Legislative Plumbing: Amending Iowa's Municipal Utility Board Statute to Include a For-Cause Removal Requirement for Utility Board Trustees

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ABSTRACT: A 2014 Iowa district court ruling, Keltner v. City of Oskaloosa, *revealed a shortcoming in the Iowa statutes governing the removal of utility board members. The court ruled that the Iowa Code allows a mayor to remove municipal utility board members at will. Under Iowa's home rule regime, the Iowa Code governs both the ability of cities to establish, maintain, and operate city utilities as well as the ability to create boards to manage these utilities. The Iowa Code structures utility boards in a way that insulates boards' operations from political pressure and influence. For example, it establishes staggered six-year terms for utility board members and prohibits city officers from also serving on a utility board. At the same time, however, the Code fails to prevent a city executive from exercising control through an unrestricted removal power. The Code's failure to restrict the mayor's power to remove utility board members is inconsistent with the independent nature of utility boards and the insulating provisions that make up the Iowa Code's statutory scheme. The Iowa Legislature should amend the Iowa Code to include a for-cause requirement for the removal of city utility board members. A for-cause requirement will be more consistent with the insulating provisions in the Iowa Code and will do more to support independent utility board action.*

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I. INTRODUCTION

States confer legal status on cities, towns, and other municipal corporations primarily to meet local needs and provide services to their citizens.[1] One way that state legislatures allow municipalities to serve their citizens is by authorizing municipalities to establish public utility services.[2] In

1. *See* 1 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 1:59 (3d ed., rev. vol. 2010) ("The municipal corporation is a public institution . . . designed to promote the common interests of the inhabitants in their organized capacity as a local government. It acts for the inhabitants residing within its boundaries in giving community service . . . ."). Generally, the term "municipality" encompasses counties, cities, and towns; however, in this Note, I use the term and its variations, including "municipal corporation" and "municipal," to refer only to cities as defined in the Iowa Code. *See* IOWA CODE § 362.2(4) (2015) ("'City' means a municipal corporation, but not including a county, township, school district, or any special-purpose district or authority.").

2. *See, e.g.*, IOWA CODE § 388.2 (establishing the procedures for establishing a city utility); S.D. CODIFIED LAWS § 9-39-6 (2004) (same); TENN. CODE. ANN. § 7-52-107 (2011) (same).

conjunction with establishing a public utility, municipalities can delegate management of the utility to a city board.[3] In Iowa, the creation of a board to oversee the utility is an integral component of establishing a public utility in the first place.[4]

A recent case in Iowa's Eighth Judicial District revealed an issue in the law governing the relationship between public utility boards and municipal governments. The court in *Keltner v. City of Oskaloosa* held that, so long as procedural notice requirements are met, a mayor can remove utility board members at any time and for any reason.[5] The court upheld this broad at-will removal power even though other provisions in the Iowa Code suggest that the legislature intended that utility boards enjoy independence from municipal executive power and insulation from political influence and pressures.[6]

Removal is often a contested process, involving issues of separation of powers and the structure of government.[7] These issues are most visible at the highest tiers of the federal government, but also can (and do) arise at the municipal level.[8] Both state and city law shape municipal government structure and removal power within municipalities. The municipal removal power poses questions about the structure of local governments and the powers of their officials that are similar to the questions that federal executive removal power poses about federal governmental structure and the powers of federal officials.

This Note analyzes the reasoning and ruling of the Iowa district court in the *Keltner* case and finds the current statutory framework for removal of municipal utility board trustees wanting. Part II summarizes the district court's decision in *Keltner*, examines the legal framework governing the court's ruling, and shows how that framework guided and determined the court's decision. Part III scrutinizes the Iowa statutes governing the relationship between cities and their utility boards and demonstrates why a mayor's power to remove a utility board trustee at will frustrates the overall

3. *See* 73B C.J.S. *Public Utilities* § 152 (2015) ("The function and purpose of a utility [board] is in general to supervise, regulate, and control public utilities within its authority.").

4. IOWA CODE § 388.2.

5. Keltner v. City of Oskaloosa, No. CVEQ087684, slip op. at 8 (Iowa Dist. Ct. July 30, 2014).

6. *See infra* Part III.

7. This is especially so at the federal level. *See generally* Jack M. Beerman, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467 (2011) (analyzing appointment and removal as a medium to explore issues of separation of powers under the Constitution); Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Séance*, 60 TENN. L. REV. 841 (1993) (reexamining the appointment and removal powers as applied in the federal government); Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779 (2006) (examining removal power as it relates to each branch of the federal government).

8. Albeit a much smaller executive than the President, a city mayor is an executive nonetheless. A mayor's removal power thus prompts questions concerning the extent (and limits) of that power that are similar to the questions about the President's removal power.

statutory scheme, as the Iowa Code contains other provisions that insulate utility boards from city-government interference. Part IV offers possible solutions to this problem and concludes that the best solution is for the Iowa Legislature to amend section 388.3 of the Iowa Code to require that utility board trustees be removable only for cause.

II. *KELTNER* AND THE LEGAL FRAMEWORK FOR REMOVING IOWA UTILITY BOARD MEMBERS

This Part surveys the legal framework governing the removal of municipal utility board members. After considering the facts of *Keltner*, this Part shows how that framework affected the district court's ruling. Specifically, this Part addresses home rule in Iowa, from its origins to the modern regime (which establishes the Iowa Code as the supreme source of Iowa municipal government structure); the Iowa Code statutes governing public utility boards and removal of city officials; and who qualifies as a city officer under the Iowa Code's general removal statute.

A. KELTNER V. CITY OF OSKALOOSA

In the spring of 2014, the mayor of the City of Oskaloosa, Iowa ("the City"), decided to remove Errin Keltner, one of three trustees on the board of the Oskaloosa Municipal Water Department ("Water Department"), from his position.[9] The events leading to the removal began in 2012 when the City hired a management firm to "determine if [sic] combining duties between the water department and city staff could help increase productivity and cut costs."[10] The firm completed its study the following March and submitted a detailed 44-page report to the City and the Water Department, highlighting the "potential for cost savings and/or efficiencies through changes in current operations or enhanced collaboration and communication between the [two entities]."[11] The recommendations included improving communication

9. *Mayor Removes Water Board Trustee*, COMM. RES. INST. WILLIAM PENN U. (Mar. 28, 2014, 1:36 PM), http://www.criwmpennu.net/component/content/article/37-weekly-news-pkg/2927-mayor-removes-water-board-trustee.

10. *City Council to Study Water Department*, COMM. RES. INST. WILLIAM PENN U. (Nov. 20, 2012, 9:15 AM), http://www.criwmpennu.org/component/content/article/39-news-story/2071-city-council-to-study-water-department. The study "review[ed] . . . current operational costs and metrics, benchmark[ed] . . . similar systems and review[ed] . . . local and national best practices" of city and water department interaction. THE PFM GROUP, SHARED SERVICES STUDY: CITY OF OSKALOOSA AND THE OSKALOOSA MUNICIPAL WATER DEPARTMENT 4 (2013), http://www.oskaloosaiowa.org/DocumentCenter/View/324. The study emphasized that looking at national trends and practices was important due to "improvements in technology and a greater understanding of opportunities for economies of scale and integration of information, shared services and similar approaches to merging duties and functions." *Id.* It noted that "[a]round the nation, local governments and their subsidiary or component units have been able to collectively reduce costs and/or improve operations through enhanced collaborative efforts." *Id.*

11. THE PFM GROUP, *supra* note 10, at 4.

between the City and Water Department;[12] improving "joint budget and planning efforts;"[13] sharing software-licensing costs and other equipment;[14] sharing building locations;[15] and remaining open to future opportunities for privatization of the Oskaloosa water utility.[16] In April 2013, the City and the Water Board of Trustees ("the Board"), which runs the Water Department, met to discuss implementing eight of the recommendations in light of the combined $320,000 the City and Water Department would purportedly save.[17]

In the following months, neither the City nor the Water Department acted on the recommendations. Other events soon revealed increasing tensions between the City and the Water Department and foreshadowed conflict on the horizon. In the fall of 2013, the Water Department's general manager (after comparing his salary to those of general managers in similar communities) requested[18] a raise and received a 25% salary increase.[19] The Board also approved a "monthly . . . appreciation lunch" for Water Department employees.[20] As the City was trying to cut costs, the Water Department was actually increasing them. The Oskaloosa City Council ("City Council") disapproved of these changes. One councilmember even suggested that the City faced a dichotomous choice: either the Water Department and the City could remain separate and frustrate the City's goal of cutting costs, or the voters of Oskaloosa should be given the chance to vote on the consolidation of the Water Department into the City so that the City could "start saving some money."[21]

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12. *Id.* at 33.

13. *Id.* at 34.

14. *Id.* at 39.

15. *Id.* at 40.

16. *Id.*

17. *Shared Services Study: City Council and Water Utility Board of Trustees Analyze Possible Changes*, COMM. RES. INST. WILLIAM PENN U. (Apr. 12, 2013, 11:24 AM), http://criwmpennu.org/component/content/article/37-weekly-news-pkg/2308-shared-services-study-city-council-and-water-utility-board-of-trustees-analyze-possible-changes. The recommendation to look for privatization opportunities was vetoed at this meeting. *Id.*

18. Eduardo Zamarripa, *City Council Discusses Possible Water Department Merger*, OSKALOOSA NEWS (Oct. 23, 2013), http://www.oskynews.org/?p=59684.

19. Charlie Comfort, *General Manager Gets 25 Percent Raise*, OSKALOOSA HERALD ONLINE (Nov. 30, 2013, 8:00 AM), http://www.oskaloosa.com/news/local_news/general-manager-gets-percent-raise/article_fb68d381-eb87-583c-b779-d1affa4183d8.html.

20. Zamarripa, *supra* note 18. The Board planned to fund these lunches by selling scrap metal. *Id.*

21. *Id.* As with many dichotomies, this was a false one. Nothing would have prohibited the council from tabling the recommendations for a time and then proposing their adoption again after the board membership had changed, with members friendlier to adoption of the report's recommendations. It would not have taken long to reach this point. One of the three trustees already seemed to be favorably inclined to the City's position, having voted against the litigation that ensued. *See infra* text accompanying note 29; *see also* Ken Allsup, *Water Board Votes to No Longer Pursue Keltner Removal*, OSKALOOSA NEWS (Aug. 14, 2014), http://www.oskynews.org/?p=65385

At the November City Council meeting, the Board of Trustees expressed lingering skepticism of the management firm's recommendations—the Board did not view the study as favorably as did the City.[22] After further discussing the matter, both sides punted decision-making on the recommendations until the next meeting, scheduled for February 2014.[23] By the February meeting, the City felt that it could not work with the Water Board as then constituted and still successfully implement the cost-cutting measures; so, in March 2014, the mayor of Oskaloosa removed Errin Keltner from the position of Water Board trustee.[24]

In a letter to Keltner, the mayor justified his decision by citing "the lack of communication and cooperation . . . in trying to make our operations more efficient and effective."[25] The City Council approved the removal after a hearing held pursuant to the Iowa Code.[26] At the hearing, the mayor reiterated that Keltner's removal was based on the lack of progress in improving communications and efficiency and not on any notion that Keltner "was doing anything illegal or immoral."[27]

Keltner decided to challenge the removal action, and the Water Board gave him its blessing and support.[28] As the Water Department and the City

("[One trustee] had voted against the petition that initially set the lawsuit in motion."). During the course of the litigation, another trustee's term naturally expired, and the mayor appointed someone else to fill his place. Allsup, *supra*. The mayor could have just waited until this expiration to appoint a trustee more inclined to pursue implementation of the report's recommendations.

22. *See* Eduardo Zamarripa, *City Council and Water Board Hold Shared Services Meeting*, OSKALOOSA NEWS (Nov. 13, 2013), http://www.oskynews.org/?p=60166. The general manager of the Water Department remarked:

> You go through the recommendations and it talks about eliminating my staff. . . . I have awesome employees, but to sit here and tell you that they aren't scared to death that they're losing their jobs because of this study, I'd be lying to you . . . . [I]t's been a very stressful year because of that. And every time we think that it's started to, kind of, smooth out, and we can move forward, there's a hiccup somewhere and all of this is thrown in our face again.

Id.

23. *Id.*

24. Ken Allsup, *Oskaloosa Water Protests Removal Order*, OSKALOOSA NEWS (Mar. 28, 2014), http://oskynews.org/?p=62741. The mayor had actually appointed Keltner in 2012. *Mayor Removes Water Board Trustee*, *supra* note 9.

25. Allsup, *supra* note 24. Keltner's reluctance to implement the recommendations seems to be the chief reason why the mayor selected him from among the three trustees for removal.

26. Ken Allsup, *Council Votes to Remove Water Board Trustee*, OSKALOOSA NEWS (Apr. 24, 2014), http://www.oskynews.org/?p=63308.

27. *Id.*

28. Ken Allsup, *Osky Water Backs Board Member*, OSKALOOSA NEWS (Apr. 21, 2014) [hereinafter Allsup, *Osky Water Backs Board Members*], http://www.oskynews.org/?p=63236. Later, a stay was issued by the district court to last until the final adjudication of the issue. Ken Allsup, *Stay Granted in Water Board Trustee Removal*, OSKALOOSA NEWS (May 21, 2014), http://www.oskynews.org/?p=63903 ("At this stage, and with the noted uncertainty as to the status of the law in this area, it is difficult to know whether plaintiff Keltner is 'likely to prevail' in these

prepared for the ensuing litigation, each party's view of the relationship between the Water Department and the City took center stage. On the one hand, the Water Department maintained that it and its Board enjoyed independence from the City and expressed a limited view of the mayor's removal power—as one trustee put it, "I look at it as a business; we're running a business . . . . [Decisions] are made by a business, not a political body that has constituents and other folks they need to please."[29] He expressly worried about the precedent that the mayor would set by "continually selecting to remove and add people."[30]

The City and the mayor, on the other hand, took a more expansive view of the mayor's removal power: "I'm the person who's suppose [sic] to make these appointments in the first place, with the confirmation of the [city] council . . . . We appoint them, [and] we are also able to take them off . . . . The responsibility for an appointment doesn't end as soon as you make that appointment."[31]

At the July 2014 trial, both parties' arguments centered on their interpretation of the relevant portions of the Iowa Code. The attorney for Keltner and the Water Department, the plaintiffs in the case, argued that the Iowa Code did not allow the mayor to remove Water Board trustees because the Code's framework for the structure of utilities makes the Water Board and Water Department independent from the City.[32] The plaintiffs asserted that trustees could only be removed for cause.[33] The City countered, arguing that nothing in the Code isolates the Water Board membership from interference by the City.[34] Because the Water Department was not as independent from the City as the Board believed, there was no for-cause requirement, and because the mayor and City Council followed all the statutory requirements for removal, the City argued that the plaintiffs' claim should fail.[35] After weighing each side's arguments and analyzing the statutory framework involved, the

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proceedings. . . . The prudent course for the court at this juncture is to order a stay of the removal . . . during the pendency of these proceedings . . . .").

29. Ken Allsup, *Oskaloosa Water to File Petition*, OSKALOOSA NEWS (Apr. 26, 2014), http://www.oskynews.org/?p=63367; *see also Mayor Removes Water Board Trustee*, *supra* note 9 ("[A trustee is] not a political position[—]it's strictly running a business. . . . To be able to remove one of those people at the whim of a city official defeats the whole purpose. Then it ceases to become independent and is then tied to the political end of a city council.").

30. Allsup, *supra* note 29.

31. Allsup, *supra* note 24.

32. *See Oskaloosa Water and City of Oskaloosa Square Off in Court*, COMM. RES. INST. WILLIAM PENN U. (July 18, 2014, 1:14 PM), http://www.criwmpennu.org/home/37-weekly-news-pkg/3119-oskaloosa-water-and-city-of-oskaloosa-square-off-in-court ("[T]he whole purpose of the independence of a utility was, from the outset, to insulate the water board and the water utility . . . .").

33. *Id.*

34. *Id.*

35. *Id.*

district court held for the City.[36] The court shot down the plaintiffs' argument centered on its independence from the City.[37] The court ruled that "there [was] no evidence of illegality in remov[ing] Keltner from his appointed position on [the Water Board]. The path chosen by the Mayor and the City Council of Oskaloosa w[as] not illegal, and the Mayor and the City properly exercised their authority."[38]

Due to high litigation costs (the combined legal fees totaled over $80,000)[39] and the fees' impact on the Water Department's budget, the remaining trustees decided against appealing the trial court's decision.[40] While the decision to not appeal is understandable from a financial standpoint—the preservation of one utility board trustee's continued service weighed against the probable monetary and community costs of continued litigation—it means that the Iowa Supreme Court never tested the trial court's final ruling. Therefore, the ability of an Iowa mayor to legally remove the trustees of his or her city's utility board[41] remains uncertain outside of the Eighth Judicial District. This is unfortunate for cities pondering their own options relating to their utility boards; local news reported that the case "gain[ed] considerable interest from various city and municipal boards statewide, who have not had clear direction in the matter for nearly a century."[42] Despite this lack of finality, *Keltner* nevertheless highlighted the absence of a for-cause requirement in the statute governing the removal of city utility board members.

B. HOME RULE AND IOWA CITIES

In *Keltner*, state law rather than city law formed the legal backbone of the court's ruling. The City's ordinances played no part because of Iowa's system of home rule. The concept of home rule concerns the ability of cities to manage their own affairs and make their own laws and ordinances.[43] It

36. Keltner v. City of Oskaloosa, No. CVEQ087684, slip op. at 9 (Iowa Dist. Ct. July 30, 2014).

37. *See id.* at 8 ("[N]othing within the Iowa Code . . . suggests that the Water Board has the type of independence Plaintiffs assert it has.").

38. *Id.* at 9.

39. Allsup, *supra* note 21. The citizens of Oskaloosa ultimately paid the bill for both parties—the city's in their capacity as taxpayers, and the Water Board's in their capacity as consumers. *Id.* What began with a study meant to hopefully save money by cutting costs ironically ended up costing citizens more, at least in the short term.

40. *Id.*

41. *See* IOWA CODE § 388.1 (2015) (applying to "*utility* board" members (emphasis added)).

42. *Oskaloosa Water and City of Oskaloosa Square Off in Court*, *supra* note 32.

43. *See* 1 MCQUILLIN, *supra* note 1, § 1:44 ("Municipal home rule in its broadest sense means the power of local self-government."); *see also* George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 20 STETSON L. REV. 5, 29 (1990) ("The essence of home rule is the promotion of local interests based on the premise that municipal citizens are capable of self-government.").

encompasses "the selection by the city . . . of its charter" and "the power to determine what things the local community desires to do."[44]

Iowa's earliest home rule statute was enacted in 1851 and predated the state's constitution.[45] The statute enabled cities to "obtain special charters from the . . . legislature" for their own self-government until the adoption of the 1857 constitution ended this practice.[46] The Iowa Constitution and the judicial opinions that followed its adoption gradually whittled away at the power of cities to make their own laws and order their own affairs until the shift reached its "culminat[ion] in 1868 with Dillon's Rule."[47] Dillon's Rule effectively prohibited cities from acting in any way unless the state legislature expressly allowed them to do so.[48] Dillon's Rule was the law in Iowa for a century until a 1968 amendment to the state constitution returned Iowa to home rule, at least in principle.[49] The amendment explicitly proclaimed home rule for cities and substantively rejected Dillon's Rule.[50]

While the rigid principles of Dillon's Rule no longer restrict Iowa cities from taking initiative in making their own rules, municipalities still operate within constitutionally set boundaries. Under the Iowa Constitution, municipal laws may not be "inconsistent with the laws of the General Assembly," and municipalities may not levy taxes "unless expressly authorized by the General Assembly."[51] At first glance, these provisions do not seem

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44. 1 MCQUILLIN, *supra* note 1, § 1:44.

45. Paul Coates et al., *Iowa*, *in* HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 149, 149 (Dale Krane et al. eds., 2001).

46. *Id.*

47. *Id.* Named for the justice who wrote the opinion that established it, Dillon's Rule states that municipal corporations only have the powers "granted in express words" and "those necessarily implied or necessarily incident to the powers expressly granted." Merriam v. Moody's Ex'rs, 25 Iowa 163, 170 (1868).

48. *See* Jill Welch, *Local Government—Home Rule Doctrine and State Preemption—the Iowa Supreme Court Resurrects Dillon's Rule and Blurs the Line Between Implied Preemption and Inconsistency:* Goodell v. Humboldt County, *575 N.W.2d 486 (Iowa 1998)*, 30 RUTGERS L.J. 1548, 1551 (1999) ("By the early 1870s, state governments had total control over municipalities."). As with many aspects of American law, the railroad played a major role in the evolution of law restricting municipal authority. *See id.* at 1550–51 ("In response to the panic of 1837, . . . several states passed constitutional provisions prohibiting states from issuing railroad bonds. Thus, railroads turned to municipal bonds as a source of revenue. The involvement of local officials in fraudulent schemes and unnecessary, ill-conceived public improvements which nearly bankrupted many cities gave force to the argument that the state should have control over municipalities and led state legislatures to pass many laws regulating local affairs." (footnote omitted)).

49. IOWA CONST. art. III, § 38A ("Municipal corporations are granted home rule power . . . .").

50. *Id.* ("The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words *is not a part of the law of this state*." (emphasis added)).

51. *Id.*; *see also* SUSAN CROWLEY, LEGISLATIVE SERVS. AGENCY, LEGISLATIVE GUIDE TO IOWA LOCAL GOVERNMENT INITIATIVE AND REFERENDUM 2 (2000) ("[Home rule] give[s] cities . . . authority to determine their own local affairs and government in a manner which is not inconsistent with state statute . . . ."); GUIDE TO THE IOWA CITY HOME RULE CHARTER 2 (2015)

overly restrictive or unreasonable. However, an entire title of the Iowa Code pertains directly to local government,[52] and a significant portion of that title governs cities.[53] Cities, therefore, continue to operate in the long shadow of the state legislature.[54] Furthermore, the Iowa Supreme Court gives state legislation primacy over city ordinances, even going so far as to restrict cities from passing more restrictive ordinances.[55]

An in-depth analysis of the nuances, complexities, and problems with Iowa's home rule is beyond the scope and purpose of this Note; however, the general operation of home rule in Iowa is important to understanding how Iowa courts use municipal laws when necessary in their decisions. In accordance with the Iowa Constitution, a city can pass any ordinance that does not conflict with the letter[56] or the spirit[57] of Iowa state statutes. When approaching cases implicating concepts of home rule, Iowa courts begin with the text of the relevant state statute.[58] When a state statute is silent on an issue or procedure, courts look to city codes and ordinances that essentially fill the gap left by the state statute.[59] For example, a statute silent on who has the power to appoint members of a municipal board of adjustment may be supplemented by a city ordinance vesting that power in the mayor.[60] Having used the city's ordinance for guidance and clarification, courts proceed by applying the supplemented state statute in its analysis and ruling.[61]

Some have argued that a long line of Iowa Supreme Court decisions has left "[t]he current state of municipal home rule authority in Iowa . . . substantially unclear."[62] What does seem to be clear, however, is that the Iowa

("Home rule is the broad, although not unlimited, constitutional grant of power to every city in Iowa authorizing self-governance.").

52. IOWA CODE tit. IX (2015).

53. *Id.* §§ 362–420.

54. *See* Coates, *supra* note 45, at 148 ("For cities [in Iowa], the promise of home rule has been disappointing because it has not resulted in any significant independence from state interference.").

55. *See* Jay P. Syverson, Note, *The Inconsistent State of Municipal Home Rule in Iowa*, 57 DRAKE L. REV. 263, 299 (2008) ("[A 1998] Iowa Supreme Court[] ruling . . . seemed to greatly restrict—if not ban altogether—a municipality's ability to adopt local regulations more stringent than state law."); Welch, *supra* note 48, at 1563–64 ("[A 1998] Iowa Supreme Court majority decision . . . threatens to turn the clock back to an era when Dillon's Rule governed . . . .").

56. *See* IOWA CONST. art. III, § 38A (granting municipalities power and authority consistent with the Iowa Code).

57. *See* Welch, *supra* note 48, at 1555 (analyzing an Iowa Supreme Court case, *Goodell v. Humboldt County*, 575 N.W.2d 486 (Iowa 1998), that held a city ordinance that was more stringent than the Code was inconsistent with the Code and thus invalid).

58. *See, e.g.*, Waddell v. Brooke, 684 N.W.2d 185, 191 (Iowa 2004).

59. *See, e.g.*, *id.* at 191–92.

60. *Id.*

61. *See id.* at 192.

62. Syverson, *supra* note 55, at 309. Iowa Supreme Court jurisprudence, with its express and implied standards, can produce varying results, with some local ordinances surviving review despite their stringency and others failing. *See id.* at 309–10.

Code controls when it expressly enunciates standards and procedures. Local ordinances, to the contrary, are preempted in these situations, either expressly or impliedly.[63] Under this system, the city ordinances either mimic the Iowa Code's mandates[64] or fill the gaps left to the city's discretion.[65] In either form, state statutes are the controlling source of law when courts resolve issues of municipal law and procedure. City ordinances become important in courts' analyses only so far as the Iowa Code is silent on the issue before the court.

C. *IOWA'S CITY UTILITIES AND DEFAULT REMOVAL STATUTES*

In accordance with the Iowa Constitution, if cities operate their own public utility systems, they must do so in accordance with Chapter 388 of the Iowa Code, which encompasses and controls city-owned utilities.[66] Chapter 388 first provides key definitions and delineates the procedure for establishing a city-owned utility. Section 388.1(2) defines "utility board" as "a board of trustees established to operate a city utility."[67] Section 388.2 provides the procedure for establishing city-owned utilities with a board of either three or five members.[68] A city council can establish a city-owned utility by passing a proposal, which the city's voters must then approve during an election.[69] The next provisions detail characteristics of a city-owned utility. Section 388.3 of the public utility statute expressly vests the power to appoint members of

63. *See generally* Welch, *supra* note 48 (arguing that the 1998 Iowa Supreme Court case *Goodell v. Humboldt County* essentially revived Dillon's Rule by finding that implied, rather than express, preemption invalidated a city regulation).

64. *Compare* IOWA CODE § 388 (2015) (discussed, *infra*, in the text accompanying notes 66–72), *with* OSKALOOSA, IOWA, CODE OF ORDINANCES §§ 2.80.010–.030 (2015), https://www.municode.com/library/ia/oskaloosa/codes/code_of_ordinances?nodeId=TIT2ADPE_CH2.80WAUTBOTR ("The purpose of this chapter is to provide for the operation of the municipally owned water utility by a board of trustees. . . . Pursuant to an election . . . , the management and control of the municipally owned waterworks was placed in the hands of a board of trustees. . . . The mayor shall appoint, subject to the approval of the council, three persons to serve as trustees for staggered six-year terms. No public officer or salaried employee of the city may serve on a utility board."). For further examples of municipally owned utilities established under section 388 of the Iowa Code, see BURLINGTON, IOWA, CODE OF ORDINANCES §§ 23.01–.03 (2003); DENISON, IOWA, CODE OF ORDINANCES §§ 24.01–.03 (2009); HARLAN, IOWA, CODE OF ORDINANCES §§ 25.01–.03 (2006); MARION, IOWA, CODE OF ORDINANCES §§ 24.01–.03 (2015); NEW HAMPTON, IOWA, CITY CODE & ORDINANCES §§ 26.1–.3 (1999); PERRY, IOWA, CODE OF ORDINANCES §§ 25.01–.03 (2001).

65. *See, e.g.*, HARLAN, IOWA, CODE OF ORDINANCES § 25.03 (2006) (prohibiting trustees from serving more than two consecutive terms); PERRY, IOWA, CODE OF ORDINANCES § 25.03 (2001) (designating the "first day of April following appointment" as the starting date for appointees to the board).

66. *See* IOWA CODE §§ 388.1–.11; *see also supra* text accompanying notes 49–55.

67. IOWA CODE § 388.1(2).

68. *Id.* § 388.2(1)(d).

69. *See generally id.* § 388.2.

the utility board in the mayor "subject to the approval of the [city] council."[70] This statute further provides that board members serve "staggered six-year terms" and prohibits those already serving in a public office or employed by the city from simultaneously "serv[ing] on a utility board."[71] Section 388.4 gives utility boards the ability to "be a party to legal action" and enables boards to "exercise all powers of a city in relation to the city utility," with a few exceptions.[72] Notably, chapter 388 lacks a provision governing the removal of utility board members.

Although chapter 388 lacks a removal provision, the Iowa Code addresses removal powers in title IX. Title IX contains a default removal statute, section 372.15, which vests removal power in the person or entity with appointment power and establishes the procedure for removal of people serving in city office by written order.[73] The Iowa Supreme Court has clarified who retains the appointing power when statutes like section 388.3 attach provisions that subject appointment to approval by a city council: the mayor retains the "appointing power" under the statute because "a requirement of confirmation of initial appointment does not make the confirming body the appointing power."[74] Section 372.15 also requires, among other procedures, that "[t]he order shall give the reasons" for the removal.[75] The Iowa Supreme Court has expressly declared that the requirement to "give the reasons" is not a for-cause requirement.[76] Therefore, the requirement is met so long as the order states the basis for the removal.

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70. *Id.* § 388.3.

71. *Id.* A possible interpretation of this provision is that utility board trustees are not city officers. However, the substance of a position, rather than its title, determines whether or not a person is a public officer. *See infra* Part II.D. It would be counterintuitive if a person were disqualified from serving on a utility board for being a public officer when the person is a public officer only because of the position on the board. The Iowa Supreme Court has never elaborated the matter. The State Office of the Attorney General has, to some extent, spoken on the issue. *See* 41ST BIENNIAL REP. IOWA ATTORNEY GEN. 623 (1976) ("[W]e are of the opinion that a member of a city council cannot also be a member of a utility board."); 23D BIENNIAL REP. IOWA ATTORNEY GEN. 538 (1940) ("It is . . . our conclusion that a member of the city council may not at the same time hold the office of trustee of the municipally owned [utility]."). These advisory opinions from the Iowa Attorney General's Office suggest that the provision exists more to maintain some measure of independent membership on utility boards than anything else.

72. IOWA CODE § 388.4. The exceptions include restrictions on levying taxes, "pass[ing] ordinances or amendments," and issuing bonds. *Id.*

73. *Id.* § 372.15.

74. LaPeters v. City of Cedar Rapids, 263 N.W.2d 734, 737 (Iowa 1978).

75. IOWA CODE § 372.15 .

76. Waddell v. Brooke, 684 N.W.2d 185, 190 (Iowa 2004); Bennett v. City of Redfield, 446 N.W.2d 467, 473 (Iowa 1989); Scott v. City of Waterloo, 180 N.W. 156, 156 (Iowa 1920). *Scott* interpreted a predecessor statute to section 372.15 with essentially the same substantive notice requirement; the court determined that the earlier statute did "not require that removal from office shall be for cause, but only that the reasons therefor shall be made a part of the written order of removal." *Scott*, 180 N.W. at 157. The Court reaffirmed this interpretation after section 372.15 came into effect. *Bennett*, 446 N.W.2d at 473 ("We find no reason to alter the standard

Section 372.15 contains a provision giving the state and city flexibility in delegating the removal power.[77] According to Iowa Supreme Court rulings, however, because cities may not adopt laws that alter the other procedural requirements of the statute, it seems that this allowance only extends to deciding who may remove a person from public office.[78] A new state law, however, can alter the default provisions of section 372.15. For example, if Chapter 388 of the Iowa Code provided that members of a city board are removable only for cause, then it (rather than section 372.15's default rule) would guide a court's analysis.[79]

D. THE PUBLIC OFFICER TEST AND ITS EXPANSION UNDER WADDELL V. BROOKE

Iowa's general removal statute declares that, "[e]xcept as otherwise provided by state or city law, all persons appointed to city office may be removed by the officer or body making the appointment."[80] The applicability of this statute hinges on the determination of whether the position in question is that of a "city office." In early cases where the nature of a person's office was important to the determination of the case, the Iowa Supreme Court utilized the term "public officer" and initially enunciated a six-factor test for whether a person was a public officer.[81]

The facts in *State v. Spaulding* required the court to determine whether the treasurer of a pharmacy commission was a public officer within the scope of the state's embezzlement statute.[82] The *Spaulding* court seemed to limit its

articulated in *Scott*."). This distinction makes logical sense since other provisions of the Iowa Code expressly require for-cause removal. *See, e.g.*, IOWA CODE § 414.8 (requiring that the removal of city board of adjustment members be for cause).

77. *See* IOWA CODE § 372.15 ("*Except as otherwise provided by state or city law*, all persons appointed to city office may be removed by the officer or body making the appointment . . . ." (emphasis added)).

78. *See* Berent v. City of Iowa City, 738 N.W.2d 193, 208 (Iowa 2007) ("Pursuant to this provision, a city has the option of vesting removal authority in an entity or person other than the original appointing authority. Section 372.15, however, is qualified by the provision 'but every such removal . . . .' The very specific 'but every such removal' language in Iowa Code section 372.15 is designed as a limitation on the city's power to remove public officers."). The *Berent* court went on to hold that the city was not allowed to change the procedural requirements of the statute. *Id.* at 208–10.

79. *See Waddell*, 684 N.W.2d at 192 (using section 414.8, rather than section 372.15, of the Iowa Code in analyzing the removal of a member of a city board of adjustment). The procedural provisions of section 414.8 otherwise are quite similar to the requirements of section 372.15, guaranteeing a public hearing and some sort of written document notifying the member of the removal. *Compare* IOWA CODE § 414.8 ("Members shall be removable . . . upon written charges and after public hearing."), *with id.* § 372.15 ("[E]very such removal shall be by written order. . . . [T]he person removed . . . shall be granted a public hearing before the council . . . .").

80. IOWA CODE § 372.15; *see also supra* text accompanying notes 73–78.

81. State v. Spaulding, 72 N.W. 288, 290 (Iowa 1897).

82. *Id.* at 288.

holding to the facts before it;[83] however, nearly 50 years later, the Iowa Supreme Court expanded the use of *Spaulding*'s public officer test to new facts in *Hutton v. State*.[84] *Hutton* required the court to determine whether a state director of conservation was a public officer under the relevant statute.[85] The *Hutton* court recast the test as the current five-factor version used to determine whether or not a person is a public officer:

> (1) [The position] must be created by the constitution or legislature or through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government; (3) [its] duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law . . . ; [and] (5) the [position] must have some permanency and continuity, and not be only temporary and occasional.[86]

In subsequent years, the court employed the *Hutton* factors in many different cases, holding that a "county superintendent of schools and . . . state superintendent of public instruction,"[87] a city zoning inspector,[88] and the Secretary of the Iowa Board of Pharmacy Examiners[89] were all public officials. The court made these rulings in a variety of legal contexts including criminal law,[90] employment compensation,[91] and the awarding of retirement benefits.[92]

In *Waddell v. Brooke*, the Iowa Supreme Court applied the public officer test to a member of a municipal board for the first time.[93] The plaintiff, Waddell, had served several stints on Davenport's Board of Adjustment since 1986, with "[e]ach appointment . . . confirmed by the city council."[94] Brooke, who had defeated Waddell in a municipal primary and was subsequently elected mayor, wrote to Waddell soon after taking office and asked him to

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83. *See id.* at 290 ("[W]e think the following rules may properly be laid down for determining whether one is a public officer, *within the contemplation of our statute relating to embezzlement of such officers* . . . ." (emphasis added)).

84. Hutton v. State, 16 N.W.2d 18, 19 (Iowa 1944).

85. *Id.*

86. *Id.* The *Hutton* Court crafted this test based on the *Spaulding* decision. *Id.* The *Spaulding* test differed from the current test as outlined in *Hutton* only in its length of explanation, suggesting an oath of office supported a finding that a person was a public officer, and its seemingly limited applicability. *See Spaulding*, 72 N.W. at 290.

87. Francis v. Iowa Emp't Sec. Comm'n, 98 N.W.2d 733, 736 (Iowa 1959).

88. State v. Taylor, 144 N.W.2d 289, 293 (Iowa 1966).

89. Vander Linden v. Crews, 205 N.W.2d 686, 687–88 (Iowa 1973).

90. *Taylor*, 144 N.W.2d at 290–91.

91. *Hutton*, 16 N.W.2d at 18–19.

92. *Francis*, 98 N.W.2d at 734–35.

93. Waddell v. Brooke, 684 N.W.2d 185, 192 (Iowa 2004).

94. *Id.* at 188.

explain "certain allegations . . . involving Waddell's fitness to continue to serve on the Board."[95] Waddell responded neither to this letter nor to the follow-up letter Brooke sent after a month of silence from Waddell.[96] Brooke then informed Waddell of his removal from the Board of Adjustment, citing "Waddell's failure to respond" to the letters.[97] After a public hearing at which Waddell challenged the action for removal, "[t]he [Davenport] city council confirmed [the mayor's] decision" and voted to remove Waddell.[98]

Waddell argued that the mayor lacked "authority to remove [him] from the Board [of Adjustment]" and that the "failure to respond to [the mayor's] letters" was insufficient to support the removal.[99] The court quickly resolved the issue of whether the mayor could remove a member of the Board of Adjustment in the affirmative after analyzing relevant Iowa statutes supplemented by sections of Davenport's municipal code.[100] The issue of whether Waddell's silence constituted grounds for removal required the court to determine whether Waddell was a city officer.[101] After applying the factors of the public officer test to the facts, the court concluded that a member of the city Board of Adjustment qualified as a city officer and confirmed the legality of the mayor's removal action.[102]

On its face, the holding of *Waddell*—that members of adjustment boards are city officers—appears as limited in scope and narrow in focus as the century-old *Spaulding* decision.[103] However, Iowa Supreme Court jurisprudence concerning who is a city officer suggests that *Waddell*'s reasoning can, and probably will, be extended under the facts of future cases. Regardless of title, a person is a public officer so long as the factors of the court's test are met.[104] The approach in *Waddell* demonstrates the flexible

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 189.
99. *Id.*
100. *Id.* at 191–92.
101. *Id.* at 192–93.
102. *Id.* at 193.
103. *See* State v. Spaulding, 72 N.W. 288, 290 (Iowa 1897).
104. *See* McKinley v. Clark Cty., 293 N.W. 449, 451 (Iowa 1940) ("The question is not primarily one of language but rather of statutory powers and duties."). *McKinley* predates *Hutton*; therefore, the court relied on the *Spaulding* version of the public officer test. *See id.* The relevant statute in *McKinley* provided that "[t]he [county] board of supervisors shall *employ* one or more registered civil engineers who shall be known as county engineers." *Id.* at 450 (emphasis added). Despite this language, the court held that McKinley was not an employee but rather a public official after analyzing the statutory duties and authority of county engineers. *Id.* at 451. For further examples of the controlling power of substance rather than language in the determination of who is a public officer, see State v. Taylor, 144 N.W.2d 289, 293 ("[A]ll the necessary elements to constitute [the city zoning inspector] a public officer were sufficiently shown . . . ."); and Hutton v. State, 16 N.W.2d 18, 20 ("[B]ased upon a consideration of all the pertinent statutory provisions[,] . . . the director of conservation [is] a public official . . . .").

meaning and application of the public officer test unhampered by semantics. The court placed no legal significance whatsoever on the difference between the terms "city" and "public," suggesting that they may be used interchangeably when applying the test.[105] In harmony with the test, substance controlled the outcome rather than form.

Furthermore, the *Waddell* court began its analysis of Waddell's removal in section 372.15 of the Iowa Code, which refers to "all persons appointed to city office."[106] It then applied the public officer test to a member of a municipal adjustment board.[107] *Waddell* thus foreshadows the likelihood that the court will wield this public officer test in other settings to determine who is a public officer. Importantly, if a position meets the criteria established in the public officer test, then section 372.15 of the Iowa Code governs the removal of a person from that office, absent a separate statutory declaration changing the requirements for removal.[108]

E. THE STATUTORY FRAMEWORK AND KELTNER'S REMOVAL

The elements discussed above combined to produce the district court's ruling in *Keltner*.[109] City ordinances were not part of the analysis; the controlling state statutes spoke completely on the issue, leaving no gaps or ambiguities for city law to fill.[110] The court found section 372.15 applicable because a utility board trustee is a public officer under the test used in *Waddell*.[111] Section 372.15 also governed the removal action because nothing in section 388 altered that requirement.[112] It did not matter at all that Keltner had done nothing wrong or that the mayor openly acknowledged this fact.[113] The mayor complied with the procedural requirements of the removal statute

105. *Waddell*, 684 N.W.2d at 192–93.

106. *Id.* at 190.

107. *Id.* at 192–93.

108. IOWA CODE § 372.15 (2015).

109. *See supra* Parts II.B–.D (discussing the statutory framework).

110. *See* Keltner v. City of Oskaloosa, No. CVEQ087684, slip op. at 6–8 (Iowa Dist. Ct. July 30, 2014).

111. *Id.* at 5–6 ("Keltner's position was authorized by Iowa Code Chapter 388. The legislature delegated power to him as a member of the Water Works Utility Board to operate and manage the City-owned Water Works Utility. The duties are defined by Chapter 388. The decisions of the Board are not subject to review by any other City department or officer. And, the term of office of the Water Works Board is set by statute. Furthermore, in *Waddell*, the Court stated that the test allows the Court to determine if 'a person holds public office.' Because . . . a trustee of the board meets the factors of the tests cited in *Waddell*, this Court concludes that Keltner's position meets the factors set forth in *Waddell*, and he is therefore a City Officer subject to Iowa Code [s]ection 372.15." (citations omitted)). The Iowa Attorney General would agree with this determination. *See* 49TH BIENNIAL REP. IOWA ATTORNEY GEN. 173. ("We believe that the local utility board of trustee member does hold a public office under the *State v. Taylor* analysis."). Recall that *State v. Taylor* was also used by *Waddell* and first used in *Hutton*. *See supra* text accompanying notes 86–93.

112. *Keltner*, slip op. at 7.

113. *Supra* note 25 and accompanying text.

and the removal was proper.[114] In sum, because the Iowa Code gave the mayor the power to appoint utility board trustees, the mayor could remove the trustee subject only to the procedural requirements that the Iowa Code prescribes.

III. LEAKY PIPES: THE HOLE IN THE CODE

In light of the legal framework described in Part II, it is difficult to see any result in the *Keltner* removal action other than the one that the district court reached. An Iowa mayor may remove a utility board trustee at any time for any reason, with the only limiting factor being approval by the city council.[115] Although Keltner argued that the Iowa Code made the Water Department and Board independent from the City, the court found that the Iowa Code did not support that contention.[116] A mayor can remove any number of a utility board's trustees at one time—for any given reason—and appoint new ones in their stead. This result highlights the concern expressed by the Water Board trustees that the Board and Water Department could become politicized, and it reveals a significant gap in the provisions governing utility board structure.[117]

While this conclusion results from a technical reading of the statute, the at-will removal power is counterintuitive in light of other provisions in the Iowa Code that suggest a legislative intent to insulate utility boards from unjustified political interference. This Part argues that the ability of a mayor to remove utility board trustees for any reason and at any time is a significant "hole" in the statutory scheme for two reasons. First, the relationship between city utility boards and the city executive is more analogous to the relationship of federal independent agencies to the federal executive than that of federal executive agencies to the federal executive. Because of the similarities between city utility boards and federal independent agencies, utility board trustees should have the same protection from at-will removal that members of federal independent agencies have from the President's removal power. Second, the Iowa Code's provisions suggest that city utility boards should enjoy protection from the city executive's interference. Specifically, the Code provides for staggered six-year terms and prohibits those already serving in public office from serving on utility boards, even though utility boards are unquestionably extensions of the cities they serve.

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114. *Keltner*, slip op. at 9.

115. *See supra* notes 73–76; *see also supra* Part II.E.

116. *See Keltner*, slip op. at 7–8.

117. *See supra* note 29 and accompanying text. A quote attributed to the Russian writer Leo Tolstoy highlights the effect of the lack of more protection from at-will removal: "The law condemns . . . only actions within certain definite and narrow limits; it thereby justifies, in a way, all similar actions that lie outside those limits." LARRY K. GAINES & VICTOR E. KAPPELER, POLICING IN AMERICA 439 (8th ed. 2015).

A. CITY UTILITY BOARDS AND FEDERAL INDEPENDENT AGENCIES

There is a lack of scholarship concerning the relationship of utility boards and the cities they serve. This Subpart, therefore, draws upon scholarship analyzing provisions and structures within the federal government analogous to a city utility board to support the argument that the unrestricted removal power of Iowa mayors, as applied to utility board trustees, must be remedied.

Law distinguishes federal independent agencies—which serve regulatory functions and (as the name suggests) enjoy some measure of independence from the federal executive—from federal executive agencies (which serve as extensions of the President's Cabinet and may be removed at-will).[118] Independent agencies are usually "run by multi-member commissions or boards, whose members serve fixed, staggered terms," and have characteristics—such as "regulatory authority in areas of significant economic or social import;" "adjudicative authority;" "authority to issues [sic] rules or regulations, which set forth generally applicable policy;" and "enforcement authority"—which heighten the need for protection from politicization.[119] Federal executive agencies, in contrast, usually only have a single individual as their head and are extensions of the federal executive itself.[120]

An examination of the Oskaloosa Water Board's characteristics shows that the Board is more analogous to federal independent agencies than to federal executive agencies. First, like federal independent agencies, the Board has authority to regulate areas of significant economic and social importance. Chapter 388 of the Iowa Code gives the Board "all powers of a city in relation to the city utility, city utilities, or combined utility system it administers."[121] Second, the Board may be a litigating party separate from (or even in opposition to) the City,[122] and the Board may acquire property for its

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118. *See* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 14 (11th ed. 2011) ("Some agencies are regulatory commissions, headed by multi-member bodies; these are usually free-standing bodies whose members can be removed from office by the President only for 'cause,' and accordingly are sometimes called 'independent' agencies. . . . Other entities are headed by a single administrator who serves at the President's pleasure, and these are often nestled within larger entities headed by members of the President's Cabinet, whom the President can also discharge at will.").

119. *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 609–10 (2010). Independent agencies are distinct from executive agencies, and an agency's classification affects the federal executive branch's removal powers. *See id.* at 600. *But see* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 826–27 (2013) (arguing that the traditional view of dividing agencies between the categories of "independent" and "executive" is incorrect and should be replaced by a "continuum" of executive agencies with varying degrees of independence).

120. *See* Bressman & Thompson, *supra* note 119, at 610.

121. IOWA CODE § 388.4 (2015).

122. *See id.* Nothing in the Iowa Code prohibits a public utility board from suing the city it serves; indeed, this is exactly what happened in *Keltner*.

operation.[123] Finally, similar to federal independent agencies, the Board has authority to issue and enforce generally applicable rules and regulations. For example, the Board may set nondiscriminatory utility rates[124] even if it cannot certify taxes, pass city ordinances, or issue certain types of bonds.[125] The utility board also has control over the tax revenue it receives from the city and the funds brought in by the utility itself.[126]

These characteristics, especially the broad grant of "all powers of a city,"[127] mirror the characteristics of independent agencies highlighted above to varying degrees, albeit on a much smaller scale.[128] The analogy, of course, has limits—a utility board lacks many of the regulatory capacities of federal independent agencies that it has as a result of Congress's grant of broad regulatory and rulemaking power by federal statute, and a much smaller geographic area is under utility board jurisdiction than the area under federal independent agency jurisdiction. But the relationship between a utility board and the city executive is more similar to the relationship between federal independent agencies and the federal government than the relationship between federal executive agencies and the federal government. Because of the similarities between these relationships, it is appropriate to analyze the purpose between aspects of federal agency structure similar to those of Iowa utility boards.

B. STATUTORY REASONS FOR ADDING A FOR-CAUSE REMOVAL REQUIREMENT

In addition to the similarities between city utility boards and federal independent agencies, the Iowa Code has specific provisions that suggest city utility boards should enjoy protection from the city executive's interference. Specifically, the Code establishes staggered term limits for utility board members and restricts persons already holding city office from serving on utility boards. This Subpart analyzes these two provisions in turn.

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123. *See id.* § 388.4(2) ("The title to all property of a city utility . . . must be held in the name of the city, but the utility board has all the powers and authorities of the city with respect to the acquisition by purchase, condemnation, or otherwise, lease, sale, or other disposition of such property, and the management, control, and operation of the same . . . .").

124. *Id.* § 388.6. The utility may charge a different rate to the city, subject to section 384.91 of the Iowa Code. *Id.* Section 384.91 allows the city to buy power at a reduced rate or even receive free service, subject to a few conditions. *Id.* § 384.91.

125. *Id.* § 388.4(1).

126. *Id.* § 388.5.

127. *Id.* § 388.4.

128. *See supra* text accompanying note 119. The utility board guides the policies involved with the public utility—rate fees, expansion, and other municipal powers. These powers are often checked by other parts of the local government—hence, the limited scope. For example, though a water board has broad discretion in determining when to disconnect water, it is not the final adjudicator for challenges to its decisions. *See* IOWA ASS'N OF MUN. UTILS., MUNICIPAL UTILITY LAW 101: A BASIC PRIMER ON COMMON LEGAL ISSUES AND FREQUENTLY ASKED QUESTIONS 8 (2012).

1. Staggered Terms

Section 388.3 provides that utility board members shall serve "staggered six-year terms."[129] This provision supports the contention that the utility board is meant to be independent from the city executive. Staggered terms are a tool used to enhance the stability and independence of governmental bodies. For example, the U.S. Constitution provides that U.S. Senators are elected every six years in staggered classes with the goal of maintaining stability within the Senate.[130] Similarly, federal agencies and commissioners often serve staggered terms, with similar benefits to stability.[131] Stability results when a utility board is protected from sudden shifts in political officeholders or party leadership.[132]

Staggered terms also increase the independence of utility boards by preventing legislative capture.[133] Staggered terms insulate agencies and boards from politics by making it difficult for an appointing power to commandeer a board or agency by replacing all members of the group with supporters and allies.[134] The influence of any one executive over the membership of a board is limited because, under normal circumstances, an executive will appoint only part of a board.[135] If the contrary were true, a mayor could dominate a city board with appointees who favor and support

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129. IOWA CODE § 388.3.

130. *The Senate and the United States Constitution*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Constitution_Senate.htm (last visited Nov. 19, 2015).

131. *See, e.g.*, *Introduction to the Board of Governors*, FED. RES. BANK OF ST. LOUIS, https://www.stlouisfed.org/In-Plain-English/Federal-Reserve-Board-of-Governors (last visited Nov. 19, 2015) ("Appointments to the [Federal Reserve] Board of Governors are staggered . . . . [T]he staggered terms enable stability and continuity on the Board of Governors.").

132. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 25 (2010) ("Stability . . . aims to keep an agency free from unwanted political forces even as the enacting coalition fades from power. . . . A policy maker concerned with the agency's long-term success must create insulating measures that will work even as the presidency and Congress undergo shifts in party leadership.").

133. *See generally id.*

134. *See* Jennifer L. Selin, *What Makes an Agency Independent?* 6–7 (Vanderbilt Univ. Ctr. for the Study of Democratic Insts., Working Paper No. 08-2013, 2013), http://www.vanderbilt.edu/csdi/research/CSDI_WP_08-2013.pdf ("When the terms of members of a board expire at different times, . . . political principals cannot change the entire makeup of the agency's key decision makers at one time."); *see also* JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 14 (7th ed. 2013) ("The [Securities and Exchange] Commission is composed of five commissioners appointed by the President to five-year terms. The terms are staggered so that one expires each June . . . ."); *Introduction to the Board of Governors*, *supra* note 131 ("A Governor's term is 14 years. . . . Appointments to the Board of Governors are staggered—one Governor's term expires every two years. Terms are staggered to provide the Federal Reserve political independence as a central bank, ensuring that one president cannot take advantage of his power to appoint Governors by 'stacking the deck' with those who favor his policies.").

135. *See* Bressman & Thompson, *supra* note 119, at 610 ("[Independent agencies] are generally run by multi-member commissions or boards, whose members serve fixed, staggered terms, rather than a cabinet secretary or single administrator who serves at the pleasure of the President and thus will likely depart with a change of administration, if not before.").

the mayor's policy. This point is especially clear from the facts in *Keltner*—the mayor's chief goal in removing the trustee was to replace him with a person who would help implement the cost-cutting recommendations of the managerial firm.[136]

A for-cause removal requirement often accompanies the establishment of staggered terms for many federal agencies.[137] The for-cause requirement may be established either by statute or by judicial interpretation and complements the staggered term provision by making it more difficult for an executive to undermine the purpose behind establishing staggered terms in the first place.[138] Because the Iowa Code lacks a for-cause requirement for the removal of utility board trustees, the protection offered to trustees by the staggered term provision in section 388.3 of the Iowa Code is essentially meaningless. It offers no bulwark against the mayor's (as the city executive) removal power.

2. Membership Restrictions

Section 388.3 also prohibits city officers and paid city employees from serving on city utility boards.[139] This provision further supports the contention that the utility board is meant to enjoy some measure of independence from other city government entities. There are two main purposes behind provisions restricting membership on boards in this manner. The first is to avoid conflicts of interest.[140] The second is to avoid incompatibility of office.[141] The two are related but distinct: incompatibility means that two governmental

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136. *See supra* notes 24–27 and accompanying text. The only limitation on the mayor's interference in this way is that those appointed to fill vacancies left on the board "by reason other than the expiration of a term" only serve for the remainder of the unexpired term. IOWA CODE § 388.3 (2015).

137. Bressman & Thompson, *supra* note 119, at 663 ("The fifteen members of the [Independent Payment Advisory Board] serve staggered six-year terms, appointed by the President and confirmed by the Senate with removal only for cause."); *see also* Datla & Revesz, *supra* note 119, at 772, 776 ("Independent agencies are almost always defined as agencies with a for-cause removal provision limiting the President's power to remove the agencies' heads to cases of 'inefficiency, neglect of duty, or malfeasance in office.'").

138. *See* Marshall J. Breger & Gary J. Edles, *Established By Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000) (stating that for-cause removal protection is either expressly given or "reasonably implied" for the members of many agencies); *see also* Bressman & Thompson, *supra* note 119, at 600 n.2 (noting that the Securities Exchange Commission statute is "commonly understood" to include a for-cause removal limitation despite lacking the specific language); Datla & Revesz, *supra* note 119, at 832–35 (discussing cases in which courts found implied for-cause requirements).

139. IOWA CODE § 388.3; *see also supra* Part II.C.

140. *See* 3 MCQUILLIN, *supra* note 1, § 12.67 ("Public policy demands that an officeholder discharge his or her duties with undivided loyalty.").

141. *See id.* § 12.67 ("[The doctrine of incompatibility involves] an inconsistency in the functions of . . . two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both.").

positions or interests are involved while conflict of interest is broader, implicating both governmental and nongovernmental interests and positions.[142] Both of these concepts, however, reflect the idea that "[n]o man can serve two masters."[143] Because section 388.3 of the Iowa Code specifically prohibits city officers and paid city employees from utility board service, it is the latter doctrine, incompatibility, which is espoused by the provision.

The incompatibilities between a utility board member and a city councilperson are obvious: "The board must make reports to the council, and all matters concerning taxes, ordinances, resolutions, and bonds, as they relate to a utility, must be handled by the council."[144]

If a councilperson simultaneously served on the board, that person would be reporting to himself or herself. The Code simply proscribes the councilperson's service on the board rather than allow for any conflict that could arise from this situation. A board thus maintains an extra level of separation—with the accompanying independence—from the city.

Because the Iowa Code prohibits the mayor and city officials from serving on a city utility board to promote board independence, the mayor's ability to remove trustees at will subverts the spirit of the Iowa Code. The Code's prohibitions prevent the city executive from introducing his or her preferred policies through management of utility board membership. But a mayor's at-will removal power allows the mayor to accomplish practically the same thing by removing trustees for any reason at any time and replacing them with a supporter. Should the current trustees become an obstacle to the mayor's and council's agenda, the mayor could simply replace them with trustees that would not stand in the way. The mayor could remove all of the trustees at the same time should the "old guard" become an obstacle to the mayor's goals. This ability violates the spirit of the provisions that provide the board with independence from the city. Indeed, this is what occurred in the *Keltner* litigation.[145]

IV. CALL A PLUMBER!: FIXING THE LAWS GOVERNING REMOVAL OF CITY UTILITY BOARD TRUSTEES IN IOWA

Part III argued that the Iowa Code, as currently constituted, essentially has a leak in the utility board provisions because the relationship between a city utility board and the city executive is analogous to the relationship between federal independent agencies and the federal executive, and because

142. *See id.* § 12.67, at 374–75 ("Incompatibility of office or position is to be distinguished from conflict of interest. Although conflict of duties is also a conflict of interest, a conflict of interest can exist when only one office or position is involved, the conflict being between that office or position and a nongovernmental interest. In short, incompatibility of office or position is not involved unless two governmental offices or positions are involved as to the same individual.").

143. *Matthew* 6:24 (King James).

144. Iowa Attorney Gen., Opinion Letter No. 76-7-4 (July 12, 1976), 1976 WL 375960.

145. *See supra* text accompanying notes 21–31.

the mayor's unfettered removal power pertaining to utility board trustees undermines the purpose behind staggered terms and restricting membership. Unless something happens to the state of the law, this leak will continue to jeopardize the independence-promoting provisions of the Iowa Code.

This Part presents several options for fixing section 388. First, the Iowa Supreme Court could read an implied for-cause requirement into the statute—provided that litigation costs do not prevent a case from reaching the court and that the Iowa Supreme Court's canons of statutory interpretation and a lack of statutory ambiguity would not prevent reading the requirement into the statute. Second, cities could amend their codes to require that removal of trustees be for cause, provided that the city does so in a way that does not violate Iowa's home rule regime.[146]

The third and best way to rectify the inconsistency in the Iowa Code is by legislative amendment. The Iowa Legislature could amend the Code in at least one of two contrasting ways. First, the legislature could remove the provisions providing for staggered terms and membership restrictions, thus making the Code consistent with the current general removal statute[147] by eliminating any vestiges of independence. Second, the legislature could add a provision to section 388.3 establishing that utility board members may only be removed for cause. This Part argues that adding a provision is the best option because it does not require a landmark change and is consistent with other states' laws.

A. *THE PROSPECT OF A JUDICIAL RULING*

The Iowa Supreme Court could change the current state of the law by judicial ruling. In doing so, it would not be the first court to imply a for-cause requirement for removal proceedings into a statute that is silent on the matter.[148] The court is not likely to follow this course for two reasons. First, it is doubtful that such a case will reach the court. Litigation is expensive, and while it is true that Keltner paid the initial filing fee out of his own pocket,[149]

146. *See supra* Part II.B.

147. *See supra* notes 73–80 and accompanying text.

148. *See* Bressman & Thompson, *supra* note 119, at 600 n.2 (noting that courts assume a for-cause requirement in the U.S. Securities and Exchange Commission statute despite its silence on the matter); Datla & Revesz, *supra* note 119, at 832–35 (explaining cases in which courts found an implied for-cause requirement in the relevant statute). Datla and Revesz began by explaining the United States Supreme Court case *Wiener v. United States*, which held that members of the War Claims Commission could only be removed for cause because of its classification as an independent agency. Datla & Revesz, *supra* note 119, at 832–33 (citing Weiner v. United States, 357 U.S. 349, 350–54 (1958)). After describing lower federal court cases that applied similar reasoning to the Federal Exchange Commission and the U.S. Securities and Exchange Commission, these authors criticize the decisions as wrongly decided. *Id.* at 833–34. One of their chief criticisms of this line of cases is that it ignores the possibility of deliberate legislative omission of for-cause removal protection. *Id.* at 834.

149. Allsup, *Osky Water Backs Board Members*, *supra* note 28.

the Water Department still incurred over $53,000 in legal fees at the district court level alone.[150] For utility boards in small Iowa municipalities like Oskaloosa, defending their members (and their independence) through lengthy judicial appeals will likely be too expensive.[151] Trustees like Keltner would probably have to foot the bill on their own and may determine that continued service on a utility board may not be worth the cost.

Even under perfect circumstances—a removed trustee with deep pockets, an injured ego, and endurance to pursue litigation to its limits—it is unlikely that the Iowa Supreme Court would imply a for-cause requirement for reasons of statutory construction. The court has emphasized that it does not "search for meaning" beyond the express terms of a statute where, as here, the express terms are unambiguous.[152] The court does not wield its interpretive power to substantively alter statutes to meet the court's approval.[153] Although section 388.3 says nothing about the removal of utility board trustees, section 372.15 does.[154] Read in conjunction with section 388.3, section 372.15 vests the power to remove utility board trustees in the mayor. Also, the court has already declined to interpret section 372.15 to have a for-cause requirement.[155] Thus, if change to the current state of the law is to occur, it will probably not be from the courts.

B. DO IT YOURSELF: CHANGING CITY ORDINANCES

Another possible option for fixing this inconsistency in the statutory scheme is for cities to amend their codes to require for-cause removal. This approach, more proactive than waiting for the litigation of the unascertained rich, offended, and removed trustee–plaintiff of the future (who may never exist), nevertheless poses its own problems. The validity of such a provision is highly questionable in light of Iowa's system of home rule.[156] To be valid, the provision would have to "fill a gap" only, and not alter the letter or spirit of the Iowa Code provisions.[157]

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150. Allsup, *supra* note 21.

151. *See id.* (reporting that one trustee said, "[a]s we take a look at our budget, and compar[e] revenues and expenses, I think we need to be cognizant we may have to make some changes along the way to recoup this and to get our budget back in line").

152. State v. Nicoletto, 845 N.W.2d 421, 426 (Iowa 2014) (citing State v. Hearn, 797 N.W.2d 557, 583 (Iowa 2011)).

153. *See id.* at 427. ("It is not our function to rewrite the statute. If changes in the law are desirable from a policy, administrative, or practical standpoint, it is for the legislature to enact them, not for the court to incorporate them by interpretation." (quoting State v. Wedelstedt, 213 N.W.2d 652, 656–57 (Iowa 1973)).

154. *See supra* text accompanying notes 73–79.

155. *See* Bennett v. City of Redfield, 446 N.W.2d 467, 473 (Iowa 1989); Scott v. City of Waterloo, 180 N.W. 156, 157 (Iowa 1920).

156. *See supra* Part II.B.

157. *See supra* notes 56–65 and accompanying text.

A city cannot pass ordinances that change the Code's provisions absent a specified grant of power.[158] As discussed above, the Code already speaks to the removal power.[159] Because a municipality cannot fill a gap that is not there, the limitations on city home rule render this option practically unviable.[160]

C. *FIX THE PIPES: AMEND THE CODE*

The best way to rectify the inconsistency between the Iowa Code's protective provisions for utility board trustees and the mayor's removal power is to amend the Code. As currently written, the provisions establishing staggered terms and restricting utility board membership are ineffective as a means to protect the independency of board decisions.[161] The Iowa Legislature could remove the protective provisions that suggest a degree of independence from city interference[162] to unequivocally send a message that utility boards are subservient to the city executive. However, given the functions the utility board performs, the better option is to amend section 388.3 to require that removals of utility board trustees be for cause. This option supplements the express provisions already in the Iowa Code by strengthening the measures that give utility boards their independence from the cities they serve, while it also provides greater clarity to the statute by specifically designating the process for removal in the statute itself.

To fix the leak in the Iowa Code, the legislature should amend Iowa Code section 388.3 to state that the mayor may only remove a utility board trustee from his or her position for cause. "Cause" is often defined as "inefficiency, neglect of duty, or malfeasance in office."[163] If such a provision were already in the Iowa Code, Oskaloosa's mayor would not have been able to remove Keltner as trustee, because, as the court noted, Keltner's conduct did not constitute cause under this definition.[164]

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158. *See* Berent v. City of Iowa City, 738 N.W.2d 193, 208 (Iowa 2007) (holding that the city could not allow removal procedures without a written notice giving the reasons for the removal and without a hearing because Iowa Code section 372.15 expressly prescribes these measures); *see also supra* Part II.B.

159. *See supra* text accompanying note 112.

160. The result would be different under the home rule regimes of some other states. For example, California's constitution allows city charters "to provide . . . the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal." CAL. CONST. art. 11, § 5(b)(4).

161. *See supra* text accompanying notes 128–37.

162. *Supra* Part III.B.

163. Barkow, *supra* note 132, at 27.

164. Recall that the mayor acknowledged that Keltner had done nothing illegal or immoral. *Supra* text accompanying note 27. The cause requirement would not be met simply because Keltner did not support the mayor's policy of implementing the report's recommendations. *Cf.* Barkow, *supra* note 132, at 27 ("[M]ost commentators agree that it is not good cause for removal if an agency performs a lawful regulatory agency action that the President disagrees with as a matter of policy.").

Adding the for-cause requirement would not signal a landmark change in the substance of the Iowa Code because other provisions that govern similar entities and require that removal be for cause already exist in the Code. For example, section 414.8 allows the appointing power to remove members of a municipal board of adjustment only for cause.[165] Similar language can be inserted into section 388.3, along with a reiteration of the procedural requirements for a removal action.

If the legislature amends the Code to include a for-cause requirement, it will follow the example of other jurisdictions that already protect their public utility boards in this manner.[166] For example, Tennessee law provides that "[a]ny member of the board may be removed from office for cause" after a public hearing by the "governing body of the municipality."[167] Wyoming law allows the mayor, "with the concurrence of the governing body," to remove a board member for cause.[168] South Dakota's utility board removal statute allows removal "only under the provisions of chapter 3-17."[169] That chapter governs removal from office in South Dakota and specifically says that local officers may only be removed for cause.[170] Kansas has also has a for-cause requirement for removal.[171] The for-cause requirements in these jurisdictions accompany provisions establishing staggered terms[172] and in some cases restrict board membership to those not already officers.[173] Utility boards in

165. IOWA CODE § 414.8 (2015); *see also id.* § 341A.2(2) ("Any member of the [civil service] commission may be removed by the appointing authority for incompetence, dereliction of duty, malfeasance in office, or for other good cause; however, no member . . . shall be removed until apprised in writing of the nature of the charges against the member and a hearing . . . has been held before the board of supervisors.").

166. *See* Breger & Edles, *supra* note 138, at 1138 ("A requirement that members serve a fixed term of years is an essential element of independence, but alone is not sufficient. The critical element of independence is the protection . . . against removal except 'for cause.'" (footnote omitted)).

167. TENN. CODE ANN. § 7-52-112 (2011). Tennessee adds another hurdle to removing utility board members, requiring a three-fourths majority vote in favor of removing the member. *Id.*

168. WYO. STAT. ANN. § 15-7-402 (2014). The statute also emphasizes that "politics [and] religion" are not sufficient cause. *Id.*

169. S.D. CODIFIED LAWS § 9-39-14 (2015).

170. *Id.* § 3-17-6 ("Any officer of any local unit of government may be charged, tried, and removed from office for misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression, or gross partiality.").

171. KAN. STAT. ANN. § 12-827 (2014).

172. *See id.* §§ 12-827, 12-829; S.D. CODIFIED LAWS §§ 9-39-10 to -11 (establishing staggered terms for three- and five-member utility boards); TENN. CODE ANN. § 7-52-108(a) (establishing a utility board with members serving staggered terms, with four years being the maximum term length); WYO. STAT. ANN. § 15-7-402 ("One (1) member of the board shall be appointed for a term of two (2) years, two (2) for a term of four (4) years and two (2) for a term of six (6) years. Thereafter each member shall be appointed for a term of six (6) years.").

173. *See* S.D. CODIFIED LAWS § 9-14-16 (restricting certain offices from holding other municipal offices while serving, though allowing for exceptions); TENN. CODE ANN. § 7-52-107(b) (prohibiting paid officers and employees from serving on utility boards).

these jurisdictions are thus better insulated from political interference in setting policies and fulfilling their duties. Iowa should offer municipal utility boards that same protection.

V. CONCLUSION

The current state of the Iowa law governing the removal of utility board trustees allows a mayor to remove trustees at any time and for any reason, so long as the city council approves the removal. This power is inconsistent with the purpose of other statutory provisions in the Iowa Code that give some degree of independence for municipal utility board trustees. It is also inconsistent with the protections independent agencies are given at the federal level. The Iowa Legislature should act now and fix this leak in the statute by amending section 388.3 of the Iowa Code to include a for-cause requirement for the removal of utility board trustees.