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Expert Analysis

Monserrate and the Question Of Pink Slips for Elected Officials

By **Jerry H. Goldfeder**

According to Paul Simon, there may be 50 ways to leave your lover.[1] In the world of politics, the options are decidedly fewer for ousting an objectionable elected official. Now that a committee of the New York State Senate has recommended to the full body that it consider expelling Senator Hiram Monserrate, it is worth previewing some of the legal issues that might be raised over the next few months in connection with Mr. Monserrate's future in the Senate.

If the Senate decides not to expel him, of course, his constituents might vote him out of office. Challenging an incumbent is very difficult for a variety of legal and political reasons, and the chance to do so occurs only at appointed times, every two or four years—in this case, later this fall. A wide array of groups and elected officials are already behind a challenger, so the voters in Queens may have that option.

The far more interesting question, however, is whether, and under what circumstances, a public official can be forced out of office *prior* to Election Day. Unlike 18 other states, New York voters cannot act on their own by "recalling" elected officials.[2] States that permit recall require the circulation of petitions to put such a question on the ballot, and then the proposed recall of an elected official is put to a vote. A recent example involved Governor Gray Davis of California, whose policies obviously offended a sufficient number of voters to warrant this action.

An attempt to amend the New York City Charter to allow the recall of municipal officials occurred in 1986, but the proposed amendment was DOA on the ground that the New York State constitution barred the recall procedure.[3] In 2002, the residents of Buffalo tried in vain to recall their mayor.

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Nevertheless, the law does provide certain opportunities for removing an elected official. The most straightforward circumstance is when one is found guilty of a felony. That, in and of itself, creates a vacancy.[4] No resignation or further action is required. Mr. Monserrate, however, was convicted of a misdemeanor, of recklessly harming his female companion.

The other instance that causes a vacancy is if the elected official is convicted of a crime "involving a violation of his oath of office."[5] This provision suffers from ambiguity, and the courts are sometimes asked to adjudicate whether a particular crime constitutes a violation of that official's oath.[6] In any event, no one has argued that Mr. Monserrate's crime fell into this category.

The law also permits the Governor to "remove" a public official under certain circumstances,[7] or recommend to the New York Senate that an official be removed.[8] New Yorkers faced the latter situation two years ago when Governor George E. Pataki considered recommending to the Senate that it remove then-Comptroller Alan Hevesi for misdeeds involving the use of his state car. (That legal and political to-do was resolved when Mr. Hevesi pled guilty to a felony.) Removal is not to be confused with impeachment, which is instituted by the New York State Assembly, but in both cases the Senate acts as a trier of fact. Remarkably, neither the state Constitution nor the law provides any specific guidance as to the standard to be applied or what procedures must be followed in either removal or impeachment cases.

In any event, the state Constitution bars removal of a legislator for misconduct.[9] This would seem to mean that a Senator cannot be removed by the Governor or impeached by the Assembly. Does it also mean that a legislator cannot be removed through expulsion? Although the state Constitution is silent on the subject of expulsion, one could argue that the more general prohibition against removing a legislator encompasses expulsion. After all, until 1821, the Constitution provided that the Legislature had the same powers found in our colonial charter, including the right to "purge" members.[10] That power was eliminated, and all successive versions of the state Constitution continue to omit any right by the Legislature to expel a member.

Our current Constitution thus stands in contrast to the federal Constitution, which expressly includes such authority.[11] Can we thus infer that generations of drafters of the state Constitution decided to affirmatively bar the Legislature from expelling one of its own? If so, the current Senate's recommendation to expel Senator Monserrate is on thin ice.

Apparently in conflict with this history, however, the state Legislature enacted a provision permitting the Senate or Assembly to expel one of its members. Section 3 of the Legislative Law states that "[e]ach house has the power to expel

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any of its members…." Given that statutes are presumed to be constitutional,[12] and the Assembly may have relied upon this law in 1920 when it ousted five Socialists, the Senators considering expulsion today might have a basis to do so should they choose.

Interestingly, the last time the Legislature analyzed the issue, it was determined that it did not have the power to expel one of its members. The year was 1987, and Assemblywoman Gerdi Lipschutz had apparently approved the hiring of various "no-show" employees. In a 19-page report, the bipartisan New York State Assembly Committee on Ethics and Guidance (which included then-Assemblyman George Pataki) concluded that it was significant that the New York Constitution of 1821 expunged the Legislature's authority to expel, and drafters have kept it out for the last 190 years.

The authors of the report also analyzed the state constitutional provision allowing each chamber to be the "judge of the elections, returns, and qualifications of its own members"[13] and found that it related to the seating of a Senator or Assembly member if they met certain age and residence qualifications.[14] Accordingly, the report concluded that, in the absence of express constitutional support, an inherent right to expel should not be presumed.[15]

Although the authors of the Assembly Report conducted a rigorous and persuasive analysis, several flaws suggest that its conclusion is not ironclad. First of all, the report failed to mention the Legislative Law that permits each chamber to expel its members; and second, its authors seem to have misunderstood the precedent of the Assembly's expulsion of five members in 1920.

The report's failure to refer to the statute deprived the Assembly Committee of the opportunity to address how an otherwise presumptively constitutional provision might nevertheless be discounted in their analysis. On the other hand, an acknowledgment of the statute might have led the report's authors to a very different conclusion.

The precedent of the Assembly having ousted five Socialist members in 1920 and what it meant is also problematic. The report states that they were excluded, not expelled, and, as such, the body was exercising its constitutional prerogative to judge the qualifications for office of those elected to the Assembly. However, an alternative reading of the historical record suggests that they were, in fact, expelled after having been seated.[16] If this interpretation is the correct one, then the Assembly Report's analysis is defective. Or, perhaps, they were expelled unconstitutionally. In that the Socialists immediately ran for their vacant seats and were re-elected, no court opined on whether the ouster was exclusion or expulsion, or whether it was legal.

Fast forward to today. Unlike the 1987 Assembly Report, the Senate's Select Committee regarding Senator Hiram Monserrate, in a 55-page report that is both scholarly and historically comprehensive, concludes that the Senate does have the authority to expel. The Select Committee relies in large measure upon the implied and plenary powers of state legislatures, and refers to the historical precedent that sitting legislators have, indeed, been expelled.[17] It also takes the earlier Assembly Report to task for ignoring Legislative Law Section 3, and refers to an 1827 legislative commission that apparently believed statutory authority for expulsion was not unconstitutional.

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The Select Committee adds, however, that "a complete analysis of the Assembly's position is beyond [its] scope." Furthermore, the Senate Committee did not address the issue of the meaning of the constitutional provision that bars removal of a legislator.

Thus, we have two legislative studies—each well-reasoned and persuasive—with inconsistent analyses and conclusions.

All of this suggests a legally ambiguous landscape as the Senate ponders whether and how to punish Senator Monserrate. Whatever choice it makes, the Senate should reprise the 1987 report's recommendation that the state Constitution be amended "to clarify the power of each House to punish or expel its members for disorderly behavior."[18] Of course, if the Senate votes to expel Senator Monserrate, the courts will have the opportunity to settle the issue once and for all.

1. Paul Simon, 50 Ways to Leave Your Lover (Warner Bros. 1975).
2. National Conf. of State Legislatures, Recall of State Officials (March 21, 2006), available at: http://www.ncsl.org/default.sapx?tabid=16581.
3. *Sinawski v. Cuevas*, 133 Misc.2d 72 (Sup. Ct. N.Y. County 1986).
4. N.Y. Pub. Off. Law §30 (McKinney 2010).
5. N.Y. Pub. Off. Law §30 (McKinney 2010).
6. See, e.g., *Feola v. Carroll*, 10 N.Y.3d 569 (2008) (holding that a misdemeanor conviction for conduct outside of the line of duty will be considered a crime that violates one's oath of office only if the violation is apparent from the Penal Law's definition of the crime).
7. N.Y. Const. Art. V, §4; Art. XIII, §13; N.Y. Pub. Off. Law §§33; 33-a (McKinney 2010).
8. N.Y. Pub. Off. Law §32 (McKinney 2010).
9. N.Y. Const. Art. XIII, §5.
10. Committee on Ethics and Guidance, The Assembly of the State of New York, Findings After Investigation Concerning Charges Against Assemblywoman Gerdi E. Lipschutz (March 4, 1987) at 10.
11. "Each House may…punish its Members for disorderly behavior and, with the concurrence of two thirds, *expel a Member*." U.S. Const. Art. I, §5, cl. 2. (emphasis added).
12. *People v. Pagnotta*, 25 N.Y.2d 333, 337 (1969) ("There is a strong presumption that a statute duly enacted by the Legislature is constitutional").
13. N.Y. Const. Art. III, §9.
14. See *Powell v. McCormack*, 395 U.S. 486 (1969).
15. Committee on Ethics and Guidance, The Assembly of the State of New York, Findings After Investigation Concerning Charges Against Assemblywoman Gerdi E. Lipschutz (March 4, 1987) at 12.
16. See Thomas E. Vadney, "The Politics of Repression: A Case Study of the Red Scare in New York," 49 N.Y. Hist. 56, 58 (1968) ("The accused Assemblymen…had been sworn into office by the Secretary of State without incident."); id. at n. 8 ("[T]he New York Socialists had been allowed to take the oath of office and had been seated in the House as members.") Contemporary news accounts confirm Vadney's account. See, e.g., "Begin to Rush Legislation: Assembly Passes 70 Bills, Senate Also Active," N.Y. Times, April 2, 1920 (using the term "expulsion").
17. Report of the New York State Senate Select Committee to Investigate the Facts and Circumstances Surrounding the Conviction of Hiram Monserrate on Oct. 15, 2009 (Jan. 13, 2010).
18. Letter from Committee on Ethics and Guidance, The Assembly of the State of New York to Hon. Mel Miller, Speaker, New York State Assembly (March 4, 1987).