Originally published in

New York Law Journal

Election and Political Law Column

October 08, 2024

The Governor and the Mayor: A Modern Seabury Hearing?

By Jerry H. Goldfeder

After the U.S. attorney unsealed the recent indictment of Mayor Eric Adams, a host of public officials urged him to resign or be removed by Gov. Kathy Hochul. Replacements of key aides are occurring every day at City Hall, and the Marist poll found a whopping 69% of New Yorkers want him gone one way or the other.

New York governors and NYC mayors usually have a fraught relationship (see, e.g., Rockefeller vs. Lindsay; Cuomo vs. de Blasio), but Hochul and Adams seem to have worked well together. So the current situation must be difficult for each of them, personally and politically. Add to this mix the impending presidential election—Adams is a presidential elector from New York. Although Adams insists he will not resign, he would not be the first public official to be pressured into changing his mind (see, Spiro Agnew, "I will not resign if indicted!"); and he would be following in the footsteps of ex-Mayors Jimmy Walker and William O'Dwyer. But if the governor removes him, it would be a first. In either case, Public Advocate Jumaane Williams would succeed him until a special election was held within approximately 80 days.

It is fair to say, then, that New Yorkers are facing an extraordinary crossroad—it being highly unusual for an elected official to be prematurely ousted from office. This rarity occurs mainly by resignation, but sometimes an office holder is "recalled," a special vote permitted by 19 states (see, e.g., Gov. Gray Davis of California); by a legislature invoking its authority to expel a member (see, e.g., Rep. George Santos); or by a governor exercising "removal power" (see, e.g., Gov. Franklin Roosevelt initiating removal charges against Mayor Jimmy Walker).

In New York, there is no recall procedure. So, despite the indictment (and likely forthcoming superseding indictment and probably related charges against some of Adams' closest political colleagues), the mayor is standing his ground. Yet the drumbeat urging his removal is palpable.

Let's look at the law and the Roosevelt-Walker precedent.

The Law

It is without question that the governor of New York State has the authority to remove the mayor of the City of New York. New York's Constitution, its Public Officers Law, and the New York City's Charter gives her the power to do so.

The Constitution, Article XIII, Section 5, enables the state Legislature to enact a law "for the removal for misconduct or malversation in office …" Let's stop right there. How is "misconduct" defined? Does the fact of an indictment constitute misconduct? Even what is known as a "speaking indictment," spelling out the details of alleged crimes, is only one side of the story—as disturbing or persuasive as it might sound. And "malversation"? This term, which has thankfully fallen out of favor, is generally thought to be derived from the French and relates to corrupt conduct by an office holder. So, perhaps this moves us closer to understanding the kind of conduct the framers of the New York constitution had in mind—not just untoward acts, or even criminal conduct per se*,* but that which evidences a violation of the public trust.

In enacting a removal statute, the state legislature did not explain these terms. The provision relevant to the current situation, Section 33(2) of the Public Officers Law, simply states that "The chief executive officer of every city [and other officials] … may be removed by the governor …" The legislature's only elaboration of the constitutional directive was to add the requirement that, in exercising her authority, the governor is required to provide "a copy of the charges against [the alleged miscreant] and an opportunity to be heard in his defense." In that this is a procedure consistent with rights normally associated with any kind of charging instrument, the legislature was undoubtedly within bounds to require it in the removal process. How such due process rights are to be honored, however, is unclear.

And New York City echoes the state law in its City Charter. Redundantly—and perhaps superfluously—Section 9 of the Charter reiterates the governor's authority by providing that "the mayor may be removed from office by the governor upon charges and after service upon him of a copy of the charges and an opportunity to be heard in his defense." But then the Charter goes on to say that "pending the preparation and disposition of charges, the governor may suspend the mayor for a period not exceeding thirty days." The power to suspend during a removal process is not found in the constitution or the statute, so one can legitimately ask whether New York City could give the governor this authority.

The state law says that the governor's power of removal "shall be deemed to be in addition to the power of removal provided for in any other law," but goes on to say that it "shall apply notwithstanding any inconsistent provisions of any general, special or local law, ordinance or city charter." Thus, if a locality limits the governor's removal powers, state law's broader power would trump it. And, as here, if a locality expands the governor's authority, it is questionable whether it had jurisdiction to do so. In providing for a governor's power to suspend a public official "[p]ending the preparation or disposition of charges," the city may have overstepped. Moreover, if the governor could suspend the mayor during a hearing on the charges, or even before charges are brought, his due process rights could be seriously compromised.

All told, then, a governor who chooses to exercise the power of removal has no clear guideposts, and must navigate proceedings with care. The Jimmy Walker precedent may be instructive.

The Precedent

The last time a New York governor brought a removal proceeding against a sitting mayor was in 1932, when then-Gov. Franklin Roosevelt brought charges against the popular and flamboyant Mayor Jimmy Walker. In a riveting book on the subject, "Once Upon a Time in New York: Jimmy Walker, Franklin Roosevelt, and the Last Great Battle of the Jazz Age," by New York Times columnist and Pulitzer Prize winner Herbert Mitgang, the drama of the "trial" of Walker is told. The state legislature empaneled a committee to investigate a variety of corruption scandals in the city, not the least of which included how Walker enriched himself by apparently illegal means. A highly respected former judge, Samuel Seabury, was tapped to conduct the inquiry, and proceeded to hear a slew of witnesses, including the mayor, which inevitably led to a detailed report to the governor of widespread pocket-lining by multiple judges, commissioners and Walker.

At the time Seabury sent his findings to Albany, Roosevelt was already the Democratic nominee for president, and felt the political pressure to demonstrate his anti-corruption bona fides. At the same time, he had to worry about the potent Tammany machine in the city turning against him in the election. Mitgang reports that FDR assiduously studied the Seabury report, which led him to convene a removal proceeding. The governor permitted Walker and his attorneys to call any witness they wished and present any evidence they could to refute the specific corruption charges. Roosevelt also considered suspending Walker, as apparently permitted under the NYC Charter even then, but declined to do so.

As the public official with the ultimate responsibility to remove Walker, Roosevelt himself conducted the hearings, questioned the mayor and other witnesses, and ruled on objections. Walker's supporters held rallies and attempted to pressure "Judge" Roosevelt, but the facts were damning and the defense was more theatrical than persuasive. FDR appeared to have no choice—which is what some of Walker's allies told the mayor. Indeed, former Gov. Al Smith, no friend of Roosevelt at the time, advised Walker that he was "through" and should "resign for the good of the [Democratic] party." And so, on the eve of the hearings' final session, Walker did just that.

A Modern Seabury Hearing?

Mayor Adams has yet to present his narrative of the facts to refute or call into question what the U.S. attorney has thus far alleged. Presumably his attorneys have advised him to not address the specifics, and leave the defense for court filings. Indeed, they have already moved to dismiss some of the charges. That is all well and good in routine prosecutions, but is it enough to forestall calls for removal? Even without being formally charged, Jimmy Walker took the opportunity to present his side of the story in the Seabury hearings. After all, as he was certainly advised, "misconduct" does not necessarily require conviction of a crime, and no doubt believed that by testifying before Seabury he could prevent his removal. As it turns out, the facts were his undoing.

Some 90 years later, the current governor is seriously thinking about removing Adams. Perhaps she should consider establishing a process akin to the Seabury hearings to flesh out the accusations and his responses. She might, for example, appoint a group of bar leaders or former judges like Seabury to expeditiously hear out the U.S. attorney and the mayor—assuming either or both would participate—and Adams could present his side of the story without adversely impacting his legal defenses. Of course she could bypass this step, and simply determine that New Yorkers of all political stripes want a new mayor and institute removal proceedings immediately. As an attorney, she is capable of conducting a fair and thorough hearing. As the state's chief executive, she has the authority—and some would say the obligation—to give the mayor and all New Yorkers a speedy determination.

On the other hand, the governor can decide that she owes it to the electoral process to allow the city's duly elected mayor to fulfill his obligations even while he is contesting the U.S. attorney's allegations.

Clearly, the governor and mayor have some tough choices ahead.

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