Adapted from the original version published in the

New York Law Journal

Government and Election Law Column

August 26, 2021

Impeachment: The New York Version

By Jerry H. Goldfeder

During the impeachment trials of former President Donald Trump, I wrote a series of articles in the *New York Law Journal* delving into various issues and ambiguities of the constitutional process. New York has its own version of impeachment, and, just as there are problems with the federal model, our state's procedure needs a basic overhaul.

Fortunately, New Yorkers will not have to live through the impeachment of Gov. Andrew Cuomo. With his resignation, the Assembly concluded, correctly I believe, that it no longer had jurisdiction to impeach him. However, in addition to releasing a report of their investigation, the state legislature ought to take a hard look at the impeachment process itself. Without Cuomo on trial, a more dispassionate review of the law is in order.

New York's impeachment and conviction of Gov. William Sulzer in 1913 was, by most accounts, a politically driven affair. Indeed, in 1983, a special Legislative Committee reviewed the Sulzer impeachment, and the Senate Judiciary Committee concluded that the proceeding denied him procedural and substantive due process. It therefore recommended that the enabling laws be reformed to (1) define more specifically what acts constitute impeachable conduct; (2) describe more precisely who was subject to impeachment; and (3) clarify if impeachable offenses must

occur during the alleged malfeasor's term of office. The legislature took the recommendations under advisement, and did not act.

A few years later, Sen. John R. Dunne, Deputy Majority Leader of the senate, and Michael A. L. Balboni, formerly counsel to its Judiciary Committee and subsequently elected to the senate, wrote a comprehensive narrative and analysis of the Sulzer impeachment for the *Fordham Law Review*. Their essay is the authoritative work on the subject, reflecting the Senate Judiciary Committee's findings. It was undoubtedly a must-read for the current Assembly Judiciary Committee as it began to draw up articles of impeachment against Gov. Cuomo. With Cuomo's impeachment now out of the way, the Assembly should reflect on the issues raised by Dunne and Balboni.

So let's step back. By now, the legal community, if not most of the public, is aware of what the U.S. Constitution prescribes as an impeachable offense: treason, bribery, or other high crimes and misdemeanors. Of course, when considering the impeachment of either Richard Nixon, Bill Clinton or Donald Trump, there occurred in the House of Representatives—as well in the public square—a robust debate as to whether specific actions by these presidents fell within the definition of an impeachable offense. Indeed, the threshold question of what was even meant by "high crimes and misdemeanors" consumed many Americans during those deliberations. As explained by Rep. Jerry Nadler, Chair of the House Judiciary Committee, the decision to impeach is a political decision, swatting away a dictionary-definition approach and emphasizing that political judgments are required. He added, "just because it's an impeachable offense does not mean [a public official] should be impeached. It's a different judgment." Impeachment, then, would have to be based upon a rationally based, agreed-upon consensus that a public official misused his or her office, and that such conduct required removal.

As relatively open-ended as federal impeachment might seem, New York's "definition" is even murkier. The state constitution does not define an impeachable offense, but Judiciary Law #240 does: A civil officer may be impeached for "willful and corrupt conduct in office." Notice that the phrase is in the conjunctive. The allegedly corrupt behavior must be willful.

The threshold question here is: What is meant by "corrupt"? You and I know when some act smells fishy, but such subjectivity and ambiguity is troubling. On the other hand, that which constitutes corruption should not be so tied to specific acts as to render the impeachment process practically ministerial. And, just as the federal model does not require a criminal act for a finding of an impeachable offense, New York law should be similarly flexible for the legislature to take action.

Equally problematic is that neither the constitution nor the Judiciary Law provides a standard of proof. Impeachment proceedings are conducted by legislators who swear to be impartial, but who, at least in the Sulzer impeachment, seemed to have made up their minds even before the trial or the articles were written; and this was no different from either the Clinton or Trump impeachment trials. But, still, shouldn't the impeachment prosecutors have to find impeachable

conduct either beyond a reasonable doubt, by a preponderance of the evidence or by clear and convincing proof? Albany should clarify the law in this regard as well.

Even if Dunne and Balboni's admonition to fix the law is heeded, we come back to Congressman Nadler's point that impeachment is meant to be a political process in order to remove a public official who seems to have breached the public trust in some important way. Thus, irrespective of definitions and standards of proof, we may simply have to accept this 700-year-old process as imprecise, but as contemplated—an extraordinary authority to remove a public official whose actions are so egregious that the public trust has been undermined.

Yet, I remain troubled. Public officials must be permitted, even encouraged, to act with sufficient independence from the legislature. After all, they are elected to use their best judgment to perform their duties. So, the definition of an impeachable offense and the standard of proof actually does matter. And the public official in the dock should have the tools to defend themselves and argue that their impeachment or conviction violated either their procedural or substantive due process rights.

This concern brings me to a reform that Dunne and Balboni did not address, but is also worth considering. Unlike the federal model in which only Senators act as jurors of the impeached, in New York, members of the Court of Appeals also sit as jurors alongside state senators—a feature that suggests the official has no recourse to the courts to challenge either the articles of impeachment or their conviction. This should be changed. Even if the courts' default position would be to defer to the judgment of the Assembly or senate, it is an important check on a run-away political process—as was visited upon Governor Sulzer. Albany should look into eliminating the role of the judges as jurors and explicitly permit judicial review. It is generally thought that federal impeachment trials are not subject to judicial review, but this view is based upon the constitutional provisions that the House has the "sole power" to impeach and the Senate has the "sole power" to try the case. Such language does not appear in the New York State Constitution, and thus its absence suggests the possibility of judicial review.

Finally, the state constitution provides that a public official who has been impeached is temporarily relieved of their office unless and until acquitted by the senate—essentially convicting an official, albeit conditionally, before a trial. Even public officials who have been indicted are not required to step aside until they are acquitted. This unfair provision should be eliminated.

I imagine all of these issues would have been addressed had Governor Cuomo not resigned. Fortunately, the legislature has the opportunity to look at New York's impeachment process without their deliberations being outcome-determinative. It should do so.

***Jerry H. Goldfeder**, special counsel at Stroock & Stroock & Lavan, teaches Election Law at Fordham Law School, and is the author of Goldfeder's Modern Election Law (NY Legal Pub. Corp.) He previously served as Special Counsel for Public Integrity to then-Attorney General*

Andrew M. Cuomo, and served as campaign counsel to Assembly Judiciary Chair Charles D. Lavine.