Originally published in

New York Law Journal

Commentary

November 13, 2019

Impeachment Sidebar: Historical Context

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'Impeachment Sidebar' will address various salient legal issues relating to the impeachment process during the next several months. This is the first installment.

In mid-2017, I wrote on these pages that the "extraordinary" constitutional prerogative of impeachment should be approached warily (***Remove the President? Read This First***, NYLJ, May 18, 2017). I urged those conducting inquiries relating to the president's conduct to emulate Sergeant Friday of **TV's *Dragnet*** fame by searching for "the facts, and just the facts." Of course, it was easy for Sgt. Friday to get the truth, even in the face of liars or dissemblers, because radio and TV audiences 40 years ago demanded that crime shows be wrapped up in a half-hour.

Impeachment is no made-for-TV drama, however. There is no pre-ordained script, and the House of Representatives' inquiry has already encountered recalcitrant witnesses and a slew of legal proceedings. One does not have to be partisan to acknowledge that an unobstructed inquiry is essential for the House to fulfill its constitutional obligation. After all, our Founders included this sanction as a safety-valve against a president (and other **"civil officers"**) who abused power. James Madison said it this way: Impeachment was **"indispensable" to defend us from the "perfidy of the chief Magistrate."** Ben Franklin thought impeachment was "favorable

to the executive" **to avoid the recourse of assassination**. And like English impeachments dating from the 1300s, this constitutional provision was to be employed only to remedy the most egregious conduct.

True to the original intent to exercise this authority sparingly, the **House has invoked its impeachment power** against a president only three times (Andrew Johnson, Richard Nixon and Bill Clinton), resulting in a full Senate trial only twice and acquittals in both instances (Johnson and Clinton). Nixon, of course, avoided impeachment by resigning. On the other hand, 15 judges of various federal courts have been impeached; eight were convicted and removed from by the Senate. In its first use of this power, in 1797, the House impeached U.S. Senator William Blount, but the Senate dismissed the proceeding on the ground that members of Congress were not subject to impeachment. One cabinet member, Secretary of War William W. Belknap, was impeached in 1876, but was acquitted.

As the jury in the impeachment process, the U.S. Senate may vote not only to remove an official, but to impose **the additional sanction** of barring them from holding future office. Removal requires a two-thirds supermajority of Senators present, but disqualification from future office requires only a simple majority. This ban has been levied only twice, in 1862 against Judge West H. Humphreys of the District Court of Tennessee and in 2010 against Judge G. Thomas Porteous Jr. of the District Court of Louisiana.

Interestingly, one of the federal judges who was impeached and removed but not disqualified from holding office is actually a current member of the House of Representatives—and may very well vote on articles of impeachment this year. In 1989, **Alcee Hastings, then a federal judge sitting on the District Court in Florida**, was removed from the bench, but was subsequently **elected to the House** where he has served for almost 30 years. Since his election in 1992, he has already voted on several impeachments.

So as the current impeachment inquiry moves forward, and the House marshals the facts, a central question for it will be whether the ascertained conduct of President Trump constitutes an impeachable offense; and, if the House passes articles of impeachment, the question for the Senate will be whether such articles warrant removal from office and disqualification from holding future office.

These and other legal issues will be addressed in subsequent Sidebars.

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