Memorandum of Law

Question Presented:

May the New York State Assembly impeach and the Court for the Trial of Impeachments convict and disqualify a person who has resigned from public office?

Summary of Conclusion:

Probably not, although the question has not been definitively answered in New York State jurisprudence. Unlike the language used in the United States Constitution, section 24 of Article VI of the New York State Constitution expressly states that "[j]udgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification" from future public office. Disqualification is thus expressly linked to removal, and the language does not seem to contemplate an impeachment or trial when removal from office is not the central determination. This interpretation is reinforced by the fact that, in New York State, no trial on an article of impeachment has proceeded after the official in question has resigned. Therefore, if an official resigns his or her public office at any point before conviction after trial in the Court for the Trial of Impeachments, the Court would lose its jurisdiction to rule in the matter, as it may only render a judgment that removes an official from office.

Discussion:

Section 24 of Article 6 of the New York State Constitution establishes the Court for the Trial of Impeachments. It states, in part:

> Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust, or profit under this state; but the party impeached shall be liable to indictment and punishment according to law.

In addition, section 240 of the New York Judiciary Law states that "[t]he court for the trial of impeachments has power to try impeachments, when presented by the assembly, of all civil officers of the state, except justices of the peace, justices of justices' courts, police justices, and their clerks, for willful and corrupt misconduct in office (emphasis added)." This limitation to "civil officers of the state" would likely exclude a former official. The language in the Constitution contemplates removal of an existing officer in both decisions that the Court could make and the Judiciary Law provision applies only to existing civil officers.

We did not find any New York impeachment proceedings or trial of an impeached official that continued after the official accused of wrongdoing had resigned at any stage, whether articles of impeachment were pending or adopted or trial had begun. That practice is consistent with the final clause of section 24, which expressly clarifies that the criminal processes to punish violations of law are not supplanted by impeachment. Civil remedies for torts also remain available to the persons who suffered damages. This limitation on the use of impeachments is also consistent with the purpose of impeachment to remove public officials who corrupt their office or commit "malversation in office." (*See* NYS Constitution, Article 13, §5.)

The removal of an elected official by the Court for the Trial of Impeachments, whereby the Court overrides the choice of the voters, is an unusual step provided for in the Constitution to guarantee that the integrity of the government is not undermined before the voters are able to address the situation. We found at least five impeachments in New York. Four went to trial, the fifth ended when the judge resigned. Of the four trials, two were acquitted and two were convicted. (There appear to have been other individuals who were investigated but who were not the subject of formal impeachment proceedings.) The absence of a process independent of

removal may reflect the fact that once the official is removed from office, the threat that the government will be undermined by corruption is over. At that point, the more usual judicial processes and its associated due process can safely be used to assess any penalties. The New York State Assembly Judiciary Committee considered this question in 1853 and concluded, "It is . . . clear, from the terms of the Constitution, that the person must be in office at the time of impeachment" because removal is contemplated in both possible outcomes in the Court for the Trial of Impeachment set forth in the Constitution. *See* Report of the Judiciary Comm. Relative to Power of Impeachment, N.Y. Ass. Doc. No. 123, 76th Sess. 1 (June 23, 1853).

The federal process is somewhat different from the New York State process. The cognate provisions in the United States Constitution, Article I, §3, state in part:

> Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to the law.

Although the federal language does not clearly link removal and disqualification, no impeachment trial in the Senate has led to disqualification of an official who had already resigned. We have identified six federal instances when proceedings ended when the official resigned, including the case of President Nixon. In two instances the trial went forward after the official left office, but in both cases, including the second impeachment of President Trump, the official was acquitted. (President Trump was still in office when he was impeached, but his term had ended before the trial in the Senate began.) The other impeachment of an official who resigned was that of Secretary of War Belknap in 1876, who was accused of bribery but acquitted. In the Belknap impeachment, the Senate ruled by majority vote that it had jurisdiction

even though Belknap had resigned, but many of the Senators who voted to acquit explained their vote by stating they did not think the Senate impeachment process was valid against someone not in office.

The United States Senate has treated the questions of removal and disqualification as divisible and as subject to different requirements. It imposed both removal and disqualification on Judges Humphreys (1907) and Archbald (1936). It required a two-thirds vote to remove and a majority vote to disqualify. (*See* 6 Cannon's Precedents of the House of Representatives §512 (1936).)

A review of impeachments and trials in other states revealed a history similar to that of New York State. In most cases, when an accused official resigned, the proceedings ended. The only litigated case that expressly confirmed the ability of a state senate to impose a judgment after a resignation is unique in that the resignation did not occur until the Senate had already voted to convict. In a Texas impeachment, reviewed in Ferguson v. Maddox, 114 Tex. 85, 99 (1926), the impeached governor appeared before the bar of the House and answered the charges against him and participated in the trial until the vote was taken and he was found guilty. Before the Senate could pronounce its judgment, he resigned, but the Senate concluded it had the authority, and the court on review upheld its authority, to enter its judgment, having properly exercised jurisdiction over the trial, which was not affected by the resignation at that point; the constitutional provisions, the court held, could not be thwarted by an eleventh-hour resignation.

In State v. Hill, 37 Neb. 80, 86 (1893), the Supreme Court of Nebraska expressly held that the Nebraska constitution did not allow the legislature to impeach a person after he is out of office,

because its constitution expressly stated that it could impeach "all civil officers of this state." The court reasoned that a person who had resigned his or her office was no longer a civil officer of the state. This case may provide some guidance. While the impeachment provisions of the New York State Constitution do not include the language on which the Nebraska decision relied, the language of Judiciary Law §240 is essentially the same as that of the Nebraska constitution. Also, section 5 of Article 13 of the New York Constitution directs the legislature to make provision for the "removal for misconduct or malversation in office of all officers . . . who shall be elected at general elections . . . ." That language and the language of Judiciary Law §240 prompt the same conclusion as that reached by the Nebraska court, that the goal of impeachment and trial is removal of someone in office, not a judgment on someone who is a former official.

Smith v. Brantley, 400 So. 2d 443, 445 (1981), is a Florida case that expressly held that the Florida Senate had no jurisdiction to impeach a former officeholder who had relinquished his office prior to the commencement of impeachment proceedings. Despite that conclusion, however, the court affirmed the trial court's determination that the impeachment conviction was valid. So this case provides little guidance, as its final ruling seems inconsistent with its announced holding.

The one proceeding from another state that seems definitely to reach a different conclusion is the matter of Pennsylvania Chief Justice Rolf Larsen in 1994. He was removed from office automatically due to a criminal court conviction, but the State Legislature, which had been investigating him for months, chose to continue with an impeachment and trial. Public perception was that Senators conducting the impeachment trial believed this was necessary, so

that if his criminal conviction were overturned on appeal, he still would be disqualified from returning to the bench. The Pennsylvania legislature interpreted its powers under its state constitution more liberally than New York has done in the past. Pennsylvania's constitutional language, however, is closer to the federal constitutional language than to that of New York.