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Cover Page Footnote

The writers are, respectively, the Deputy Majority Leader of the New York State Senate and the former Counsel to the New York Senate Judiciary Committee. In addition, the following people have contributed in the research and writing of this article: Paul Rulison, Director of Research; Roberta Glaros, Senate Fellow; Thomas J. O'Connor, Project Assistant; and Lora Eriole, Project Secretary.

NEW YORK'S IMPEACHMENT LAW AND THE TRIAL OF GOVERNOR SULZER: A CASE FOR REFORM

John R. Dunne & Michael A.L. Balboni*

I. Introduction

Impeachment plays a unique role in our system of government. It serves as the method by which a government disciplines an errant official so as to maintain public confidence in the political system.¹ Designed to check the gross misuse of authority, the impeachment process must also guarantee due process for the official accused of violating the public trust.² The impeachment of Governor Sulzer illustrates that an unreasonable, arbitrary and capricious impeachment process can be politicized, thereby diminishing the legitimacy of a process designed to maintain the integrity of government and the confidence of the people.³

At a 1981 hearing concerning the impeachment proceedings of Governor William Sulzer, Assemblyman Maurice Hinchey (D-Kings-ton) questioned the propriety and legality of those proceedings which led to Governor Sulzer's removal from office in 1913.⁴ After examining the facts surrounding the impeachment proceedings and the law that permitted those proceedings to be conducted, there appeared to be a serious lack of constitutional protections in terms of both the procedures and the substance of the impeachable acts.⁵ While no immediate prospect for the impeachment of any civil officer in New York State existed at the time, the absence of adequate pro-

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1. See *infra* notes 36-59 and accompanying text.

2. See THE FEDERALIST No. 65, at 396 (A. Hamilton) (new ed. 1857).

3. See *infra* notes 67-68 and accompanying text.

4. See *Legislative Committee on Review of the Constitutional Process of Impeachment and Inquiry on the Impeachment of Governor William Sulzer* 77-97 (Apr. 28, 1983) (testimony of James T. Kirk, Jr.) [hereinafter *Legislative Committee*].

5. See *id.*

tections was of a sufficiently grave concern for the legislature that it decided to create a special committee to inquire not only into the Sulzer affair but also into the laws of our state which authorized such a proceeding.

The Senate Judiciary Committee found that the 1913 impeachment proceeding resulted in a denial of both procedural and substantive due process,⁶ and that the constitutional and statutory provisions are relevant today because the law under which Sulzer was removed from office in 1913 is still the law of New York State.⁷ Accordingly, the Committee staff recommends several constitutional changes to establish:

- (1) A description of which public officials are subject to impeachment, which will more specifically ensure the application of impeachment to every "state officer."⁸
- (2) A more specific definition of what acts constitute impeachable conduct—a definition broad enough to include a wide range of misconduct, criminal as well as civil, yet specific enough to prohibit the use of impeachment as a political tool.⁹
- (3) A clearer indication of the jurisdiction of impeachment and when misconduct has to occur in order to be impeachable.¹⁰
- (4) A recommendation that these provisions be placed in the constitution to assure their permanence.¹¹

II. The Rise and Demise of William Sulzer

A substantial amount of evidence indicates that William Sulzer was the victim of a partisan political act orchestrated by Tammany Hall Boss Charles Murphy.¹² Sulzer's record of public service from 1890 to 1912, both as a New York State Assemblyman and as a United States Congressman, demonstrates his extraordinary success and energy as a public official whose politics blended the strains of populism and progressivism that dominated both national and

6. See *infra* note 35 and accompanying text.

7. See *infra* notes 91-104 and accompanying text.

8. See *infra* note 203 and accompanying text.

9. See *infra* note 201 and accompanying text.

10. See *infra* note 202 and accompanying text.

11. See *infra* note 200 and accompanying text.

12. See, e.g., THE AMERICAN REVIEW OF REVIEWS 262 (Sept. 1913) ("Tammany leaders and the powerful interests behind them had determined to impeach the Governor in order to get him out of the way").

state politics in the early twentieth century.¹³ But Sulzer also had a tendency to work independently of the party hierarchy.¹⁴ In fact, as a progressive, he dedicated himself to electoral reforms designed to curb severely the power of party machines and bosses.¹⁵

Aside from serving as an assemblyman and a congressman, Sulzer also became the speaker of the assembly at age thirty, the youngest person ever to serve in that capacity.¹⁶ In Congress, he was chairman of the powerful House Committee on Foreign Affairs,¹⁷ allowing him to exert his influence upon both national and international affairs.

Although Sulzer's "political career was deeply tied to the New York City Tammany Hall organization,"¹⁸ his relationship with Tammany leaders was never easy.¹⁹ By 1912, however, Sulzer was a nationally prominent political figure and he finally secured nomination for governor by the Democrats with the tacit consent of Charles Murphy.²⁰

13. See *Legislative Committee*, *supra* note 4, at 82-85. Mr. Kirk noted that Mr. Sulzer "was the author of more than [twenty-five] distinct bills embodying progressive legislation" while he served as a United States Congressman. *Id.* at 84. These included:

A bill to establish a Bureau of Corporations; to secure better enforcement of the antitrust law; establishment of the Department of Labor . . . something he introduced in 1904, which was finally passed in the House in 1912 and in the Senate in 1913; a resolution to amend the U.S. Constitution so as to permit the election of United States Senators by direct vote of the people; advocated the income tax amendment to the Federal Constitution . . . ; favored the publicity of campaign contributions in the United States House of Representatives; . . . he authored the eight-hour work day bill; sponsored and supported the establishment of a parcel post and supported a law to increase the pay of letter carriers; a bill to restore the Merchant Marine by giving preferential duties to American ships, a bill for Federal aid in the construction of good national roads; a bill to establish a Department of Transportation; a bill to improve the Foreign Consular and diplomatic service; and a bill prohibiting the sailing of any ship from the United States unless equipped with safety devices.

Id. at 84-85.

14. See 4 THEODORE ROOSEVELT PAPERS 3 (1969) [hereinafter ROOSEVELT PAPERS].

15. See *id.*

16. See H. MORGENTHAU, *ALL IN A LIFE-TIME* 471 (1922).

17. See 4 ROOSEVELT PAPERS, *supra* note 14, at 2.

18. *Legislative Committee*; *supra* note 4, at 86.

19. See *id.* In 1898, Tammany boss Richard Croker tried unsuccessfully to block Sulzer's renomination to Congress. See *id.* Moreover, from 1896 on, "Sulzer actively sought the Democratic nomination for Governor of New York and was successfully blocked by Tammany Hall." *Id.*

20. See 4 ROOSEVELT PAPERS, *supra* note 14, at 2.

Governor Sulzer "was determined to choose high-class men [for appointments to important positions] and clean out the prevailing rottenness" in state government.²¹ Moreover, Sulzer initiated a vigorous campaign to replace party conventions with direct primaries as the method for nominating candidates for political office, enraging both Republican and Democratic party leaders.²² Relations between the governor and the legislature had so deteriorated through the winter and spring of 1913²³ that by the summer, the stage was set for a confrontation between the popular, progressive governor and the powerful leader of Tammany Hall. Finally, on June 16, 1913, the two houses of the legislature passed a concurrent resolution authorizing a joint legislative committee, chaired by Senator James J. Frawley, to investigate "the [g]overnor's use of patronage and of the veto in opposing the [l]egislature's wishes on direct primary."²⁴ The Frawley Commission subsequently extended its investigation into Sulzer's campaign finances.²⁵

Based on findings of the Frawley Commission, the assembly approved the Articles of Impeachment on August 13, 1913,²⁶ charging Governor Sulzer with eight separate counts. These counts included: (1) two counts of filing false statements of campaign receipts and expenditures;²⁷ (2) two counts of suppressing evidence;²⁸ (3) one count of converting campaign funds to personal use;²⁹ (4) one count of bribing witnesses testifying before the Frawley Commission;³⁰ (5) one count of bribing assemblymen in order to secure their votes for one of the governor's bills;³¹ and (6) one count of using his authority to affect the prices of securities listed on the New York Stock Exchange.³² After a lengthy trial in the Senate, Governor Sulzer was found innocent of five of the charges but was convicted of two counts of filing false statements of campaign receipts and expenditures and of one count of suppressing evidence during a committee

21. THE AMERICAN REVIEW OF REVIEWS 260 (Sept. 1913).

22. See *id.*

23. See 4 ROOSEVELT PAPERS, *supra* note 14, at 3.

24. *Id.*

25. See *id.*

26. See *id.* at 3-4.

27. See 1 STATE OF NEW YORK PROCEEDINGS OF THE COURT FOR THE TRIAL OF IMPEACHMENTS 46-47 (1913) [hereinafter PROCEEDINGS].

28. *Id.* at 50-51.

29. *Id.* at 48-50.

30. *Id.* at 50.

31. *Id.* at 54-55.

32. *Id.* at 52-54.

investigation.³³ The impeachment court voted to remove Sulzer from the office of governor, although it permitted him to hold further public office.³⁴

The impeachment and removal of Governor Sulzer raises the issue of whether New York has a workable impeachment law that incorporates adequate due process safeguards against misuse of the impeachment power by the legislature. Historical accounts of the Sulzer affair have alluded to the confusion that became apparent at the trial regarding the substantive and procedural aspects of New York's impeachment law, confusion which contributed no doubt to the impeachment of Governor Sulzer.³⁵

III. The Emergence and Role of Impeachment in State Politics

By the time of New York's first Constitutional Convention in 1777, England's impeachment law was firmly established for over 400 years.³⁶ Parliament developed the process as a means of increasing its own political power in order to counter the power of the monarchy.³⁷ Even with the impeachment power, Parliament exercised little control over the person of the King because of the doctrine of sovereign immunity.³⁸ The King, however, would often employ ministers and friends to effect illegal schemes³⁹ and Parliament needed some mechanism to "curb ministers who were [used as] tools of royal oppression."⁴⁰ The power of impeachment served this purpose well.⁴¹

33. See 4 ROOSEVELT PAPERS, *supra* note 14, at 4.

34. See *id.*

35. See Legislative Committee, *supra* note 4, at 77-97.

36. See Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 5 (1970) (impeachment procedure was firmly in place in 1399 and during reign of Henry IV) [hereinafter Feerick].

37. See generally STAFF OF H.R. COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT—REPORT BY THE STAFF OF THE IMPEACHMENT INQUIRY 4 (Comm. Print 1974) [hereinafter HOUSE REPORT].

38. See generally R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 4 (1973) [hereinafter *Berger*].

39. *Id.*

40. *Id.*

41. See P. HOFFER & N.E. HULL, IMPEACHMENT IN AMERICA 1635-1805, 3 (1984) ("House of Commons found impeachment a potent weapon, exclusively theirs by precedent, to chastise, weaken, and—if the Lords would consent—penalize the king's ministers for corruption, infringement on parliamentary rights, misuse of power, and other abuses of public trust") [hereinafter HOFFER & HULL].

English impeachment law contained several features that would later influence impeachment in America. The House of Commons initiated the impeachment,⁴² while the more aristocratic House of Lords held the trial.⁴³ Beginning in the fourteenth century, impeachment trials were held for treason, trespasses and other illegal acts in violation of statute or common law.⁴⁴ These impeachments almost always involved a criminal penalty for conviction.⁴⁵ English impeachment language included such terms as " 'treason,' 'high treason,' 'misdemeanors,' 'malversations,' and 'high [c]rimes and [m]isdemeanors' " to describe the acts that were punishable.⁴⁶ With the adoption of these descriptions, Parliament attempted to include "allegations of misconduct as various as the kings (or their ministers) were ingenious in devising means of expanding royal powers."⁴⁷

The right of impeachment did not immediately take root in the American colonies.⁴⁸ Impeachment, however, soon became a method of challenging British authority⁴⁹ and was ultimately transformed into a means of ensuring that the independent state governments did not revert back to an English authoritarian government.⁵⁰ "From a tool of provincial assemblies to chastise corruption in other branches, it became a method for expressing the people's grievances (as enunciated in their assemblies) against imperial rulers."⁵¹ Impeachment was, in effect, an act of political protest.⁵²

After American independence, the revolutionaries resorted to impeachment to address the conflict between virtue and corruption that they believed was inherent in all republics.⁵³ From their perspective, the experiences of the first Revolutionary Congresses illustrated that no government "could escape the dangers of corruption, misuse of

42. See Feerick, *supra* note 36, at 5.

43. See *id.*

44. See HOFFER & HULL, *supra* note 41, at 3.

45. See *id.*

46. HOUSE REPORT, *supra* note 37, at 5.

47. See *id.*

48. See HOFFER & HULL, *supra* note 41, at 15 ("American impeachment precedent began almost inadvertently, in 1635, as a practical, local response to apparent misconduct in a high place").

49. See *id.* at 10-12.

50. See *id.* at 14 ("in a series of cases argued before independence, the colonists tested impeachment as a tool to resist imperial policy and assert the rights of the lower house as the representatives of the people").

51. *Id.* at 41-42.

52. See *id.* at 42 (politics acted as catalyst of impeachment).

53. See *id.* at 61.

power, and outright criminality.”⁵⁴ American theorists, such as John Adams, believed that “ ‘[p]ublic [v]irtue cannot exist in a nation without private [virtue], and public [v]irtue is the only [f]oundation of [r]epublics.’ ”⁵⁵ Checks and balances,⁵⁶ limited grants of power in fundamental constitutions⁵⁷ and bills of rights⁵⁸ were partial solutions. In the final analysis, however, only impeachment provided an adequate remedy for public corruption and abuse of power.⁵⁹

In order to perform this function, however, impeachment had to be transformed from a political act to a legal process. Limits on the power of impeachment had to be developed because the officials who might be impeached were either elected by the sovereign people or appointed by popularly elected officials.⁶⁰ Alexander Hamilton clearly identified the central problem of republican impeachment: How to provide for the removal of officials who either abuse or violate the public trust, while at the same time ensuring that the legislature will not use its vast power of impeachment for partisan political ends.⁶¹

Thus, impeachment raised a thorny problem for the framers of the state and federal constitutions in the new nation. The impeachment of Governor Sulzer highlights New York's struggle to achieve a proper balance between impeachment as a legal process and impeachment as a political weapon.

IV. New York State's Struggle With Impeachment Law

Since 1777, the framers of New York State's successive constitutions have wrestled with various solutions to the central problem Hamilton posed regarding impeachment.⁶² New York's first two constitutions restricted the applicability of impeachment by creating a special court and by defining which acts were impeachable.⁶³ Later versions of New York's Constitution, however, shifted away from substantive impeachment law towards reliance on vaguely defined

54. *Id.*

55. *Id.*

56. See THE FEDERALIST No. 48, at 228 (J. Madison) (new ed. 1857).

57. See *id.* No. 47, at 222 (J. Madison) (new ed. 1857).

58. See *id.* No. 84, at 391 (A. Hamilton) (new ed. 1857).

59. See HOFFER & HULL, *supra* note 41, at 60 (suggesting that without impeachment, only alternatives are assassination or revolution).

60. See THE FEDERALIST No. 65, at 300 (A. Hamilton) (new ed. 1857).

61. See *id.*

62. See *infra* notes 64-104 and accompanying text.

63. See *infra* notes 64-90 and accompanying text.

procedural and jurisdictional safeguards against legislative abuse.⁶⁴ The reason for this shift away from strict due process requirements is unclear. The shift may have occurred because the framers feared that a precise definition of impeachable acts would diminish the effectiveness of the impeachment procedure.⁶⁵ In weighing the balance between the rights of the accused and the effectiveness of the process, the framers gradually chose to enhance the effectiveness of the process.⁶⁶

The shift in New York's impeachment law toward weaker due process requirements was well established by the time of the impeachment of Governor William Sulzer,⁶⁷ and thus allowed the removal of a powerful political opponent by members of the legislature. The lack of an adequate constitutional standard defining the acts that were impeachable and the vagueness of the procedural due process safeguards tipped the balance of power between the branches of New York's government in favor of the legislature and permitted a "political" impeachment to take place.⁶⁸ Thus, the Sulzer impeachment highlights the need for both substantive and procedural due process within the impeachment law in order to maintain a constitutional balance of power between the executive and legislative branches of government.

A. The Constitution of 1777

New York's first Constitution, adopted in 1777, established a "bare-bones" impeachment standard and process consisting of three articles.⁶⁹ Article 32 established: (1) a court for the trial of officials accused of committing impeachable acts; and (2) a court for cor-

64. See *infra* notes 90-104 and accompanying text.

65. The more concise and succinct the definition of impeachment, the less conduct it will encompass. See, e.g., CROSWELL & SUTTON, DEBATES AND PROCEEDINGS IN THE NEW YORK STATE CONVENTION FOR THE REVISION OF THE CONSTITUTION 436 (1846) [hereinafter CROSWELL & SUTTON]. Alvah Worden, a delegate to the constitutional convention of 1846 "apprehended that it would be unsafe to define in a law what offences should be punishable. For it was beyond the power of human ingenuity to think of every thing that would be punishable. And to name some, we should run the hazard of excluding others that should be included." *Id.*

66. See *infra* notes 100-104 and accompanying text.

67. See *infra* notes 115-22 and accompanying text.

68. See *infra* notes 123-27 and accompanying text.

69. See 1 C. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 181-83 (1906) [hereinafter LINCOLN].

recting any errors made by the lower courts of law.⁷⁰ These two courts sat together as one court and consisted of the president pro-tem and members of the Senate, and the chancellor and judges of the supreme court.⁷¹

Article 33 established institutionally the power of impeachment and provided a rudimentary impeachment standard.⁷² The Assembly was granted the power of impeaching all officers of the state for "mal and corrupt conduct in their respective offices"⁷³ The members of the impeachment court were required to take an oath of impartiality prior to voting on the issue of impeachment.⁷⁴ Article 33 further provided that a conviction under the Articles of Impeachment required a two-thirds vote of the members present.⁷⁵ Upon conviction, the judgment could extend no further than "removal from office and disqualification to hold or enjoy any place of honor, trust, or profit, under this state."⁷⁶ The article also provided that impeachment would not bar an official from prosecution under criminal law.⁷⁷

Article 34 provided solely that the party impeached had a right to counsel.⁷⁸ Together, these three articles provided for a system of impeachment that relied on procedural and structural devices. For example, the impeachment court's structure guaranteed the participation of judges from the supreme courts and legislators from the Senate, thus providing for a forum that was both a political and judicial body.⁷⁹ Moreover, the requirement of a two-thirds vote for

70. See N.Y. CONST. art. XXXII (1777).

71. *Id.*

72. See N.Y. CONST. art. XXXIII (1777).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* This provision became the focus of debate during the 1846 Constitutional Convention largely because it raised the question of double jeopardy. See CROSWELL & SUTTON, *supra* note 65, at 436. During the constitutional convention, delegate Alvah Worden expressed the fear that "a party tried on articles of impeachment . . . might throw himself on the great principle that a man shall not twice be put in jeopardy for the same offence and he might plead his acquittal as a bar to an indictment in a court of law." *Id.* In a constitutional sense, however, jeopardy denotes a risk traditionally associated with a criminal prosecution where the punishment is loss of life or limb. See *Price v. Georgia*, 398 U.S. 323, 326 (1970). The concept of double jeopardy has not been applied to impeachment in New York State. See *People v. Stilwell*, 81 Misc. 456, 462-63, 142 N.Y.S. 628, 633 (Sup. Ct. N.Y. County 1913).

78. See N.Y. CONST. art. XXXIV (1777).

79. See *supra* note 71 and accompanying text.

conviction added a further safeguard to protect public officials from partisan political impeachment.⁸⁰

The convention documents of 1777 contain very little debate on the impeachment standard. It was not until the second Constitutional Convention, in 1821, that the framers addressed the impeachment standard, and even then they addressed it with little debate or explanation.

B. The Constitution of 1821

The Constitution of 1821 differed from the 1777 Constitution in two significant ways: (1) it strengthened the standard for impeachment; and (2) it reduced to a simple majority vote, from a two-thirds majority of the assembly, the vote needed to impeach a public official.⁸¹ While both of these changes, the first substantive and the second procedural, were important, it was the change in procedure that sparked a debate during the convention.⁸²

The proposal to vest the power to impeach in a simple majority of the Assembly met with opposition, especially from Delegate General Tallmadge who argued that "impeachments were usually from political motives" and that it was "not safe to vest this power in a bare majority."⁸³ Similarly, Delegate Abraham Van Vechten stated that he was "not disposed to put the rod into the hand of one branch of the government [the legislature], unless there was some limit set to the exercise of their power."⁸⁴ Delegate Peter Jay went even further, believing the power of impeachment unnecessary because "[a]dequate remedy could be had in the courts of law for those offenses that were not susceptible of sufficient punishment from the frown of public opinion."⁸⁵

Chancellor Kent responded that a majority vote was permissible as long as it was a majority of the entire Assembly.⁸⁶ Various other

80. See *supra* note 75 and accompanying text.

81. See 4 LINCOLN, *supra* note 69, at 600. The Constitution of 1821 retained the separate provisions for a court of impeachment and for impeachment by the Assembly. The section specifying the right to counsel was placed in a general section dealing with the right to counsel in a criminal case. The section relating to the composition of the court for the trial of impeachment remained basically the same. See N.Y. CONST. art. VI, § 13 (1821).

82. See 4 LINCOLN, *supra* note 69, at 601.

83. *Id.* at 600.

84. *Id.* at 601.

85. *Id.*

86. See *id.* at 600 (Chancellor Kent would not have objected to the section "if it required a majority of all the members elected").

delegates to the convention pointed out that the majority vote proposal was substantially in accordance with the English rule that permitted an impeachment by a bare majority of the House of Commons.⁸⁷

Although the delegates to the Constitutional Convention focused primarily on issues of procedure, they did not entirely neglect the issues surrounding substantive impeachment law. Several of them expressed the belief that while impeachment provided a useful tool for removing corrupt officials from public office, it had to be used restrictively.⁸⁸ One attempt to restrict the use of impeachment was an amendment that added the phrase "high crimes and misdemeanors."⁸⁹ This amendment reflected an attempt to apply impeachment to both civil and criminal acts, but required that these acts be of a serious nature, or an act of "high" criminality.⁹⁰ This amendment narrowed the scope of impeachment, thus limiting the possibility of a "political" impeachment.

C. The Constitution of 1846

Unlike earlier debates, the debate during the Constitutional Convention of 1846 centered on the issue of whether the constitution should contain a substantive impeachment standard.⁹¹

The definition of impeachable conduct, first included in the 1777 Constitution and expanded in the 1821 Constitution, had also been placed in statute.⁹² The placement of the definition in statute may have encouraged debate on the continued inclusion of the standard in the constitution. The Convention chose to delete the definition from the constitution and, in so doing, left open to interpretation the issue of what acts were impeachable. The parameters of the impeachment law now rested in statute,⁹³ thus greatly enhancing the legislature's ability to alter that definition.⁹⁴

87. See *id.* at 601.

88. See *id.* at 600-601.

89. See N.Y. CONST. art. V, § 2 (1821); see also 1 LINCOLN, *supra* note 69, at 210.

90. See *supra* note 89.

91. See CROSWELL & SUTTON, *supra* note 65, at 434-36.

92. 1 THE REVISED STATUTES § 15 (1829). In 1827, an impeachment standard containing the same language as the 1822 Constitution ("mal and corrupt conduct," and "high crimes and misdemeanors") was placed into section 15 of the first volume of the Revised Statutes.

93. See *id.*

94. Amending the constitution is a difficult task: two successive legislatures must consider and pass the bill and then the electorate must vote on it. See N.Y. CONST. art. XIX, § 1 (McKinney 1969).

A sense of complacency on the part of some of the delegates over the need for an impeachment process may explain the deletion of the standard from the constitution in 1846. Lemuel Stetson, of Clinton County, commented that "[i]t was a proud tribute to our state that hitherto there [have] been no impeachments."⁹⁵ Believing that no impeachments would occur in the future, Stetson envisioned the impeachment power mainly "as a warning to officers."⁹⁶

Some delegates, however, felt that they should retain the standard in order to ensure that the legislature would not misuse the impeachment power.⁹⁷ Federal Dana, a delegate from Madison, moved to amend the constitution to provide for impeachment for "mal and corrupt practices in office and high crimes and misdemeanors."⁹⁸ The Oneida County delegate, Charles P. Kirkland, offered another amendment to give the Assembly the power to impeach all "civil officers of this state for corrupt practices in office, and high crimes and misdemeanors."⁹⁹

The delegates, however, rejected all amendments that sought to define the impeachable acts in the constitution. The opposition to these amendments was, perhaps, best expressed by Alvah Worden, a convention delegate from Ontario County. He thought it unsafe and unwise to define impeachable acts specifically, "[f]or it was beyond the power of human ingenuity to think of everything that would be punishable."¹⁰⁰ Worden feared that specifying only certain acts would risk excluding others.¹⁰¹ Faced with the difficult question of how to define impeachable acts without limiting the effectiveness of the impeachment provision, the delegates chose instead to place their reliance on procedural safeguards to achieve due process.¹⁰² As a result, New York's Constitution no longer contained any definition of impeachable conduct.

In removing the "mal and corrupt" and "high crimes and misdemeanors" language from the constitution, the delegates also removed the language "in office."¹⁰³ This left the constitution bereft of any indication of *when* impeachment applied. The delegates thus

95. CROSWELL & SUTTON, *supra* note 65, at 436.

96. *Id.*

97. *See id.*

98. *Id.* at 434.

99. *Id.* at 435-36.

100. *Id.* at 436.

101. *See id.*

102. *See id.*

103. *See* 1 LINCOLN, *supra* note 69, at 248.

left to the legislature the task of clearing up this jurisdictional confusion. In 1853, the Assembly Judiciary Committee undertook a study of the problem.¹⁰⁴

D. Assembly Judiciary Committee Report of 1853

The Assembly Judiciary Committee considered two impeachment issues.¹⁰⁵ The first was "[w]hether a person could be impeached who at the time of his impeachment was not the holder of an office . . . of this [s]tate."¹⁰⁶ The Committee's answer was in the negative.¹⁰⁷ The members found that because impeachment affected only the officer's official status and could result only in removal from office and disqualification from future office, the only basis for the jurisdiction of the court of impeachment would be an offense committed by a person currently holding office in the state of New York.¹⁰⁸

The second issue was "[w]hether a person could be impeached and deprived of his office for mal-conduct, or offences done or committed under a prior term of the same or any other office."¹⁰⁹ The Committee's answer to the second question was also in the negative.¹¹⁰ The members determined that it was the prerogative of the electorate to put into office any person it so desired, regardless of the candidate's moral character.¹¹¹ The Committee ruled that a person holding elective office could not be impeached for acts committed prior to taking office.¹¹² Thus, the Committee interpreted

104. See *infra* notes 105-14 and accompanying text.

105. See REPORT OF THE JUDICIARY COMM. RELATIVE TO POWER OF IMPEACHMENT, N.Y. Ass. Doc. No. 123, 76th Sess. 1 (June 23, 1853). The committee was directed by resolution to consider these questions. See *id.* (resolution of Mr. Weeks). There was a reference to the Committee being under a time constraint. See *id.*

106. *Id.*

107. See *id.* at 4.

108. See *id.* at 2. In reaching its conclusion, the Committee on the Judiciary stated:

It is equally clear, from the terms of the Constitution, that the person must be in office at the time of the impeachment: this instrument provides but two modes of punishment, viz., removal from office, or removal and disqualification to hold office; in either mode of punishment, the person must be in office, for removal is contemplated in both cases, which cannot be effected unless the person is in office.

Id.

109. *Id.* at 1.

110. See *id.* at 4.

111. See *id.* at 2-3.

112. See *id.* at 4.

"impeachment" as applying only to acts committed during the current term of office.¹¹³ The impeachment trial of Governor Sulzer some sixty years later, however, overruled this holding.¹¹⁴

E. Impeachment Trials and Law

Subsequent events have revealed that the debates during New York's Constitutional Conventions on substantive and procedural impeachment law did not settle the issues. Rulings made during actual impeachment trials further complicated the debate over impeachment issues. In 1868, for example, Robert C. Dorn, Canal Commissioner, was tried in the court of impeachments and acquitted.¹¹⁵ The standard used in the case was "mal and corrupt conduct in office" and "high crimes and misdemeanors."¹¹⁶ The court chose to reaffirm the constitutional standard of the 1821 Constitution, which had employed the high crimes and misdemeanors language, as opposed to the standard of 1846, "mal and corrupt conduct."¹¹⁷

In 1872, supreme court Justice George Barnard was impeached, convicted and removed from office for official misconduct.¹¹⁸ The main issue of the trial was a jurisdictional one, focusing on whether or not the judge could be impeached in his second term of office for misconduct alleged to have been committed during his first term.¹¹⁹ The court of impeachment ruled that they could consider the prior misconduct, since portions of that conduct related to acts committed during the judge's second term.¹²⁰ Judge Barnard was the only New York State official convicted by the court of impeachment during the period from 1777 to 1913.¹²¹ In 1913, however,

113. See *id.*

114. See *Legislative Committee*, *supra* note 4, at 94 (Governor Sulzer was convicted for filing false statements of campaign receipts, actions which may have been improper but which occurred prior to taking oath of office). *But see* *People v. Berg*, 228 A.D. 433, 239 N.Y.S. 670 (2d Dep't) (offer to bribe public official prior to beginning of his term of office does not sustain conviction under New York Penal Law § 378), *aff'd mem.*, 254 N.Y. 544, 173 N.E. 858 (1930). See *infra* note 184 for a discussion of the *Berg* case.

115. See 4 LINCOLN, *supra* note 69, at 607.

116. *Id.* at 602-605.

117. *Id.*

118. See *id.* at 607.

119. See *id.* at 605.

120. See *id.* (impeachment court "considered all the charges, which included alleged misconduct during parts of both terms").

121. See *id.* at 605-607.

for the first time in New York State history, the vast power of impeachment focused upon the removal of the chief executive of the state, Governor William Sulzer.

By 1913, New York impeachment courts had several sources for interpreting the scope of the legislature's impeachment power: (1) the records of three constitutional conventions; (2) the 1853 Assembly Judiciary Committee Report; and (3) subsequent case law. Yet, the arguments presented at the Sulzer impeachment trial indicate that considerable confusion remained over which acts were impeachable and the extent of the legislature's impeachment power.¹²²

F. The Impeachment Trial of Governor Sulzer

The impeachment of Governor Sulzer demonstrates that the absence of a clear and precise constitutional standard defining impeachable acts can increase the already extensive power and discretion granted to the legislature in impeachment cases. The best example of this broad power involves the actions taken by the Frawley Commission, a joint legislative committee which was initially charged with investigating "the [g]overnor's use of patronage and of the veto in opposing the [l]egislature's wishes on direct primary."¹²³ The Commission expanded its jurisdiction to investigate Sulzer's individual campaign financing and eventually proposed the impeachment of Sulzer.¹²⁴ At that time, the impeachment standard contained in the controlling statute, the Code of Criminal Procedure, was "wilful and corrupt misconduct."¹²⁵ In its Articles of Impeachment, however, the Commission broadened the standard to include acts committed while a *candidate* for office by proposing that Sulzer be impeached for "high crimes and misdemeanors" as well as for "wilful and corrupt misconduct in his said office."¹²⁶ By including the phrase

122. See *infra* notes 133-47 and accompanying text.

123. 4 ROOSEVELT PAPERS, *supra* note 14, at 3.

124. See *id.* ("[i]t has been proclaimed in the voluminous literature on Sulzer's impeachment that the Frawley Committee clearly extended beyond its legal bounds in investigating Sulzer's campaign finances").

125. See 4 LINCOLN, *supra* note 69, at 605.

126. See 1 PROCEEDINGS, *supra* note 27, at 46. The title of the Articles of Impeachment read:

In the Name of Themselves and of all the People of the State of New York, against William Sulzer, Governor of said State, in Maintenance of their Impeachment against Him for Wilful and Corrupt Misconduct in His said Office, and for High Crimes and Misdemeanors.

Id.

"high crimes and misdemeanors" after the phrase "in office," the Frawley Commission was able to bring Sulzer to trial for election law violations that he allegedly committed prior to his taking public office.¹²⁷

Three major issues surfaced at Governor Sulzer's trial. One issue related to the disqualification of the members of the Frawley Commission and Senator Wagner, the majority leader of the Senate, from sitting on the court of impeachments.¹²⁸ The members of the Frawley Commission had participated in drafting the Articles of Impeachment,¹²⁹ and Senator Wagner was the successor to the lieutenant governor upon the removal of Governor Sulzer.¹³⁰ Presiding Judge Cullen resolved this issue by ruling that "there is this marked distinction between a challenge to a juror and a challenge to a judge At common law, nothing disqualifies a judge from sitting, except direct interest in the case."¹³¹ Judge Cullen further stated that disqualification of members of the court of impeachment could not "be extended or in any way changed from those prescribed by the [c]onstitution," which prohibited only the lieutenant governor from taking part in the trial.¹³²

Another issue involved whether the legislature could consider impeachment during a special session called by the governor specifically to consider other matters.¹³³ The New York Constitution provides that, at extraordinary sessions, the governor must first recommend a subject before the legislature can act upon it.¹³⁴ Chief Judge Cullen believed that this provision was inapplicable to the power of impeachment because the power of impeachment belonged to the legislature alone.¹³⁵ Subsequently, the court overruled this objection.¹³⁶

127. See *id.* By putting the "high crimes" language after the "wilful and corrupt misconduct in office," the Articles of Impeachment focused on two time periods: one for actions taken in office, and the other for actions taken out of office but which nonetheless constituted "high crimes and misdemeanors." See *id.*

128. See *id.* at 43-44.

129. See *Legislative Committee*, *supra* note 4, at 96.

130. See *id.* at 90.

131. See 1 PROCEEDINGS, *supra* note 27, at 44.

132. *Id.*

133. See *Legislative Committee*, *supra* note 4, at 96.

134. See N.Y. CONST. art. IV, § 3 (McKinney 1914).

135. See *People ex rel. Robin v. Hayes*, 163 A.D. 725, 149 N.Y.S. 250 (3d Dep't) (appellate division adopting Judge Cullen's belief that nothing limited New York Assembly's power to impeach during extraordinary session of legislature), *appeal dismissed*, 212 N.Y. 603, 106 N.E. 1041 (1914).

136. See *id.*

The third issue concerned the substance of the Articles of Impeachment, namely the question of whether the governor could be impeached for acts committed prior to his tenure in office.¹³⁷ The first two Articles of Impeachment concerned acts alleged to have occurred prior to Sulzer's taking the oath of office.¹³⁸ These acts involved the filing of false statements regarding receipt and expenditure of campaign funds and use of campaign funds for speculation in the stock market.¹³⁹

Some of the judges who voted against considering impeachment for prior acts based their vote on the premise that the "in office" language contained in the statutes applied only to acts committed while in office.¹⁴⁰ The sentiment of the members of the court of impeachment, however, was that the acts of a candidate cannot be distinguished from the acts of an official.¹⁴¹ Senator Elan R. Brown of Watertown noted that "[e]very day a public official is in office he holds it by virtue of his election, and if in securing that election he secretly committed crimes or moral offenses, or both those crimes and offenses, he is guilty of official misconduct."¹⁴²

One judge expressed the opinion that the crimes themselves, no matter when the official had committed them, did not have a serious criminal character.¹⁴³ Conversely, Senator George Blauvelt interpreted New York impeachment law as permitting the legislature to impeach for whatever reason it saw as sufficient justification.¹⁴⁴

Senator Blauvelt's attitude was pervasive among the impeachment court members, many of whom felt that they had a virtual *carte blanche* in determining which acts were impeachable. For example, Senator Carswell stated that after having examined the constitution—

137. See 2 PROCEEDINGS, *supra* note 27, at 1749.

138. See 1 PROCEEDINGS, *supra* note 27, at 46-50.

139. See *id.*

140. See 2 PROCEEDINGS, *supra* note 27, at 1592-1600.

141. See *id.* at 1591 (statement of Senator Argetsinger) ("I find that the acts of integrity and immorality are so closely allied" before and after taking oath of office "that I am unable to divorce the two").

142. *Id.* at 1599 (statement of Senator Brown).

143. See *id.* at 1592 (statement of Judge Bartlett).

144. See *id.* at 1596 (statement of Senator Blauvelt). Senator Blauvelt stated:

Even though the limitations fixed by the Penal Law are included in the statute, I do not think they are controlling or binding upon us. The highest court of this State has repeatedly held that the Legislature cannot enlarge the provisions of the Constitution. That being so, how then can it abridge them?

Id.

"the sole repository of the constitutional grant of power relating to . . . impeachment"¹⁴⁵—he found an affirmative intention to enlarge the grant of power from time to time as opposed to an implied limitation upon impeachment.¹⁴⁶ The judges of the impeachment court finally voted by a margin of five to four in favor of impeachment based on prior acts.¹⁴⁷

V. New York Case Law: An Analysis of Impeachment Jurisdiction

The removal of Governor Sulzer raises three interrelated questions: (1) did the legislature abuse the power of impeachment; (2) if so, were there sufficient due process protections in New York's impeachment law; and, more generally, (3) had New York established a device for removing officials who violated the public trust without adequately protecting them against political misuse of the impeachment power? Since it has virtually no standard for identifying impeachable acts, New York must look to the courts to interpret the collection of vaguely worded statutes that make up New York's impeachment law.

New York lacks both a constitutional and a statutory provision for appellate review of the findings or determinations of an impeachment court.¹⁴⁸ As a result, no judicial interpretations of jurisdictional or substantive impeachment issues exist. Nevertheless, subsequent case law dealing with the removal of public officials under other provisions of law has discussed the actions of the court of impeachments.¹⁴⁹ The effect of these subsequent decisions has been to reemphasize the weaknesses of New York's impeachment law.

New York case law has addressed one of the key issues raised during the impeachment trials of both Barnard and Sulzer, namely, whether the officer must have committed the misconduct while he was in office. The parallel provisions of the New York Constitution and the Public Officers Law relating to the *removal* of officers, as opposed to *impeachment* of officers, specify certain acts which are

145. *Id.* at 1749.

146. *Id.*

147. See *People v. Berg*, 228 A.D. 433, 440, 239 N.Y.S. 670, 677 (2d Dep't), *aff'd mem.*, 254 N.Y. 544, 173 N.E. 858 (1930).

148. See N.Y. CONST. art. VI, §§ 1-37 (McKinney 1969 & Supp. 1987).

149. See *supra* notes 115-22 and accompanying text.

grounds for removal. Both impeachment and removal proceedings require that the misconduct be committed "in office."¹⁵⁰ The appointing agency may remove appointed public officers, except judges, for "malversations" or "misconduct."¹⁵¹ Proceedings to remove local officials are brought in the appellate division of the supreme court and, therefore, are subject to further judicial review by the court of appeals.¹⁵²

In the majority of cases involving the removal of a public officer, the issue on appeal was whether the officer could be removed for misconduct committed during a prior term of office.¹⁵³ The courts are nearly unanimous in holding that misconduct during a prior term of office *does* constitute grounds for impeachment.¹⁵⁴

The courts have recognized, however, that in certain situations, they must make a distinction between "secret" misconduct and misconduct that has been made public.¹⁵⁵ If in the intervening election the public has received full disclosure of the misconduct, then the intervening election is viewed as an exoneration by the public of the wrongdoing and the courts have refused to hold officials accountable in these situations.¹⁵⁶

For example, in *Carlisle v. Burke*,¹⁵⁷ a town superintendent of highways appealed his removal, which had been based upon charges of "malfeasance" and "misfeasance" in his prior term of office.¹⁵⁸ The court noted that after a full disclosure of the charges during the intervening election campaign, the electorate returned the superintendent to office.¹⁵⁹ The court ruled that since the supervisor had received an intervening "mandate" from his constituency, his

150. N.Y. CONST. art. XIII, § 5 (McKinney 1969); *see also* N.Y. PUB. OFF. LAW §§ 32-36 (McKinney 1952).

151. *See* N.Y. PUB. OFF. LAW § 36 (McKinney 1952).

152. *Id.*

153. *See infra* notes 157-87 and accompanying text.

154. *See* *People ex rel. Burby v. City of Auburn*, 85 Hun. 601, 33 N.Y.S. 165 (Sup. Ct. 1895) (councilman removed for acts committed during prior term); *see also In re Abare*, 21 A.D.2d 84, 248 N.Y.S.2d 826 (3d Dep't 1964) (town supervisor pleaded guilty to petit larceny committed during prior term of office); *Corwin v. Mercier*, 14 A.D.2d 652, 218 N.Y.S.2d 718 (3d Dep't 1961) (town highway superintendent removed for receiving kickbacks during prior term).

155. *See infra* notes 157-64 and accompanying text.

156. *Id.*

157. 82 Misc. 282, 144 N.Y.S. 163 (Nassau County Ct. 1913).

158. *See id.* at 284-89, 144 N.Y.S. at 164.

159. *See id.* at 289, 144 N.Y.S. at 166.

acts in a prior term of office could not form the basis for his removal during the subsequent term.¹⁶⁰

Some years later, a different department of the appellate division upheld an official's removal from office. In *Newman v. Strobel*,¹⁶¹ a town supervisor sought to dismiss a removal petition which the town board had brought. The removal proceeding, like that in *Carlisle*, was based upon misconduct occurring in a prior term of office.¹⁶² The supervisor argued that he could not be dismissed from office for wrongful acts committed prior to his current term and that any wrongdoing in a previous term had "been washed away by the action of the people of his town in re-electing him."¹⁶³ The court ruled against the supervisor because it was unclear that the electorate had received full disclosure of his misdeeds during the re-election.¹⁶⁴

The *Newman* court extensively analyzed the precedents dealing with the question of whether misconduct committed prior to office should constitute grounds for removal from office.¹⁶⁵ In discussing the impeachment of William Sulzer, the court noted that the governor had been impeached "for misconduct which occurred while he was a private citizen, and before his term of office commenced."¹⁶⁶ The court pointed out that four of the five court of appeals judges sitting on the court of impeachment had sustained impeachment for misconduct committed prior to office.¹⁶⁷ The court stated:

The four judges voting in favor of the accused based their vote upon the ground that Governor Sulzer could not be removed for acts, no matter how reprehensible they might be, which were done when he was not in office at all, and while he was a private citizen. That is an entirely different situation from that which exists here, where respondent was in office at the time of the misconduct complained of, as well as when the removal proceedings were instituted.¹⁶⁸

In distinguishing the *Sulzer* holding, the *Newman* court observed that the court of impeachment removed Governor Sulzer for acts

160. See *id.* at 290, 144 N.Y.S. at 167.

161. 236 A.D. 371, 259 N.Y.S. 402 (4th Dep't 1932).

162. See *id.* at 372, 259 N.Y.S. at 403.

163. *Id.*

164. See *id.* at 373, 259 N.Y.S. at 405.

165. See *id.* at 374-77, 259 N.Y.S. at 405-409.

166. *Id.* at 376, 259 N.Y.S. at 407.

167. See *id.* at 376, 259 N.Y.S. at 408.

168. *Id.*

committed when he was a private citizen.¹⁶⁹ The *Newman* court, however, never reached the question of whether Sulzer was in a private or public capacity, since in the *Newman* case, the defendant was a public officer at all times.¹⁷⁰ In fact, the court held:

Mr. Strobel's tenure of office having continued for the past five or six years without cessation or interruption, the entire period can and should be considered as one continuous term, and he can be called to account for his misdeeds committed at any time during this period, even though the act actually occurred prior to the commencement of the separate and distinct term which he is now serving.¹⁷¹

The consensus emerging from these cases is that the phrase "in office," whether used in a context of impeachment or removal, does not mean misconduct occurring strictly within the current term of office. Rather, impeachment may attach to misconduct committed in a prior term of office.¹⁷² As the *Newman* court stated: "A public officer is none the less unfit to hold office, and the interests of the public are none the less injuriously affected because the misdeeds which portray his unfitness occurred on the last day of one term rather than on the first of the next succeeding term."¹⁷³

The courts and the Assembly Judiciary Committee Report of 1853 have also agreed, however, that these prior acts may not be employed to discharge from office an official who has been exonerated by an intervening election.¹⁷⁴ The finding of whether such intervening election is in fact an exoneration is based upon whether the official made a full and frank disclosure of the misconduct.¹⁷⁵ This issue is a question of fact for the courts to decide on a case-by-case basis.¹⁷⁶

An example of how New York courts have dealt with the issue of whether persons may be impeached for acts committed in a prior term is found in *People v. Berg*.¹⁷⁷ This case presented the court with the question of whether a person could be prosecuted for bribing an official prior to the commencement of that official's

169. See *id.* at 376, 259 N.Y.S. at 407.

170. See *id.* at 374, 259 N.Y.S. at 405.

171. *Id.* (citations omitted).

172. See *supra* notes 150-71 and accompanying text.

173. 236 A.D. at 373, 259 N.Y.S. at 404.

174. See *supra* notes 109-14 and accompanying text.

175. See *Newman*, 236 A.D. at 373-74, 259 N.Y.S. at 405.

176. *Id.*

177. 228 A.D. 433, 239 N.Y.S. 670 (2d Dep't 1930).

tenure in office.¹⁷⁸ The official, the Queens Borough President-elect, had not yet taken the oath of office when the defendant offered him a bribe in order to influence the subsequent assignment of building construction contracts.¹⁷⁹ The appellate division ruled that an official's term of office commenced with the taking of the oath of office and dismissed the indictment because at the time the defendant had offered the bribe, the Queens Borough President had not yet undertaken the duties of his office.¹⁸⁰

The *Berg* court examined the issue of whether the "in office" restriction, contained in the Code of Criminal Procedure, was a valid restraint upon the legislature's constitutional power of impeachment.¹⁸¹ The *Berg* court was faced with the *Sulzer* court ruling which broadened impeachable acts to include the acts of a private citizen committed prior to office.¹⁸² This holding conflicted with section 12 of the Code of Criminal Procedure¹⁸³ which limited impeachment to acts committed while in office. The *Berg* court interpreted the *Sulzer* decision as holding that the Code of Criminal Procedure's statutory restriction to acts committed while "in office" was an unconstitutional limitation of the broad authority granted to the court of impeachment by the constitution.¹⁸⁴

The effect of the *Sulzer* court's refusal to acknowledge the impeachment language contained in criminal procedure law was that the court ignored any reference to *when* the acts had to be committed in order to be impeachable. With this ruling, the *Sulzer* court not only altered the definition of impeachable acts, but it also expanded the application of the law to include acts committed prior to office.¹⁸⁵ This expansion, however, did not necessarily constitute an abuse of the impeachment power. There is little purpose in having an impeachment provision that is ineffective before an oath of office is

178. See *id.* at 434-35, 239 N.Y.S. at 671.

179. See *id.*

180. See *id.* at 435, 239 N.Y.S. at 672.

181. See *id.* at 440, 239 N.Y.S. at 677.

182. *Id.* at 440, 239 N.Y.S. at 677-78.

183. See N.Y. JUD. LAW § 240 (McKinney 1983).

184. See *Berg*, 228 A.D. at 440, 239 N.Y.S. at 677-78 ("majority of the judges of the Court of Appeals in the *Sulzer* case held that the limitation expressed in section 12 of the Code of Criminal Procedure was unconstitutional and that, under the Constitution, impeachable offenses were not limited to those committed in office") (citations omitted).

185. See *Newman*, 236 A.D. at 376, 259 N.Y.S. at 407 ("Governor Sulzer was impeached for misconduct which occurred while he was a private citizen, and before his term of office commenced").

taken. Egregious acts committed while an officer is running for office can be just as damaging to the office. The *Barnard*, *Newman* and *Carlisle* courts, and the 1853 Assembly Judiciary Committee also expanded the application of the impeachment law by concluding that misconduct in a prior term may be a basis for removal from a subsequent term, as long as no exonerating election intervened.¹⁸⁶ Consequently, the weight of authority justifies the application of impeachment to misconduct that occurs: (1) in office; (2) during a prior term of office or; (3) while an official is seeking public office.¹⁸⁷

VI. Problems with New York's Impeachment Law

New York's impeachment law fails to describe what are impeachable acts. Perpetuation of an impeachment standard that is both vague and overbroad harms the process of government in two ways. First, it restricts the ability of New York's leaders to be independent for fear that the actions they take will result in their removal from office. Second, it denies persons subject to impeachment notice and due process. A law violates due process if it is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"¹⁸⁸ An impeachment statute that fails to describe any action as being impeachable provides no basis for understanding which actions the legislature has proscribed.

Unfortunately, no authority or history provides a clear definition of what is impeachable conduct. The prefix "mal" is defined as "bad, wrong, fraudulent."¹⁸⁹ "Corruption is more specific, referring to an unlawful or wrongful act of a public official and to an act

186. See *supra* notes 109-14 and accompanying text.

187. It is arguable that while a candidate is seeking public office he is a private citizen. He is, nonetheless, holding himself out to the public as a well-qualified candidate, one worthy of the public trust. As a matter of common sense, if this person should come into office, his acts performed prior to office will most surely affect his office as much as those acts performed while in office. As one author noted:

An act or a course of misbehavior which renders scandalous the personal life of a public officer shakes the confidence of the people in his administration of the public affairs, and thus impairs his official usefulness, although it may not directly affect his official integrity or otherwise incapacitate him properly to perform his ascribed functions.

Brown, *The Impeachment of the Federal Judiciary*, 26 HARV. L. REV. 684, 692-93 (1913).

188. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

189. BLACK'S LAW DICTIONARY 861 (5th ed. 1979).

designed to procure some benefit for oneself or another that is contrary to public duty and to the rights of others.¹⁹⁰

The phrase "high [c]rimes and [m]isdemeanors," borrowed from the English impeachment statutes, is also contained in the federal constitution.¹⁹¹ This phrase denotes "great" offenses and crimes so morally repugnant as to make them impeachable.¹⁹² One author has defined "high [c]rimes and [m]isdemeanors" as those acts that "are rather obviously wrong, whether or not 'criminal,' and which so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator."¹⁹³

These words and phrases do not give a very satisfying definition of impeachable misconduct. For example, these words and phrases fail to indicate how to handle acts of willful omissions, in which the official refuses to do his duty. Yet, as a matter of common sense, impeachment should apply to officials who refuse to carry out acts required by law and who display intentional disregard for a plain or manifest duty.

In adopting a definition of impeachable misconduct, one must take special care not to be too specific; otherwise certain types of impeachable conduct might not be included.¹⁹⁴ The definition should indicate, however, that impeachment is to apply to acts that are extremely serious, exhibiting corruption in some way, and are subversive to the political process. The impeachment standard should carry with it an understanding of injustice, dishonor and criminal color, unbefitting of a person in a position of high trust. The standard should guide public officials in the discharge of their public duties and provide them with a better understanding of the type of behavior that may result in impeachment.

Another problem with the current impeachment law is its failure to specify the individuals to whom impeachment potentially applies. The constitution currently contains provisions concerning the individuals who may sit on the court of impeachments, and who may be excused from sitting if the governor or lieutenant governor is impeached.¹⁹⁵ The constitution, however, fails to indicate which of-

190. *Id.* at 311.

191. See U.S. CONST. art. II, § 4.

192. For a discussion of the origin of the phrase "high crimes and misdemeanors," see *Berger*, *supra* note 38, at 59-63.

193. C.L. BLACK, IMPEACHMENT—A HANDBOOK 39-40 (1974).

194. See *supra* note 65.

195. See N.Y. CONST. art. VI, § 24 (McKinney 1969).

ficials may be removed from their office by impeachment. Section 240 of the Judiciary Law¹⁹⁶ addresses this issue by stating that the court for the trial of impeachment has the power to try impeachments "of all civil officers of the state, except justices of the peace, justices of justices' courts, police justices, and their clerks."¹⁹⁷

While no statute defines a "civil" officer, the Public Officers Law does contain the qualifications necessary to hold civil office.¹⁹⁸ Moreover, the Public Officers Law defines "state officer" as including:

[E]very officer for whom all the electors of the state are entitled to vote, members of the legislature, justices of the supreme court, regents of the university, and every officer, appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation to any political subdivision of the state, except United States senators, members of congress, and electors for president and vice-president of the United States.¹⁹⁹

Basic rules of construction allow the interpretation of "state officer" as one who holds civil office and, therefore, is a civil officer as referred to in section 240.

Failure to include in the constitution a clear statement indicating which officials are subject to impeachment provides a potential for abuse. For example, it is possible for the legislature to amend the Judiciary Law to exempt its members from the reach of impeachment. Can it seriously be contended that this was the intent of the framers of the constitution?

VII. Recommendations

The meager constitutional references to impeachment and the statutory preoccupation with procedural detail have perpetuated the emphasis on procedural formalities while ignoring the due process rights of the accused. It is time for New York to address this issue and frame a comprehensive standard of conduct to prevent future possible abuses of the impeachment power.

196. N.Y. JUD. LAW § 240 (McKinney 1983).

197. *Id.*

198. See N.Y. PUB. OFF. LAW § 3 (McKinney 1952 & Supp. 1987).

199. *Id.* § 2 (McKinney 1952).

In light of the foregoing discussion, the Judiciary Committee staff recommends that article six, section 24 of the New York State Constitution be amended to provide the following:²⁰⁰

(1) Limit impeachment for "corruption, malfeasance, willful neglect of duty and other high crimes and misdemeanors."²⁰¹

(2) Define impeachable acts to include those acts committed "in office, in a prior term of office or while the official is seeking public office."²⁰²

(3) Make subject to impeachment "every state officer for whom all the electors of the state are entitled to vote, members of the legislature, justices of the supreme court, regents of the university, and every officer appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation to any political subdivision of the state."²⁰³

VIII. Conclusion

Despite the uncertainty of substantive standards and the legitimate concerns over constitutional due process after the Sulzer trial, New York has failed to fashion a workable impeachment law with adequate safeguards against legislative abuse of the impeachment power.

Since 1913, New York has had three Constitutional Conventions. The only amendments to the impeachment provision, however, have been procedural in nature, with nothing relating to the weaknesses discussed above.²⁰⁴ Nor has the legislature addressed these issues in a statute.

In 1971, the legislature recodified the Code of Criminal Procedure and removed to the Judiciary Law the provisions dealing with impeachment.²⁰⁵ As a result, the entire body of New York's current impeachment law is contained in article six, section 24 of the constitution,²⁰⁶ and various articles of the Judiciary Law.²⁰⁷ The new sections of the Judiciary Law continue to focus on procedural due

200. See *supra* note 11 and accompanying text.

201. See *supra* note 9 and accompanying text.

202. See *supra* note 10 and accompanying text.

203. See *supra* note 8 and accompanying text.

204. See 1 LINCOLN, *supra* note 69, at 181-83; see also CROSWELL & SUTTON, *supra* note 65, at 434-36.

205. See N.Y. JUD. LAW §§ 240-248 (McKinney 1983).

206. See N.Y. CONST. art. VI, § 24 (McKinney 1969).

207. See N.Y. JUD. LAW §§ 240-248 (McKinney 1983).

process and fail to fill the substantive due process void.²⁰⁸ They establish an elaborate procedure for operating the court for the trial of impeachments, including a detailed description of the members of the court,²⁰⁹ the seal of the court,²¹⁰ the time for the holding of the court,²¹¹ how service is to be made upon the defendant²¹² and the form for any objections.²¹³

Despite all of these procedural embellishments, New York's impeachment law still contains very little substance. As a result, the only reference to impeachable conduct contained in section 240 of the Judiciary Law,²¹⁴ retains the standard of "for willful and corrupt misconduct in office."²¹⁵ This vacuum demands legislative action in the form of constitutional amendments.

208. *See id.*

209. *See id.* § 241.

210. *See id.* § 244.

211. *See id.* § 245.

212. *See id.* § 417.

213. *See id.* § 420.

214. *See id.* § 240.

215. *Id.*

