

An Examination of the Indiana Removal Statute: What Does It Take to Remove Public Officials in Indiana?

Jacob Todd[♦]

INTRODUCTION

When considering the identity of an elected official, most people naturally think of the General Assembly and Congress—Senators and Representatives on both state and federal levels. However, numerous local officials within county and city governments also serve under the mandate of the public. In the context of Indiana, the state constitution designates several offices to be filled through elections.¹ These include positions such as clerk of the circuit court, auditor, recorder, treasurer, sheriff, coroner, and surveyor.²

However, there's more to this story. Article 6 of the Indiana Constitution grants the authority to establish county and township offices as needed, either through elections or appointments.³ This power to create offices has resulted in the merging of certain roles, for instance, combining the positions of clerk and treasurer to form clerk-treasurers, who are responsible for the functions of both roles.⁴

In a decision authored by Justice Goff on February 27, 2019, the Indiana Supreme Court determined that a clerk-treasurer's failures and errors did not render her liable to judicial removal from public office.⁵ In so doing, the supreme court set an exceptionally high bar for removing an elected official from office, reasoning that substantial deference should be accorded to the voters' choice in representation.⁶

Yet, the question arises: is the *Neff* Court's reasoning justified? Elected officials drafted the statute that allows for their removal.⁷ In America, the

[♦] J.D. Candidate, 2024, Indiana University Robert H. McKinney School of Law; M.A. Candidate, 2024, Indiana University Lilly School of Philanthropy; B.A. 2021, Indiana University – Bloomington, Indiana.

¹ See generally Ind. Const. art. VI, §§ 4, 6-8.

² Ind. Const. art. VI, § 2.

³ Ind. Const. art. VI, § 3.

⁴ IND. CODE § 36-5-6-6 (2023).

⁵ State v. Neff, 117 N.E.3d 1263, 1272 (Ind. 2019).

⁶ Marilyn Odendahl, *New Law Established Process for Removing No-Show Elected Officials from Office*, THE INDIANA LAWYER (June 23, 2021) <https://www.theindianalawyer.com/articles/new-law-establishes-process-for-removing-no-show-elected-officials-from-office> [https://perma.cc/5U4W-D8KU].

⁷ IND. CODE § 5-8-1-35 (2023).

ultimate presumption is that the people's will is expressed through their elected officials—the legislature.⁸ This dynamic creates a nuanced balance of powers and interests. On one side, the legislation crafted by the legislature embodies the electorate's collective intent, as it reflects the will of the people who have chosen their representatives.⁹ The laws, thus, serve as a tangible expression of the public's desires and preferences. However, on the other side of this dynamic, the judiciary is tasked with the crucial responsibility of interpreting and applying these laws, particularly when aspects of their interpretation are unclear or open to differing perspectives.¹⁰ The courts could accurately be said to act at times as the fulcrum in this balancing act, the place where citizens go to weigh their cases against the law.¹¹ This dual relationship underscores the intricate interplay between the legislature where laws are formulated in alignment with the voters' preferences, and the judiciary where laws are upheld and equitably administered, particularly when questions arise about their precise meaning.¹²

This note seeks to examine the jurisprudence surrounding the current interpretation of Indiana Code 5-8-1-35¹³ (the “Removal Statute”) and propose changes to the statute and the Indiana Constitution to close the gaps that still permit dereliction of duty on the part of elected officials. Section I of this note will discuss the history of the Removal Statute and the basis for its power and constitutional validity. Section II will dissect the case law controlling the current interpretation of the Removal Statute and delineate the source of each factor of *Neff's* three-factor test. Section III will analyze the problems with the supreme court's reasoning in *State v. Neff*,¹⁴ specifically the hole in the current case law. Section IV will propose amendments to the state constitution and the Removal Statute as a solution to the issues put forward in Part III.

⁸ See generally Kate Brown, *What is Power Under the Rule of Law?*, AMERICAN BAR ASSOCIATION (Mar. 23, 2021), https://www.americanbar.org/groups/public_education/law-day/law-day-2021/what-is-power-under-the-rule-of-law/ [https://perma.cc/G3NC-KHY4].

⁹ *Id.*

¹⁰ See generally Ind. Const. art. §§ 4, 6-8.

¹¹ RUBIN H. TED, *THE COURTS: FULCRUM OF THE JUSTICE SYSTEM* 3 (1984).

¹² *Id.* at 3-5 (discussing the role of the court in the administration of justice).

¹³ IND. CODE § 5-8-1-35 (2023).

¹⁴ *State v. Neff*, 117 N.E.3d 1263, 1267 (Ind. 2019).

I. HISTORY OF THE REMOVAL STATUTE: THE OLD, THE NEW, AND THE INDIANA CONSTITUTION

In Indiana, the state constitution and specific statutes govern the judicial removal of elected officials.¹⁵ The general power for removal is rooted in the constitution, specifically impeachment,¹⁶ but a relevant statute provides the specific mechanism for judicial removal.¹⁷ Which statute is the applicable statute depends on the position of the elected official being subjected to the action for removal.¹⁸ This section will discuss the Indiana Constitution and the historical iterations of the Removal Statute to provide insight into the state legislature's initial and subsequently evolving intent regarding when judicial removal of an elected official is warranted.

A. *The Indiana Constitution*

The Indiana Constitution empowers and limits the availability and applicability of an elected representative's removal. The Supreme Court of Indiana has held that it is proper to consider Article 6, Section 7 and Section 8 together when removing an elected official.¹⁹

Article 6, Section 7 of the Indiana Constitution states that state officers shall be liable for removal for crime, incapacity, or negligence.²⁰ Removal of officials under this section of the constitution is done either by impeachment or by a joint resolution of the General Assembly.²¹ For a removal to succeed under either of these two methods, the respective bodies of the General Assembly, the Senate, and the House of Representatives must agree by a two-thirds vote that the action is proper.²² It is important to note that this section may be applied to all state officers; however, it has been employed rarely, with only a single governor being impeached under its rule.²³

¹⁵ Ind. Const. art VI §§ 7, 8; IND. CODE § 5-8-1-35 (2023).

¹⁶ Ind. Const. art VI §§ 7, 8

¹⁷ IND. CODE § 5-8-1-35 (2023).

¹⁸ See e.g., *Waller v. City of Madison*, 183 N.E.3d 324 (Ind. App. 2022) (discussing Indiana Code 36-7-4-218 as an alternative means of removal for appointed officials).

¹⁹ See generally *State v. Sutherlin*, 92 N.E.2d 923 (Ind. 1950).

²⁰ Ind. Const. art. 6, § 7.

²¹ *Id.*

²² *Id.*

²³ *Indiana Governor History: Warren Terry McCray*, IN.GOV, <https://www.in.gov/governorhistory/2349.htm> [https://perma.cc/6A7H-D9FB]. Governor Warren McCray was convicted of mail fraud during his tenure in office. Although he was impeached, he was not removed, choosing instead to resign before serving three years in federal prison.

Article 6, Section 8 of the Indiana Constitution states that “[a]ll State, county, township, and town officers, may be impeached, or removed from office, in such manner as may be prescribed by law.”²⁴ The language of import in this section is “as may be prescribed by law.” This language gives the General Assembly the power to dictate the mechanism by which elected officials may be removed from office.²⁵ Therefore, when properly construed with section 7, the “Constitution provides that county, township, and town officers may be impeached, or removed from office, for crime, incapacity, or negligence in such manner as the legislature may prescribe.”²⁶ These mechanisms for removal are statutes, in this case, Indiana Code 5-8-1-35, the Removal Statute.²⁷

B. The Old: The Impeachment Act of 1897

What is today colloquially known as the Removal Statute²⁸ was formerly Section 35 of the Impeachment Act of 1897 (“the Act”).²⁹ The Act was adopted from another jurisdiction, specifically Nevada,³⁰ lamentably without consideration for Indiana’s Constitution.³¹ Consequently, it was up to the Supreme Court of Indiana to promulgate a body of case law governing the Act.³²

The Impeachment Act of 1897 at once failed to provide mechanisms of removal under specific provisions and swept too broadly in other sections. Section 35 of the Act provides that when a written and verified accusation is presented to a circuit court alleging an officer's charging of illegal fees or neglect of official duties, the court must summon the accused within five days.³³ A summary hearing involving evidence from both sides takes place within twenty days, and if the charge is proven, the court removes the accused from office and imposes a fine, along with legal costs.³⁴

²⁴ Ind. Const. art. 6, § 8.

²⁵ *State v. Neff*, 117 N.E.3d 1263, 1268 (Ind. 2019).

²⁶ *State v. Neff*, 117 N.E.3d 1263, 1268 (Ind. 2019) (citing *McComas v. Krug*, 81 Ind. 327, 333 (1882)).

²⁷ IND. CODE § 5-8-1-35 (2023).

²⁸ *Id.*

²⁹ 1897 Ind. Acts 278-82.

³⁰ Nev. Rev. Stat. §§ 2851, 2851 (1912).

³¹ *State ex rel. Ayer v. Ewing*, 106 N.E.2d 441, 446 (Ind. 1952) (Emmert, J., concurring).

³² See Ind. Const. Art. 7, § 4; Ind. R. App. P. 4 (2023).

³³ 1897 Ind. Act 282.

³⁴ *Id.*

Initially, there were no provisions in the Act providing a statutory cause for removal by a grand jury³⁵ until the Supreme Court of Indiana unanimously held in *State v. Sutherlin*³⁶ that under Article 6, Sections 7 and 8 of the constitution, a county official could be removed for the constitutional causes found in Section 7 of the article.³⁷ This was to be the single enlargement of the Act as, over time the court began to winnow down the statute's reach to include only certain public officials, sometimes despite the statute's explicit language.

The supreme court began by narrowing the field of officers eligible for removal under the Impeachment Act. In *State v. Patterson*,³⁸ the court decided that if the legislative intent behind § 35 of the 1897 act allowed for the removal of prosecuting attorneys due to neglect in official duties, such an interpretation would render the act partially invalid as it would clash with § 12, Art. 7 of the constitution.³⁹ The *Patterson* court examined the distinction between "state officers" and "all judges and prosecuting attorneys" within the phrase "all state officers, and all judges and prosecuting attorneys are liable to impeachment."⁴⁰ Based on this analysis, the court concluded that the legislature did not consider prosecuting attorneys as state officers and could not, therefore, be removed for negligence.⁴¹

In *State v. Dearth*,⁴² the supreme court not only affirmed the *Patterson* distinction between state officers and judges and prosecuting attorneys, it also made explicit the elimination of negligence as a basis for removing judges and prosecuting attorneys.⁴³ The Court looked to Article 7, section 12 of the constitution, which, at the time,⁴⁴ stated that the removal of a judge or prosecuting attorney would only be proper after a conviction of corruption or other high crime at the judgment of the supreme court.⁴⁵ Furthermore, the Impeachment Act did not "provide any manner for the removal of judges

³⁵ Ewing, 106 N.E.2d at 446 (Emmert, J., concurring).

³⁶ See generally *State v. Sutherlin*, 92 N.E.2d 923 (Ind. 1950).

³⁷ *Sutherlin*, 92 N.E.2d at 924.

³⁸ See *State v. Patterson*, 105 N.E. 228, 229 (Ind. 1914).

³⁹ The 1970 amendment rewrote the section, which read as appearing in the 1851 Indiana Constitution: "Any judge or prosecuting attorney, who shall have been convicted of corruption or other high crime, may, on information in the name of the state, be removed from office by the supreme court, or in such other manner as may be prescribed by law." Ind. Const. art 7 § 12 (amended 1970).

⁴⁰ *Patterson*, 105 N.E. at 229.

⁴¹ *Id.*

⁴² See generally *State v. Dearth*, 164 N.E. 489 (Ind. 1929).

⁴³ *Id.* at 493.

⁴⁴ Ind. Const. art 7 § 12 (amended 1970).

⁴⁵ *Dearth*, 164 N.E. at 492.

from office other than that indicated in § 12, Art. 7, of the Constitution.”⁴⁶ Therefore, “[s]tatutory provisions for the impeachment of judges on grounds other than those specified in § 12 of Art. 7, of the Constitution are void for being in conflict with § 12.”⁴⁷

In the *Dearth* and *Patterson* cases, the court refined the group of eligible "officers" for removal under the Impeachment Act, specifically excluding judges and prosecuting attorneys.⁴⁸ Moreover, negligence was deemed an inapplicable basis for action against these officials due to the constitution's precise language and a standard rule of interpreting constitutional provisions.⁴⁹ Both analyses strictly adhere to textual evidence and reach the same conclusion due to the conflicting language between the Impeachment Act and the constitution.⁵⁰ While this rationale might hold up regarding judges and prosecuting attorneys, subsequent courts, specifically those that are the focus of this note, have further restricted the scope and relevance of the Removal Statute, often relying on earlier reasoning grounded in the wording of the Impeachment Act.

C. *The New: The Removal Statute*

Although its creation dates back a century twice previous, the wording of the Removal Statute remains essentially the same.⁵¹ This may seem surprising given the government's penchant for revision, but it becomes less so in light of the startlingly low number of cases in which the Statute is involved.⁵² As a point in fact, a search of the Removal Statute's usage reveals that Indiana Code 5-8-1-35 was cited in a mere twenty cases despite its relatively old age.⁵³

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *State v. Patterson*, 105 N.E. 228, 229 (Ind. 1914); see also *Dearth*, 164 N.E. at 493.

⁴⁹ See *Patterson*, 105 N.E. at 229; see also *Dearth*, 164 N.E. at 493.

⁵⁰ See *Patterson*, 105 N.E. at 229; see also *Dearth*, 164 N.E. at 489 (quoting 1987 Ind. Acts 279). Compare 1987 Ind. Acts 279 (“Be it enacted by the General Assembly of the State of Indiana, That all State officers and all Judges and Prosecuting Attorneys are liable to impeachment for any misdemeanor in office”). It is important to note that the direct language of the court adds a comma and omits the final five words of the quoted section.

⁵¹ *State v. Neff*, 117 N.E.3d 1263, 1268 (Ind. 2019) (comparing the language of Indiana Code § 5-8-1-35 (2023) to that found in *State v. McRoberts*, 192 N.E. 428, 430 (Ind. 1934)).

⁵² See *State v. Neff*, 117 N.E.3d 1263, 1268 (Ind. 2019).

⁵³ 5-8-1-35 *Verification of Accusation; Citing Party; Hearing; Judgement*, THOMSON REUTERS WESTLAW PRECISION, (Jan. 26, 2023, 1:56 PM) (select “citing references” tab; then select “cases” tab on the left side menu).

The current-day language of the statute is relatively straightforward. It outlines how a proceeding against an elected official in a county⁵⁴ or township position⁵⁵ must be prosecuted. There must be an accusation in writing alleging that an officer has been guilty of one or more prohibited acts.⁵⁶ The acts include: (1) charging and collecting illegal fees for services rendered or to be rendered in the officer's office; (2) refusing or neglecting to perform the official duties pertaining to the officer's office; (3) if a county officer, such as a county auditor, treasurer, recorder, surveyor, or assessor, failing to be physically present in the officer's office; or (4) failing to perform statutorily imposed duties if the officer is the executive of a township.⁵⁷ The accusation must be verified by oath and presented to a circuit, superior, or probate court.⁵⁸ After the accusation is filed, a strict timeline of actions commences. Within five to ten days of the filing of the accusation, the accused must be charged with appearing in court no later than twenty days after the accusation was filed.⁵⁹ At the appearance, there is a hearing where each party presents evidence supporting their procedural stances.⁶⁰

Section (b) of the statute sets forth the details of what happens after the hearing if it is found that the accusation is sustained.⁶¹ The court must take several actions.⁶² First, the court must enter a decree stripping the accused of office.⁶³ Then, the court must enter a judgment of \$500 for the prosecuting officer,⁶⁴ costs as allowed in civil cases,⁶⁵ and damages equivalent to the amount of money paid to the officer by their employer since the accusation's filing.⁶⁶

Finally, section (c) of the Removal Statute explains what happens if the accused officer emerges triumphant from litigation.⁶⁷ The court may award reasonable attorney's fees, court costs, and other litigation expenses so long

⁵⁴ IND. CODE § 36-2-8.7 (2023).

⁵⁵ IND. CODE § 36-6-4-2 (2023).

⁵⁶ IND. CODE § 5-8-1-35 (2023).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ IND. CODE § 5-8-1-35(a) (2023).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² IND. CODE § 5-8-1-35(b) (2023).

⁶³ IND. CODE § 5-8-1-35(b)(1) (2023).

⁶⁴ *Id.*

⁶⁵ IND. CODE § 5-8-1-35(b)(2) (2023).

⁶⁶ *Id.*

⁶⁷ IND. CODE § 5-8-1-35(c) (2023).

as the accused officer prevails and the accusation is found to be frivolous or vexatious.⁶⁸

II. FROM CASE LAW TO THREE-FACTOR TEST: HOW THE INDIANA SUPREME COURT DERIVED ITS MOST RECENT INTERPRETATION OF THE REMOVAL STATUTE

In *State v. Neff*,⁶⁹ the Indiana Supreme Court promulgated a three-factor test to crystalize the case law jurisprudence concerning the interpretation of the Removal Statute, specifically in relation to subsection (a)(2).⁷⁰ The three factors that are meant to guide judicial decisions regarding the removal of an elected official are: (1) an officer may be removed under the Removal Statute only for failure to perform multiple required duties;⁷¹ (2) the officer's failures must constitute nonfeasance rather than malfeasance or misfeasance;⁷² and (3) the nonfeasance must significantly impact the day-to-day operation of the officer's office.⁷³ Collectively, these three factors coalesce to form a threshold test. Once it is adjudged that an official has engaged in activities that meet the criteria of each factor, the Court may decide whether removal is warranted.

These factors are derived from several cases: *State v. McRoberts*,⁷⁴ *State ex rel. Ayer v. Ewing*,⁷⁵ and *Bateman v. State*.⁷⁶ The first and second factors come from *Ewing*⁷⁷ and *McRoberts*.⁷⁸ The final factor comes from *Bateman*.⁷⁹

This section examines each factor as a product of case law precedent. It first discusses the facts, reasoning, and holding of the case or cases relevant to each factor. Then, a brief breakdown of each factor as it stands today will follow.

⁶⁸ *Id.*

⁶⁹ *State v. Neff*, 117 N.E.3d 1263, 1268 (Ind. 2019).

⁷⁰ IND. CODE § 5-8-1-35(a)(2) (2023).

⁷¹ *Neff*, 117 N.E.3d at 1720.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See generally* *State v. McRoberts*, 192 N.E. 428 (Ind. 1934).

⁷⁵ *See generally* *State ex rel. Ayer v. Ewing*, 106 N.E.2d 441 (Ind. 1952).

⁷⁶ *See generally* *Bateman v. State*, 214 Ind. 138 (1938).

⁷⁷ *See generally* *Ewing*, 106 N.E.2d 441.

⁷⁸ *See generally* *McRoberts*, 192 N.E. at 428.

⁷⁹ *Bateman*, 214 Ind. at 148.

A. The First Factor: An Officer May be Removed Under the Removal Statute Only for Failure to Perform Multiple Required Duties

The first factor is derived from a combination of *Ewing*⁸⁰ and *McRoberts*.⁸¹ From *Ewing*⁸² comes the actual language of the factor. From *McRoberts*,⁸³ the Court develops the burden of proof required by the state to fulfill this factor.

McRoberts is the foundational precedent on which the court grounds its decision-making when considering judicial removal under the Removal Statute.⁸⁴ The facts of the case are as follows.

In *State v. McRoberts*,⁸⁵ the State of Indiana brought an action to remove a group of councilmen from Gibson County from office.⁸⁶ The affiant, in this case, the county superintendent, was allowed reimbursement of \$300 for travel expenses that may have arisen throughout the school year.⁸⁷ Before the treasurer could reimburse the superintendent, the superintendent needed to prove the expenses by affidavit to the county auditor.⁸⁸ By law, the county council's duty was to appropriate the funds necessary to reimburse the superintendent.⁸⁹ However, when the time came for the budget to be re-examined and approved by the county council for the next year, the councilmen named in the case "refused and neglected" to appropriate the funds for the travel expenses.⁹⁰ Four times, the superintendent submitted his estimated expenses to be reimbursed.⁹¹ Four times, the county councilmen refused to consider appropriating additional funds for the superintendent's expenses despite the superintendent following the proper procedures.⁹² Four refusals were finally too much for the superintendent to suffer, and he notified the state of the council's repeated misdealing.⁹³

⁸⁰ *Ewing*, 106 N.E.2d at 445.

⁸¹ *McRoberts*, 192 N.E. at 428.

⁸² *State ex rel. Ayer v. Ewing*, 106 N.E.2d 441, 445 (Ind. 1952) (stating that "a failure to perform just one duty required by law is not a sufficient cause for impeachment of an officer under the statute in question. There must be a general failure to perform official duties alleged, before a right of action against the officer under this statute will lie.")

⁸³ *See generally* *State v. McRoberts*, 192 N.E. 428 (Ind. 1934).

⁸⁴ *Id.*

⁸⁵ *McRoberts*, 192 N.E. at 428.

⁸⁶ *State v. McRoberts*, 192 N.E. 428, 429 (Ind. 1934).

⁸⁷ *Id.* at 429.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 429, 430.

⁹² *McRoberts*, 192 N.E. at 429, 430.

⁹³ *Id.* at 430.

The supreme court ultimately held that the allegations of the petition for removal were insufficient to “oust the appellees as members of the county council.”⁹⁴ As an example of what could adequately constitute a refusal or neglect of official duties, and thus sufficient to oust an official, the court gave the hypothetical of a sheriff who “closes his office and remains away and refuses and neglects to discharge the duties thereof, and has no one to perform his official duties.”⁹⁵ The court shortly concluded that, in comparison, the councilmen’s failure did not rise to the appropriate level because “there [was] no allegation that the county council or any member thereof [had] failed, refused, or neglected to perform the duties of their office, other than the refusal or neglect to make this one item of appropriation.”⁹⁶

The court’s example of a neglectful sheriff, and more specifically, the number of duties an official can fail before being cited for neglect under the Removal Statute, has proven highly persuasive in subsequent actions for removal.⁹⁷

1. *State ex rel. Ayer v. Ewing*

Ewing sets forth the actual language of the first factor and elaborates on the number and types of failures an official can get away with under the removal statute.

A verified accusation instituted a proceeding for removal against Frank Ayer (“Ayer”), a trustee of Hammond Township, who allegedly “refus[ed] and neglect[ed]” to consider the job application of a teacher.⁹⁸ Robert Foertsch (“Foertsch”). The teacher in question, applied to work in the schools of Hammond Township.⁹⁹ He submitted his job application for the 1951-1952 school year.¹⁰⁰ At the time of Foertsch’s application, Ayer was running for re-election as Township Trustee during the general election.¹⁰¹ Foertsch alleged that Ayer required him to pay \$100 to the political campaign fund of the political party with—which Ayer was affiliated—

⁹⁴ *Id.*

⁹⁵ *Id.* at 430.

⁹⁶ *Id.*

⁹⁷ See e.g., *State v. Sutherlin*, 92 N.E.2d 923 (Ind. 1950); *State ex rel. Ayer v. Ewing*, 106 N.E.2d 441, 446 (Ind. 1952); *State ex rel. Durham v. Marion Circuit Court*, 162 N.E.2d 505 (Ind. 1959); *State v. Neff*, 117 N.E.3d 1263 (Ind. 2019).

⁹⁸ *Ewing*, 106 N.E.2d at 442.

⁹⁹ *Id.* at 442.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

before Ayer would consider Foertsch for employment.¹⁰² Ayer allegedly refused to even look at Foertsch's application if the \$100 was not paid.¹⁰³ Foertsch was not the only teacher subjected to this treatment.¹⁰⁴ Another teacher, Margaret Thomas, brought an accusation alleging the same treatment.¹⁰⁵ Her complaint was combined with Foertsch's case, eventually reaching the Indiana Supreme Court.¹⁰⁶

The supreme court held that the circuit court lacked jurisdiction under the Removal Statute because there was no showing of the jurisdictional facts required by the statute to institute a proceeding.¹⁰⁷ The court, in its reasoning, stated that unless the verified written charge as filed contains an allegation that an officer is guilty of either "charging and collecting illegal fees for services rendered, or to be rendered, in his office" or "has refused or neglected to perform the official duties pertaining to his office[,]” the trial court would be without jurisdiction.¹⁰⁸ However, this lack of jurisdiction does not stop the court from further exploring the legal plausibility of Foertsch's claim.

The court looked to *McRoberts* for a standard that would fulfill the Removal Statute's "has refused or neglected to perform the official duties" clause.¹⁰⁹ First, the court reiterated a "presumption that [charged officials] have performed and discharged their tasks and duties."¹¹⁰ Second, the court inferred from the holding of *McRoberts* that "a failure to perform just one duty required by law is not a sufficient cause for impeachment of an officer under the statute in question."¹¹¹ Finally, the court used the language of "general failure" to encapsulate the spirit of the *McRoberts* holding.¹¹² As the court said, "There must be a general failure to perform official duties alleged, before a right of action against the officer under this statute will lie."¹¹³

¹⁰² *Id.* at 442.

¹⁰³ *Id.*

¹⁰⁴ State ex rel. Ayer v. Ewing, 106 N.E.2d 441, 442. (Ind. 1952).

¹⁰⁵ *Id.* at 442.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 446.

¹⁰⁸ *Id.* at 443.

¹⁰⁹ *Id.*

¹¹⁰ State ex rel. Ayer v. Ewing, 106 N.E.2d 441, 442 (Ind. 1952).

¹¹¹ *Id.* at 445 (relying on the example of the "sheriff who closes his office and remains away and refuses and neglects to discharge the duties thereof, and has no one to perform his official duties" as an illustration of refusal and neglect) (citing State v. McRoberts, 192 N.E. 428, 430 (Ind. 1934)).

¹¹² *Id.* at 445.

¹¹³ *Id.*

2. *A Breakdown of the Supreme Court's Synthesis of McRoberts and Ewing to Develop the First Factor*

Justice Goff, writing for the *Neff* court, examined the wording of subsection (a)(2) of the Removal Statute.¹¹⁴ The relevant portion states, “refusing or neglecting to perform the official duties pertaining to the officer’s office.”¹¹⁵ As the reasoning goes, the plural form of “official duties” indicates how many duties an officer can fail to perform before being removed from office.¹¹⁶ Therefore, as stated in *Ayer*, “a failure to perform just one duty required by law is not . . . sufficient” for the removal of an officer.¹¹⁷ The failure to perform official duties goes far beyond that, as illustrated in *State v. McRoberts*,¹¹⁸ where the court gives the example of a sheriff who “closes his office and remains away and refuses and neglects to discharge the duties thereof, and has no one to perform his official duties.”¹¹⁹ The court referred to this as a “general failure” of duties and a necessary condition that must exist before an action for removal will lie under the Removal Statute.¹²⁰ It is, therefore, the State’s burden to show that an officer has failed “to perform multiple required duties” as it is a standing presumption that unless “proven otherwise[,] a defendant in a removal action is presumed to have carried out his or her duties.”¹²¹ This sets a high bar for removal, which bears further examination and consideration.

B. The Second Factor: The Officer’s Failures Must Constitute Nonfeasance Rather Than Malfeasance of Misfeasance

The second factor promulgated by the supreme court in *State v. Neff*¹²² is similarly derived from *State v. McRoberts*¹²³ and *State ex rel. Ayer v. Ewing*.¹²⁴ The facts of *McRoberts* and *Ewing* having been set forth previously, this subsection will focus on the Court’s synthesis of these two cases in *State v. Neff*.¹²⁵

¹¹⁴ *State v. Neff*, 117 N.E.3d 1263, 1268 (Ind. 2019).

¹¹⁵ IND. CODE § 5-8-1-35(a)(2) (2023).

¹¹⁶ *Neff*, 117 N.E.3d at 1268.

¹¹⁷ *State ex rel. Ayer v. Ewing*, 106 N.E.2d 441, 445 (Ind. 1952).

¹¹⁸ 192 N.E. 428, 430 (1934).

¹¹⁹ *Id.*

¹²⁰ *Neff*, 117 N.E.3d at 1268.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See generally* 192 N.E. 428 (1934).

¹²⁴ *See generally* 106 N.E.2d 441 (Ind. 1952).

¹²⁵ 117 N.E.3d 1263 at 1268.

The *Neff* court interpreted subsection (a)(2) of the Removal Statute to address nonfeasance,¹²⁶ emphasizing that the statute's concern lies in complete failure to fulfill required duties, irrespective of degrees of inadequacy, as supported by textual analysis and corroborating case law definitions of nonfeasance, misfeasance, and malfeasance.¹²⁷ Taking a textualist approach similar to that of *McRoberts* and *Ayer*, the court looked to Black's Law Dictionary to define and affirm these terms, looking to *McRoberts* and *Ayer* as corroborating case law.¹²⁸ Nonfeasance is defined as "[t]he failure to act when a duty to act exists."¹²⁹ Misfeasance is defined as "[a] lawful act performed in a wrongful manner."¹³⁰ Malfeasance is defined as "[a] wrongful, unlawful, or dishonest act; esp[ecially], wrongdoing or misconduct by a public official."¹³¹ Malfeasance is a newer term than nonfeasance and misfeasance. However, each originated in tort law as evidenced by this statement by Keeton, "[h]ence there arose very early a difference, still deeply rooted in the law of negligence, between 'misfeasance' and 'nonfeasance' — that is to say, between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm."¹³²

In examining this "nonfeasance" language, the Court decided the Removal Statute does not examine and is not concerned with degrees of failure.¹³³ Instead, "only complete failure to perform required duties will do."¹³⁴

C. The Third Factor: The Nonfeasance Must Significantly Impact the Day-to-Day Operation of the Officer's Office

The third factor crafted to steer the application of the Removal Statute is rooted in *Bateman v. State*.¹³⁵ Its facts and a discussion of the third factor's genesis follow. *Bateman v. State*¹³⁶ again involves a group of officials—

¹²⁶ IND. CODE § 5-8-1-35(a)(2) (2022).

¹²⁷ *State v. Neff*, 117 N.E.3d 1263, 1268 (Ind. 2019).

¹²⁸ *Id.* at 1273 n.3.

¹²⁹ NONFEASANCE, Black's Law Dictionary (11th ed. 2019).

¹³⁰ MISFEASANCE, Black's Law Dictionary (11th ed. 2019).

¹³¹ MALFEASANCE, Black's Law Dictionary (11th ed. 2019).

¹³² PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 374 (5th ed. 1984).

¹³³ *State v. Neff*, 117 N.E.3d 1263, 1268 (Ind. 2019).

¹³⁴ *Id.*

¹³⁵ *See generally* *Bateman v. State*, 14 N.E.2d 1007 (Ind. 1938).

¹³⁶ 14 N.E.2d at 1008.

county commissioners, to be exact.¹³⁷ The commissioners were accused of a laundry list of misdeeds while in office. The first accusation was for making unlawful contracts.¹³⁸ In 1934, the Daviess County commissioners contracted to repair and maintain highways, bridges, and culverts.¹³⁹ The county supervisor originally submitted an itemized estimate of the cost of the repairs and filed the estimate with the county auditor in 1933.¹⁴⁰ However, the commissioners failed to approve or even make a record that they had received the appraisal.¹⁴¹ In 1934, they altered the road budget by reallocating thirteen thousand dollars from materials and splitting the amount between the cost of labor and the cost of equipment.¹⁴²

The second alleged misconduct occurred in the spring of 1934 when the commissioners signed an order to purchase five “motor trucks,” which would cost \$9,750.¹⁴³ The order had been made to be paid on a specified date and properly filed with the county auditor.¹⁴⁴ However, there was no room for the trucks in the Daviess County budget, and the commissioners made an allowance to purchase the trucks for 500 dollars more than the original brokered deal.¹⁴⁵ The commissioners made this allowance without properly submitting a claim for payment to the auditor.¹⁴⁶ The extra allowance authorized by the commissioners made the price of the trucks above market value.¹⁴⁷

The third accusation involved the commissioners' purchase of tarvia, or tar, for use on the highways.¹⁴⁸ The tar was meant for use within the county and was purchased for fifteen cents per gallon in 1933.¹⁴⁹ In 1934, the commissioners ordered that the contract for the tar be extended, but no contract was ever filed with the auditor's office, and the price paid for the tar increased by one-half cent per gallon.¹⁵⁰

¹³⁷ *Id.* at 1008.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Bateman v. State*, 14 N.E.2d 1007, 1008 (Ind. 1938).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Bateman v. State*, 14 N.E.2d 1007, 1008 (Ind. 1938)..

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

The fourth wrongdoing occurred in 1934 when the board of commissioners made a contract to repair a bridge.¹⁵¹ The commissioners failed to advertise that they were looking to contract properly and did not receive competitive bids, as was their duty.¹⁵²

Fifth, the defendant, Bateman, had his personal vehicle repaired with county-owned parts by a county-employed individual.¹⁵³ The parts included springs valued at \$17.72 as well as bearings and retainers valued at \$15.75.¹⁵⁴ The county employee who did the work was typically paid 35 cents per hour, and they worked on the truck for ten hours.¹⁵⁵

Sixth, Bateman used a tractor equipped with caterpillars owned by the county to plow and disk his own farm.¹⁵⁶ He did not do this for the benefit of the county.¹⁵⁷

Seventh, Bateman stored a tractor and grader, each belonging to Daviess County, on his personal farm.¹⁵⁸ He used them to grade and open ditches along the private drive leading to Bateman's house.¹⁵⁹

Eighth, the commissioners authorized payment of \$74.95 from a gravel road repair fund to a worker for the repair of said worker's vehicle.¹⁶⁰ The vehicle had been used in the maintenance and servicing of machinery and equipment which belonged to the county.¹⁶¹ The commissioners also allowed another automobile owner to make a similar claim for vehicle repairs because it had been used to perform labor on Daviess County roads.¹⁶²

Finally, on the first Monday of every month, the payroll for the highways was paid by the county assistant superintendents.¹⁶³ The superintendents prepared the payrolls and swore to their accuracy.¹⁶⁴ Some of these payrolls were increased and paid after the assistant superintendents had sworn to them.¹⁶⁵ The commissioners not only knew of this occurrence but also

¹⁵¹ *Bateman v. State*, 14 N.E.2d 1007, 1008 (Ind. 1938).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Bateman v. State*, 14 N.E.2d 1007, 1009 (Ind. 1938).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Bateman v. State*, 14 N.E.2d 1007, 1009 (Ind. 1938).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

allowed the assistant superintendents to file a “large number of duplications of payment for labor performed by individual employees” improperly.¹⁶⁶ This was the final miscarriage of duty, and the State brought suit.¹⁶⁷

In the end, the supreme court held that there was a “total failure of evidence” and reversed the trial court’s judgment.¹⁶⁸ In its reasoning, the court looked to several other statutes to determine the legality of Bateman’s and the other commissioners’ actions.¹⁶⁹ After comparing the commissioners’ alleged wrongdoings to the laws in effect at the time of commission, the court ruled that no regulations prevented the commissioners’ actions. Furthermore, in the case of using the tractor and plow and the duplicated payments, the court decided that an officer should not be removed for such “inconsequential matters.”¹⁷⁰ The court then concluded that an official should only be removed for “willful and malicious failure or neglect” in the performance of the officer’s duties.¹⁷¹

The *Neff* court builds upon the precedent set in *Bateman*, where the court determined that an official’s removal should be predicated on “willful or malicious failure or neglect” in the discharge of official duties. Further, it refines this standard by integrating it into the definition of nonfeasance. In *Bateman*, the court held that an official should only be removed for “willful or malicious failure or neglect” in the performance of the officer’s duties.¹⁷² The *Neff* court further incorporates the *Bateman* court’s reasoning in the definition of nonfeasance.¹⁷³ The court targets “critical or essential duties of the office” as the only duties that will “necessarily have a significant impact on the day-to-day operation of the officer’s office” if affected by nonfeasance.¹⁷⁴ The “nonfeasance of a few ancillary duties,” which may not always significantly impact the “day-to-day operation of the officer’s office[,]” is simply not enough to consistently warrant removal.¹⁷⁵ Justice Goff, writing for the court, declared that “[s]ubsection (a)(2) of the Removal Statute does not apply when an officer has done his or her job poorly or even

¹⁶⁶ *Id.*

¹⁶⁷ *Bateman v. State*, 14 N.E.2d 1007, 1009 (Ind. 1938).

¹⁶⁸ *Id.* at 1011.

¹⁶⁹ *Id.*; *see e.g.*, 1899 Ind. Act 343; 1913 Ind. Act 977; 1923 Ind. Act 532; 1925 Ind. Act 367; 1933 Ind. Act 732.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *State v. Neff*, 117 N.E.3d 1263, 1268 (Ind. 2019).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

improperly; rather, it applies when an officer has effectively not done his or her job at all.”¹⁷⁶

III. A HOLE IN THE LAW: AN ANALYSIS OF THE SUPREME COURT’S DECISION IN *STATE V. NEFF*

It is important to note that judicial removal is “an extreme and extraordinary measure, intended only for extreme and extraordinary occasions.”¹⁷⁷ It is “fraught with seriousness and a demand for extreme caution” when bringing the charge and pronouncing judgment.¹⁷⁸ Of particular importance is the danger of extinguishing the people’s collective voice in their leadership choice. America, as a democracy and a republic, is built on the foundation of the people’s freedom to choose their leaders. The court acknowledged this freedom by stating that “public officials are normally voted in and out of office.”¹⁷⁹ The Removal Statute is employed when removing *elected* officials.¹⁸⁰ This means that the official in danger of removal was, at some point, chosen by the people in their community as a leader. Therefore, a cautious approach to removing leaders selected by the public is generally ideal. However, there comes the point when an approach becomes too conservative and similarly snuffs out the people’s ability to regulate the government. At this point, it is time for a change.

Presently, there exists a hole in the legal framework concerning the removal of public officials. This hole resulted from the decision in *State v. Neff*,¹⁸¹ where the supreme court crystallized the case law jurisprudence governing the Removal Statute. This section initially lays out the factual background of *State v. Neff*, which serves as the groundwork for the subsequent part of this discussion. The following segment will examine the supreme court’s rationale and the three-factor test’s application. This analysis will consider the good, what the supreme court got right; the bad, what the supreme court got wrong; and the ugly, the hole left in the law by the supreme court’s promulgation and application of the three-factor test that limits the removal of officials only to instances of total neglect where removal may otherwise be warranted or desirable.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1267.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ IND. CODE § 5-8-1-35 (2023).

¹⁸¹ See generally *State v. Neff*, 117 N.E.3d 1263.

*A. State v. Neff: The Facts and the Reasoning**1. The Facts*

*State v. Neff*¹⁸² is the ultimate result of the supreme court's case law concerning the Removal Statute.¹⁸³ When this case was being appealed, Beth Neff ("Neff") served as the elected Clerk-Treasurer of the Town of Yorktown and was responsible for, among other things, managing and maintaining records related to the financial matters of the town.¹⁸⁴ As a result of this role, her office was subject to regular examination by the Indiana State Board of Accounts ("SBOA").¹⁸⁵ Two such examinations conducted by the SBOA, in addition to actions taken in response to the findings of those examinations, form the basis for this legal proceeding.¹⁸⁶

The first examination, which was conducted in relation to the year 2012, revealed a number of deficiencies in the financial records and processes of Yorktown.¹⁸⁷ These deficiencies included improper reconciliation of bank accounts, errors in the town's annual financial activity report, and a financial account with a negative cash balance of around \$140,000.¹⁸⁸ In a meeting held in November 2013, the SBOA discussed the results of this examination with Neff, the President of the Yorktown Town Council, and the Town Manager and guided Neff on how to avoid similar deficiencies in the future.¹⁸⁹

The second examination, which was conducted in relation to 2013, 2014, and 2015, found that the deficiencies identified in the first examination persisted during these years.¹⁹⁰ The Audit Manager, who oversaw both examinations, testified that Yorktown's financial records had deteriorated after the first examination and that there were too many errors to track properly.¹⁹¹ In a meeting held in October 2016, the SBOA again discussed the results of this examination with Neff, the President of the Yorktown Town Council, and the Town Manager.¹⁹²

¹⁸² *Id.*

¹⁸³ 117 N.E.3d at 1265.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *State v. Neff*, 117 N.E.3d 1263, 1265 (Ind. 2019).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

In response to the second examination, the Yorktown Town Council voted to hire an external accounting firm to review the Town's financial records and perform reconciliations for 2012 through 2015.¹⁹³ The accounting firm's review revealed over 150 errors, which, when added up together, amounted to a total of approximately \$3,090,000.¹⁹⁴ The net impact of these errors was that the Town's financial records were understated by approximately \$346,000.¹⁹⁵ After completing the bank account reconciliations, the accounting firm identified and made recommendations for adjustments to the Town's financial records, which reduced the errors to nearly \$250.¹⁹⁶ Initially, the Town had contracted to spend \$20,000 on this work but ultimately spent almost \$70,000 due to the extensive nature of the work that needed to be done.¹⁹⁷

The State subsequently sought Neff's removal for refusing or neglecting to "perform the official duties pertaining to the office of the Yorktown Clerk-Treasurer."¹⁹⁸ The State brought three counts against Neff, alleging that the clerk-treasurer failed to: "(1) complete monthly accounting reconciliations; (2) follow the directions of the SBOA, the relevant state examiner; and (3) use the accounting and financial reporting systems adopted by the SBOA in its Accounting and Uniform Compliance Guideline Manual for Cities and Towns."¹⁹⁹

The trial court ruled in Neff's favor, holding that the Removal Statute applies in three situations: "complete failures to act, the inability to act due to mental conditions, or crimes."²⁰⁰ On appeal, the appellate court agreed with the State's argument that "the Removal Statute does not require the State to show a failure to fulfill all duties, all the time, to remove a public official."²⁰¹ Rather, a showing of "pervasive failures involving critical duties" should suffice for removal.²⁰² The appellate court reversed the trial court's ruling, and the supreme court granted Neff's motion to transfer.²⁰³

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *State v. Neff*, 117 N.E.3d 1263, 1265 (Ind. 2019).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1265-66.

¹⁹⁹ *Id.* at 1266.

²⁰⁰ *State v. Neff*, No. 18C01-1707-IF-000015 (Ind. Cir. Ct. 2017).

²⁰¹ *State v. Neff*, 117 N.E.3d 1263, 1266 (Ind. 2019).

²⁰² *Id.*

²⁰³ *Id.*

2. *The Reasoning: When the Removal Statute May Be Applied Properly*

The supreme court ultimately held that Neff's failures and errors did not result in a "general failure," so the Removal Statute did not apply.²⁰⁴ To arrive at this result, the court examined when the Removal statute may be applied and whether Neff's failures rose to the level required for removal under the Removal Statute.²⁰⁵ In analyzing when the Removal Statute may be used, the supreme court promulgated its three-factor test.²⁰⁶ The court then applied the three-factor test to arrive at its final judgment.²⁰⁷

a. When the Removal Statute may be Applied

The court began its reasoning by stating that the "Removal Statute applies only in limited situations."²⁰⁸ The court then proceeded to examine the controlling law surrounding the Removal Statute.

First, the court looked to Article 6, section 7²⁰⁹ and section 8²¹⁰ of the Indiana Constitution to determine when a county, township, or town officer may be removed from office. When Sections 7 and 8 are properly construed together, the court found that the "Constitution provides that county, township, and town officers may be impeached, or removed from office, for crime, incapacity, or negligence in such manner as the legislature may prescribe."²¹¹

The court then briefly discussed the nature of removal proceedings, stating that "[b]ecause of the unique nature of the summary proceedings and the penalty mandated by the legislature, the Removal Statute must be strictly construed in favor of the defendant and not expanded further than the legislature has expressly provided."²¹² Although not an explicit part of the three-factor test eventually set forth by the court, the summary nature of the Removal Statute's proceedings is important nonetheless. Functioning as a quasi-criminal process, distinct procedural regulations come into play to safeguard the defendant's interests.²¹³ Instead of adhering to the civil procedure rules that govern typical proceedings, there is a reliance on the principle that penal laws should be interpreted rigorously—a principle with

²⁰⁴ *Id.* at 1272.

²⁰⁵ *Id.* at 1268.

²⁰⁶ *Id.* at 1270.

²⁰⁷ *State v. Neff*, 117 N.E.3d 1263, 1270-72 (Ind. 2019).

²⁰⁸ *Id.* at 1267.

²⁰⁹ Ind. Const. art. 6, § 7.

²¹⁰ Ind. Const. art. 6, § 8.

²¹¹ *Neff*, 117 N.E.3d at 1267.

²¹² *Id.*

²¹³ *State ex rel. Ayer v. Ewing*, 106 N.E.2d 441, 442 (Ind. 1952).

a longstanding history that finds its basis in both the law's consideration for individual rights and the fundamental division of power between legislative and judicial branches²¹⁴. Essentially, the legislature's role, not the court, stipulates what constitutes a crime and the appropriate penalty. The *Ewing* court stated that the Removal Statute is “a penal statute, is in derogation of the common law, and it cannot receive an equitable construction. It must be strictly construed in favor of the [defendant].”²¹⁵

Moving from the nature of the Removal Statute, the court proceeded to craft its three-factor test.²¹⁶ The court pulled together all the controlling case law discussed above to promulgate its new test.²¹⁷ The first factor, that “an officer may be removed under the Removal Statute only for failure to perform multiple required duties,”²¹⁸ was derived from a combination of *Ewing*²¹⁹ and *McRoberts*.²²⁰ The second factor that the officer's failures must constitute nonfeasance rather than malfeasance or misfeasance was similarly derived from *Ewing*²²¹ and *McRoberts*.²²² The third factor that the “nonfeasance must significantly impact the day-to-day operation of the officer's office”²²³ was taken from *Bateman v. State*.²²⁴

Finally, the court stated that “to determine whether Neff's alleged failures to carry out her duties amounted to ‘a general failure to perform official duties’ that would subject her to removal,” Neff's duties and actions needed to be considered using these three factors.²²⁵

b. The Court's application of the three-factor test to determine whether Neff's failures rose to the level required for removal by the Removal Statute

Under the first factor, an officer's removal under the Removal Statute is contingent upon failing to fulfill multiple mandated duties. The court noted that the trial court's findings supported the state's allegations that the defendant, Neff, failed to complete several duties of a town clerk-treasurer,

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *State v. Neff*, 117 N.E.3d 1263, 1269 (Ind. 2019).

²¹⁷ *See* Section II, *supra*.

²¹⁸ *State v. Neff*, 117 N.E.3d 1263, 1270 (Ind. 2019).

²¹⁹ *Ewing*, 106 N.E.2d at 445.

²²⁰ *See generally* *State v. McRoberts*, 192 N.E. 428 (Ind. 1934).

²²¹ *State ex rel. Ayer v. Ewing*, 106 N.E.2d 441, 445 (Ind. 1952).

²²² *See generally* *McRoberts*, 192 N.E. at 428.

²²³ *Neff*, 117 N.E.3d at 1270.

²²⁴ *Bateman v. State*, 14 N.E.2d 1007, 1009 (Ind. 1938).

²²⁵ *State v. Neff*, 117 N.E.3d 1263, 1270 (Ind. 2019).

which are prescribed by statute.²²⁶ The court observed that there were at least fourteen statutory duties required of a town clerk-treasurer but chose to focus on the three relied on by the State in its accusations and concurred with the court below that Neff neglected to complete them.²²⁷

The court concluded succinctly that there was no doubt that Neff's failures and errors involved multiple duties.²²⁸ In making its determination, the court looked to the phrase "official duties" in subsection (a)(2)²²⁹ of the Removal Statute, in tandem with the *McRoberts* court's statement that "a failure to perform just one duty required by law is not . . . sufficient" for removal.²³⁰ The court, therefore, ruled that the first factor weighed in favor of the state.²³¹

Applying the second factor for officer removal, which focuses on distinguishing nonfeasance from malfeasance or misfeasance, the court evaluated Neff's case, identifying instances of nonfeasance in specific duties, acknowledging uncertainty in others, and considering the impact on her office's operation.²³² The court began its analysis of whether Neff's actions or lack of actions constituted nonfeasance rather than malfeasance or misfeasance by stating that "[w]hile the trial court's undisputed factual findings support the conclusion that Neff committed nonfeasance of at least one specific duty, they are less clear regarding whether Neff committed nonfeasance of multiple duties."²³³ The court went on to say that "[b]ecause Neff failed to complete monthly accounting reconciliations when she had a duty to do so, she committed nonfeasance of this duty." However, the court could not determine whether Neff had committed nonfeasance "regarding Neff's response to the SBOA's directions and her adoption and use of the systems required by the SBOA Manual."²³⁴ Continuing this line of reasoning, the court posited the hypothetical that if Neff had wholly failed to heed "all the SBOA's directions and failed to adopt and use any of the systems required by the SBOA Manual," she would have doubtless committed nonfeasance of those duties.²³⁵ However, the court decided not

²²⁶ *Id.* at 1269.

²²⁷ *State v. Neff*, 117 N.E.3d 1263, 1269 (Ind. 2019).

²²⁸ *Id.* at 1270.

²²⁹ IND. CODE § 5-8-1-35(a)(2) (2023).

²³⁰ *State v. Neff*, 117 N.E.3d 1263, 1269 (Ind. 2019) (*citing* *State ex rel. Ayer v. Ewing*, 106 N.E.2d 441, 442 (Ind. 1952)) (discussing *McRoberts*).

²³¹ *Neff*, 117 N.E.3d at 1270.

²³² *See Id.*

²³³ *Id.* at 1271.

²³⁴ *Id.*

²³⁵ *Id.*

to determine whether there was nonfeasance of these duties because if Neff had committed nonfeasance, it would not have had a significant impact on the operation of her office.²³⁶

The third factor in assessing officer removal under the Removal Statute revolves around the nonfeasance's substantial impact on the daily office operation. The court stated its conclusion to the third factor in the first sentence of its reasoning, “Neff’s failure to carry out three of her duties did not have a significant impact on the day-to-day operation of her office because those duties were not essential to the regular functioning of her office.”²³⁷ Then, the court admitted that Neff had failed to do the three duties the State had previously alleged in its complaint: completing reconciliations, following the SBOA’s directions, and adopting and using certain accounting and financial systems.²³⁸ But despite this admission of nonfeasance, the court pressed on to reason that because these duties had to do with oversight, their failure had no impact on ensuring the “daily functioning” of Neff’s office.²³⁹

The court determined that “Neff’s nonfeasance did not have a significant impact on the day-to-day operation of her office, the third guideline in the removal analysis [was] not met, and she did not generally fail to perform her official duties.”²⁴⁰ The court defended its decision by explaining that although Neff had indeed failed some of her statutory duties, there were many more that she presumably carried out.²⁴¹ As a clerk-treasurer, Neff’s duties included responsibilities related to the traditional clerk and treasurer roles.²⁴² But because the State never alleged a failure of any of those duties, it was presumed that Neff had performed them.²⁴³ Thus, the court held, there was no “general failure to perform official duties.”²⁴⁴

In the final paragraph of the opinion, the court assessed Neff’s situation as closer to the *McRoberts* Councilmen and the *Ewing* trustee rather than the hypothetical sheriff.²⁴⁵ Because Neff had not “effectively closed up shop like the hypothetical sheriff, [but] continued the daily operation of her office like

²³⁶ *Id.*

²³⁷ *State v. Neff*, 117 N.E.3d 1263, 1271 (Ind. 2019).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Neff*, 117 N.E.3d at 1272.

²⁴⁴ *Id.*

²⁴⁵ *State v. Neff*, 117 N.E.3d 1263, 1272 (Ind. 2019).

the councilmen and trustee,” the clerk-treasurer could not be subjected to the extreme and extraordinary measure of removal.²⁴⁶

B. Analysis of Problems the Supreme Court’s Application of the Three-Factor Test

The *Neff* court created its three-factor test to guide the application of the Removal Statute. Unfortunately, the guidance it offers is not entirely clear or entirely effective. The court’s guidance falters on three counts: the interpretation of the language pertaining to “official duties” found in subsection (a)(2) of the Removal Statute,²⁴⁷ the omission of an opportunity to distinguish between “refusing or neglecting,”²⁴⁸ and, as a result, the inadvertent creation of a legal void where removal is applicable for either misconduct or inactivity, but not for incompetence.

1. Interpretation of “Official Duties”

Subsection (a)(2) of the Removal Statute states, “refusing or neglecting to perform the official duties pertaining to the officer’s office.”²⁴⁹ Although the *Neff* court is not the first to consider these words,²⁵⁰ the *Neff* court is the first to look explicitly at the plural form of “duties” used by the statute.²⁵¹ In the court’s assessment, they concluded that there must be more than one duty neglected by the official.²⁵²

However, the court’s conclusion relies on a narrow focus and forgoes an essential tool of statutory interpretation: statutory context.²⁵³ When a statutory dispute turns on the meaning of only a few words, the court may interpret those words in light of further statutory context.²⁵⁴ This context may be another similar statute, the entire clause of the statute, or a few extra words that give a more complete perspective.²⁵⁵ In this case, the court looked at two words but only interpreted one. What does official mean? Does

²⁴⁶ *Id.*

²⁴⁷ IND. CODE § 5-8-1-35(a)(2) (2023).

²⁴⁸ *Id.*

²⁴⁹ IND. CODE § 5-8-1-35 (2022).

²⁵⁰ See *State ex rel. Ayer v. Ewing*, 106 N.E.2d 441, 444 (Ind. 1952).

²⁵¹ *State v. Neff*, 117 N.E.3d 1263, 1268 (Ind. 2019).

²⁵² *Id.*

²⁵³ Congressional Research Service, *Statutory Interpretation: Theories, Tools, and Trends*, R45153, Congressional Research Service, updated May 18, 2022. <https://crsreports.congress.gov/product/pdf/R/R45153> [<https://perma.cc/K5MU-34L8>] at 25.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

“official” mean statutory duties? Or does “official” mean only those duties that the official is expected to accomplish but are not defined by statute? These questions must be answered, or else the Removal Statute must be recreated for the Removal Statute to capture miscarriages of duty effectively.

2. Differentiating “Refusing or Neglecting”

At no point in the case law governing the interpretation of the Removal Statute does the supreme court strive to define “refuse” as anything but “neglect.” The court in *Neff* said that “[t]his is not a case where an officer has refused and neglected to perform the official duties of his office, as, for instance, where a sheriff closes his office and remains away and refuses and neglects to discharge the duties thereof”²⁵⁶ The court had the opportunity to delve into the differences between the two words but failed to do so.

The court’s conflation of the two words runs counter to canons of statutory interpretation known as the surplusage canon, which requires courts to give each word and clause of a statute operative effect.²⁵⁷ Take careful note of the word between “refusing” and “neglecting.” It is “and.” In the statute, the word between refusing and neglecting is “or.” The word “or” means that “neglecting duties” is both included in “refusing duties” as well as being a separate wrongdoing. In other words, refusing to do an official duty means something more than mere neglect. Black’s Law Dictionary defines “neglect” as “[t]he failure to give proper attention to a person or thing, whether inadvertent, negligent, or willful; the act of treating someone or something heedlessly or inattentively.”²⁵⁸ Refuse is defined in a very different way. The Merriam-Webster dictionary defines the verb “refuse” as “to express oneself as unwilling to accept.”²⁵⁹

The differentiation between negligence and refusal within a legal context holds significant importance due to the distinct implications associated with these terms. The interpretation of these terms serves to clarify an individual’s intentions and actions, thereby influencing the understanding of their culpability and accountability. Negligence, characterized by inadvertent failure to fulfill a duty, implies a lack of intention to abstain from the task. In contrast, refusal signifies a conscious and explicit unwillingness to engage

²⁵⁶ *Neff*, 117 N.E.3d at 1271 (Ind. 2019)

²⁵⁷ Congressional Research Service, *Statutory Interpretation: Theories, Tools, and Trends*, R45153, Congressional Research Service, updated May 18, 2022. <https://crsreports.congress.gov/product/pdf/R/R45153> [<https://perma.cc/K5MU-34L8>] at 31.

²⁵⁸ NEGLECT, Black’s Law Dictionary (11th ed. 2019)

²⁵⁹ REFUSE, Merriam-Webster Dictionary (2022).

in a specific action. This distinction is crucial for accurately assessing an individual's actions and intentions within legal proceedings.

Furthermore, the differentiation between negligence and refusal plays a crucial role in determining an individual's level of culpability and blameworthiness. Negligence, often resulting from a lapse in attention, might carry less culpability than refusal, which inherently suggests an intentional rejection of responsibility. By recognizing these nuanced gradations in culpability, the legal system can allocate responsibility and consequences more fairly.

Perhaps most importantly, treating negligence and refusal as separate legal concepts ensures the precise application of laws. Legal statutes often prescribe distinct consequences for negligence and refusal. Accurate interpretation allows for appropriate consequences based on the nature of an individual's actions, preventing confusion and promoting equitable treatment under the law.

An amendment to the Removal Statute would provide a simple and effective fix to what has become a knotted confluence of case law.

3. *The Hole in the Law of Removal*

The court's decision in *State v. Neff* cemented into place the hole in the law of removal. Under current jurisprudence, judicial removal is an option only for a "general failure of official duties"²⁶⁰ or when an elected official commits a crime.²⁶¹ This problem arose in part due to the issues previously discussed but also for another reason: an overreliance on hypothetical situations.

Recall the hypothetical sheriff from *McRoberts*.²⁶² This hypothetical has been used in every single case where the supreme court has been called upon to decide whether judicial removal of an elected official is warranted.²⁶³ Instead of relying on actual precedent, the court has used a hypothetical as a standard of proof.²⁶⁴ This is a problematic standard because it leaves individuals seeking to remove an official under the Removal Statute with an unbearable burden of proof. Not even criminal cases have a burden so high. Short of proving that an official has closed their office and "refused and neglected" to do their duties, this burden of proof would allow an

²⁶⁰ *State v. Neff*, 117 N.E.3d 1263, 1271 (Ind. 2019).

²⁶¹ Ind. Const. art. 6, § 7.

²⁶² *State v. McRoberts*, 192 N.E. 428, 429 (Ind. 1934).

²⁶³ *See generally* *State v. Neff*, 117 N.E.3d 1263 (Ind. 2019); *State v. McRoberts*, 192 N.E. 428 (Ind. 1934); *State ex rel. Ayer v. Ewing*, 106 N.E.2d 441 (Ind. 1952); *Bateman v. State*, 214 Ind. 138 (1938).

²⁶⁴ *Neff*, 117 N.E.3d at 1268 (citing *McRoberts*, 192 N.E. at 430).

incompetent or inapt individual to maintain their office even in the face of a flagrant inability to perform their duties. Under *Neff*'s test, such an inept official would only have to attempt to do their duties to defeat litigation.²⁶⁵

IV. CLOSING THE GAP: A PROPOSAL TO ELIMINATE THE HOLE IN THE LAW

Three shortcomings in the current jurisprudence governing the law of judicial removal have resulted in the failure of the law to serve the people adequately. They are a lack of clarity regarding the phrase “official duties,” a lack of differentiation between “neglecting” and “refusing,” and a failure to capture ineptitude in office as a sufficient standard for judicial removal. These three shortcomings can be fixed with two simple solutions. They are amending the Indiana Constitution and the Removal Statute. This final section will propose appropriate changes to the law to capture ineptitude in office as a sufficient standard for judicial removal, clarify the interpretation of the Removal Statute, and introduce a new mechanism for replacing ousted officials.

A. Amending the Indiana Constitution to Capture all Forms of Dereliction of Duty

The first step in fixing the current problems with the jurisprudence of removal is to amend the Indiana Constitution. Article 6, Section 7 of the Indiana Constitution states, “[a]ll State officers shall, for crime, incapacity, or negligence, be liable to be removed from office, either by impeachment by the House of Representatives, to be tried by the Senate, or by a joint resolution of the General Assembly; two-thirds of the members elected to each branch voting, in either case, therefor.”²⁶⁶ As it is currently interpreted, incapacity relates only to drunkenness or inebriation.²⁶⁷ A change of verbiage is necessary to capture all forms of dereliction of duty.

The amended version of Article 6, Section 7 should read, “[a]ll State officers shall, for crime, incapacity, *ineptitude*, *misfeasance*, or negligence, be liable to be removed from office, either by impeachment by the House of Representatives, to be tried by the Senate, or by a joint resolution of the General Assembly; two-thirds of the members elected to each branch voting,

²⁶⁵ *State v. Neff*, 117 N.E.3d 1263, 1271 (Ind. 2019)

²⁶⁶ Ind. Const. art. 6, § 7.

²⁶⁷ *McComas v. Krug*, 81 Ind. 327, 334 (1882).

in either case, therefor.”²⁶⁸ Ineptitude should be defined as a “lack of skill or ability.”²⁶⁹ Furthermore, misfeasance, or lawful wrongdoings, should also be included.²⁷⁰

Simply adding these two words and interpreting them by their plain meaning makes it possible to close the gap between absolute negligence and criminal activity when attempting to remove an elected official. Rooting the change in the Constitution significantly lowers the risk of creating an unconstitutional provision. This is a critical consideration because the Constitution defines what an elected official may be removed from office for. A statute provides the *mechanism*, but in creating a new cause of action, all statutes must yield to the limiting powers of the Constitution. These two words, ineptitude and misfeasance, create a gap closer that is constitutional and effective in creating a tool that can be used to amplify the will of the people.

B. Amending the Removal Statute

The second step in fixing the current problems in the judicial removal jurisprudence is to amend the Removal Statute. The Removal Statute should be amended in two ways. First, it should be amended to provide clarity in its language. Second, it should be amended to include a mechanism for replacing ousted elected officials.

1. Amending the Removal Statute to Provide Clarity in Language

As stated previously, this Note seeks to address issues in the law of judicial removal arising primarily due to imprecise language. These problems revolve around words and phrases found in Subsection (a)(2), which states, “refusing or neglecting to perform the official duties pertaining to the officer’s office[.]”²⁷¹ Two changes to the Removal Statute should be enacted to remedy this imprecise language issue.

First, the language in Subsection (a)(2) should be changed to “refusing,[] neglecting, or *ineptly performing any duty assigned by statute* to the officer’s office[.]”²⁷² This change accomplishes two things. First, the gap which previously existed for misfeasance is closed by the addition of

²⁶⁸ Ind. Const. art. 6, § 7 (additions in italics).

²⁶⁹ INEPTITUDE, Merriam-Webster Dictionary (2022).

²⁷⁰ MISFEASANCE, Black’s Law Dictionary (11th ed. 2019).

²⁷¹ IND. CODE § 5-8-1-35(a)(2) (2023).

²⁷² *Id.* (alterations in italics).

“ineptly performing.” No longer would an elected official be able to avoid removal by merely bumbling about while in office. Second, by changing the statute’s language from “official duties” to “any duty assigned by statute,” the obligation of an elected official to do their job is heightened. This nuanced transformation accentuates the significance of all statutory obligations, thereby raising the performance bar for officials. It underscores the fundamental principle that elected representatives are beholden to fulfilling their duties and are duty-bound to execute them proficiently. This shift elucidates that inept performance across any stipulated statutory duty may warrant removal, obviating uncertainties tied to narrowly demarcated “official duties.”

Second, a definition section should be added to the statute. It should include a definition of “ineptly performing.” Ineptly performing should be defined as a standard that must be met for removal to be successful. Specifically, ineptly performing should be defined as “executing a duty in such a manner as to cause a reasonable person of similar skill and capability to doubt the ability of the other to execute a duty properly.” This objective standard is reminiscent of “beyond a reasonable doubt,” the highest legal standard in the legal system.²⁷³ Removing an elected official is a serious and delicate matter, but it should not be impossible.

Amending the Removal Statute in such a fashion provides clarity without opening the floodgates of litigation. By instituting a well-defined standard for inept performance, the proposal effectively curtails subjective interpretations, instead introducing an objective benchmark for evaluating an elected official's conduct. This strategic inclusion aims to preempt baseless claims and curtail potential legal proceedings propelled by disparate opinions on an official's efficacy. By adhering to a specific standard evocative of the esteemed “beyond a reasonable doubt” doctrine, the proposal constructs a rigorous framework that mandates a robust case for removal. This deliberative approach adroitly balances the imperative of accountability against the necessity of forestalling undue legal entanglements.

2. Amending the Removal Statute to Include a Mechanism for Replacing Ousted Elected Officials

If the Removal Statute is amended to clarify its language, it is inevitable that, eventually, an official will be removed from office. If that happens,

²⁷³ *In re Winship*, 397 U.S. 358, 364 (1970).

then what? The statute does not contemplate how to replace an elected official removed by the judiciary.

Subsection (d) should be added: "Upon the removal of an elected official, a special election in the removed official's jurisdiction should be called to elect an interim official until regular elections are held again. The special election should occur no later than 30 days after the conclusion of the removal proceedings. A special deputy may be appointed to serve in the event of an appeal or prolongment of the removal proceeding, but the deputy should not serve longer than 30 days."

The proposed subsection (d) of the amendment offers a crucial solution to bridge the gap that arises between the removal of an elected official and the subsequent regular elections. This transition period can potentially leave constituents without proper representation, disrupting governance and democratic processes. By stipulating a clear and prompt timeline for a special election, typically within 30 days after the conclusion of the removal proceedings, the proposed amendment ensures a swift replacement. This special election, aimed at selecting an interim official, emphasizes continuity of representation during this crucial interim phase. It underscores that the interim official's role is temporary, serving until regular elections can be conducted. Importantly, the amendment recognizes the possibility of appeals or extended removal proceedings and introduces measures to prevent further disruption. The limit of 30 days for a special deputy's service in such cases guarantees that the interim period is controlled and defined. Through this proposed amendment, the democratic principles of representation, accountability, and community involvement are upheld, safeguarding effective governance and the interests of the residents even in times of transition.

CONCLUSION

The Indiana Removal Statute has a rich history rooted in the Indiana Constitution and has undergone various interpretations by the supreme court. The current interpretation of the statute, as articulated by the supreme court, requires a three-factor test to be met before an elected official can be removed from office. However, the court's extreme caution in the judicial removal of elected officials suggests a need for better and clearer litigation standards. To address this issue, Part IV proposed statutory and Constitutional reform to provide clarity and predictability in the removal process. The proposed reforms aim to ensure public officials are held

accountable for their actions while protecting their due process rights. This examination of the Indiana Removal Statute highlights the importance of balancing the interests of the public and elected officials in the removal process.

