

October 6, 2023

Honorable Robin Vos
Speaker of the Wisconsin State Assembly
Room 217 West
Wisconsin State Capitol
Madison, WI 53708

Dear Mr. Speaker:

You asked me to address the Assembly's power and authority to impeach a member of the Wisconsin Supreme Court. The issue arises because Justice Janet Protasiewicz, in her recent campaign for the Court, emphasized her hostility to the Supreme Court's approval of a Republican bill for legislative reapportionment after the United States Supreme Court rejected the reapportionment plan of Governor Tony Evers that the Wisconsin Court had approved earlier.

During her campaign, candidate Protasiewicz said the electoral maps were "rigged" and "unfair".

"Let's be clear here—the maps are rigged, bottom line. Absolutely, positively rigged. They do not reflect the people in this state," she said.

"They are rigged, period. Coming right out and saying that. I don't think you could sell to any reasonable person that the maps are fair."

Candidate Protasiewicz repeatedly stated that she could not say how she would decide a case about the reapportionment maps. She also stated that she would not participate in a case in which the Democratic Party of Wisconsin was a party.

These two statements reveal that Justice Protasiewicz is conscious of the Supreme Court's ethical rules for justices and judges.

Impeachment

Section 1 of Article VII (Judiciary) of the Wisconsin Constitution establishes the law for impeachment:

Impeachment; trial.... The court for the trial of impeachments shall be composed of the senate. The assembly shall have the power of impeaching all civil officers of this state for corrupt conduct in office, or for crimes and misdemeanors; but a majority of all the members elected shall concur in an impeachment.... No judicial officer shall exercise his office, after he shall have been impeached, until his acquittal. Before the trial of an impeachment the members of the court shall take

an oath or affirmation truly and impartially to try the impeachment according to evidence; and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold any office of honor, profit or trust under the state; but the party impeached shall be liable to indictment, trial and punishment according to law.

The second sentence in Section 1 clearly provides that the Assembly has the “power of impeaching all civil officers of this state.” The term “civil officers” is not very clear but it surely includes a Supreme Court Justice.

More important, however, is that the Assembly is limited to impeaching civil officers who have engaged in “corrupt conduct in office, or for crimes and misdemeanors.” Whether “crimes and misdemeanors” need to have been committed while “in office” is not certain. My view is that “crimes” committed before a person becomes a “civil officer” in a particular office may be eligible for impeachment inasmuch as there is a comma between “corrupt conduct in office” and “crimes and misdemeanors”. If that is accurate, a criminal offense well in the past may not be appropriate justification for impeachment of an officer who has reformed and made amends.

Justice Protasiewicz is not accused of any crime or misdemeanor. Consequently, the issue is whether Justice Protasiewicz can be impeached for “corrupt conduct in office”. I do not see any evidence of “corrupt conduct” after Justice Protasiewicz took office as a member of the Supreme Court on August 1, 2023.

Impeachment is very severe and ought to be very rare. As I understand it, there has been only one impeachment of a judge (1853) in Wisconsin history, and that judge prevailed in the state senate court.

In my view, “corrupt conduct” is not a term that is open to a mere political grievance. If that were the case, legislative bodies could be trading questionable impeachments with considerable frequency.

In the absence of a “crime”, especially “in office”, impeachment for “corrupt conduct” must be based on extremely serious conduct that the public will recognize and support. These days it is obvious that the news media does not tolerate impeachment of liberal “civil officers” and will assert that any impeachment effort is strictly partisan. In reality, impeachment requires “corrupt conduct” that is so bad that it cannot be ignored.

The impeachment of Donald Trump for his telephone call to the President of Ukraine was highly partisan and didn’t have legs. If there were an impeachment of New Jersey Senator Bob Menendez, the public and most politicians would eagerly support it because Senator Menendez and his wife appear to have committed serious crimes. Of course, the evidence presented would have to be very persuasive.

Section 1 of Article VII states that before the trial of impeachment, “the members of the court [Senate] shall take an oath or affirmation truly and impartially to try impeachment according to evidence.” In my view, there is no assurance that two-thirds of the present “court” would be convinced that they are bound “impartially” by the “evidence” to vote for impeachment. Once again, the “evidence” has to persuade members of the court...and a large percentage of the public...that impeachment is legitimate. Impeachment that appears to be solely partisan will likely backfire.

Even if a Supreme Court Justice were impeached and convicted, the governor would promptly name a successor who might be more problematic.

The Constitution also provides that “no judicial officer shall exercise his [or her] office, after he [or she] shall be impeached, until his [or her] acquittal.” To impeach a justice solely to delay a case or cases will be viewed as unreasonable partisan politics.

To sum up my views, there should be no effort to impeach Justice Protasiewicz on anything we know now. Impeachment is so serious, severe, and rare that it should not be considered unless the subject has committed a crime, or the subject has committed indisputable “corrupt conduct” while “in office”.

Supreme Court Rules

Justice Protasiewicz is not free from professional oversight. She may be reviewed by the Wisconsin Judicial Commission on her ethical responsibilities in deciding cases.

Justice Protasiewicz will have to review Chapter 60 of Supreme Court Rules (SCR) before deciding how to act on certain cases, especially cases involving reapportionment. Supreme Court Rules are nonpartisan, and the legislature played no part in developing them.

In the Preamble to Chapter 60, the third paragraph states:

When the text of a rule uses "shall," "shall not" or "may not," it is intended to impose binding obligations the violation of which can result in disciplinary action. For a judge's conduct to constitute a violation of a rule, the judge must have known or reasonably should have known the facts giving rise to the violation.

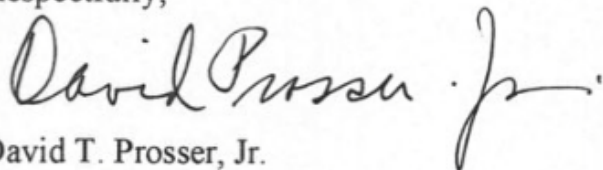
The use of "should" or "should not" in the rules is intended to encourage or discourage specific conduct and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

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The most relevant provisions in Chapter 60 are SCR 60.03; SCR 60.04(1)(b), (e); (4)(a); SCR 60.05(1)(b); and SCR 60.06. Most of these provisions are binding.

Ignoring these rules is a serious risk for Justice Protasiewicz.

Respectfully,

A handwritten signature in black ink that reads "David Prosser Jr." with a stylized flourish at the end.

David T. Prosser, Jr.