.

Constitutional Amendment Proposals — The first attempt to amend the state Constitution to permit the recall of state public officials did not occur until 1911. In that year (the same year that the municipal recall statutory provision was enacted), the Wisconsin Legislature adopted for the first time a constitutional amendment to permit the recall of officials elected from the state, the counties, congressional districts, judicial districts or legislative districts. After passing the Legislature a second time in 1913, the amendment was placed on the ballot and defeated at the 1914 general election (81,628 to 144,386).

The defeated amendment was resurrected in the 1920s, and — under the leadership of Senator Henry Huber (later the Lieutenant Governor) — it was passed by the 1923 and 1925 Wisconsin Legislatures. Greatest opposition to the amendment came from the bench and bar on the grounds that a recall provision that permitted the recall of judges posed a serious threat to the independence of the judiciary. In 1926 the amendment was ratified by the narrow margin of 205,868 to 201,125, and became Article XIII, Section 12 of the Wisconsin Constitution. The provisions of this section have remained unchanged up to present time.

Recall of State Officials — In 1933 the third major contribution to the recall in Wisconsin was made. The 1933 Wisconsin Legislature enacted Chapter 44, Laws of 1933, to implement the constitutional provisions, setting forth the procedures for carrying them out. Statute Section 6.245, created by the act, was subsequently incorporated along with the municipal recall provision (10.44) into the current Section 9.20 of the Wisconsin Statutes. According to the drafting records of Chapter 44, the bill grew out of an attempt in 1932 to recall the author, Senator Mueller. Up to this time, no statutory provision had been enacted to implement the constitutional provision that was adopted in 1926. In the Mueller recall election some of the signers were secured months before the final signers and in other respects the petitions appeared very irregular.

The drafting records of the first draft of 1933 Senate Bill 47 (enacted as Chapter 44, Laws of 1933) contain instructions from the author of the draft, Senator Mueller, that the bill was to provide machinery for a recall of state and legislative officers like Section 10.44 governing local recalls.

It is interesting to note that Chapter 44 contained a requirement that a statement of the reason for the recall be included in the recall petition. In 1948, however, this provision was ruled invalid by the Wisconsin Attorney General (37 OAG 91). The Attorney General stated that a later law could not impose an obligation on the electorate which had been expressly omitted in the constitutional provision.

Wisconsin Constitutional and Statutory Provisions

The two major recall provisions, Article XIII, Section 12 of the Wisconsin Constitution and statute Section 9.10 are printed below in their entirety. Several other miscellaneous recall-related statutory provisions [Sections 7.15 (2) (d), 17.12, 62.60 (2) and 64.06] are not reprinted here.

Recall of elective officers. SECTION 12. [As created Nov. 1926] The qualified electors of the state or of any county or of any congressional, judicial or legislative district may petition for the recall of any elective officer after the first year of the term for which he was elected, by filing a petition with the officer with whom the petition for nomination to such office in the primary election is filed, demanding the recall of such officer. Such petition shall be signed by electors equal in number to at least twenty-five per cent of the vote cast for the office of governor at the last preceding election, in the state, county or district from which such officer is to be recalled. The officer with whom such petition is filed shall call a special election to be held not less than forty nor more than forty-five days from the filing of such petition. The official against whom such petition has been filed shall continue to perform the duties of his office until the result of such special election shall have been officially declared. Other candidates for such office may be nominated in the manner as is provided by law in primary elections. The candidate who shall receive the highest number of votes shall be deemed elected for the remainder of the term. The name of the candidate against whom the recall petition is filed shall go on the ticket unless he resigns within ten days after the filing of the petition. After one such petition and special election, no further recall petition shall be filed against the same officer during the term for which he was elected. This article shall be self-executing and

all of its provisions shall be treated as mandatory. Laws may be enacted to facilitate its operation, but no law shall be enacted to hamper, restrict or impair the right of recall. [1923 J.R. 73, 1925 J.R. 16, 1925c. 270, vote Nov. 1926]

9.10 Recall. (1) The qualified electors of the state, of any county, city, village, town, or of any congressional, legislative, judicial or school district may petition for the recall of any elective official after the first year of the term for which the official is elected by filing a petition with the same official or agency with whom the petition for nomination to the office was filed demanding the recall of the officeholder. The petition shall be signed by electors equal to at least 25 % of the vote cast for the office of governor at the last election within the same district or territory as that of the officeholder being recalled. If at the last election any group of candidates were voted for in common to fill 2 or more offices of the same designation, the required number of petition signers shall be equal to 25 % of the number computed by dividing the total vote for that office by the number of offices filled jointly.

(2) (a) The preparation and form of the recall petition shall be governed by s. 8.15. In addition, a recall petition for a city, village, town or school district office shall contain a specific statement of good and sufficient reason upon which removal is sought.

(b) After the recall petition has been offered for filing, no name shall be erased or removed. No signature shall be valid or counted unless the date is less than 60 days before the date offered for filing.

(3) (a) The provisions of this subsection apply for the recall of all elective officials other than city, village, town and school district officials. City, village, town and school district officials are recalled under sub. (4).

(b) Within 3 days after the petition is offered for filing, the official with whom the petition is left shall determine by careful examination whether the petition is sufficient and so state in a certificate attached to the petition. If the petition is found to be insufficient, the certificate shall state the particulars creating the insufficiency. The petition may be amended to correct any insufficiency within 5 days following the affixing of the original certificate. Within 2 days after the offering of the amended petition for filing, it shall again be carefully examined to determine sufficiency and a certificate stating the findings shall be attached. Immediately upon finding an original or amended petition sufficient, the official shall file the petition and call a special election to be held not less than 40 nor more than 45 days from the filing date.

(c) The official against whom the recall petition is filed shall be a candidate at the special election without nomination unless he resigns within 10 days after the original filing of the petition. There shall be no primary. Candidates for the office may be nominated under the usual procedure of nomination for a primary election by filing nomination papers not later than 5 p.m. 4 weeks preceding the election and have their names placed on the ballot at the special election.

(4) (a) For the recall of any city, village, town or school district official, the municipal clerk shall verify the eligibility of the respective signers and circulators, shall certify thereto and shall transmit the petition to the clerk of circuit court within 10 days of the filing date. The circuit court within 10 days after receipt of the petition shall determine by hearing whether the petition states good and sufficient reason for the recall. The clerk of circuit court shall notify the incumbent of the hearing date. The person subject to recall and the petition circulators may appear by counsel and the court may take testimony with respect to the recall petition. If the circuit court judge determines the grounds stated in the petition and proof offered at the hearing show good and sufficient reasons for recall, the judge shall issue a certificate directing the governing body or school board to hold an election under this section. If the grounds stated in the petition and proof offered at the hearing do not show good and sufficient reason for recall, issuance of the certificate shall be denied. Any party aggrieved by the circuit court determination may appeal to the court of appeals within 10 days following the circuit court determination by filing a notice of appeal with the clerk of the court of appeals. An appeal under this section shall have preference on the court of appeals calendar. The appeal shall stay enforcement of a certificate issued by the circuit court until the court of appeals determines the appeal. The governing body or school board upon receiving the certificate from the circuit court shall call a special election not less than 50 nor more than 60 days from the date of the certificate. The special election for recall of more than one official may be held on the same day.

(b) The official against whom the recall petition is filed shall be a candidate at the special election without nomination unless he resigns before the deadline for filing nomination papers. Other qualified persons may become candidates by filing their nomination papers not later than 5 p.m. of the day 6 weeks before the day of the election. If the number of candidates including the incumbent, when he is a candidate, is more than twice the number of

offices of that designation to be filled, a special primary shall be held. The incumbent's name shall not appear on the primary ballot. When a primary is held, the name of the person receiving the highest number of votes shall be placed on the special election ballot with the incumbent. When the incumbent is not a candidate, the 2 persons receiving the highest number of votes shall be placed on the special election ballot. When an election to recall more than one official of the same designation is held at the same time, the names of all candidates nominated shall be grouped together on the ballot with instructions to vote for the number of offices to be filled.

(5) The official against whom a recall petition has been filed shall continue to perform the duties of his office until the result of the special election is officially declared. The person receiving the highest number of votes at the special election shall be declared elected for the remainder of the term. If the incumbent receives the highest number of votes he shall continue in office. If another receives the highest number of votes he shall succeed the incumbent if he qualifies within 10 days after receiving notification.

(6) After one recall petition and special election, no further recall petition shall be filed against the same official during the term for which he was elected.

(7) The purpose of this section is to facilitate the operation of article XIII, section 12, of the constitution and to extend the same rights to electors of cities, villages, towns and school districts.

1979 Wisconsin Legislation

During the 1979 session of the Wisconsin Legislature, 3 bills (1979 Senate Bill 425 and 1979 Assembly Bills 53 and 909) and one joint resolution (1979 Senate Joint Resolution 5) have been introduced as of December 1, 1979 on the subject of recall. While 1979 SJR 5 has been adopted in the Senate and is pending in the Assembly, the 3 bills are awaiting further action in their house of origin.

The measures variously revise recall procedures for local officials and deal with the question of primaries in recall elections.

1979 Senate Bill 425

1979 Senate Bill 425, introduced by the Senate Committee on Governmental and Veterans Affairs, revises the procedure for recall of city, village, town and school district officials to make it more consistent with the procedure for recall of state, congressional, legislative and judicial officials. The requirement to satisfy a circuit court that there is "good and sufficient reason" for the recall of a city, village, town and school district official is deleted. A primary continues to be required whenever there are more than 2 candidates for an office at a recall election (including the incumbent) but the primary procedure is changed. Currently, the primary is held between the candidates who desire to challenge the incumbent, and the incumbent does not appear on the primary ballot. Under the bill, all candidates, including the incumbent, appear on the primary ballot and the 2 persons receiving the greatest number of votes appear on the election ballot. If the incumbent is defeated in the primary, he or she may continue to serve until a successor is elected. The dates for recall elections and primaries are also adjusted by the bill.

1979 Senate Joint Resolution 5

The recall provision of the constitution was ratified by the voters in the election of November 1926. Under the recall provision, a special election is held "not less than forty nor more than forty-five days from the filing" of a recall petition signed by 25% of the vote cast in the recall jurisdiction at the last preceding gubernatorial election. The name of the incumbent goes "on the ticket unless he resigns within ten days" after the recall petition is filed, and other "candidates for such office may be nominated in the manner as provided by law in primary elections".

In 1932, Attorney General Reynolds ruled (XXI OAG 824) that: "where recall petition is filed there is to be no primary election". With regard to recall from a partisan elective office, "nominations for recall elections are to be made under party designation" and the names of "all candidates, including incumbent, are to be placed on single ballot, each under proper party designation".

There are no drafting records for legislative sessions preceding 1927. However, the recall provision added to the constitution in 1926 seems to have been based on the 1913 law for municipal recall elections, contained in the 1925 statutes as section 10.44. That law provided for a recall election to be held 40 to 50 days from the validation of the recall petition, set a filing deadline not less than 30 days before the date for the special election, and required a primary 2 weeks before the election if there were more than 2 candidates including the incumbent.

1979 Senate Joint Resolution 5 introduced by Senator Braun, *et al.*, and cosponsored by Representative Hauke, *et al.*, and proposed to the 1979 legislature on first consideration, clarifies the text of the existing recall provision so as to make it more specific (SECTION 1), and requires that a primary be held if there are more than 2 candidates including the incumbent. If there is a primary, the incumbent runs in the primary. The two winners of the primary are the candidates in the special election

(SECTION 2), but independents and splinter-party candidates are treated the same as in other partisan elections.

1979 Assembly Bill 53

1979 Assembly Bill 53, introduced by Representatives Edward McClain and David Kedrowski, repeals the spring primary and other nonpartisan primaries, and all candidates for those offices will be on the spring election ballot. The person receiving the majority of the votes is elected. If no person receives a majority, the 2 candidates receiving the most votes will be on the ballot in a runoff election. A similar procedure is to be established for recall elections, except that in the case of a recall election for a judicial office or the office of state superintendent of public instruction, there is no primary nor runoff election. The bill includes numerous other election-related provisions.

1979 Assembly Bill 909

Under present law, elected school district officers may be recalled if a petition is presented signed by a number of electors equal to 25% of the votes cast for governor in the school district at the last election.

1979 Assembly Bill 909, introduced by Representative Thomas Hauke, applies a formula used in the school laws for determining the percentages of electors who must sign petitions when no election statistics are available on a school district basis. Under the formula, if the boundaries of a school district do not coincide with the municipality or part thereof for which election statistics are kept, the number of electors is determined by dividing the area of the school district in square miles by the area of the municipality in which it lies in square miles.

The vote for governor at the last general election in the municipality within which the school district lies is then multiplied by the quotient to determine the required number of electors.

If a school district lies in more than one municipality, the same method of determination is used for each part of the school district which constitutes only a fractional part of any area for which election statistics are kept.

Use of Recall in Wisconsin

The rash of recall elections during the year 1977 was truly remarkable. In August 1977, five La Crosse school board members were recalled; in September 1977, Dane County Judge Archie Simonson was recalled from office, and in November 1977, Juneau County Judge William Curran retained his judicial post in a heated judicial recall election. The Simonson removal was the first time in Wisconsin history that a judge had been recalled from office. There had been several earlier attempts to remove judges, but they all stopped short of an actual recall.

Prior to the year 1977, recall had been a relatively unused procedure. Records indicate that during the entire 65-year period from 1911 (when the first recall law was enacted in Wisconsin) until 1976, only 8 recall elections had been conducted. In addition to the actual recall elections held, Wisconsin has had a number of recall attempts which have failed for lack of signatures, faulty procedure, or failure to state grounds for the recall action. One of the more interesting incidents involved an attempt to recall Senator Joseph McCarthy in 1954. The attempt failed and there also existed considerable doubt whether the United States Constitution would permit the state recall of a member of the United States Congress.

Two separate but conflicting opinions concern the recall of U.S. senators or representatives. One opinion, by Mr. Norman Small (Legislative Attorney, American Law Division, Library of Congress) stated that congressmen are not subject to the law of any state providing for the recall of public officers. Mr. Small's opinion, published in the June 17, 1958 issue of the *Congressional Record* at the request of Senator Richard Neuberger is printed below.

"By the terms of the United States Constitution, which is the supreme law of the land (art. VI), a seat occupied by a United States Senator or Member of the House of Representatives can become vacant only by resignation, death, or expiration of the term of office of an incumbent thereof, or by direct action, such as expulsion, directed at the incumbent by the Senate or House itself in the exercise of its allotted powers (art. I, sec. 2, clause 2, sec. 3, clause 2, sec. 5, clause 2; *Burton v. U.S.* [(1906) 202 U.S. 344, 369]) As a consequence States lack the constitutional competence to extend the application of their recall election procedures to the offices of United States Senator and Members of the House; for to permit such attempted extension would be tantamount to allowing a State to effect an unauthorized amendment of the Constitution by enlarging the grounds set forth therein, and heretofore enumerated, whereby a seat in the Senate or House becomes vacant. For these reasons a United States Senator or Member of the House is deemed not to be subject to the law of any State providing for the recall of public officers."

The other legal opinion was issued by Attorney General Bronson C. La Follette on May 3, 1979 (OAG 54-79), in response to a question from the State Elections Board relative to the possible recall of

a member of the United States Senate. The 8-page opinion concluded that "in the event petitions for the recall of a United States senator are presented to the Elections Board, you should proceed to carry out your responsibilities under Wis. Const. Art. XIII, Sec. 12, and sec. 9.10, Stats., unless and until directed otherwise by a court of law." In other words, the Attorney General stated that neither Wisconsin's Constitution nor statutes prohibit the initiation of a recall action against a U.S. senator. However, he qualified his opinion with the directive that should a court of law direct or dictate otherwise, the Elections Board should, of course, accept the judicial decision.

The most significant recall election held in Wisconsin prior to 1977 involved the attempted recall of state Senator Otto Mueller in 1932. According to a September 3, 1932, *Milwaukee Journal* article, "The recall election of Senator Otte Mueller of Wausau involves a good deal more for Wisconsin than mere representation in the legislature from the senator's own district. It raises the question of whether a man can be intimidated and taken for a political ride by organized office holders for using his own best judgment." Senator Mueller, however, was returned to office in the recall election of September 20, 1932, by a vote of 14,160 to 8,541 for Roland Kannenberg. Apparently, the unsuccessful movement to unseat Senator Mueller was part of a larger Progressive Republican plan to recall state legislators who opposed the tax bill submitted by Governor Philip La Follette.

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