NORTH CAROLINA LAW REVIEW

Volume 102 | Number 2 Article 6

1-1-2024

Dueling Discretion: The Imperfect Mechanisms for Removing Elected Prosecutors

Meighan R. Parsh

Dueling Discretion: The Imperfect Mechanisms for Removing Elected Prosecutors*

As demonstrated by the threatened, attempted, and successful removal of elected prosecutors nationwide, the balance that has traditionally existed between local prosecutors and state officials has turned into a power struggle over where to draw the line between prosecutorial discretion and prosecutorial misconduct. Because of this changing dynamic, the mechanisms for removing local prosecutors have entered the national spotlight and have set up a conflict between the discretion of prosecutors and of those who seek to remove them. This conflict has resulted in removal decisions that are used to target political adversaries rather than as a legitimate check on abuses of prosecutorial power. This Comment argues that the current mechanisms for removing elected prosecutors allow officials and voters to substitute their discretion for that of the prosecutor. This dueling exercise of discretion disrupts the necessary exercise of prosecutorial discretion and makes the removal procedure liable to abuse rather than an effective tool for addressing misconduct. In response, it suggests a model framework for prosecutorial removal that reduces the likelihood that the process will be used arbitrarily but is still effective for voters seeking to hold prosecutors responsible for misconduct. This Comment also provides a new resource for prosecutors, researchers, voters, and other stakeholders who seek to understand the process for removing local prosecutors and the implications of doing so.

INTRODUCTION 574
I. THE CATEGORIES OF LOCAL PROSECUTOR REMOVAL MECHANISMS 577
A. *Recall Elections* 579
B. *Impeachment* 581
C. *Judicial Proceedings* 584
D. *Oversight Commission and Pending Legislation* 586
II. THE ROLE OF DISCRETION 589
A. *Prosecutorial Discretion* 589
B. *The Discretion To Remove* 592
C. *Checks Without Balance* 594
III. A MORE BALANCED PROCESS 599
A. *The Benefits and Drawbacks of the Prosecutor Removal Mechanisms* 599
B. *A Hybrid Mechanism for Removing Local Prosecutors* 602
CONCLUSION 605

APPENDIX 607

INTRODUCTION

Local prosecutors nationwide have found themselves locked in a power struggle with state officials and voters over where to draw the line between prosecutorial discretion and misconduct. On August 4, 2022, Florida Governor Ron DeSantis suspended State Attorney Andrew Warren from office after Warren signed letters pledging not to prosecute violations of Florida's laws limiting abortion and banning gender-affirming care for minors.[1] In June 2022, San Francisco District Attorney Chesa Boudin, a proponent of criminal justice reform, was recalled from office amid increasing public agitation related to property and drug crime.[2] An attempt to do the same to progressive Los Angeles District Attorney George Gascón in August of 2022 was unsuccessful.[3] Philadelphia District Attorney Larry Krasner was impeached by the Pennsylvania House of Representatives on November 16, 2022, with the articles of impeachment alleging that his policies contributed to an increase in crime.[4] Manhattan District Attorney Alvin Bragg has been the subject of calls for removal since the beginning of his term in January of 2022 in response to his controversial charging policies.[5] St. Louis Circuit Attorney Kim Gardner

1. Lawrence Mower & Emily L. Mahoney, *DeSantis Removes Hillsborough County State Attorney Andrew Warren*, TAMPA BAY TIMES, https://www.tampabay.com/news/florida-politics/2022/08/04/desantis-suspends-hillsborough-county-state-attorney-andrew-warren/ [https://perma.cc/XZ5K-Y67N (dark archive)] (last updated Aug. 4, 2022). Warren also drew ire for his policies concerning the prosecution of charges from pedestrian and bike stops and other low-level offenses and for his political affiliations. *See* Warren v. DeSantis, No. 22-cv-302, 2023 WL 345802, at *4–5 (N.D. Fla. Jan. 20, 2023).

2. Thomas Fuller, *Voters in San Francisco Topple the City's Progressive District Attorney, Chesa Boudin*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/07/us/politics/chesa-boudin-recall-san-francisco.html [https://perma.cc/KY8X-5UPK (staff-uploaded, dark archive)]. Before being recalled, Boudin's reform policies included "eliminat[ing] cash bail, vow[ing] to hold police accountable and work[ing] to reduce the number of people sent to prison." *Id.*

3. Michael R. Blood, *Recall Election Aimed at LA Prosecutor Fails To Make Ballot*, ASSOC. PRESS (Aug. 15, 2022, 8:42 PM), https://apnews.com/article/elections-california-los-angeles-san-francisco-recall-3c93405372f4d55f08113a98fea65f32 [https://perma.cc/V32D-PMX5].

4. Scott Calvert, *Philadelphia District Attorney Larry Krasner Impeached by Pennsylvania House*, WALL ST. J., https://www.wsj.com/articles/philadelphia-district-attorney-larry-krasner-faces-impeachment-vote-in-pennsylvania-house-11668604729 [https://perma.cc/B6YA-9FXJ (staff-uploaded, dark archive)] (last updated Nov. 16, 2022, 7:33 PM).

5. Johnathan Dienst, *Hochul To Meet with Bragg, Knows 'Full Well' Her Power To Remove Him: Report*, NBC N.Y., https://www.nbcnewyork.com/news/politics/hochul-to-meet-with-bragg-knows-full-well-her-power-to-remove-him-report/3518446/ [https://perma.cc/98MA-JNM8] (last updated Jan. 27, 2022, 5:13 AM); Jonah E. Bromwich, *Running Against Hochul, Lee Zeldin Finds Another Target: Alvin Bragg*, N.Y. TIMES (Oct. 27, 2022), https://www.nytimes.com/2022/10/27/nyregion/lee-zeldin-alvin-bragg.html [https://perma.cc/7RLJ-8CMS (staff-uploaded, dark archive)]. Shortly after taking

resigned in May of 2023 amid a lawsuit seeking her removal and legislative efforts to strip St. Louis voters of the power to elect their local prosecutor.[6] In Texas, Nueces County District Attorney Mark Gonzalez resigned from office in September of 2023 ahead of a removal trial scheduled for later that year.[7] In Oakland, California, reform-oriented District Attorney Pamela Price has been targeted by a recall campaign launched just seven months into her first term in office.[8] And just over a year after suspending Andrew Warren, Governor Ron DeSantis suspended a second state attorney, Monique Worrell, for allegedly neglecting her duty as a prosecutor.[9]

In each of these cases, the prosecutor removed or sought to be removed was duly elected to their office and had announced or enacted policies about how they would exercise their prosecutorial discretion.[10] In the cases involving recall elections, the same voters who elected the prosecutors voted to remove them. This aligns with the idea that electing local prosecutors makes them accountable to the public, but the arbitrary nature of the grounds for recall[11] detracts from the process's seeming democratic legitimacy. On the other hand,

office, Bragg released a policy memo that, among other things, "limited the kinds of cases in which his office would ordinarily seek prison sentences." Joshua Perry, *What the Backlash over Alvin Bragg's "Day One Memo" Gets Wrong*, SLATE (Feb. 27, 2022, 10:02 AM), https://slate.com/news-and-politics/2022/02/manhattan-district-attorney-alvin-bragg-prosecutorial-discretion.html [https://perma.cc/N67P-LVJH].

6. Shannon Najmabadi, *Kim Gardner, Top Elected Prosecutor for St. Louis, Is Resigning*, WALL ST. J. (May 4, 2023, 7:30 PM), https://www.wsj.com/articles/kim-gardner-top-elected-prosecutor-for-st-louis-is-resigning-bda5fc62 [https://perma.cc/M5PF-TBEE (staff-uploaded, dark archive)].

7. Taylor Alanis & Rachel Denny Clow, *Mark Gonzalez Resigns as Nueces County District Attorney*, KRIS 6 NEWS CORPUS CHRSTI, https://www.kristv.com/news/6-investigates/mark-gonzalez-will-step-down-as-nueces-county-district-attorney [https://perma.cc/GBB3-6KR6] (last updated Sept. 6, 2023, 2:28 PM). Gonzalez said he intends to run for Senate and attacked the removal efforts against him, saying "[t]hey want to use me as a sacrificial lamb to send a foreboding message to other duly elected DAs in Texas who exercise their discretion, intending to chill their constitutional and statutory authority to dispense their duties as they see fit." *Id.*

8. Akela Lacy, *Campaign To Recall Oakland Reform District Attorney Gets Rolling*, INTERCEPT (July 12, 2023, 3:00 PM), https://theintercept.com/2023/07/12/recall-oakland-da-pamela-price/ [https://perma.cc/9TFY-Z6PZ (dark archive)]. As of September 2023, it remains to be seen whether the recall campaign will gather enough signatures to trigger a recall election. *See* Jeremy B. White, *California Keeps Electing Progressive DAs — Then Pushing To Recall Them*, POLITICO (Aug. 15, 2023, 5:01 AM), https://www.politico.com/news/2023/08/15/california-keeps-electing-progressive-das-then-pushing-to-recall-them-00111181 [https://perma.cc/Z3WF-HLHR].

9. DeSantis cited Worrell's charging practices, specifically those intended to avoid mandatory minimum sentences, as one basis for his decision to suspend her from office. Fla. Exec. Order No. 23-160 (Aug. 9, 2023), https://www.flgov.com/wp-content/uploads/2023/08/EO-23-160.pdf [https://perma.cc/8G2N-KR7E]. Worrell filed a lawsuit in the Florida Supreme Court challenging her suspension, arguing that "[t]o the extent the Governor disagrees with how Ms. Worrell is lawfully exercising her prosecutorial discretion, such a disagreement does not constitute a basis for suspension from elected office." Petition for Writs of Quo Warranto and Mandamus at 3, Worrell v. DeSantis, No. SC2023-1246 (Fla. Sept. 6, 2023).

10. *See supra* notes 1–9 and accompanying text.

11. *See infra* Section I.A.

in cases involving removal by governors, legislatures, or the judiciary, the local voters play little role. The lack of citizen involvement in these scenarios is concerning because many of the prosecutors targeted for removal explicitly campaigned on the policies that made them targets.[12] This indicates that local voters wanted their prosecutors to implement reforms, and state actors overrode those preferences.

These events are part of an increasing trend of backlash seeking to curb prosecutorial discretion in response to the progressive prosecution movement's efforts to pursue criminal justice reform from within the system.[13] Removing a prosecutor from office is not the only way to do this, and many states have laws that suppress discretion by removing cases from a prosecutor's jurisdiction when they do not act in the desired manner.[14] These supersession mechanisms are rarely used, with "prosecutors and statewide officials . . . develop[ing] an equilibrium over the last half-century . . . likely based on an implicitly agreed upon set of mutual expectations" in which state officials expect prosecutors will enforce the laws of the state and prosecutors expect their discretion will not be superseded.[15]

But, as the instances described above indicate, the balance between local prosecutors and state officials is being upended when their policies conflict. The aftermath of *Dobbs v. Jackson Women's Health Organization*[16] is a prime example of that conflict, with dozens of local prosecutors signing a letter pledging not to prosecute abortion providers or patients despite state laws criminalizing abortion and state officials seeking to pass even more restrictive laws.[17] Andrew Warren signed this letter, which Ron DeSantis specifically cited as grounds for

12. *See, e.g.*, Tyler Quinn Yeargain, Comment, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 102–07 (2018) (discussing recent electoral successes of progressive prosecutor candidates and the reforms they campaigned on).

13. Keri Blakinger, *Prosecutors Who Want To Curb Mass Incarceration Hit a Roadblock: Tough-on-Crime Lawmakers*, MARSHALL PROJECT (Feb. 3, 2022, 6:00 AM), https://www.themarshallproject.org/2022/02/03/prosecutors-who-want-to-curb-mass-incarceration-hit-a-roadblock-tough-on-crime-lawmakers [https://perma.cc/A2YY-C6RB].

14. Yeargain, *supra* note 12, at 110–11; *see also* Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 565–66 (2020) (noting that while suppression has historically been used sparingly, "it may become increasingly prevalent in states where voters' criminal justice preferences are markedly divergent, and that divergence begins to manifest in locally elected prosecutors' exercise of enforcement discretion"); Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 550–56 (2011) (discussing how state-level actors infrequently exercise their discretion to intervene in local law enforcement decisions).

15. Yeargain, *supra* note 12, at 108–09.

16. 142 S. Ct. 2228 (2022).

17. Joseph Gedeon, *Blue-City Prosecutors in Red States Vow Not To Press Charges over Abortions*, POLITICO (June 26, 2022, 7:00 AM), https://www.politico.com/news/2022/06/26/blue-city-prosecutors-in-red-states-vow-not-to-press-charges-over-abortions-00042415 [https://perma.cc/D9PB-R6F7].

suspension for neglect of duty.[18] Warren—who filed a federal lawsuit arguing that the suspension violated his First Amendment rights—claimed that DeSantis abused his power and "substitute[d] his judgment for that of the voters who elected" Warren.[19] This lawsuit highlights the conflict that exists between prosecutorial discretion and the discretion of actors seeking to remove prosecutors from office, resulting in decisions based on political disagreements rather than a legitimate check on abuses of prosecutorial power. In fact, the district court acknowledged that DeSantis's motivations for removing Warren were inappropriate under the Florida Constitution and violated the First Amendment.[20]

This Comment argues that the current mechanisms for removing elected local prosecutors allow officials and voters to substitute their discretion for that of the prosecutor, which disrupts the necessary exercise of prosecutorial discretion and makes the procedure vulnerable to abuse rather than an effective tool for addressing misconduct. Part I will examine the three categories of prosecutor removal mechanisms: (a) recall elections, (b) impeachment, and (c) judicial proceedings. It will also discuss Georgia's new oversight commission mechanism and other recent legislation regarding the removal of elected prosecutors. Part II will discuss the necessity and potential for abuse of prosecutorial discretion, the discretionary nature of the removal mechanisms, and the consequences of the conflicting exercises of discretion that arise when state officials and other actors seek to remove elected prosecutors. Finally, Part III will discuss the benefits and drawbacks of each removal mechanism and suggest reforms to these procedures that would create a more balanced process for checking abuses of prosecutorial power.

I. THE CATEGORIES OF LOCAL PROSECUTOR REMOVAL MECHANISMS

All states have a mechanism for removing local prosecutors from office prior to the end of their elected term.[21] This part identifies and categorizes the

18. Fla. Exec. Order No. 22-176 (Aug. 4, 2022), https://www.flgov.com/wp-content/uploads/2022/08/Executive-Order-22-176.pdf [https://perma.cc/P7ST-2N3H].

19. Amanda Watts & Veronica Stracqualursi, *Florida State Attorney Challenges Suspension by Gov. Ron DeSantis*, CNN POL., https://www.cnn.com/2022/08/17/politics/florida-state-attorney-challenge-suspension-desantis-cnntv/index.html [https://perma.cc/L4GG-L3JD] (last updated Aug. 17, 2022, 11:15 AM).

20. Warren v. DeSantis, No. 22-cv-302, 2023 WL 345802, at *16–17, *21 (N.D. Fla. Jan. 20, 2023). Although the federal district court found that DeSantis violated both the Florida Constitution and the First Amendment, the Eleventh Amendment prevents a federal court from granting the relief sought against a state official based on a state law violation (the First Amendment violations were not essential to the outcome). *Id.* at *21.

21. This analysis only examines the removal of elected prosecutors. Alaska, Connecticut, Delaware, New Jersey, and Rhode Island appoint local prosecutors and are thus excluded. Additionally, Hawai'i, Montana, and North Dakota allow the counties to decide whether to elect or appoint local

mechanisms for removing a prosecutor, including the grounds for removal and who can trigger the mechanism.[22] The grounds for removing a local prosecutor vary depending on the mechanism employed, and states do not have consistent grounds even when they have similar mechanisms.[23] Further, the definitions of the grounds for removal, where provided, are different depending on the removal mechanism and state.[24] The same is true for who may initiate the removal mechanism.[25]

Some removal provisions, especially constitutional impeachment provisions, do not explicitly refer to local prosecutors in the list of officers subject to the provision. Examples of broad categories included are "[a]ny officer of the state"[26] and "all civil officers,"[27] and while some states have decisions interpreting the scope of these provisions,[28] their scope remains ambiguous in other states due to lack of interpretation.[29]

The three broad categories of removal mechanisms are: (a) recall elections, (b) impeachment, and (c) judicial proceedings. Many states do not fit into a single category but rather employ multiple mechanisms for removing a local prosecutor, and the procedures followed in each category are not entirely

prosecutors. The vast majority of counties in these states elect their local prosecutors. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1550–52 (2020); *see infra* Appendix.

22. *See infra* Appendix.

23. *Compare* ARK. CONST. art. XV, § 1 (LEXIS through all legislation of the 2023 Reg. Sess.) (stating that prosecuting attorneys are liable to impeachment for "high crimes and misdemeanors, and gross misconduct in office"), *with* KAUA'I CNTY., HAW., CHARTER art. XXIII, § 23.13 (2022) (stating that officers "may be impeached for malfeasance, misfeasance, or nonfeasance in office").

24. *Compare* MINN. STAT. § 351.14 (2022) ("'Malfeasance' means the willful commission of an unlawful or wrongful act in the performance of a public official's duties which is outside the scope of the authority of the public official and which infringes on the rights of any person or entity."), *with* WASH. REV. CODE § 29A.56.110(1) (2022) ("'[M]alfeasance' in office means any wrongful conduct that affects, interrupts, or interferes with the performance of official duty.").

25. *Compare* OHIO REV. CODE ANN. § 3.08 (LEXIS through File 12 of the 135th General Assemb. (2023-2024)) (stating that the judicial proceedings for the removal of a prosecuting attorney may be initiated by the filing of a complaint signed by either an adequate number of qualified electors or the governor), *with* IND. CODE § 5-8-1-21 (2023) (stating that the accusation that triggers judicial removal proceedings against a prosecuting attorney "may be presented by the grand jury of the county in which the officer accused is elected or appointed").

26. *See, e.g.*, W. VA. CONST. art. IV, § 9.

27. *See, e.g.*, KY. CONST. § 68 (Westlaw through the 2023 Reg. Sess. and the Nov. 8, 2022 election).

28. *E.g.*, People v. Losavio, 606 P.2d 856, 858 (Colo. 1980) (en banc) (stating that "[t]he district attorney is a state officer" in deciding that the constitutional impeachment provision applying to "state and judicial officers" is the only mechanism for removing district attorneys, other than by recall or disqualification for conviction of certain offenses); Valle v. Pressman, 185 A.2d 368, 374 (Md. 1962) (acknowledging that state's attorneys are state, not local, officials and stating that "[r]emoval is thus a State and not a local function").

29. *See, e.g.*, Krasner v. Ward, No. 563 M.D. 2022, 2023 WL 164777, at *16 (Pa. Commw. Ct. Jan. 12, 2023) ("There do not appear to have been any prior cases that have interpreted what this phrase means in the context of impeachment.").

consistent across states. Additionally, there are removal mechanisms that do not fit neatly into these categories, but many share key similarities and are categorized as such. Each category will be analyzed according to these understandings. Finally, Georgia has recently enacted a new form of removal mechanism, an oversight commission, that does not fit into any of the three categories. Georgia is currently the only state with this mechanism, and it will be discussed separately along with a brief overview of other recent legislation regarding the removal of elected prosecutors.

A. *Recall Elections*

The nineteen states[30] that provide for the removal of local prosecutors by recall election generally follow similar procedures, and in every state the recall procedure is initiated by the voters who elected the official being recalled.[31] For example, the typical procedure requires that qualified voters sign a recall petition that explains the grounds for removal, then the petition must be deemed sufficient by the relevant authority, at which point additional signatures may be required.[32] A recall election is held only if all statutory requirements are met.[33]

Within the states with a recall mechanism, there are three distinct groups. First, there are twelve states that do not enumerate grounds for recall, meaning that electors may recall a local prosecutor for any reason.[34] In most of these states, voters must give a brief statement of the reason for recall,[35] but Hawai'i and Wisconsin require no articulation of grounds.[36] This means that in any of

30. *See infra* Appendix, Table 1.

31. *E.g.*, ARIZ. CONST. art. VIII, pt. 1, § 1 (Westlaw through legislation of the First Reg. Sess. of the Fifty-Sixth Leg.); GA. CODE ANN. § 21-4-4(a) (LEXIS through 2023 Reg. Sess. of the General Assemb.).

32. *E.g.*, GA. CODE ANN. §§ 21-4-5 to -15.

33. *E.g.*, *id.*

34. ARIZ. REV. STAT. ANN. § 19-203 (Westlaw through the First Reg. Sess. of the Fifty-Sixth Leg.); CAL. ELEC. CODE § 11020 (Westlaw through Chapter 1 of 2023–24 1st Extraordinary Sess., and urgency legislation through Chapter 890 of 2023 Reg. Sess.); COLO. CONST. art. XXI, § 1 (LEXIS through all legislation from the 2023 Reg. Sess.); KAUA'I CNTY., HAW., CHARTER § 27.01 (2022); HONOLULU CITY & CNTY., HAW., CHARTER § 12-104 (2023); HAWAI'I CNTY., HAW., CHARTER § 12-1.1 (2022); IDAHO CODE § 34-1703(2) (LEXIS through all legislation from the 2023 Reg. Sess.); LA. STAT. ANN. § 18:1300.6 (Westlaw through the 2023 First Extraordinary, Reg., and Veto Sess.); MICH. COMP. LAWS § 168.952(1)(c) (2023); NEB. REV. STAT. § 32-1303(3) (2023); NEV. REV. STAT. § 306.020(4)(a) (2023); N.D. CONST. art. XI, § 11 (LEXIS through results of the Nov. 8, 2022 election); OR. CONST. art. II, § 18(3), (5); WIS. CONST. art. XIII, § 12; WIS. STAT. § 9.10 (2021–2022).

35. *See, e.g.*, COLO. CONST. art. XXI, § 1 (LEXIS through all legislation from the 2023 Reg. Sess.) (requiring that a "[recall] petition shall contain a general statement, in not more than two hundred words, of the ground or grounds on which such recall is sought" but providing no further details).

36. WIS. STAT. § 9.10(2)(b); KAUA'I CNTY., HAW., CHARTER (2022); HAWAI'I CNTY., HAW., CHARTER § 12-1.1(a) (2022); HONOLULU CITY & CNTY., HAW., CHARTER § 12-103 (2023).

the states in this group, voters could deploy the process for political motives, even when a prosecutor appropriately exercises their discretion.[37] For example, if a prosecutor declined to pursue charges against an individual in a highly publicized case because, in the prosecutor's judgment, the evidence was insufficient to prove beyond a reasonable doubt that the individual committed the offense, disgruntled voters could base their recall petition on that decision despite it being well within the scope the prosecutor's discretion.[38]

Second, there are five states that enumerate specific grounds on which an official may be recalled. These states are Georgia, Kansas, Montana, New Mexico, and Washington.[39] The exact grounds vary between the states, but "malfeasance"[40] and "misconduct"[41] are common. Having specifically enumerated reasons for recall arguably constrains the use of this mechanism. However, these terms are broad, and thus open to interpretation.[42] The petition review process does not generally determine whether the allegations giving rise to the petition are true or false; that is left for the voters to decide.[43]

Finally, there are two outlier states that have adopted recall mechanisms that include a procedure for substantive judicial review of a recall petition before it reaches the voters. Both of these states also enumerate specific grounds for removal. One such state is Mississippi. There, the voters send a petition to the governor requesting that she remove the officer.[44] If the petition contains enough signatures verified by the county registrar, the governor convenes a council of judges to evaluate whether there is a substantial basis to hold a special

37. *See, e.g.*, Bernzen v. City of Boulder, 525 P.2d 416, 418 (Colo. 1974) (en banc) (stating that "the recall intended by the framers of the Colorado Constitution is purely political in nature").

38. *See infra* Section II.A.

39. WASH. CONST. art. I, § 33; GA. CODE ANN. § 21-4-3(7) (LEXIS through the 2023 Reg. Sess. of the General Assemb.); KAN. STAT. ANN. § 25-4302(a) (Westlaw through laws enacted during the 2023 Reg. Sess. of the Kan. Leg. effective on June 8, 2023); MONT. CODE ANN. § 2-16-603(3) (Westlaw through chapters effective January 1, 2024 of the 2023 Sess.); N.M. STAT. ANN. § 1-25-3(B)(1) (Westlaw through July 1, 2023 of the 2023 First Reg. Sess. of the 56th Leg. (2023)).

40. WASH. CONST. art. I, § 33; GA. CODE ANN. § 21-4-3(7)(B)(i); N.M. STAT. ANN. § 1-25-3(B)(1).

41. GA. CODE ANN. § 21-4-3(7)(B)(iii); KAN. STAT. ANN. § 25-4302(a); MONT. CODE ANN. § 2-16-603(3).

42. *See, e.g.*, WASH. REV. CODE § 29A.56.110(1) (2022) ("[M]alfeasance" in office means any wrongful conduct that affects, interrupts, or interferes with the performance of official duty.").

43. *E.g.*, Baker v. Gibson, 913 P.2d 1218, 1224 (Kan. App. 1995) ("Provided the grounds listed in the recall petition sufficiently meet the requirements of K.S.A. 25–4302, the truth or falsity of the grounds must still be determined by the electorate . . . ."). To be clear, it is not the voters participating in the recall election that abuse their power. The potential for abuse arises in the petition stage when there is no check to ensure the legitimacy of the reasons for seeking a recall.

44. MISS. CODE. ANN. § 25-5-7 (LEXIS through 2023 Reg. Sess. legislation effective July 1, 2023).

removal election, which functions in the same way as a recall election.[45] Mississippi's statute enumerates specific grounds for removal.[46]

Minnesota also follows a similar procedure that combines a recall election with substantive judicial review. The petition is not sent to the governor, but there is a judicial evaluation process prior to holding a recall election.[47] Minnesota also provides specific grounds for removal[48] and adds a limitation to the applicability of its law, saying that an official cannot be subject to removal "on the ground of disagreement with actions taken that were within the lawful discretion of the elected county official."[49]

B. *Impeachment*

Twenty-nine states have impeachment mechanisms.[50] Some states make clear that these mechanisms apply to local prosecutors, either through statutory language, case law, or past practice.[51] Others have general impeachment mechanisms that do not specifically mention local prosecutors, but likely include them in the absence of evidence to the contrary.[52] The states that remove their local prosecutors by impeachment generally follow similar procedures in which the House of Representatives (lower house) impeaches and the Senate (upper house) tries the case.[53] Removal is effective upon the affirmative vote of two-thirds of the upper house members.[54]

As mentioned, there is some uncertainty as to whether these provisions apply to local prosecutors. Some states specify that local prosecutors are subject

45. *See id.* §§ 25-5-15, 25-5-21 to -31.

46. *Id.* § 25-5-5.

47. MINN. STAT. §§ 351.16 to .22 (2022).

48. *Id.*

49. *Id.* § 351.16.

50. *See infra* Appendix, Table 2.

51. *See, e.g.*, ARK. CONST. art. XV, § 1 (LEXIS through all legislation of the 2023 Reg. Sess.) (constitutional language); People v. Losavio, 606 P.2d 856, 858 (Colo. 1980) (en banc) (case law). In some states the practice is less explicit; for instance, Vermont's past practice of utilizing impeachment to remove sheriffs suggests that state attorneys may be removed in the same manner, because both are elected under the same section of the Vermont Constitution. *See* Mayo v. State, 415 A.2d 1061, 1061–62 (Vt. 1980); VT. CONST. Ch. II, § 50 (LEXIS through December 31, 2022).

52. For example, Utah's constitution states that "State and Judicial officers shall be liable to impeachment" but does not define either term. UTAH CONST. art. VI, § 19 (LEXIS through 2022 Third Spec. Sess. of the 64th Leg.). However, Utah provides for the election of public prosecutors in the constitutional article pertaining to the state's judiciary, indicating that prosecutors might fall under the state's impeachment mechanism. UTAH CONST. art. VIII, § 16 (LEXIS through 2022 Third Spec. Sess. of the 64th Leg.).

53. *E.g.*, ARK. CONST. art. XV, § 2 (LEXIS through all legislation of the 2023 Reg. Sess.); LA. CONST. art. X, § 24 (Westlaw through amendments through January 1, 2023).

54. *E.g.*, ARK. CONST. art. XV, § 2 (LEXIS through all legislation of the 2023 Reg. Sess.); LA. CONST. art. X, § 24 (Westlaw through amendments through January 1, 2023).

to impeachment in constitutional or statutory provisions,[55] have case law interpreting those provisions as applying to local prosecutors,[56] or have examples of local prosecutors being impeached.[57] But, in many other states, there is broad language describing the officers subject to impeachment and few cases interpreting whether the relevant portions of the provisions apply to local prosecutors.[58] In the states where the impeachment mechanism is untested for removing local prosecutors, a removal attempt[59] or new legislation could provide clarity.

As with the recall mechanism, the grounds for impeachment vary across states, and there is overlap among the states. Among the common grounds for impeachment are "misdemeanors,"[60] "malfeasance,"[61] and "misconduct."[62] Some states have case law interpreting these terms; but when the terms are construed broadly, it creates a risk that the impeachment mechanism could be used to remove prosecutors on the basis of legitimate discretionary decisions.[63] For example, the Commonwealth Court of Pennsylvania found that the

55. *E.g.*, ARK. CONST. art. XV, § 1 (LEXIS through all legislation of the 2023 Reg. Sess.) ("Prosecuting Attorneys[] shall be liable to impeachment . . . ."); TENN. CONST. art. V, § 4 (LEXIS through 2023 Reg. Sess.) ("[A]ttorneys for the state . . . shall be liable to impeachment."); IND. CODE § 5-8-1-1 (2023) ("[P]rosecuting attorneys . . . are liable to impeachment.").

56. *E.g.*, *Losavio*, 606 P.2d at 858 (stating that "[t]he district attorney is a state officer" in interpreting the constitutional impeachment provision applying to "state and judicial officers"); *see also* Perez v. Plaquemines Par. Comm'n Council, 391 So. 2d 1308, 1311 (La. Ct. App. 1980), *writ refused*, 397 So. 2d 805 (La. 1981) (stating that if accusations against the district attorney can be sustained then he "abused his office and should be subjected to the penalties provided for by the constitution and laws of this state," which "include impeachment"); Mayo v. State, 415 A.2d 1061, 1061–62 (Vt. 1980) (demonstrating that Vermont's impeachment mechanism applies to officials elected in the same manner as state's attorneys per VT. CONST. Ch. II, § 50).

57. For example, Florida does not explicitly include local prosecutors in its constitutional removal mechanism, but its use against Andrew Warren demonstrates that the mechanism applies to local prosecutors. FLA. CONST. art. IV, § 7; Warren v. DeSantis, No. SC2023-0247, 2023 WL 4111632, at *2 (Fla. June 22, 2023) (challenging the factual sufficiency of Governor DeSantis's decision to suspend Warren, not the use of the mechanism itself).

58. *See, e.g.*, MISS. CONST. art. 4, § 50 (LEXIS through 2023 Reg. Sess.) ("[A]ll other civil officers of this State[] shall be liable to impeachment."); OHIO CONST. art. II, § 24 (LEXIS through the Nov. 8, 2022 election) ("[A]ll state officers[] may be impeached."). There are states that have interpreted their otherwise vague impeachment provisions as applying to local officials in such a way that may extend to local prosecutors. *E.g.*, Adler v. Sheriff, Clark Cnty., 552 P.2d 334, 335–36 (Nev. 1976) ("[T]he Nevada legislature enacted extensive legislation providing for the removal of public officers . . . . NRS 283.140—283.290 (impeachment) . . . provide[s] procedures for removal of all local officials . . . .").

59. *See, e.g.*, Krasner v. Ward, No. 563 M.D. 2022, 2023 WL 164777, at *16 (Pa. Commw. Ct. Jan. 12, 2023) (holding that a local prosecutor is subject to the state constitution's impeachment provision after Larry Krasner challenged the law's applicability to his office).

60. *E.g.*, KY. CONST. § 68 (Westlaw through the 2023 Reg. Sess. and the Nov. 8, 2022 election).

61. *E.g.*, COLO. CONST. art. XIII, § 2 (LEXIS through the 2023 Reg. Sess.).

62. *E.g.*, ARK. CONST. art. XV, § 1 (LEXIS through all legislation of the 2023 Reg. Sess.).

63. *See, e.g.*, Stanley v. Jones, 2 So. 2d 45, 51 (La. 1941) ("The phrase 'misconduct in office' is broad enough to embrace any willful malfeasance, misfeasance, or nonfeasance in office. It does not necessarily imply corruption or criminal intent.").

Pennsylvania House of Representatives failed to allege conduct sufficient to establish misbehavior in office when it impeached Philadelphia District Attorney Larry Krasner for decisions made within his discretion as a prosecutor.[64] The primary limitation on the applicability of these grounds is that the conduct giving rise to impeachment generally must be related to the officer's official duties.[65] But when a prosecutor is targeted for removal based on the exercise of her prosecutorial discretion, that limitation provides little constraint.[66]

Some of these twenty-nine states have removal mechanisms that do not follow the typical impeachment procedures but are functionally very similar. These mechanisms either involve a single branch of state government removing a local prosecutor,[67] or the state legislature retaining the removal power but a different executive actor (usually the governor) initiating the proceedings.[68] One example of the latter approach is Florida's mechanism, which Governor Ron DeSantis used to suspend Andrew Warren from office unilaterally, though the state senate must decide whether to permanently remove him.[69] In regards to the former approach, the procedures in some states include judicial review,

64. *See Krasner*, 2023 WL 164777, at *20 ("[T]he House simply appears not to approve of the way District Attorney has chosen to run his office. Regardless of whether any of the House's concerns have substantive merit, it remains that such disagreements, standing alone, are not enough to create a constitutionally sound basis for impeaching and removing District Attorney."). Pennsylvania House impeachment managers have filed an appeal to the Pennsylvania Supreme Court seeking to reverse the Pennsylvania Commonwealth Court's decision that the articles of impeachment fail to establish "misbehavior in office" for the purposes of impeachment. Reply Brief of Appellees Representatives Timothy R. Bonner and Craig Williams at 32–33, Krasner v. Ward, No. 563 M.D. 2022, 2023 WL 164777 (Pa. Commw. Ct. 2023), *appeal filed*, Jan. 26, 2023 (No. 2 EAP 2023). Larry Krasner also filed an appeal seeking to reverse the Commonwealth Court's decision that the impeachment did not die when the General Assembly adjourned and that he is subject to impeachment. Brief of Appellant District Attorney Larry Krasner at 8, Krasner v. Ward, No. 563 M.D. 2022, 2023 WL 164777 (Pa. Commw. Ct. 2023), *cross-appeal filed*, Feb. 8, 2023 (No. 3 EAP 2023). The appeals are undecided as of the time of this writing.

65. *Stanley*, 2 So. 2d at 51 ("[M]isconduct sufficient to justify a removal must be misconduct in the conduct of the office, and not merely personal misbehavior.").

66. *See, e.g.*, Israel v. DeSantis, 269 So. 3d 491, 496 (Fla. 2019) (quoting State *ex rel.* Hardie v. Coleman, 155 So. 119, 125–26 (Fla. 1934)) (stating that neglect of duty is "the neglect or failure on the part of a public officer to do and perform some duty or duties laid on him as such by virtue of his office or which is required of him by law" regardless of "whether the neglect be willful, through malice, ignorance, or oversight"). Governor Ron DeSantis cited this language in support of his decision to suspend Andrew Warren for promising not to enforce offenses related to abortion and gender-affirming care for minors. Fla. Exec. Order No. 22-176 (Aug. 4, 2022), https://www.flgov.com/wp-content/uploads/2022/08/Executive-Order-22-176.pdf [https://perma.cc/P7ST-2N3H].

67. *E.g.*, MICH. CONST. art. 5, § 10; WIS. CONST. art. VI, § 4.

68. *E.g.*, FLA. CONST. art. IV, § 7 (vote of the Senate on the recommendation of the Governor); MD. CONST. art. V, § 7 (LEXIS through the November 8, 2022 General Election; and current until the November 2023 General Election) (vote of the Senate on the recommendation of the Attorney General); OR. CONST. art. VII, § 20 (removal by the Governor after vote of both chambers of the legislature).

69. FLA. CONST. art. IV, § 7; Mower & Mahoney, *supra* note 1.

but they are more similar to impeachment because the final removal decision rests with a single executive actor or legislative body as opposed to a judge.[70]

C. *Judicial Proceedings*

This category includes removal mechanisms that primarily involve the judicial branch, and within this category, there are three main sub-categories. First, there are states that designate specific judicial proceedings as a mechanism for removing a local prosecutor. In this first category, it is a judge, a panel of judges, or a jury that decides whether to remove a prosecutor from office, and many of the procedures are like those found in civil or criminal proceedings. Second, many states punish conviction of certain crimes[71] or disbarment[72] with removal from office in addition to other penalties such as imprisonment or fines. This second category, while notable, is not within the scope of this Comment.[73] Third, a writ of quo warranto provides an alternate civil cause of action that may be used to remove a local prosecutor from office.

Thirty-one states have a judicial proceedings mechanism, and their exact procedures vary widely.[74] There are two common variations among the states' procedures. First, who initiates the proceeding varies widely. North Carolina has a relatively low barrier to use, as any individual may initiate the proceeding with a sworn affidavit.[75] In other states, a state official like the attorney general or the governor may file a petition, or there is a higher barrier to use that

70. *See, e.g.*, N.Y. CONST. art. XIII, § 13 (McKinney through L.2023, chapter 1 to 682); W. VA. CODE § 6-6-6 (2023).

71. In many states, these crimes do not have to be related to an official's duties in office but rather include, for example, any felony conviction. *E.g.*, IND. CODE § 5-8-1-38(b) (2023). Wisconsin goes so far as to permit the suspension from office if an official is merely charged or arrested. WIS. STAT. § 17.11 (2021–2022). Finally, the conviction of a qualifying crime is listed in the statute providing the grounds for the judicial removal mechanism in some states. *E.g.*, IOWA CODE § 66.1A (2023) (conviction).

72. *E.g.*, N.C. GEN. STAT. § 7A-410 (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the General Assemb.).

73. These removal mechanisms are distinct from the others described here for two important reasons: (1) the removal is automatic upon satisfaction of the necessary condition, removing the discretionary element; and (2) the triggering conduct can be—in the case of criminal charges or convictions—completely unrelated to the prosecutor's actions in office. However, a handful of states do have a removal mechanism structured as a criminal proceeding, with the grounds for removal—such as malfeasance or misconduct—being criminal offenses. *E.g.*, ARK. CODE ANN. § 16-90-112 (LEXIS through all legislation of the 2023 Reg. Sess.). These states are included because they are not merely providing for automatic removal in the event of a criminal conviction but rather turning the grounds for removal into criminal offenses for which a local prosecutor may be removed from office. In doing so, these laws still raise the possibility of conflicting exercises of discretion, as described in Part II below. These states are specifically noted in the Appendix. *See infra* Appendix, Table 3.

74. *See infra* Appendix, Table 3.

75. *E.g.*, N.C. GEN. STAT. § 7A-66 (requiring only a sworn affidavit).

requires a requisite number of electors to file the petition.[76] Second, there is variation in whether the judgment is made by a jury, judge, or panel of judges.[77] In some states, the prosecutor targeted for removal may also plead guilty, at which point the court would enter a judgment of removal.[78]

Beyond these variations, the procedure for judicial removal typically involves a complaint, summons, defensive pleadings, and a trial followed by judgment.[79] The common grounds for judicial removal proceedings are similar to those for recall elections and impeachment; they frequently include misconduct,[80] neglect of duty,[81] and malfeasance.[82] These grounds, while occasionally defined in the statutes, are broad. But the possibility of an abuse of this broadness is limited by the fact that most states have an appeal process,[83] and there is often an opportunity to challenge and review the sufficiency of the stated grounds for removal during the proceedings.[84]

A writ of quo warranto also provides a judicial proceeding through which a local prosecutor may be removed from office. A writ of quo warranto is the means by which an official's right to hold public office or to exercise the power of public office can be challenged.[85] The writ originated in England as a

76. *E.g.*, IOWA CODE § 66.3 (allowing the attorney general or a requisite number of electors to file a petition); OHIO REV. CODE ANN. § 3.08 (LEXIS through File 12 of the 135th General Assemb. (2023-2024)) (allowing the governor or a requisite number of electors to file a petition).

77. *Compare* N.C. GEN. STAT. § 7A-66 (a superior court judge), *with* N.D. CENT. CODE §§ 44-10-10 to -11 (LEXIS through all legislation from the 68th Legis. Assemb.) (a guilty plea or trial by jury), *and* MASS. GEN. LAWS ANN. ch. 211, § 4 (Westlaw through chapter 25 of the 2023 1st Ann. Sess.) (a majority of the Supreme Judicial Court's justices), *and* W. VA. CODE § 6-6-7(g) (2023) (a court composed of three circuit judges).

78. *E.g.*, ARIZ. REV. STAT. ANN. § 38-343(A) (Westlaw through the First Reg. Sess. of the Fifty-Sixth Leg.); N.D. CENT. CODE §§ 44-10-10 to -11.

79. *E.g.*, NEB. REV. STAT. §§ 23-2004 to -2008 (2023).

80. *E.g.*, IOWA CODE § 66.1A (2023); TEX. LOC. GOV'T CODE ANN. § 87.013 (Westlaw through legislation effective July 1, 2023, of the 2023 Reg. Sess. of the 88th Leg.).

81. *E.g.*, TENN. CODE ANN. § 8-47-101 (LEXIS through the 2023 Reg. Sess.); VA. CODE ANN. § 24.2-233 (LEXIS through the 2023 Reg. Sess.).

82. *E.g.*, S.D. CODIFIED LAWS § 3-17-6 (Westlaw through the 2023 Reg. Sess. and Supreme Court Rule 23-17); MAUI CNTY., HAW., CHARTER § 13-13 (2021).

83. *E.g.*, N.C. GEN. STAT. § 7A-66 (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the General Assemb.) ("The district attorney may appeal from an order of removal to the Court of Appeals on the basis of error of law by the superior court judge."); OHIO REV. CODE ANN. § 3.09 (LEXIS through File 12 of the 135th General Assemb. (2023-2024)) ("The decision of the court of common pleas in all cases for the removal of officers may be reviewed on appeal on questions of law by the court of appeals.").

84. *E.g.*, ARIZ. REV. STAT. ANN. § 38-342 (Westlaw through the First Reg. Sess. of the Fifty-Sixth Leg.) ("The accused may answer the accusation . . . by objecting in writing to the sufficiency thereof or of any charge therein . . . ."); NEB. REV. STAT. § 23-2006 (2023) ("[T]he defendant may move to reject the complaint upon any ground rendering such motion proper . . . .").

85. *See* John W. Wilcox, Case Comment, *Allowing the Tree To Be Cut Down: Quo Warranto Writs in Florida*, 71 FLA. L. REV. 1541, 1544–45 (2019); *Quo Warranto Processes: States and Territories Survey*, PROJECT ON GOV'T OVERSIGHT (Jan. 26, 2023) [hereinafter PROJECT ON GOV'T OVERSIGHT],

mechanism to "determine the authority upon which one who claimed an office, franchise, or liberty of the Crown supported his claim."[86] The remedy in these cases was typically ouster from the office or franchise claimed.[87]

The writ of quo warranto was adopted by many states after the founding and remains the means by which one may challenge the usurpation of state power.[88] Rules regarding the writ have also been codified in some states, though it is governed by common law in states that have not codified the writ.[89] The procedure varies widely depending on the state. For example, in Alabama, any person may bring an action via a writ of quo warranto,[90] while in Minnesota its use is limited to the state's attorney general.[91] That said, the writ of quo warranto is a universal mechanism available in every state.[92]

Despite its historic roots, the writ of quo warranto has been put to recent use. On February 23, 2023, Missouri Attorney General Andrew Bailey filed a petition for writ of quo warranto seeking the removal of St. Louis Circuit Attorney Kim Gardner in response to her alleged neglect of duty.[93] In her response to Bailey, Gardner alleged that allowing the writ to be used in this case would turn it into "a political tool for an Attorney General to remove a politically opposite prosecutor whenever he can point to some failing in the prosecutor's office with which he disagrees."[94] However, Gardner resigned, and Bailey voluntarily dismissed the petition, before a court could make a decision on the merits of the case.[95] This attempt, and the ubiquity of the quo warranto mechanism, raises the possibility that other prosecutors could face similar removal efforts in the future.

D. *Oversight Commission and Pending Legislation*

Legislators in multiple states have introduced bills aimed at curbing prosecutorial power in response to growing scrutiny of prosecutors' policies and

https://www.pogo.org/resource/2023/01/quo-warranto-processes-states-and-territories-survey [https://perma.cc/2XNL-WXDQ].

86. Note, *Quo Warranto in Missouri*, 1972 WASH. U. L.Q. 751, 751 (1972).

87. *Id.*

88. Wilcox, *supra* note 85, at 1545.

89. An excellent table of these laws has already been created by the Project on Government Oversight and will thus not be included in this Comment's appendix. PROJECT ON GOV'T OVERSIGHT, *supra* note 85.

90. ALA. CODE § 6-6-591(b) (Westlaw through Acts 2023-1 through 2023-3 of the 2023 First Spec. Sess.; through Acts 2023-4 through 2023-491, and Acts 2023-493 through 2023-561 of the 2023 Reg. Sess.; and Acts 2023-562 through 2023-569 of the 2023 Second Spec. Sess.).

91. MINN. STAT. § 556.01 (2022).

92. PROJECT ON GOV'T OVERSIGHT, *supra* note 85.

93. Amended Petition in Quo Warranto at 1, Missouri *ex rel.* Bailey v. Gardner, No. 2322-CC00383 (Mo. Cir. Ct. Feb. 23, 2023).

94. Motion to Dismiss Petition and Suggestions in Support at 5, *Bailey*, No. 2322-CC00383.

95. Notice of Voluntary Dismissal, *Bailey*, No. 2322-CC00383.

decision-making.[96] And while some attempts have failed, others are still in the early stages of consideration.[97] Many of these proposed changes are supersession efforts that do not threaten to remove local prosecutors from office,[98] but bills in Texas and Georgia would alter the removal mechanisms in those states.

The Texas Legislature considered multiple bills in its 2023 regular session related to the removal of local prosecutors, with House Bill 17 ("HB 17") and Senate Bill 20 ("SB 20") being the most likely to succeed.[99] SB 20 failed after being sent to the House for consideration, but HB 17 was passed and signed into law by Governor Greg Abbott.[100] Neither bill changed the type of removal mechanism available in Texas. Instead, both expanded the grounds for removal by amending the definition of official misconduct to include the adoption of categorical nonenforcement policies by prosecutors.[101] Georgia's Senate Bill 92 ("SB 92") also amended state laws regarding the duties of district attorneys—the failure to comply with which is grounds for removal[102]—and expanded the grounds for recalling a district attorney.[103]

In addition to altering the grounds for removal, SB 92 establishes a prosecutorial oversight commission charged with "the power to discipline, remove, and cause involuntary retirement of appointed or elected district

96. Akela Lacy, *17 States Have Now Tried To Pass Bills That Strip Powers from Reform-Minded Prosecutors*, INTERCEPT (Mar. 3, 2023, 1:27 PM), https://theintercept.com/2023/03/03/reform-prosecutors-state-legistatures/ [https://perma.cc/XB5L-T5X6 (dark archive)] [hereinafter Lacy, *17 States*].

97. *See, e.g.*, LOC. SOLS. SUPPORT CTR., PUB. RTS. PROJECT, LIST OF ACTIONS TARGETING PROSECUTORIAL DISCRETION 1–5 (2023), https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/63c7048805c3145fd1eccee1/1673987210263/LSSC-ProsecutorialDiscretion-Supplement.pdf [https://perma.cc/38ZP-YZVS].

98. *See* Lacy, *17 States*, *supra* note 96. For example, Missouri's proposed law would allow the governor to appoint a special prosecutor to handle some cases if certain circumstances are met; Iowa would give the attorney general concurrent jurisdiction over criminal prosecution; and Mississippi's new law will carve out portions of Jackson to be part of a special district in which prosecutors will be appointed. *Id.* It is worth noting that few of these efforts have become law, in part because "even DAs who may not be part of the reform movement see these measures as a threat to their autonomy" and advocate against them. *Id.*

99. Eleanor Klibanoff, *House Passes Bill To Rein In "Rogue" Prosecutors*, TEX. TRIB., https://www.texastribune.org/2023/04/27/texas-house-rogue-prosecutors/ [https://perma.cc/CUQ6-B7A6] (last updated Apr. 28, 2023).

100. Press Release, Off. of the Tex. Governor, Governor Abbott Signs 8 Public Safety Bills into Law To Protect Texans (June 6, 2023), https://gov.texas.gov/news/post/governor-abbott-signs-8-public-safety-bills-into-law-to-protect-texans [https://perma.cc/QEG6-FJF4].

101. H.R. 17, 88th Legis., Reg. Sess., 2023 Tex. Sess. Law Serv. Ch. 366; S. 20, 88th Legis., Reg. Sess. (Tex. 2023). House Bill 17 also includes procedural changes, the most significant of which are related to the appointment of a presiding judge and prosecuting attorney for the removal proceedings. H.R. 17, 88th Legis., Reg. Sess., 2023 Tex. Sess. Law Serv. Ch. 366.

102. S. 92, 2023–24 Leg., Reg. Sess. (Ga. 2023).

103. *Id.* at 13.

attorneys."[104] The commission is set to be established in October of 2023 and will be composed of eight members to be appointed by the Governor, Lieutenant Governor, Speaker of the House of Representatives, and Senate Committee on Assignments.[105] If a prosecutor is removed by the commission, they are ineligible to serve as a prosecutor for ten years, but the law does establish a right to appeal that decision to the superior court of the prosecutor's county.[106]

This mechanism does not fit into any of the three categories discussed above, and while it is currently the only removal mechanism of its kind,[107] it demonstrates that the categories discussed above are subject to change at any time. The commission also demonstrates the potential conflicts that arise when local prosecutors are targeted for removal.[108] A group of Georgia prosecutors filed a lawsuit in August of 2023 seeking an injunction to prevent the implementation of the law, arguing that it violates the freedom of speech, separation of powers, and Georgia's nondelegation clause.[109] Shortly thereafter, Georgia Senator Clint Dixon threatened to use the commission to remove Fulton County District Attorney Fani Willis in the wake of her office's prosecution of Donald Trump.[110] While the impact of Georgia's new oversight commission and the legal challenge to its implementation remains to be seen as of the time of this writing, it indicates that the removal of local prosecutors will continue to be a contentious legal issue.

104. *Id.*; *see also* Jason Morris & Sydney Kashiwagi, *Georgia's GOP Governor Signs Bill That Could Remove Local Prosecutors and DAs from Their Jobs*, CNN, https://www.cnn.com/2023/05/05/politics/georgia-elections-oversight-commission-kemp-willis/index.html [https://perma.cc/K5YK-UH2T] (last updated May 5, 2023, 6:50 PM).

105. Ga. S. 92.

106. *Id.* at 11–12.

107. *But cf.* S. 284, 123d Gen. Assemb., Reg. Sess. (Ind. 2023) (proposing a prosecutor review board). Indiana's proposed legislation would create a prosecutor review board and procedure that would allow the board to petition a state judge to appoint a special prosecutor to supersede local prosecutor, but it does not provide for removal. *Id.*

108. *See infra* Section II.C for more discussion of this issue.

109. Complaint at 1–3, Boston v. State of Georgia, No. 2023CV383555 (Ga. Super. Ct. Aug. 2, 2023); *see also* Peter Hayes, *Georgia DAs Sue over New State Oversight of Elected Prosecutors*, BLOOMBERG L. (Aug. 2, 2023, 11:01 AM), https://news.bloomberglaw.com/us-law-week/georgia-das-sue-over-new-state-oversight-of-elected-prosecutors [https://perma.cc/HK34-57B4 (staff-uploaded, dark archive)]. The initial legal challenge was unsuccessful, and—although the prosecutor has promised to appeal—the newly formed commission has already received a complaint against Fulton County District Attorney Fani Willis. Greg Bluestein, *Top Senate Republicans Seek To Reprimand Fani Willis over Trump Charges*, ATLANTA J. CONST. (Oct. 9, 2023), https://www.ajc.com/politics/top-senate-republicans-seek-to-reprimand-willis-over-trump-charges/2HB45YLJUNCFLODJXRHQ4USPN4/ [https://perma.cc/W7Z3-GH25].

110. Eric Lutz, *Georgia Republicans Say They'll Move To Remove Fulton County DA Fani Willis from Office with New State Law*, VANITY FAIR (Aug. 25, 2023), https://www.vanityfair.com/news/2023/08/republicans-target-fani-willis-over-trump-racketeering-indictment [https://perma.cc/NR65-CUF5 (staff-uploaded, dark archive)].

Although states have different mechanisms for the removal of local prosecutors, one similarity across states is the broad discretion that those seeking to remove the prosecutors possess. As the next two parts will demonstrate, the use of these removal mechanisms creates a conflict between local prosecutors' legitimate exercise of their discretion and the discretion of actors who may use the mechanisms for political reasons.

II. THE ROLE OF DISCRETION

The discretion of local prosecutors and those who seek to remove them using the mechanisms discussed above come into direct conflict when the removal is based on a prosecutor's official actions, or lack thereof, in office. The conflict arises because prosecutors have broad discretion to decide whether and how to pursue criminal charges, but those who seek to remove local prosecutors often do so based on a disagreement with the prosecutor's decisions about how to exercise that discretion. In doing so, those exercising the removal power substitute their discretion for that of the prosecutor. This part will begin with an explanation of the role of prosecutorial discretion in the criminal justice system. Next, it will discuss the discretionary nature of the use of the removal mechanisms. It will conclude by exploring the conflict between these exercises of discretion and the resulting consequences.

A. *Prosecutorial Discretion*

Prosecutorial discretion is sometimes described as a "necessary evil."[111] It is necessary because discretion plays a critical role at multiple stages of the criminal justice process, but it can be abused when exercised in an arbitrary or corrupt manner. A core exercise of prosecutorial discretion consists of charging decisions in which prosecutors "choose whether to charge a defendant and what crime to select."[112] In the modern criminal justice system, broadly written laws and the proliferation of plea bargaining combine to give prosecutors the power to both interpret the scope of the law and enforce it.[113] They "decide which conduct to treat as illegal and which to treat as permissible," but many of these decisions are made in the absence of a trial, so there is little information about how prosecutors have interpreted the law.[114]

Some prosecutors exercise their discretion broadly by instituting nonenforcement policies for certain charges. For example, Parisa Dehghani-Tafti, the elected prosecutor in Arlington, Virginia, decided not to prosecute

111. ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 6 (2007) [hereinafter DAVIS, ARBITRARY JUSTICE].

112. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 181 (2019).

113. *See* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 994–96 (2019).

114. *Id.* at 996.

marijuana possession charges due to their disproportionate racial impact and low public safety value.[115] This exercise of prosecutorial discretion can be controversial and has been criticized, albeit unpersuasively, as a violation of the "obligation to protect public safety."[116] But, there is a compelling argument that these nonenforcement decisions draw legitimacy from the fact that voters elected a prosecutor who promised to implement such policies.[117] Categorical nonenforcement may also reflect changing social norms that would make the prosecution of certain crimes, like adultery, seem out of touch.[118] Further, it is often a manifestation of the fact that "there are many more offenses than resources to prosecute," and prosecutors must prioritize some offenses over others as a result.[119]

Prosecutors also frequently make charging decisions on a case-by-case basis. These decisions can be made with policy goals in mind, but prosecutors also identify and assess the consequences of pursuing a case based on an "intimate knowledge of what is likely to happen at future institutional decision points."[120] For instance, there may not be sufficient evidence to prove guilt beyond a reasonable doubt.[121] In other cases, the facts of an individual case may not support expending the resources necessary to prosecute.[122] Nonenforcement is a necessary exercise of discretion because it allows prosecutors to separate out cases that are weak or that they believe are not an appropriate use of their power.

While discretion is necessary when prosecutors choose not to act, it is also necessary when they decide to charge a defendant or crack down on a category of offenses. The laws still "have to be defined as to their meaning and relevance" before they can be applied to cases, and prosecutors must then decide whether the available facts are "relevant to the application of [the] rule."[123] Institutional

115. CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 205 (2021) [hereinafter HESSICK, PUNISHMENT WITHOUT TRIAL].

116. Carissa Byrne Hessick & F. Andrew Hessick, *The National Police Association Is Throwing a Fit over Prosecutorial Discretion*, SLATE (Jan. 4, 2019, 12:55 PM), https://slate.com/news-and-politics/2019/01/national-police-association-throwing-fit.html [https://perma.cc/7PPN-RMJE] [hereinafter Hessick & Hessick, *National Police Association*].

117. *See* W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 209–10 (2021).

118. DAVIS, ARBITRARY JUSTICE, *supra* note 111, at 13.

119. James Vorenburg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1548–49 (1981); Hessick & Hessick, *National Police Association*, *supra* note 116.

120. Robert M. Emerson & Blair Paley, *Organizational Horizons and Compliant-Filing*, *in* THE USES OF DISCRETION 231, 239 (Keith Hawkins ed., 1992) (describing the complaint filing decision-making process of deputy district attorneys in the Los Angeles County District Attorney's Office).

121. DAVIS, ARBITRARY JUSTICE, *supra* note 111, at 13.

122. *Id.* ("[I]t may be reasonable to bring a prosecution in a jurisdiction that criminalizes gambling for someone engaged in a large-scale operation but not for individuals placing small bets during a Saturday night poker game in a private home.").

123. Keith Hawkins, *The Use of Legal Discretion: Perspectives from Law and Social Science*, *in* THE USES OF DISCRETION, *supra* note 120, at 11, 35.

knowledge plays a role here too, with data indicating that prosecutors are more likely to charge petty and public-order offenses because they are "likely to be disposed of summarily and successfully."[124] Policy goals also play a role in the decision to prosecute, such as when a prosecutor believes they need to deter particular offenses or when "public outcry" demands a response.[125] As this discussion shows, discretion plays a critical role in prosecution and is motivated by a variety of factors, but without the exercise of discretion, criminal laws could not be enforced.

While prosecutorial discretion is necessary for a functioning criminal justice system, "the line between legal prosecutorial behavior and illegal prosecutorial misconduct is a thin one."[126] Even when misconduct is egregious, like the improper use, handling, or disclosure of evidence or harassing or threatening the parties involved, it is "difficult to discover, [and] much prosecutorial misconduct goes unchallenged."[127] Addressing misconduct is hindered by the fact that "most of the prosecutorial practices that occur behind closed doors . . . are never revealed to the public" and "defense attorneys are not entitled to discover what occurred behind the scenes."[128] Prosecutors also frequently condition plea bargains, the overwhelming source of criminal convictions,[129] on a waiver of the right to appeal, which can eliminate opportunities to address misconduct.[130] And when misconduct is challenged, Supreme Court precedent discourages reversing convictions when there is strong evidence of a defendant's guilt.[131]

The line between discretion and misconduct is arguably at its thinnest when prosecutors exercise their discretion in an arbitrary manner. The grant of broad discretion creates a risk that prosecutors will act "arbitrarily and capriciously" and that "the least favored members of the community . . . will be treated more harshly" because there are largely no standards for its exercise beyond the ones prosecutors set for themselves.[132] The barriers to discovering and challenging prosecutorial misconduct remain high in this context, and may

124. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not To Prosecute*, 110 COLUM. L. REV. 1655, 1716 (2010).

125. *See* Vorenburg, *supra* note 119, at 1548.

126. DAVIS, ARBITRARY JUSTICE, *supra* note 111, at 125–26; *see* Rose v. Clarke, 478 U.S. 570, 580 (1986).

127. DAVIS, ARBITRARY JUSTICE, *supra* note 111, at 126.

128. *Id.*

129. HESSICK, PUNISHMENT WITHOUT TRIAL, *supra* note 115, at 24.

130. *Id.* at 52–53; DAVIS, ARBITRARY JUSTICE, *supra* note 111, at 127.

131. DAVIS, ARBITRARY JUSTICE, *supra* note 111, at 127 (explaining that under the harmless error rule, "appellate courts affirm convictions if the evidence supports the defendant's guilt, even if she did not receive a fair trial").

132. Vorenburg, *supra* note 119, at 1555 ("No uniform, pre-announced rules inform the defendant and control the decisionmaker; a single official can invoke society's harshest sanctions on the basis of ad hoc personal judgments.").

be even more challenging to overcome because of courts' deference to prosecutorial discretion in charging and other decisions.[133]

This potential for abuse and lack of oversight supports a compelling argument in favor of the prosecutorial removal mechanisms discussed in Part I. If the courts will not remedy abuse, the voters or state officials can use these mechanisms to remove prosecutors for their misconduct. But just as prosecutors can abuse their power, so can those who seek to remove them from office.

B. *The Discretion To Remove*

Outside of the removal of a local prosecutor as punishment for the conviction of a qualifying crime,[134] an actor or actors must exercise discretion when deciding to remove a prosecutor using the mechanisms discussed in Part I. When voters decide to file or sign a recall petition, legislators decide to vote to impeach, or an actor initiates judicial proceedings, they are using their own judgment of the prosecutor's conduct to choose how to act (or not act) in response. For example, Pennsylvania legislators who voted to impeach Philadelphia's Larry Krasner for "misbehavior in office" said the move was "necessary," while those who voted against impeachment described the process as "unjustified" and subverting the will of the voters.[135] These legislators were not required by law to initiate impeachment,[136] and they used their individual judgments to decide how to vote, demonstrating the discretionary nature of prosecutorial removal power.

In states that have enumerated grounds for removal, and more so in states that define those grounds, the removal is an exercise of explicit discretion. Explicit discretion is when the law confers on an actor "the authority . . . to use her judgment in choosing between possible outcomes, rather than prescribing a particular outcome."[137] This discretion arises when the law provides flexible standards that give actors "guiding principles" to balance in determining an outcome, and it can be a broad application of what the actor thinks is just or constrained by specific factors that must be considered.[138] Giving an actor specific grounds[139] for which a prosecutor can be removed sets the boundaries

133. DAVIS, ARBITRARY JUSTICE, *supra* note 111, at 14–15 (quoting Wayte v. United States, 470 U.S. 598, 607 (1985) (illustrating the Supreme Court's deference to prosecutorial discretion)).

134. *See supra* note 73 and accompanying text.

135. Calvert, *supra* note 4.

136. PA. CONST. art. VI, § 4 reserves the impeachment power for the House of Representatives but says nothing that indicates that it is ever required to exercise that power. *See* PA. CONST. art. VI, § 4 (2023).

137. Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 196 (2014) [hereinafter Hessick & Hessick, *Procedural Rights*].

138. *See id.* at 196–97.

139. *See, e.g.*, *supra* Section I.A.

within which they can make their decisions. But the lack of fixed definitions[140] allows for interpretation, flexibility, and personal judgment in determining what the outcome will be. Even when the grounds for removal have been defined, the law does not always require actors to arrive at a particular outcome.[141] States that do not limit removal to enumerated grounds give actors vast explicit discretion constrained only by their own conception of the correct outcome.

But the discretionary nature of prosecutorial removal is not limited to how the decision to remove is made. An actor may also have "de facto discretion" when her decision to remove is insulated from review because that insulation gives the actor the power to make decisions according to her judgment.[142] De facto discretion is most likely to arise in recall elections and impeachments in which there is little or no opportunity to challenge the sufficiency of the grounds for removal at the initial stage of the removal process.[143] Both of these removal mechanisms are arguably subject to (non-judicial) review after the initiation of the removal process because a second group of individuals must vote on whether to remove the prosecutor. But each one of those voters is herself acting with de facto discretion because there is no means by which to challenge or review the outcome after the recall or impeachment trial votes have been counted. When the voters in a prosecutor's district exercise this de facto discretion in a recall election, it gives them the same control over local policy as when they participate in regularly scheduled elections. However, when state legislators use their de facto discretion in an impeachment trial, local policy preferences are usurped. States that use recall elections and impeachment to remove local prosecutors thus give petitioners and state representatives broad de facto discretion limited only by the similarly broad de facto discretion of local voters and state senators.

When the decision to remove a local prosecutor is made according to an actor's own judgment of the prosecutor's actions and that decision is insulated from appellate review, the potential for abuse is similar to when prosecutors exercise their discretion arbitrarily.[144] For example, a prosecutor who declines to charge any person arrested for violating certain gun control regulations[145] and

140. *See, e.g.*, *supra* Section I.A.

141. *See* Hessick & Hessick, *Procedural Rights*, *supra* note 137, at 196–97 (discussing the distinction between rules and standards).

142. *Id.* at 197.

143. *See supra* note 43 and accompanying text (discussing the lack of review procedures for recall election petitions).

144. *See supra* notes 126–33 and accompanying text (discussing how prosecutorial discretion can be abused).

145. *Cf.* Press Release, Ronald C. Dozier, McLean Cnty. State's Att'y, Second Amendment and Illinois Gun Laws (Aug. 21, 2012), https://www.mcleancountyil.gov/DocumentCenter/View/940

a prosecutor who declines to charge any person arrested for drug possession[146] have both exercised their discretion in the same manner. But if a state legislature initiates impeachment proceedings against one for neglecting their duty by not prosecuting people who have committed crimes, but declines to do the same for the other, that exercise of discretion seems politically motivated. Each removal mechanism is vulnerable to the same inconsistent applications, and the discretion to remove frequently lacks robust oversight, just as prosecutorial discretion does. Because prosecutorial removal is an inherently discretionary act based on judgments about prosecutors' exercise of their discretion, exercising the removal mechanisms necessarily leads to conflicting uses of discretion.

C. *Checks Without Balance*

Prosecutors are said to have "more control over life, liberty, and reputation than any other person in America" because of their power to initiate investigations, bring and dismiss charges, and make sentencing recommendations.[147] Despite their immense power, prosecutors have few checks imposed on them by the other branches of government and there is little oversight or transparency regarding their actions.[148] Courts largely act as a "rubber-stamp" for plea bargains and sentencing recommendations, legislatures expand rather than limit discretionary power by enacting new criminal statutes, and because prosecutors generally reside in the executive branch, there are few actors who can provide oversight.[149] This lack of oversight has enabled abuses of power that range from bias in decision-making to the use of perjured testimony and failure to disclose exculpatory evidence.[150] When prosecutors make seemingly arbitrary decisions that "result in tremendous disparities among similarly situated people, sometimes along race and/or class lines," there are few opportunities to challenge the consequences.[151] These examples demonstrate that more effective checks on prosecutors' power are necessary.

Elections seem like a good way for the public to hold prosecutors directly responsible for abuses of their power, but the public often lacks information

/SAOPressRelease090612 [https://perma.cc/ALT6-X6WM] (announcing a policy against prosecuting violations of certain gun control laws). Some local sheriffs have also declined to enforce gun control regulations. *See* Jesse McKinley & Cole Louison, *Another Challenge to New York's Gun Law: Sheriffs Who Won't Enforce It*, N.Y. TIMES (Oct. 9, 2022), https://www.nytimes.com/2022/10/09/nyregion/ny-gun-law-sheriffs.html [https://perma.cc/3JEQ-BQAQ (staff-uploaded, dark archive)].

146. For example, Larry Krasner's office generally declines to prosecute drug-possession cases. Calvert, *supra* note 4.

147. Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

148. Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1107–08 (2017).

149. *Id.* at 1108.

150. *Id.* at 1110–11.

151. DAVIS, ARBITRARY JUSTICE, *supra* note 111, at 16.

about prosecutorial performance, decision making, and policy necessary to cast an informed ballot.[152] And where a voter lives plays a significant role in whether there is even a competitive prosecutor election.[153] If no one is running against an incumbent prosecutor, an election cannot hold them accountable, regardless of how well-informed the public may be. As such, recall elections, impeachment, and judicial proceedings offer a potentially more effective alternative to remove misbehaving prosecutors from office because these mechanisms can be exercised at any time without the need for an opposing candidate and by actors potentially more informed than the average voter.[154] The issue, however, is that all the removal mechanisms lead to conflicting exercises of discretion and thus become checks without balance.

The idea of checks and balances is typically discussed as a constitutional principle involving the relationship between the three branches of the federal government, but it "is also a practical idea that applies all the way down the line to the lowest clerks."[155] A check on an actor's power is "at its best when it is limited to correction of arbitrariness or illegality,"[156] but the problem raised by these removal mechanisms is that they themselves can introduce arbitrariness. When the power to remove is exercised inappropriately—such as by targeting prosecutors based on political disagreements—it threatens the long-standing balance between local prosecutors and state officials[157] and detracts from the mechanisms' legitimacy as a way to rein in abuses. It may also "subject [prosecutors] to the political whims of whichever state officials are in power at any given time" if they believe they are likely to be retaliated against for implementing policies inconsistent with those of state officials.[158] And with

152. *Id.* at 166–67.

153. For instance, "[c]ommunities with large populations tend[] to have more than one candidate in their elections, while communities with small populations tend[] to have uncontested elections." CARISSA BYRNE HESSICK, THE PROSECUTORS & POL. PROJECT, NATIONAL STUDY OF PROSECUTOR ELECTIONS 4 (2020). But "most voters tend to live in jurisdictions that are more likely to give them a choice." *Id.* at 5. Additionally, "when the incumbent prosecutor runs for reelection, he or she often is the only candidate in the election." *Id.* at 6.

154. In some states, these mechanisms are initiated by the governor or state legislature rather than by voters who may lack access to information about their local prosecutors. *See supra* Part I. One example of these mechanisms being exercised effectively comes from North Carolina. In 2021, District Attorney Greg Newman was removed from office via North Carolina's judicial proceedings mechanism after he made false statements to the state bar and in court. Debra Cassens Weiss, *District Attorney Is Removed from Office Under Rarely Used State Law*, ABA J. (Apr. 30, 2021, 2:01 PM), https://www.abajournal.com/news/article/da-is-removed-from-office-under-rarely-used-state-law [https://perma.cc/UHG5-HEEB]. The removal was initiated by victims' families in relation to dropped felony charges and "failure to notify a victim of a plea bargain." *Id.*

155. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 142 (1969).

156. *Id.*

157. Yeargain, *supra* note 12, at 109.

158. *Id.* at 129.

prosecutors being removed on the basis of nonenforcement,[159] this creates a conflict with the expectation that prosecutors pursue justice rather than just convictions, and that they do so with independent judgment.[160]

In the context of recall elections, this conflict becomes murkier because, rather than state officials reaching into the realm of local officials, it is the local voters who exercise their collective discretion. Because prosecutors in most states face (re)election by the same voters at regular intervals, it is harder to see how this threatens to restrict prosecutorial discretion in the same way as when state officials intervene. But in reality, prosecutors' independent judgment is impaired because the process "places all decision-making within the context of an ongoing campaign"[161] as a result of its increasingly frequent use as a tool to harass political opponents rather than to correct misconduct.[162] Even with its democratic value, the recall mechanism can be misused by a minority of voters who disagree with a prosecutor's use of discretion, making the mechanism another check without balance.[163]

Across the various removal mechanisms, four paths to conflicting discretion arise. In each, the actor exercising their removal power can abuse that power by basing their decision on arbitrary or inappropriate criteria. First, when

159. *See, e.g.*, *supra* notes 16–20 and accompanying text (discussing the suspension of State Attorney Andrew Warren).

160. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."); CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION, STANDARD 3-1.2(a), (b) (ABA 2022), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [https://perma.cc/UR8R-V2YE (staff-uploaded)].

161. Carolina Cournoyer, *Did Wisconsin End the Recall Wave?*, GOVERNING (Aug. 28, 2012), https://www.governing.com/archive/gov-did-wisconsin-end-recall-wave.html [https://perma.cc/LA2C-SZ62] (quoting Max Neiman of the University of California, Berkley).

162. *See infra* Section III.A.

163. In 2013, two Colorado state senators, John Morse and Angela Giron, were recalled after casting critical votes in favor of stricter gun laws, in what some described as "an attempt to bully legislators who had taken tough votes." Jack Healy, *Colorado Lawmakers Ousted in Recall Vote over Gun Law*, N.Y. TIMES (Sept. 11, 2013), https://www.nytimes.com/2013/09/11/us/colorado-lawmaker-concedes-defeat-in-recall-over-gun-law.html [https://perma.cc/2QL4-GC2L (staff-uploaded, dark archive)]. In the recall election for John Morse, voter turnout was just 29.19%, and a total of 9,131 votes were cast in favor of his recall. *Colorado Election Results: 2013 Recall Election*, GOVOTECOLORADO.COM, https://results.enr.clarityelections.com/CO/47986/118604/en/summary.html [https://perma.cc/Z7X6-Y9B6 (staff-uploaded)] (last updated Sept. 26, 2013, 1:54 PM). This is far less than the voter turnout of 63.26% and 13,866 votes cast in favor of Morse in the 2010 general election. SCOTT GESSLER, WILLIAM A. HOBBS, JUDD CHOATE, OFF. OF THE SEC'Y OF STATE COLO., 2010 ABSTRACT OF VOTES CAST 121 (2010), https://www.sos.state.co.us/pubs/elections/Results/Abstract/pdf/2000-2099/2010AbstractBook.pdf [https://perma.cc/968G-WDQ2 (staff-uploaded)]. Although this case involves state senators instead of local prosecutors, it demonstrates how a relatively small number of voters who disagree with an elected official's policy choices can undo the will of the larger majority that previously elected the official.

the removal power is exercised without any form of review for sufficiency, it can lead to arbitrary outcomes. When there is no review, actors exercising the removal mechanism can abuse their power by using inappropriate criteria to remove a prosecutor. Inappropriate criteria are those motivated by the potential for political gain and used to target political adversaries over policy disagreements. For instance, Florida's removal mechanism allows the governor to suspend a local prosecutor from office with the issuance of an executive order.[164] For the removal to be permanent, the state senate must vote to remove the official from office,[165] but at that point, the official has already been suspended. And the Florida Senate's history of voting to remove officers despite findings that they should be reinstated indicates that the senators are unlikely to be a strong source of review.[166] In Andrew Warren's case, a federal district court found that Gov. DeSantis's suspension was unconstitutionally motivated by the potential for political gain, but it could not offer relief on the basis of a state law violation.[167] Warren's subsequent appeal to the Florida Supreme Court was unsuccessful,[168] but his appeal to the Eleventh Circuit Court of Appeals is still pending as of the time of this writing.[169]

Second, even in states where there are some limits on the removal power, if those limits are poorly defined an actor can still abuse the removal power by basing their decision on inappropriate criteria. An example of this path to conflicting discretion is a state with vague grounds for removal, such as Pennsylvania.[170] Pennsylvania's impeachment mechanism was used against Larry Krasner, who implemented a policy against prosecuting certain drug possession charges.[171] Instead of prosecution, his office diverts those who do not pose a danger to the community to special services.[172] Krasner was impeached for "misbehavior in office" on the basis of this policy, and others, without any allegation that he violated the law.[173] The Commonwealth Court of Pennsylvania acknowledged that there was previously little case law interpreting "misbehavior in office" in this context and found that the grounds

164. FLA. CONST. art. IV, § 7(a).

165. *Id.* § 7(b).

166. Eliott C. McLaughlin, Dianne Gallagher & Angela Barajas, *Florida Senate Votes To Remove Broward County Sheriff Scott Israel from Office*, CNN, https://www.cnn.com/2019/10/23/us/broward-county-sheriff-scott-israel-reinstatement/index.html [https://perma.cc/YZ7U-WXPD] (last updated Oct. 24, 2019, 9:12 AM) (noting that the Senate Rules Committee recommended removal "despite a Senate-appointed special master recommending Israel be reinstated").

167. *See* Warren v. DeSantis, No. 22-cv-302, 2023 WL 345802, at *21 (N.D. Fla. Jan. 20, 2023).

168. Warren v. DeSantis, No. SC2023-0247, 2023 WL 4111632, at *5 (Fla. June 22, 2023).

169. Plaintiff-Appellant's Reply Brief, Warren v. DeSantis, No. 23-10459 (11th Cir. Apr. 26, 2023).

170. PA. CONST. art. VI, § 6.

171. Calvert, *supra* note 4.

172. *Id.*

173. *Id.*

for impeaching Krasner were insufficient under the state constitution.[174] Even though Krasner succeeded in obtaining judicial review of his impeachment, review of such decisions may be unavailable on the theory that impeachments are nonjusticiable political questions,[175] nor does the availability of judicial review change the fact that legislators exercised their removal power on the basis of inappropriate criteria.

Third, when there are no stated grounds for removal, an actor is free to exercise their power for any reason, opening the door to inappropriate or arbitrary criteria. For example, California does not enumerate specific grounds for removal in its recall statutes and the state constitution explicitly states that the sufficiency of the reason for recall is not reviewable.[176] In 2022, San Francisco District Attorney Chesa Boudin lost his recall election; the petition against him took aim at his policy choices, stating that he was not fulfilling his stated reforms, he failed to prosecute crime, and he "ha[d] the wrong priorities."[177] Boudin claimed during the campaign that "he was not responsible for many of the street conditions that San Francisco residents are decrying but he recognized that he had become a vessel for their anger."[178] And given that there are no grounds for removal and no review for sufficiency, the petitioners could have just as easily sought Boudin's recall for being too tough on crime. This highlights the possibility of a misuse of the removal power that is based on inappropriate or arbitrary criteria when no grounds for removal are provided by law, an issue that is exacerbated when there is a lack of substantive review.

Fourth, as they are often used, the removal mechanisms have become a way for the empowered actor to second-guess a prosecutor's discretion. In each of the cases illustrated above, the actor(s) with the removal power disagreed

174. Krasner v. Ward, No. 563 M.D. 2022, 2023 WL 164777, at *16, *22 (Pa. Commw. Ct. Jan. 12, 2023) ("[N]one of the Amended Articles viably allege that District Attorney has acted in a manner that constitutes 'any misbehavior in office.' As such, the Amended Articles do not comply with the requirements imposed by article VI, section 6 of the Pennsylvania Constitution and cannot serve as the basis for a constitutionally sound impeachment trial.").

175. *Id.* at *5–6. The court originally found that challenges to all of the articles of impeachment were justiciable, but in a concurring opinion, one judge changed his opinion, stating that four of the articles of impeachment presented nonjusticiable political questions. *Id.* at *26–27 (Wojcik, J., concurring).

176. CAL. CONST. art. II, § 14(a) (Westlaw through Chapter 1 of 2023–24 1st Exec. Sess., and urgency legislation through Chapter 633 of 2023 Reg. Sess.); CAL. ELEC. CODE § 11020(a)(2) (Westlaw through Chapter 1 of 2023–24 1st Exec. Sess., and urgency legislation through Chapter 890 of 2023 Reg. Sess.) (requiring that the petition contain a statement of reasons for recall).

177. Notice of Intention To Circulate Recall Petition to Chesa Boudin, S.F. Dist. Att'y (Apr. 28, 2021), https://sfelections.sfgov.org/sites/default/files/Documents/candidates/20210428_NoticeOfIntentToCirculateRecallPetition_Redacted.pdf [https://perma.cc/2GA8-LAE2 (staff-uploaded)].

178. Thomas Fuller, *Voters in San Francisco Topple the City's Progressive District Attorney, Chesa Boudin*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/07/us/politics/chesa-boudin-recall-san-francisco.html [https://perma.cc/58YH-K2EN (staff-uploaded, dark archive)].

with the prosecutor's policies and replaced the discretion of the prosecutor on those policies with their own. The consequences of this conflict of discretion between prosecutors and those who seek to remove them are serious. As demonstrated by the most recent removal efforts, this conflict impairs criminal justice reform efforts.[179] And in doing so, it ignores the legitimacy given to these reforms when voters have chosen "a prosecutor who shares their priorities about which crimes to pursue most vigorously."[180] The legitimacy issue is exacerbated by claims to democratic legitimacy when a recall election is used to remove a prosecutor despite the flaws in the recall process that can be exploited to undermine the will of local voters.[181] More practically, removal threatens to substitute the independent judgment of a prosecutor for the whims of officials and citizens who lack their perspective on the proper allocation of limited prosecution resources, the sufficiency of evidence, and the interpretation of broad criminal statutes.[182] Finally, the arbitrariness with which these mechanisms can be used detracts from their legitimate use when a prosecutor actually abuses their discretion.

III. A MORE BALANCED PROCESS

The solution to this conflict of discretion is not to acquiesce to unfettered prosecutorial discretion. Nor is it appropriate to allow the removal discretion to override a prosecutor's independent decision making. To suggest a more balanced approach, this part will begin by examining the benefits and drawbacks of each removal mechanism: recall elections, impeachment, and judicial removal. Then, this part will propose a mechanism that can act as a check on abuses of prosecutorial power but is also balanced by measures meant to prevent any one actor (or group of actors) from exercising the check arbitrarily.

A. *The Benefits and Drawbacks of the Prosecutor Removal Mechanisms*

There are two key concepts underlying this discussion. First, there is the extent to which the removal mechanisms foster or threaten local control over prosecution. There are many reasons why local control is important in prosecution, including the use of local resources and the "concentrated local effects" of most crime.[183] It also speaks to the possibility for "underrepresented

179. For example, Larry Krasner was impeached for what one Pennsylvania Representative described as "dereliction of duty" after he implemented policies to increase the use of diversion programs for some drug offenders, avoid prosecuting juveniles as adults, and investigate potential wrongful convictions. Calvert, *supra* note 4.

180. Carissa Byrne Hessick, Sarah Treul & Alexander Love, *Understanding Uncontested Prosecutor Elections*, 60 AM. CRIM. L. REV. 31, 44 (2023).

181. *See infra* Section III.A for a discussion of these flaws.

182. *See supra* Section II.A.

183. Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 849–50 (2020).

and disenfranchised" communities to have "more power to choose how to police themselves" by electing a prosecutor whose policies reflect their priorities.[184] Speaking to the centrality of the public's interests, the Supreme Court of Iowa acknowledged that the state's judicial proceedings mechanism is "designed to occur before the next election and [is] mooted if the official is voted out of office or reelected with knowledge of the alleged wrongdoing."[185]

Second, there is a concern for providing a check on prosecutorial abuses without tipping the balance of power too far in favor of one actor or another. As the discussion above illustrates, there needs to be effective ways to reprimand prosecutors who abuse their power.[186] However, the removal mechanisms currently in place allow for abuse of the removal power when the decision is based on inappropriate or arbitrary criteria. What is meant to be a check on prosecutorial power instead replaces the discretion of the prosecutor with that of the actor(s) who seek(s) to remove them, which can be abused just as easily. Without balance in the process, the mechanism cannot be an effective check.

Recalling local prosecutors, like all removal mechanisms, has benefits and drawbacks. The most significant benefit is that this procedure vests the removal power in the electors who voted for the prosecutor and emphasizes a democratic process. The process itself also provides a potential benefit because, to reach the point of an election, the petition must have a number of signatures "'sufficiently high to protect elected officials' from mobs calling for their impeachment and from partisan opposition."[187] However, modern technology has undermined this benefit, with phone applications and voter databases that allow professional signature collectors to more easily gather signatures and even identify defects that would otherwise threaten the viability of a recall petition.[188] These developments threaten to undermine the effectiveness of one of the only checks in the recall process.

The power to recall local prosecutors can be misused because, while it may be historically rooted in punishing misbehaving officials, it is now often used by politicians looking to reverse election losses and "punish unfavorable policy

184. John Pfaff, *Boston's New D.A. Pushes Back Against Prosecutors' 'Punishment-Centric' Point of View*, APPEAL (Nov. 14, 2018), https://theappeal.org/bostons-new-da-pushes-back-against-the-punishment-centric-point-of-view-of-prosecutors [https://perma.cc/UG76-AMJ3].

185. State v. Watkins, 914 N.W.2d 827, 839 (Iowa 2018) (citing State *ex rel.* Doyle v. Benda, 319 N.W.2d 264, 266 (Iowa 1982)) (overturning the removal of a local prosecutor from office).

186. *See supra* Part II.

187. Timothy Pack, Comment, *High Crimes and Misdemeanors: Removing Public Officials from Office in Utah and the Case for Recall*, 2008 UTAH L. REV. 665, 687 (2008).

188. Reid Wilson, *The Era of the Recall*, WASH. POST (Sept. 3, 2013, 8:45 AM), https://www.washingtonpost.com/blogs/govbeat/wp/2013/09/03/the-era-of-the-recall/ [https://perma.cc/5KXK-5NYZ (staff-uploaded, dark archive)].

decisions."[189] The misuse of recall elections has been exacerbated by the increasing role of outside groups funding these efforts. For example, in the unsuccessful recall of Wisconsin Governor Scott Walker in 2012, more than half of the money spent during the recall campaign came from outside of the state.[190] This non-local influence challenges the perceived benefit to local control that otherwise bolsters this mechanism. And it is not a particularly effective method of addressing actual misconduct because of the lengthy process and the fact that, when recall efforts make it to the election stage, they "'fail' to remove the official two-thirds of the time."[191] The recall election's promise of local control over official misconduct is an alluring but ultimately ineffective mechanism for fulfilling that promise.

One of the benefits of impeachment is that it typically requires a super-majority of legislators to convict and remove the officer, meaning that there must be broad support for such action.[192] It also typically requires that both houses of the legislature agree that the official should be removed,[193] creating an internal check on potentially unjustified impeachments. However, this process is not well-suited for addressing local issues in which the state legislature may have less interest.[194] And due to the nature of the proceedings—and recent national developments—impeachment, like recall elections, can be used to "inflict, for partisan reasons, a political blow on an official whose conduct the impeaching Representatives simply dislike."[195] The potential for politically motivated removals is exacerbated by the fact that many of the grounds for impeachment are ill-defined[196] and that, in many states, the impeachment statutes do not explicitly provide an opportunity for judicial

189. Timothy D. Lanzendorfer, Note, *When Local Elected Officials Behave Badly: An Analysis and Recommendation To Empower State Intervention*, 82 OHIO ST. L.J. 653, 672 (2021); James Anderson, *In Some States, GOP Sees the Recall as Its Way Back to Power*, AP (July 21, 2019, 4:19 PM), https://apnews.com/article/wi-state-wire-nv-state-wire-us-news-ap-top-news-denver-dc1a8ece1cfe49229bc6b6c391c83617 [https://perma.cc/KC78-RBH2] ("Once reserved for targeting corrupt or inept elected officials, the recall has become part of the toolkit for Republicans seeking a do-over of election results.").

190. Wilson, *supra* note 188.

191. Lanzendorfer, *supra* note 189, at 670.

192. *Id.* at 667.

193. *Id.* at 665. *But see* FLA. CONST. art. IV, § 7 (requiring only a majority of the Senate to vote to remove a local official if removal is recommended by the governor or if the official has been suspended by the governor).

194. *See* Lanzendorfer, *supra* note 189, at 668 (describing the circumstances surrounding the impeachment and acquittal of a sheriff in Vermont). *But see* Ryan Hughes, *DA Larry Krasner Criticizes Closed-Door Impeachment Hearing*, CBS NEWS (Sept. 29, 2022, 5:48 PM), https://www.cbsnews.com/philadelphia/news/larry-krasner-impeachment-hearing-pennsylvania-house/ [https://perma.cc/MD23-Y474] (describing impeachment hearings targeting the Philadelphia District Attorney Larry Krasner).

195. Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 162 (2007).

196. *See supra* Section II.B.

review or appeal for lack of sufficient grounds for removal. For these reasons, impeachment and mechanisms closely resembling it are the most politicized—and thus the most vulnerable to abuse—of the removal mechanisms.

Removal by judicial proceeding has the benefit of avoiding some of the drawbacks associated with recall elections and impeachments. Importantly, most states with this mechanism also provide for an opportunity to directly challenge the sufficiency of the grounds for removal and appeal the decision to a higher court.[197] This means that even if the process is initiated for arbitrary or inappropriate reasons, there will likely be an opportunity to challenge the initiation of the proceedings before a ruling, in addition to the availability of appellate review. This is important because one of the drawbacks to this mechanism is that it can, in some instances, be initiated by only one actor,[198] making it susceptible to inappropriate or arbitrary use.[199] Additionally, the actor initiating the mechanism is not always required to be an eligible voter in the district, further threatening local control.[200] One drawback, which affects all mechanisms but is particularly relevant here, is that the case law interpreting the grounds for removal is sparse and likely outdated.[201] The judicial removal mechanism is unique because it provides due process to prosecutors targeted for removal, but it also enables a continued conflict of discretion between prosecutors and those that seek to remove them due to poorly defined grounds for removal.

B. *A Hybrid Mechanism for Removing Local Prosecutors*

No removal mechanism will be without flaws, but there are reforms that can be made to address the consequences of conflicting discretion and the drawbacks of the mechanisms currently in force. The hybrid mechanism proposed here introduces checks meant to ensure that removal is used to address

197. *See supra* notes 83–84 and accompanying text.

198. *See supra* notes 90–91 and accompanying text.

199. *Cf.* Madsen v. Brown, 701 P.2d 1086, 1093 (Utah 1985) (Stewart, J., dissenting) (observing that the state's judicial removal procedure allows "a handful of voters to override the voice of the majority").

200. *See, e.g.*, N.C. GEN. STAT. § 7A-66 (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the General Assemb.) (requiring that the proceedings be initiated by "filing with the clerk of superior court of the county where the district attorney resides a sworn affidavit charging the district attorney with one or more grounds for removal"). *But see, e.g.*, OHIO REV. CODE ANN. § 3.08 (LEXIS through File 12 of the 135th General Assemb. (2023-2024)) (requiring that the proceedings be initiated by "the filing of a written or printed complaint specifically setting forth the charge and signed by qualified electors of the state or political subdivision whose officer it is sought to remove").

201. *See* Pack, *supra* note 187, at 671 (discussing the state of Utah's case law interpreting "malfeasance in office"). *But see* State v. Watkins, 914 N.W.2d 827, 841 (Iowa 2018) (citing State v. Roth, 144 N.W. 339, 344 (Iowa 1913)) (defining "'willfully' in the removal context to mean that the public official must act 'intentionally, deliberately, with a bad or evil purpose, contrary to known duty'" (quoting State v. Roth, 144 N.W. 339, 344 (Iowa 1913))).

prosecutorial abuses rather than settle political grievances and reduce the possibility of one actor (or group of actors) removing a prosecutor inappropriately or arbitrarily. The key components of this proposal are initiation by a petition signed by a requisite number of registered voters, judicial review of the petition and grounds for removal for legal sufficiency, and a special recall election. This procedure closely resembles the removal mechanisms used in Mississippi[202] and Minnesota, in which a petition signed by a requisite number of voters is filed with the appropriate official, who appoints a judge or council of judges to conduct a hearing on the petition, and if they find sufficient cause, a recall election is held.[203] In both states, there are multiple actors from multiple branches of government and from the populace, which reduces the likelihood that any one actor or branch of government will remove a prosecutor inappropriately or arbitrarily.

Beginning with initiation of the removal, the hybrid mechanism vests the power to initiate solely with the voters who elected the prosecutor. Giving this power to voters encourages "democratic accountability for prosecutorial decisions" and preserves local control of prosecutorial policies.[204] The petition to initiate the removal should require a minimum number of registered voters in the county or district to sign the petition, similar to the process involved in a recall petition.[205] The minimum number of signatures should be a percentage of the number of voters who participated in the last prosecutor election to ensure there is broad community support for the petition.[206] Because it requires public support, this procedure creates a higher barrier to entry that discourages individuals from harassing prosecutors and impeding their work.[207] This proposal does not suggest an exact threshold for the percentage of voters

202. A discussion based on Mississippi's removal mechanism would be incomplete without mentioning the newly enacted House Bill 1020. Act of April 21, 2023, ch. 546, 2023 Miss. Legis. Serv. (to be codified in scattered sections of MISS. CODE ANN.) (repealed effective July 1, 2027, pursuant to its own terms). This bill, recently signed by Governor Tate Reeves, creates a new judicial system in the Capital Complex Improvement District in Jackson and gives the state attorney general the power to appoint prosecutors to handle low-level offenses within the district. Act of April 21, 2023 §§ 4, 5. The Mississippi Supreme Court recently struck down the portion of the law that provided for the appointment of new, temporary circuit judges, but the court upheld the portion of the law that created the new municipal court and provided for the appointment of prosecutors to serve in it. Saunders v. State, No. 2023-CA-00584, 2023 WL 6154416, ¶¶ 6–10, ¶ 19 (Miss. Sept. 21, 2023). This new law does not remove the local prosecutor from office, but it does undermine local, democratic control over prosecution, an important issue implicated by state intervention into the work of elected prosecutors. *See supra* notes 183–85 and accompanying text.

203. MISS. CODE. ANN. §§ 25-5-3 to -35 (LEXIS through 2023 Reg. Sess. legislation effective July 1, 2023); MINN. STAT. §§ 351.14–.22 (2022).

204. Hessick et al., *supra* note 180, at 44–45.

205. *See, e.g.*, ARIZ. REV. STAT. ANN. § 19-201 (Westlaw through the First Reg. Sess. of the Fifty-Sixth Leg.); NEB. REV. STAT. ANN. § 32-1303 (2023).

206. *E.g.*, VA. CODE ANN. § 24.2-233 (LEXIS through the 2023 Reg. Sess.).

207. *See* Lanzendorfer, *supra* note 189, at 685 ("Locally elected officials have incredibly important jobs to do, and repetitive and unnecessary removal actions can distract them from those jobs.").

required, but states considering these reforms should be wary of setting a threshold that is so high that it prohibits the effective use of the mechanism to check abuses.

Next, the hybrid mechanism requires judicial review of the legal sufficiency of the petition for removal, which includes the opportunity to appeal as well. The first reason for this requirement is to give the prosecutor an opportunity to challenge the sufficiency of the petition's cited grounds for removal. Given that the grounds for removing a prosecutor are broad and often have little case law interpreting them,[208] they may capture legitimate discretionary acts not well-suited for outside review.[209] Judicial review of the petition for removal also gives the prosecutor due process protections by ensuring that they "receive notice, a chance to be heard, and time to compile a defense."[210] This prevents voters from "summarily dismiss[ing] [prosecutors] from office on threadbare allegations or policy quirks held by a minority of the populace."[211] The opportunity to appeal the judgment reinforces these policies and adds further legitimacy to the removal process as a result.

Finally, the hybrid mechanism requires a special recall election to make the final removal decision. The reasons for this special recall election are similar to why registered voters should be the ones to initiate the removal.[212] Perhaps the most important reason for choosing this process is to protect the local control of prosecutorial policies. For instance, "a community that wants more aggressive prosecution of drug crimes [may] elect a prosecutor who promises to more actively pursue such cases" while "a community that wants to rely on treatment rather than prison for drug users [may] elect a prosecutor who promises to establish diversion programs and other alternatives."[213] If state officials were to make the final removal decision, the voters who made choices such as these may have their will overcome due to ideological disagreements with local policies.[214]

These key elements form the basic framework of a more balanced mechanism for prosecutorial removal that aims to encourage use only in cases of prosecutorial misconduct rather than to substitute the removing actor's discretion for the discretion of the prosecutor. To that end, states implementing this reform should consider the following factors when adapting this proposed

208. *See supra* Part I (discussing the grounds for removal in each mechanism category).

209. *Cf.* Wayte v. United States, 470 U.S. 598, 607 (1985) (stating that "the decision to prosecute is particularly ill-suited for judicial review").

210. Lanzendorfer, *supra* note 189, at 684.

211. *Id.* at 684–85.

212. *See supra* text accompanying notes 204–07.

213. Hessick et al., *supra* note 180, at 45.

214. *E.g.*, Calvert, *supra* note 4 (quoting Philadelphia Rep. Joanna McClinton, who said, "[i]mpeachment now seems to be a measure that we're using when we have a disagreement on public policy," in response to the impeachment of Philadelphia District Attorney Larry Krasner).

mechanism. First, this hybrid mechanism requires three key steps, each of which could potentially require significant time, money, and engagement. A process that takes too long to address misconduct or that imposes too many barriers to its use cannot adequately address misconduct.[215] Legislators can alleviate some of these concerns by setting strict timeframes for each stage such that the entire process takes less than a year to complete. This would ensure that the removal mechanism contains adequate procedures to protect against misuse while still serving as an effective tool to address misconduct in between—or in the absence of—competitive prosecutor elections.

Second, the typical grounds for removal (like malfeasance, misfeasance, and neglect of duty) are fairly consistent across states but not defined by many, and some states do not require specific grounds.[216] Legislators should enumerate exclusive grounds for removal[217] and provide definitions for those grounds that can inform both the voters and judges involved in this process while also narrowing the mechanism's scope to abusive conduct. This could help avoid some of the conflicts of discretion that arise in the absence of well-defined grounds for removal.

Finally, states should, when feasible, schedule removal elections alongside other regularly scheduled elections in an effort to increase voter participation. In the absence of another regularly scheduled election, states should undertake efforts to inform local voters about the upcoming election and how to participate to encourage voter participation. This would help ensure that the will of local voters is more fully represented. While "no removal mechanism can perfectly satisfy every factor or stakeholder,"[218] that should not stand in the way of making reforms such as this one that bring greater balance to the prosecutorial removal process.

CONCLUSION

As recent events demonstrate,[219] the balance that has traditionally existed between local prosecutors and state officials "will undergo stress as reformers—especially those who opt to refrain altogether from prosecuting certain crimes or seeking certain punishments—come into office."[220] Because of this changing dynamic, the mechanisms for removing local prosecutors have entered the national spotlight and set up a conflict between the discretion of prosecutors and of those who seek to remove them. This conflict threatens to impede criminal justice reforms where local prosecutors and those exercising the

215. *See* Lanzendorfer, *supra* note 189, at 673.
216. *See supra* Part I (discussing the grounds for removal in each mechanism category).
217. *E.g.*, MINN. STAT. § 351.14 (2022) (defining malfeasance, nonfeasance, and misfeasance).
218. Lanzendorfer, *supra* note 189, at 683.
219. *See supra* notes 1–9 and accompanying text.
220. Yeargain, *supra* note 12, at 109.

removal power disagree about these policies. And reform prosecutors are not the only ones who enact discretionary policies that could conflict with the preferences of actors with the power to remove them from office. For example, Ronald Dozier, the state's attorney for McLean County, Illinois, announced in 2012 that he would not enforce certain gun restrictions.[221] There was no attempt to remove him from office, but it is not hard to see how the same logic used to target Larry Krasner could have applied there.[222] It also means that the will of the voters who elected the prosecutor can be disregarded by actors substituting their discretion for that of the prosecutor.

This Comment by no means advocates for absolute deference to prosecutorial discretion.[223] Instead, it suggests a model framework for prosecutorial removal that reduces the likelihood that the process will be used arbitrarily but is still effective for voters seeking to hold prosecutors responsible for misconduct and abuses of discretion. It also provides a new resource for prosecutors, researchers, voters, and other stakeholders who seek to understand the process for removing local prosecutors and the implications of doing so. Both prosecutorial discretion and checks on prosecutorial power function best when they are free from arbitrariness. To that end, stakeholders should take this opportunity to examine and reform their mechanisms for removing local prosecutors. Doing so can take a step toward correcting the lack of effective methods for addressing prosecutorial misconduct and begin to restore the balance lost when removal based on inappropriate or arbitrary criteria substitutes the discretion of those empowered to remove for the discretion of local prosecutors.

MEIGHAN R. PARSH**

221. Press Release, Ronald C. Dozier, *supra* note 145.

222. *See* Calvert, *supra* note 4.

223. *See supra* Section II.A for a discussion of prosecutorial misconduct.

** J.D. Candidate, University of North Carolina School of Law. I am incredibly grateful to Professor Carissa Byrne Hessick for her incredible mentorship and for generously sharing her expertise and insightful comments throughout the writing process. I would also like to thank Professor Annie Scardulla for her invaluable feedback and guidance. Many thanks to my wonderful classmates for encouraging me and making me laugh every day. And to my amazing parents, who spent countless hours listening to me talk about this topic, thank you for always supporting and believing in me.

APPENDIX[224]

The tables that follow are a compilation of research findings from a fifty-state survey of state laws that allow for the removal of an elected prosecutors from office outside of a contested election. Each table will contain the source of

224. Currency information for the statutes cited in the Appendix is as follows: Alabama: (Westlaw through Acts 2023-1 through 2023-3 of the 2023 First Spec. Sess.; through Acts 2023-4 through 2023-491, and Acts 2023-493 through 2023-561 of the 2023 Reg. Sess.; and Acts 2023-562 through 2023-569 of the 2023 Second Spec. Sess.); Arizona: (Westlaw through the First Reg. Sess. of the Fifty-Sixth Leg.); Arkansas: (LEXIS through all legislation of the 2023 Reg. Sess.); California: (Westlaw through Chapter 1 of 2023–24 1st Ex .Sess. and urgency legis. through Chapter 890 of 2023 Reg. Sess.); Georgia: (LEXIS through 2023 Reg. Sess. of the General Assemb.); Hawai'i: Kaua'i County (2022), Honolulu County (2023), Hawai'i County (2022); Idaho: (LEXIS through all legislation from the 2023 Reg. Sess.); Indiana: (2023); Iowa: (2023); Kansas: (Westlaw through laws enacted during the 2023 Reg. Sess. of the Kan. Leg.); Kentucky: (Westlaw through the 2023 Reg. Sess. and the Nov. 8, 2022 election); Louisiana: (Westlaw through the 2023 First Extraordinary, Reg., and Veto Sess.); Maine: (Westlaw through the 2023 First Reg. Sess. and emergency legislation through chapter 441 of the First Spec. Sess. of the 131st Leg.); Massachusetts: (Westlaw through chapter 25 of the 2023 1st Ann. Sess.); Michigan: (2023); Minnesota: (2022); Mississippi: (LEXIS through 2023 Reg. Sess. legislation effective July 1, 2023); Missouri: (Westlaw through the end of the 2023 First Reg. Sess. of the 102nd General Assemb.); Montana: (Westlaw through chapters effective January 1, 2024 of the 2023 Sess.); Nebraska: (2023); Nevada: (2023); New Hampshire: (Westlaw through Chapter 176 of the 2023 Reg. Sess.); New Mexico: (Westlaw through July 1, 2023, of the 2023 First Reg. Sess. of the 56th Leg.); New York: (McKinney 2023); North Carolina: (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the General Assemb.); North Dakota: (LEXIS through all legislation from the 68th Legis. Assemb.); Ohio: (LEXIS through File 12 of the 135th General Assemb. (2023-2024)); Oklahoma: (Westlaw through legislation of the First Reg. Sess. of the 59th Leg. (2023) and the First Extraordinary Sess. of the 59th Leg. (2023)); Pennsylvania: (2023); South Dakota: (Westlaw through the 2023 Reg. Sess. and Supreme Court Rule 23-17); Tennessee: (LEXIS through the 2023 Reg. Sess.); Texas: (Westlaw through legislation effective July 1, 2023, of the 2023 Reg. Sess. of the 88th Leg.); Utah: (LEXIS through the 2023 Second Spec. Sess. of the 65th Leg.); Virginia: (LEXIS through the 2023 Reg. Sess.); Washington: (2022); West Virginia: (2023); Wisconsin: (2021-2022); Wyoming: (LEXIS through 2023 Gen. Sess.).

Currency information for the state constitutions cited in the Appendix is as follows: Arizona: (Westlaw through legislation of the First Reg. Sess. of the Fifty-Sixth Leg.); Arkansas: (LEXIS through all legislation of the 2023 Reg. Sess.); California: (Westlaw through Chapter 1 of 2023–24 1st Ex .Sess., and urgency legislation through Chapter 633 of 2023 Reg. Sess.); Colorado: (LEXIS through all legislation from the 2023 Reg. Sess.); Florida: (2023); Georgia: (LEXIS through 2023 Reg. Sess. of the General Assemb.); Illinois: (Westlaw through October 1, 2023); Indiana: (2018); Kansas: (Westlaw through laws enacted during the 2023 Reg. Sess. of the Kan. Leg.); Kentucky: (Westlaw through the 2023 Reg. Sess. and the Nov. 8, 2022 election); Louisiana: (Westlaw through amendments through Jan. 1, 2023); Maine: (Westlaw through the 2023 First Reg. Sess. and emergency legislation through Chapter 441 of the First Spec. Sess. of the 131st Leg.); Maryland: (LEXIS through the November 8, 2022 General Election; and current until the November 2023 General Election); Michigan: (2023); Mississippi: (LEXIS through 2023 Reg. Sess.); Nebraska: (2022); Nevada: (2023); New Hampshire: (Westlaw through Chapter 243 of the 2023 Reg. Sess.); New Mexico: (Westlaw through amendments approved through the November 2020 general election); New York: (McKinney through L.2023, chapter 1 to 682); North Dakota: (LEXIS through results of the Nov. 8, 2022 election); Ohio: (LEXIS through the Nov. 8, 2022 election); Oregon: (2022); Pennsylvania: (2021); South Carolina: (Westlaw through 2023 Act No. 102); South Dakota: (Westlaw through the 2023 Reg. Sess.); Tennessee: (LEXIS through the 2023 Reg. Sess.); Utah: (LEXIS through 2022 Third Spec. Sess. of the 64th Leg.); Vermont: (LEXIS through December 31, 2022); Washington: (2023); West Virginia: (2023); Wisconsin: (2023).

the law that creates the removal mechanism, specifies the grounds (or lack thereof) for removal, and establishes how the mechanism is initiated.

There are three broad categories of removal mechanisms: recall elections, impeachment, and judicial proceedings. The results are complicated by the fact that many states have mechanisms for the removal of a broad category of officials with little clarity as to whether local prosecutors are included. Many states also have pending legislation that could change the type of mechanisms available for future use. A discussion of Georgia's newly enacted oversight commission is provided in Section I.D. above, but it is not included in this appendix because it does not fit into any of the three categories of removal mechanisms.

Table 1: Recall Elections

This table includes all states with the recall election removal mechanism. In many states, the recall mechanism follows a standard procedure in which a requisite number of voters file a petition to hold a recall election, at which point the electors of the jurisdiction vote to decide whether the targeted official will be removed. Two states, Mississippi and Minnesota, have an intermediate step that resembles the judicial proceedings mechanism, but the ultimate removal decision is made via a recall election.

State	Laws Establishing Mechanism	Grounds for Removal	Initiation of Mechanism
Arizona	ARIZ. CONST. art. VIII, pt. 1, § 1 ARIZ. REV. STAT. ANN. § 19-201	ARIZ. REV. STAT. ANN. § 19-203	ARIZ. REV. STAT. ANN. § 19-201
California	CAL. CONST. art. II, § 13 CAL. ELEC. CODE §§ 11004, 11006	CAL. ELEC. CODE § 11020	CAL. CONST. art. II, § 14
Colorado	COLO. CONST. art. XXI, § 1	COLO. CONST. art. XXI, § 1	COLO. CONST. art. XXI, § 1
Georgia	GA. CODE ANN. § 21-4-4	GA. CODE ANN. § 21-4-3(7), -4(c)	GA. CODE ANN. § 21-4-4(a)(2)
Hawai'i (excluding	KAUA'I CNTY., HAW.,	KAUA'I CNTY., HAW.,	KAUA'I CNTY., HAW.,

Maui County)	CHARTER § 27.01 HONOLULU CITY & CNTY., HAW., CHARTER § 12-104 HAWAIʻI CNTY., HAW., CHARTER § 12-1.1	CHARTER § 27.01 HONOLULU CITY & CNTY., HAW., CHARTER § 12-104 HAWAIʻI CNTY., HAW., CHARTER § 12-1.1	CHARTER § 27.01 HONOLULU CITY & CNTY., HAW., CHARTER § 12-104 HAWAIʻI CNTY., HAW., CHARTER § 12-1.1(a)
Idaho	IDAHO CODE § 34-1701	IDAHO CODE § 34-1703(2)	IDAHO CODE § 34-1702(3)
Kansas	KAN. CONST. art. IV, § 3 KAN. STAT. ANN. §§ 25-4301, -4304(c)	KAN. STAT. ANN. § 25-4302	KAN. STAT. ANN. § 25-4325
Louisiana	LA. CONST. ANN. art. X, § 26 LA. STAT. ANN. § 18:1300.1	LA. STAT. ANN. § 18:1300.6	LA. STAT. ANN. § 18:1300.2
Michigan	MICH. COMP. LAWS §§ 168.200, .211, .951	MICH. COMP. LAWS § 168.952(1)(c)	MICH. COMP. LAWS §§ 168.952, .955
Minnesota	MINN. STAT. § 351.15	MINN. STAT. §§ 351.14, .16	MINN. STAT. § 351.16
Mississippi	MISS. CODE ANN. § 25-5-3	MISS. CODE ANN. § 25-5-5	MISS. CODE ANN. § 25-5-7
Montana	MONT. CODE ANN. § 2-16-603	MONT. CODE ANN. § 2-16-603(3)	MONT. CODE ANN. § 2-16-614
Nebraska	NEB. REV. STAT. § 32-1302	NEB. REV. STAT. § 32-1303(3)	NEB. REV. STAT. § 32-1303
Nevada	NEV. CONST. art. II, § 9	NEV. REV. STAT. § 306.020(4)(a)	NEV. CONST. art. II, § 9

	NEV. REV. STAT. § 306.020		NEV. REV. STAT. § 306.015
New Mexico	N.M. CONST. art. X, § 9 N.M. STAT. ANN. § 1-25-3	N.M. CONST. art. X, § 9(B) N.M. STAT. ANN. §§ 1-25-2(F), (G), (L) & -3(B)(1)	N.M. Const. art. X, § 9(A)
North Dakota	N.D. CONST. art. III, § 10	N.D. CONST. art. XI, § 11	N.D. CONST. art. III, § 10
Oregon	OR. CONST. art. II, § 18	OR. CONST. art. II, § 18(3), (5)	OR. CONST. art. II, § 18(2)
Washington	WASH. CONST. art. I, § 33 WASH. REV. CODE § 29A.56.110	WASH. CONST. art. I, § 33 WASH. REV. CODE § 29A.56.110	WASH. CONST. art. I, § 33 WASH. REV. CODE § 29A.56.180
Wisconsin	WIS. CONST. art. XIII, § 12 WIS. STAT. § 9.10	WIS. CONST. art. XIII, § 12 WIS. STAT. § 9.10	WIS. CONST. art. XIII, § 12(1) WIS. STAT. § 9.10(1)(b)

Table 2: Impeachment

This table includes all states with the impeachment removal mechanism. In many states, the impeachment mechanism follows a standard procedure in which the lower house of the legislature impeaches, and the upper house holds a trial. However, the procedure in some states resembles the judicial proceedings mechanism, but these procedures are impeachment mechanisms because the final removal decision rests with a non-judicial actor.[225]

State	Laws Establishing Mechanism	Grounds for Removal	Initiation of Mechanism
Arkansas	ARK. CONST. art. XV, § 1	ARK. CONST. art. XV, § 1	ARK. CONST. art. XV, § 2
Colorado	COLO. CONST. art. XIII, § 2	COLO. CONST. art. XIII, § 2	COLO. CONST. art. XIII, § 1
Florida	FLA. CONST. art. IV, § 7	FLA. CONST. art. IV, § 7(a)	FLA. CONST. art. IV, § 7(a)
Georgia	GA. CONST. art. III, § 7, ¶ I GA. CODE ANN. § 15-18-24	GA. CODE ANN. § 15-18-24	GA. CONST. art. III, § 7, ¶ I
Illinois*	ILL. CONST. art. IV, § 14	ILL. CONST. art. IV, § 14	ILL. CONST. art. IV, § 14
Indiana	IND. CONST. art. VI, § 8 IND. CODE § 5-8-1-1(a)	IND. CONST. art. VI, § 7	IND. CONST. art. VI, § 7 IND. CODE § 5-8-1-2
Kentucky	KY. CONST. § 68	KY. CONST. § 68	KY. CONST. § 66 KY. REV. STAT. ANN. § 63.020
Louisiana	LA. CONST. art. X, § 24	LA. CONST. art. X, § 24(A)	LA. CONST. art. X, § 24(B)
Maine	ME. CONST. art. IX, § 5	ME. CONST. art. IX, § 5	ME. CONST. art. IV, Pt. 1, § 8

225. *See, e.g.*, N.Y. CONST. art. XIII, § 13 (McKinney through L.2023, chapter 1 to 498); W. VA. CODE § 6-6-6 (2023).

			ME. CONST. art. IX, § 5
Maryland	MD. CONST. art. V, § 7	MD. CONST. art. V, § 7	MD. CONST. art. V, § 7
Michigan	MICH. CONST. art. 5, § 10 MICH. COMP. LAWS § 168.207	MICH. CONST. art. 5, § 10 MICH. COMP. LAWS § 168.207	MICH. CONST. art. 5, § 10 MICH. COMP. LAWS § 168.207
Mississippi*	MISS. CONST. ANN. art. IV, § 50	MISS. CONST. ANN. art. IV, § 50	MISS. CONST. ANN. art. IV, § 49
Nebraska*	NEB. CONST. art. IV, § 5	NEB. CONST. art. IV, § 5	NEB. CONST. art. III, § 17
Nevada*	NEV. CONST. art. VII, § 2 NEV. REV. STAT. § 283.140(1)	NEV. CONST. art. VII, § 2	NEV. CONST. art. VII, § 1
New Hampshire*[a]	N.H. CONST. Pt. 2, art. XVII N.H. CONST. Pt. 2, art. XXXVIII N.H. REV. STAT. ANN. §§ 24:16, 661:9(IV)	N.H. CONST. Pt. 2, art. XXXVIII N.H. REV. STAT. ANN. §§ 24:16, 661:9(IV)	N.H. CONST. Pt. 2, art. XVII N.H. REV. STAT. ANN. §§ 24:16, 661:9(IV)
New Mexico*	N.M. CONST. art. IV, § 36	N.M. CONST. art. IV, § 36	N.M. CONST. art. IV, § 35
New York*[a]	N.Y. CONST. art. XIII, § 13 N.Y. CONST. art. VI, § 24 N.Y. PUB. OFF. LAW § 34 N.Y. JUD. LAW § 240	N.Y. CONST. art. XIII, § 13(b) N.Y. JUD. LAW § 240	N.Y. CONST. art. XIII, § 13(a) N.Y. CONST. art. VI, § 24 N.Y. Jud. Law §§ 240, 415
North Dakota*	N.D. CENT. CODE § 44-09-01	N.D. CENT. CODE § 44-09-01	N.D. CENT. CODE § 44-09-02
Ohio*	OHIO CONST. art. II, § 24	OHIO CONST. art. II, § 24	OHIO CONST. art. II, § 23

Oregon	OR. CONST. art. VII (Original), § 20	OR. CONST. art. VII (Original), § 20	OR. CONST. art. VII (Original), § 20
Pennsylvania[a]	PA. CONST. art. VI, § 6 PA. CONST. art. VI, § 7 16 PA. STAT. AND CONS. STAT. § 450(a)	PA. CONST. art. VI, § 6 PA. CONST. art. VI, § 7 16 PA. STAT. AND CONS. STAT. § 450(a)	PA. CONST. art. VI, § 4 PA. CONST. art. VI, § 7 16 PA. STAT. AND CONS. STAT. § 450(a)
South Carolina	S.C. CONST. art. XV, § 3	S.C. CONST. art. XV, § 3	S.C. CONST. art. XV, § 3
South Dakota*[a]	S.D. CONST. art. XVI, § 3 S.D. CODIFIED LAWS § 3-17-3	S.D. CONST. art. XVI, § 3 S.D. CODIFIED LAWS § 3-17-3	S.D. Const. art. XVI, § 1 S.D. CODIFIED LAWS § 3-17-4
Tennessee*[a]	TENN. CONST. art. V, § 4 TENN. CODE ANN. § 8-46-101 TENN. CONST. art. VI, § 6	TENN. CONST. art. V, § 4 TENN. CODE ANN. § 8-46-101 TENN. CONST. art. VI, § 6	TENN. CONST. art. V, § 1 TENN. CODE ANN. § 8-46-101 TENN. CONST. art. VI, § 6
Utah*	UTAH CONST. art. VI, § 19	UTAH CONST. art. VI, § 19	UTAH CONST. art. VI, § 17
Vermont	VT. CONST. ch. II, § 58	VT. CONST. ch. II, § 58	VT. CONST. ch. II, § 58
Washington	WASH. CONST. art. IV, § 9	WASH. CONST. art. IV, § 9	WASH. CONST. art. IV, § 9
West Virginia*[a]	W. VA. CONST. art. IV, § 9 W. VA. CODE § 6-6-5	W. VA. CONST. art. IV, § 9 W. VA. CODE § 6-6-5(b)	W. VA. CONST. art. IV, § 9 W. VA. CODE § 6-6-6
Wisconsin[a]	WIS. CONST. art. VII, § 1 WIS. STAT. § 17.06(3)	WIS. CONST. art. VII, § 1 WIS. STAT. § 17.06(3)	WIS. CONST. art. VII, § 1 WIS. STAT. § 17.16

* = Applicability of provision to local prosecutors is ambiguous

[a] = More than one mechanism designated as impeachment

Table 3: Judicial Proceedings

This table includes all states with the judicial proceeding removal mechanism. It excludes statutes providing for the removal of a local prosecutor as an automatic punishment upon conviction of a crime or disbarment. However, a handful of states do have the judicial proceeding removal mechanism set up as a criminal proceeding, with the grounds for removal being criminal offenses. These states are included because they are not merely providing for removal in the event of a criminal conviction but rather creating a specific offense (that resembles the grounds for removal in other states and mechanisms) for which a local prosecutor may be removed.[226] These states are designated with [º]. Finally, the statutory and common law writ of quo warranto is excluded from this table because an excellent table compiling these laws has already been created by the Project on Government Oversight.[227]

State	Laws Establishing Mechanism	Grounds for Removal	Initiation of Mechanism
Alabama	ALA. CODE § 36-11-1	ALA. CODE § 36-11-1(b)	ALA. CODE § 36-11-3
Arizona	ARIZ. REV. STAT. ANN. § 38-341	ARIZ. REV. STAT. ANN. § 38-341	ARIZ. REV. STAT. ANN. § 38-341 ARIZ. REV. STAT. ANN. § 38-344
Arkansasº	ARK. CODE ANN. § 16-90-112	ARK. CODE ANN. § 16-90-112	ARK. CODE ANN. § 16-90-112
California	CAL. GOV'T CODE § 3060	CAL. GOV'T CODE § 3060	CAL. GOV'T CODE § 3060 CAL. GOV'T CODE § 3073
Georgiaº	GA. CODE ANN. § 15-18-27(a)	GA. CODE ANN. § 45-11-4	GA. CODE ANN. § 15-18-27(a)

226. *See supra* note 71 for further explanation.

227. *See* PROJECT ON GOV'T OVERSIGHT, *supra* note 85.

Hawai'i (excluding Maui County)	KAUA'I CNTY., HAW., CHARTER § 23.13 HONOLULU CITY & CNTY., HAW., CHARTER § 12-203 HAWAI'I CNTY., HAW., CHARTER § 12-2.1	KAUA'I CNTY., HAW., CHARTER § 23.13 HONOLULU CITY & CNTY., HAW., CHARTER § 12-203 HAWAI'I CNTY., HAW., CHARTER § 12-2.1	KAUA'I CNTY., HAW., CHARTER § 23.13 HONOLULU CITY & CNTY., HAW., CHARTER § 12-203 HAWAI'I CNTY., HAW., CHARTER § 12-2.1
Indiana	IND. CODE § 5-8-1-21	IND. CODE § 5-8-1-22	IND. CODE § 5-8-1-21 IND. CODE § 5-8-1-34
Iowa	IOWA CODE § 66.1A	IOWA CODE § 66.1A	IOWA CODE § 66.3
Kentuckyº	KY. CONST. § 227	KY. CONST. § 227	KY. CONST. § 227
Maine	ME. REV. STAT. ANN. tit. 30-A, § 257	ME. REV. STAT. ANN. tit. 30-A, § 257(2)	ME. REV. STAT. ANN. tit. 30-A, § 257
Maryland	MD. CONST. art. V, § 7	MD. CONST. art. V, § 7	MD. CONST. art. V, § 7
Massachusetts	MASS. GEN. LAWS ANN. ch. 211, § 4.	MASS. GEN. LAWS ANN. ch. 211, § 4	MASS. GEN. LAWS ANN. ch. 211, § 4
Mississippiº	MISS. CONST. art. 6, § 175	MISS. CONST. art. 6, § 175	MISS. CONST. art. 6, § 175
Missouri	MO. ANN. STAT. § 106.220 MO. ANN. STAT. § 106.230	MO. ANN. STAT. § 106.220 MO. ANN. STAT. § 106.230	MO. ANN. STAT. § 106.230 MO. ANN. STAT. § 106.240 MO. ANN. STAT. § 106.250

Montana*º	MONT. CODE ANN. § 45-7-401	MONT. CODE ANN. § 45-7-401	MONT. CODE ANN. § 45-7-401
Nebraska	NEB. REV. STAT. § 23-2001	NEB. REV. STAT. § 23-2001	NEB. REV. STAT. § 23-2004
Nevada	NEV. REV. STAT. § 283.300	NEV. REV. STAT. § 283.300(1)	NEV. REV. STAT. § 283.300(1) NEV. REV. STAT. § 283.430
New Mexico	N.M. STAT. ANN. § 36-1-9	N.M. STAT. ANN. § 36-1-9	N.M. STAT. ANN. § 36-1-10
North Carolina	N.C. GEN. STAT. § 7A-66	N.C. GEN. STAT. § 7A-66	N.C. GEN. STAT. § 7A-66
North Dakota	N.D. CENT. CODE § 44-10-01	N.D. CENT. CODE § 44-10-02	N.D. CENT. CODE § 44-10-02 N.D. CENT. CODE § 44-10-15
Ohio[a]	OHIO REV. CODE ANN. § 3.07 OHIO REV. CODE ANN. § 3.08 OHIO REV. CODE ANN. § 309.05	OHIO REV. CODE ANN. § 3.07 OHIO REV. CODE ANN. § 309.05	OHIO REV. CODE ANN. § 3.08 OHIO REV. CODE ANN. § 309.05
Oklahoma	OKLA. STAT. ANN. tit. 22, § 1181 OKLA. STAT. ANN. tit. 22, § 1181.1	OKLA. STAT. ANN. tit. 22, § 1181 OKLA. STAT. ANN. tit. 22, § 1181.1	OKLA. STAT. ANN. tit. 22, § 1182 OKLA. STAT. ANN. tit. 22, § 1193
Oregon*	OR. CONST. art. VII, (original), § 19	OR. CONST. art. VII, (original), § 19	OR. CONST. art. VII, (original), § 19
South Dakota	S.D. CODIFIED LAWS § 3-17-6	S.D. CODIFIED LAWS § 3-17-6	S.D. CODIFIED LAWS § 3-17-7

Tennessee*	TENN. CODE ANN. § 8-47-101	TENN. CODE ANN. § 8-47-101	TENN. CODE ANN. § 8-47-102 TENN. CODE ANN. § 8-47-108 TENN. CODE ANN. § 8-47-109
Texas	TEX. LOC. GOV'T CODE ANN. § 87.012	TEX. LOC. GOV'T CODE ANN. § 87.013 TEX. LOC. GOV'T CODE ANN. § 87.011	TEX. LOC. GOV'T CODE ANN. § 87.015
Utah*	UTAH CODE ANN. § 77-6-1	UTAH CODE ANN. § 77-6-1	UTAH CODE ANN. § 77-6-2
Virginia	VA. CODE ANN. § 24.2-233 VA. CODE ANN. § 24.2-230	VA. CODE ANN. § 24.2-233	VA. CODE ANN. § 24.2-233
West Virginia*	W. VA. CODE § 6-6-7	W. VA. CODE § 6-6-7(a)	W. VA. CODE § 6-6-7(b)
Wisconsin[228]	WIS. STAT. § 17.11	WIS. STAT. § 17.11	WIS. STAT. § 17.11
Wyoming	WYO. STAT. ANN. § 18-3-902	WYO. STAT. ANN. § 18-3-902 WYO. STAT. ANN. § 18-3-906	WYO. STAT. ANN. § 18-3-902

* = Applicability of provision to local prosecutors is ambiguous

ª = More than one mechanism designated as judicial proceeding

º = See introductory information for explanation

228. Specifically, see the language stating, "or that any district attorney or sheriff willfully neglects or refuses to perform that district attorney's or sheriff's duties." WIS. STAT. § 17.11. (2021–2022). The remainder of the language in this statute is similar to the "automatic" provisions that are excluded from this analysis. *See supra* note 73 and accompanying text.