



**Republican Conference Counsel/Program Office  
Senator Dean G. Skelos  
Temporary President of the Senate**

**To:** Elizabeth Garvey, Counsel to the Republican Conference  
**From:** Robert T. Farley, Senior Counsel  
**Date:** August 21, 2013  
**Subject:** Memorandum on Separation of Powers and the Governor's Moreland Commission

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**Part One: Introduction**

Under the Constitution of the State of New York, government is divided into three separate, independent, competing and co-equal branches.

This division has been a hallmark of republican government, since the founding of our state in 1777. Few principles of state constitutional law are so concrete, and indeed, in 1980, in the case of Matter of County of Oneida v. Berle, 49 NY2d 515 (1980), the Court of Appeals held:

***“Our State Constitution establishes a system in which governmental powers are distributed among three co-ordinate and co-equal branches (see N.Y.Const. art. III, s 1; art. IV, s 1; art. VI; Matter of Nicholas v. Kahn, 47 N.Y.2d 24, 30, 416 N.Y.S.2d 565, 389 N.E.2d 1086; Saxton v. Carey, 44 N.Y.2d 545, 406 N.Y.S.2d 732, 378 N.E.2d 95). Extended analysis is not needed to detail the dangers of upsetting the delicate balance of power existing among the three, for history teaches that a foundation of free government is imperiled when any one of the co-ordinate branches absorbs or interferes with another. “It is not merely for convenience in the transaction of business that they are kept separate by the constitution, but for the preservation of liberty itself, which is ended by the union of the three functions in one man, or in one body of men. It is a fundamental principle of the organic law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others” (People ex rel. Burby v. Howland, 155 N.Y. 270, 282, 49 N.E. 775, 779; see Matter of Nicholas v. Kahn, supra, 47 N.Y.2d at pp. 30-31, 416 N.Y.S.2d 565, 389 N.E.2d 1086).”*** Id. at 522.

Despite the fact that the three branches are separate, independent, competing and co-equal, the natural tension between them can at times cause friction. This is especially true when one branch frustrates the political will of another. Moreover, due to the very nature of the separate, independent, competing and co-equal branches, each is free to use their power to independently try to accomplish their will, until it is checked and balanced by the power of another. This encroachment, upon the “turf” or “power” of another branch, can well result in a constitutional crisis, where the encroaching branch ignores its natural constitutional limitations and restraints until it is checked or balanced back.

This is the issue with which we are presented today.

To clearly understand the issue, it is useful to review the factual progression that caused our present status.

On January 1, 2011, Governor Andrew Cuomo ascended to the office of Governor of the State of New York, after an overwhelming electoral victory. During his first two years in office, he used his popularity and political capital, to convince both houses of the legislature to enact nearly all of his proposed legislation.

Although this legislative agenda of the Governor did contain some controversial items (such as Gay marriage and Public Teacher Evaluations), the vast majority of his proposals were wildly popular among the electorate (on-time budgets, real property tax caps, increased state investment into the State University, and mild mandate relief measures) and hence, were not a particularly tough sell to legislators. Accordingly, in the 2012 midterm elections, many legislators, from both the Senate and Assembly, championed the mantra of how New York State Government was functional again, and highlighted their willingness to work with the Governor to achieve quality legislative accomplishments.

The outcome of the 2012 Presidential election, and recent events during its campaign season, however, began to shift the political landscape in New York. With a suspected eye toward both re-election in 2016 and future national political aspirations, the Governor, changed his previous pragmatic centrist agenda, to make a political shift to the liberal, reform left.

Accordingly, whereas his previous legislative agenda had been dominated by practical, non-ideological proposals, within days of the commencement of the 2013-2014 legislative session, Governor Cuomo announced a new agenda of highly controversial proposals, from sweeping gun control, to expansion of abortion rights, to draconian, over the top ethics and public officer reform.

With this new left of center shift in perspective, and a resulting popularity decline in public opinion polls, Governor Cuomo began to become outwardly frustrated, as his more radical legislative agenda began to receive legislative resistance.

With two years of comity and success, Governor Cuomo was not accustomed to failing to achieve his legislative demands, and began to show outward signs of anger and frustration. Seeking to have the legislature bend to his will, the Governor thereupon began to take measures to pressure the legislature to pass his proposals. From using his bully pulpit in the press, to trying to undermine the power sharing agreement between the Senate Republicans and the Senate Independent Democrat Conference, to publically criticizing the Assembly and Speaker Silver on ethics issues, the Governor sought to raise the political temperature on those who did not support every part of his new agenda.

Despite these tactics, and in some instances because of them, when the 2013 session closed on June 22, 2013, the Governor had not achieved passage of his full legislative agenda. With his actions at the capitol proving unsuccessful, in a constitutional version of a temper tantrum, ten days after the close of session, the Governor effectively declared a veiled war on the legislature.

With the legislature recessed, and without an ability for either house to make a coordinated response, on July, 2, 2013, the Governor launched his attack. Independently, he issued an executive order, announcing the establishment of a new commission, with its

authority allegedly arising from the Moreland Act and the joint criminal justice investigative powers conferred upon the Governor and the Attorney General under section 63 of the executive law, with the purpose of investigating and prosecuting political corruption.

This new commission, with targets of the State Board of Elections, the recently created Joint Commission on Public Ethics, and any persons who maintain activities dealing with such targets, has as its clear purpose, the use of the full power of the executive branch, as a weapon to get the legislature to conform to the political agenda of the Governor. Designed as a sword, it is an aggressive action which brings to light the serious concerns that the misuse of executive authority led our founders to separate governmental powers in the first place.

An act intended to intimidate, threaten and compel, this new Commission warps executive authority into unintended domains. It is moreover, a direct encroachment of the powers of the executive branch into the powers of the legislative branch.

Within its purposes, this new Commission thereby poses the threat to:

- Investigate, subpoena records and compel the testimony of legislators and staff;
- Submit proposed legislation for enactment by the legislature in the 2014 legislative year; and
- Bring criminal or civil prosecutions against legislators and staff.

When any of the branches of government exceeds its constitutional authority, such as in the current instance, the founders believed it incumbent upon the offended branch, to check and balance such excess, and to use its own inherent powers to resist the encroachment into its domain. The recourse available to such offended branch falls into two options. First, appeal to the other, third branch (in this case deploy the judiciary by engaging in litigation) or, second, to use self help, by either enacting legislation (presumably over a veto) expressly denying the offending branch's right to do what he is attempting, or to simply ignore his right to do so when he seeks enforcement (as the legislature is without real ability to prevent the enforcement of an executive's will, this choice is often practically very difficult).

As a result, the question presented is:

**Does the Governor have the Constitutional and Legal Authority to Establish the Commission to Investigate Political Corruption and What Recourse Does the Legislature Have With Respect to The Commission's Activities?**

This memorandum will seek to answer this question and offer suggested ideas concerning such recourse.

## Part Two: The Executive Order

As aforementioned, on July 2, 2013, Governor Andrew M. Cuomo issued Executive Order Number 106. This Executive Order established and appointed the Commission to Investigate Public Corruption. Such Commission, which is composed of 25 members, was justified:

***“by virtue of the authority vested in me by the laws of the State, and by the Constitution, including the authority pursuant to N.Y. Const. Art. IV, § 3 to report to the Legislature periodically on the ‘condition of the state, and recommend such matters to it as he or she shall judge expedient,’ and to ‘take care that the laws are faithfully executed,’ and pursuant to Section Six and Subdivision Eight of Section Sixty-Three of the Executive Law”***

The purpose of the Commission would be ***“to investigate the management and affairs of any department, board, bureau or commission of the State, or any political subdivision of the State, and weaknesses in existing laws, regulations, and procedures”***

The Commission would be further be specifically charged to

- Investigate the management and affairs of the State Board of Elections, including but not limited to:
  - determining whether the Board is fulfilling its obligation under the Election Law to administer the election process and oversee election campaign practices and campaign financing practices,
  - examining the Board's interactions with outside individuals and entities, including candidates, donors, and committees, to determine compliance with applicable State laws,
  - examining the statutory structure, composition, authority, and staffing of the Board, including but not limited to organizational structures and the roles of the Board of Elections, the Attorney General, the United States Attorneys and District Attorneys, and
  - examining compliance with and the effectiveness of campaign finance laws; and make recommendations to reform any weaknesses uncovered in existing State laws, regulations and procedures;

- Investigate weaknesses in existing laws, regulations and procedures relating to the regulation of lobbying, including but not limited to examining compliance by organizations and other persons engaged in lobbying and other attempts to influence public policies or elections, including tax-exempt organizations under Section 501(c) of the Internal Revenue Code, with the requirements of existing State laws administered by the Joint Commission on Public Ethics, and the sufficiency of such requirements; and make recommendations to reform any weaknesses uncovered in existing State laws, regulations and procedures; and
- Investigate weaknesses in existing laws, regulations and procedures relating to addressing public corruption, conflicts of interest, and ethics in State Government, including but not limited to criminal laws protecting against abuses of the public trust; and make recommendations to reform any weaknesses uncovered in existing State laws, regulations and procedures.

Executive Order 106 further provides that:

- The Attorney General is directed, pursuant to Subdivision Eight of Section Sixty-Three of the Executive Law, to inquire into the matters set forth in the Order, and requests that the Commissioners who are attorneys be appointed by the Attorney General as Deputy Attorneys General, delegating to such the authority to exercise the investigative powers that are provided for pursuant to such Subdivision Eight of Section Sixty-Three;
- The Commissioners are given and granted all the powers and authority that may be given or granted to persons appointed under of Section Six and Subdivision Eight of Section Sixty-Three of the Executive Law, including:
  - The powers to subpoena and enforce the attendance of individual witnesses, both public and private, to administer oaths and examine witnesses under oath, and
  - To require the production of any books or papers deemed relevant or material.
- The Co-Chairpersons must unanimously approve:
  - Any subpoena prior to its issuance; and
  - Any procedures and rules as they believe necessary to govern the exercise of the powers and authority given or granted to the Commissioners pursuant to such Section Six and Subdivision Eight of Section Sixty-Three, including rules designed to provide transparency while protecting the integrity of the investigation and rights to privacy;

- If in the course of its inquiry the Commission obtains evidence of a violation of existing laws, such evidence shall promptly be communicated to the Office of the Attorney General and other appropriate law enforcement authorities, and the Commission shall take steps to facilitate jurisdictional referrals where appropriate;
- The Superintendent of the Division of State Police shall, as appropriate, authorize the Attorney General, pursuant to the provisions of Subdivision Three of Section Sixty-Three of the Executive Law, to conduct an investigation of any indictable offense or offenses arising out of any activity that is the subject of an inquiry by the Commission, and to prosecute the person or persons believed to have committed the same and any crime or offense uncovered by such investigation or prosecution or both, including but not limited to, appearing before and presenting all such matters to a grand jury;
- The Commission shall cooperate with prosecutorial agencies to avoid jeopardizing ongoing investigations and prosecutions;
- Every department, board, bureau, and commission of the State, including but not limited to State agencies, shall provide to the Commission every assistance and cooperation, including use of State facilities, which may be necessary or desirable for the accomplishment of the duties or purposes of the Executive Order;
- The Commission would be required to issue a preliminary policy report on or before December 1, 2013, setting forth its initial findings and making such recommendations as required by the Order for the express purpose of consideration and enactment of statutory reforms by the Governor and the Legislature in the 2014 legislative session, and a final report on or before December 1, 2015, and all such reports must be approved by a majority of the Commissioners including all of the Co-Chairpersons; and
- The Commission would finally be required to conduct public hearings around the State to provide opportunities for members of the public and interested parties to comment on the issues within the scope of its work.

This Executive Order was issued completely independently by the Governor, upon his own fiat, without any legislative statutory authorization or resolution calling upon him to do so. The constitutional and statutory authority upon which he relies in forming the Commission is highly circumspect, especially under the subscribed purposes for which the Commission is charged. Each of these claimed authorities will be examined in light of his claims.

## Part 2-A: The Governor's Constitutional Authority Claims

The Governor claims that in his Executive order that:

***“WHEREAS, the Executive has the obligation under N.Y. Const. Art. IV, §3 to report to the Legislature periodically on the ‘condition of the state, and recommend such matters to it as he or she shall judge expedient,’ and to ‘take care that the laws are faithfully executed’;”***

To begin with, the Governor's restatement of this alleged authority, is not presented the same way in the State Constitution as it is in his executive order. For such section 3, Article IV actually provides:

***“§ 3. The governor shall be commander-in-chief of the military and naval forces of the state. The governor shall have power to convene the legislature, or the senate only, on extraordinary occasions. At extraordinary sessions convened pursuant to the provisions of this section no subject shall be acted upon, except such as the governor may recommend for consideration. The governor shall communicate by message to the legislature at every session the condition of the state, and recommend such matters to it as he or she shall judge expedient. The governor shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed. The governor shall receive for his or her services an annual salary to be fixed by joint resolution of the senate and assembly, and there shall be provided for his or her use a suitable and furnished executive residence.”***

The Governor's Executive Order contends that this section of the constitution directs him to ***“report to the Legislature periodically on the condition of the state”*** Section 3, as can be seen as set forth above, however, never says such. It says instead, that he ***“shall communicate by message to the legislature at every session the condition of the state”***. This provision relates to his role in delivering the annual message to the legislature, commonly known as the state of the state address. Nowhere in the Constitution, is the term ***“periodically”*** used, and traditionally, when any person, including the Governor, has sought to address the legislature, such as when Governor Pataki presented remarks after the September 11, 2001 attacks, they have done so upon request and resolution of the house or houses so addressed.

Additionally, when the Executive Order further provides that Section 3 of Article IV authorizes him to ***“recommend such matters to it as he or she shall judge expedient”***, once again this assertion fails to pronounce that fact that this provision is a part of section 3, in conjunction with the state of the state address (the governor's message to the legislature) and not an independent, blanket authority for him to act as a proposer of legislation.

The term “matters” is far more than just legislation, and especially in terms of the annual message could well include budget items that the governor, pursuant to Article VII of the Constitution, has far greater authority to propose. Indeed, it should be noted, that although the governor has long been provided the courtesy to offer the legislature both program and departmental bills, such is indeed a courtesy, and by no means a requirement for the legislature to introduce. Only those bills accompanying the governor’s budget, pursuant to his Article VII powers, must be introduced by the legislature.

With respect to the Governor’s contention that he is empowered to form a Commission with the powers he confers under this Executive Order because of the provision within section 3, Article IV, that he shall ***“take care that the laws are faithfully executed”***, this assertion also fails to recognize that it is the end part of a longer sentence, recognizing the legislature’s role in enacting the laws that he must execute, not merely something he seeks to recommend, when it states: ***“The governor shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed”***.

Although the courts have indeed given the governor rather broad desecration, in his inherent executive authority to faithfully execute the state’s laws, there are limits to that authority. In a similar case, Rapp v. Carey, 44 NY2d 157, 162-163 (1978), where Governor Carey was sued for issuing an Executive Order to prevent “corruption in government” by requiring government employees to file multi-detailed personal financial statements with the Board of Public Disclosure, and to abstain from various political and business activities, the Court of Appeals held:

***“The executive power of the State, vested in the Governor, is broad (see N.Y.Const., art. IV, ss 1, 3; Executive Law, arts. 2, 3). In his capacity to oversee, even beyond his responsibility to operate, the Governor may investigate the management and affairs of any department, board, bureau, or commission of the State (Executive Law, s 6). This investigatory power, which includes the power to subpoena witnesses, as well as to require the production of books and papers, and which authorizes the Governor to delegate the investigatory function to persons appointed by him for that purpose, permits the Governor to exercise considerable vigilance, but not necessarily direction, in protecting against conflicts of interest. The Constitution and statutes thus recognize explicitly the need for and the power in the Governor to oversee, but again not necessarily to direct, the administration of the various entities in the executive branch.***

***The Governor may also direct the Attorney-General to inquire into matters “concerning the public peace, public safety and public justice” (Executive Law, s 63, subd. 8). Implementation of this power is illustrated by Governor Dewey’s creation in 1951 of the New York State Crime Commission to investigate the relationship between organized crime and State government ...***

***There are, however, limits to the breadth of executive power. The State Constitution provides for a distribution of powers among the three branches of government (see N.Y.Const., art. III, s 1; art. IV, s 1; art. VI).***

*This distribution avoids excessive concentration of power in any one branch or in any one person. Where power is delegated to one person, the power is always guided and limited by standards. In fact, even the Legislature is powerless to delegate the legislative function unless it provides adequate standards ... Without such standards there is no government of law, but only government by men left to set their own standards, with resultant authoritarian possibilities. ...*

*It is true that in this State the executive has the power to enforce legislation and is accorded great flexibility in determining the methods of enforcement (see N.Y.Const., art. IV, s 3). But he may not ... “go beyond stated legislative policy and prescribe a remedial device not embraced by the policy” ( Matter of Broidrick v. Lindsay, 39 N.Y.2d 641, 645-646.). And, ... the flexibility allowed the executive in designing an enforcement mechanism depends upon the nature of the problem to be solved ... Where it would be practicable for the Legislature itself to set precise standards, the executive's flexibility is and should be quite limited.”*

The Court of Appeals in Rapp continued at pages 163-167:

*“Defendants seek to justify the executive order as an implementation of section 74 of the Public Officers Law. That statute, called a code of ethics for State officers and employees, provides guidelines designed to eliminate substantial conflicts of interest between State duties and private interests. Together with section 73 of the Public Officers Law, which, as opposed to guidelines, contains absolute rules and proscriptions, section 74 constitutes the legislative policy of the State in the conflict of interest area. ...*

*As Mr. Justice Harold J. Hughes succinctly stated at Special Term in holding the executive order invalid, first quoting from the declaration of legislative intent accompanying enactment of section 74 (L.1954, ch. 696, s 1), “ ‘Government is and should be representative of all the people who elect it, and some conflict of interest is inherent in any representative form of government. Some conflicts of material interests which are improper for public officials may be prohibited by legislation. Others may arise in so many different forms and under such a variety of circumstances, that it would be unwise and unjust to proscribe them by statute with inflexible and penal sanctions which would limit public service to the very wealthy or the very poor. For matters of such complexity and close distinctions, the legislature finds that a code of ethics is desirable to set forth for the guidance of state officers and employees the general standards of conduct to be reasonably expected of them’ \* \* \* (t)he inflexible proscriptions of the Executive Order are clearly at variance with this declaration of legislative intent” ( Rapp v. Carey, 88 Misc.2d 428, 431, 390 N.Y.S.2d 573, 575). In short, this order is not an implementation of section 74; it is a nullification of it a nullification, however benevolent in purpose, without benefit of legislative action.*

*The challenged order presumes to prohibit service in political party office by all State employees covered by paragraph II, not just by the small group of officials of high rank named in subdivision 8 of section 73 of the Public Officers Law. The order, again without any apparent statutory authority, would also prohibit, except on permission*

*of the Board of Public Disclosure, all types of privately compensated employment by State employees. That the dual loyalties engendered by this dual employment may rightly be condemned is not the issue. The crux of the matter is the determination by the Legislature, implicit in its enactment of the code of ethics, that the existence of conflicts in these areas is to be determined on a case-by-case basis, not by use of blanket prohibitions.*

*None of this is to say that the Governor may not require that his appointees, serving at his will, abstain from transactions or business associations that potentially conflict with State duties. The Governor is, of course, free to regulate the business activities of employees serving at his pleasure. The same cannot be said, however, of employees who have civil service tenure, or even gubernatorial appointees who serve for fixed terms. These employees may not be removable except for cause, and are thus not subject to summary dismissal by the Governor. The challenged executive order exceeds the Governor's power of appointment and reaches employees who could be neither directly appointed nor summarily dismissed by the Governor. As to these employees, the Governor is without power to impose the strictures contained in the executive order.*

*The restriction on political activities is particularly troublesome. While the restriction on the merits would be supported by many or even most, it involves a broad question of policy, hardly resolvable by other than the representatively elected lawmaking branch of government, the Legislature. ...*

*The crux of the case is the principle that the Governor has only those powers delegated to him by the Constitution and the statutes. On the principle, there is general agreement (see, e. g., Shapp v. Butera, 22 Pa.Cmwlth. 229, 348 A.2d 910, supra; Opinion of Justices, N.H., 360 A.2d 116, 122, supra ; cf. Illinois State Employees Assn. v. Walker, 57 Ill.2d 512, 518, 315 N.E.2d 9, supra ). There should be no less agreement on application of the principle to the facts of this case. On no reasonable reading of the Constitution, the Executive Law, or the relevant provisions of the Public Officers Law can the Governor's exercise of legislative power, exemplified in the executive order, be sustained.*

*Under our system of distribution of powers with checks and balances, the purposes of the executive order however desirable, may be achieved only through proper means. No single branch of government may assume a power, especially if assumption of that power might erode the genius of that system. The erosion need not be great. "Rather should we be alive to the imperceptible but gradual increase in the assumption of power properly belonging to another department" (People v. Tremain, 252 N.Y. 27, 57). ...*

*The Governor's objective may be achieved by obtaining the requisite legislation. Critical, however, is that any difficulty or even impossibility of obtaining legislation through the constitutionally prescribed mechanisms may not be made a source of executive lawmaking power where none otherwise exists."*

## **Part 2-B: The Governor's Moreland Act Authority Claims**

Section 6 of the executive law, commonly known as the Moreland Act (or the Sherman Moreland Omnibus Investigation Bill), was originally enacted as chapter 539 of the laws of 1907. Named after the floor leader and Ways and Means Chair in the Assembly (Republican, Chemung County - 1903 to 1907), who was its author and sponsor, it was intended as a reform measure to empower the new Republican Governor, Charles Evans Hughes, to have inspector general like powers, to investigate and clean up his own state agencies and local governments. It was never envisioned or intended as an instrument with which the executive branch could investigate or build prosecutions against members of the state legislature.

In 1907, Governor Hughes, who was a disciple of reform minded Teddy Roosevelt, was in his first year in office. Working with Assemblyman Moreland, the hard charging Hughes (who would later run for president and serve on the United States Supreme Court) sought to craft legislation that would provide governors with the ability to uncover the statutory required justification, he believed governors should have, to clean up their own executive branch agencies, as well criminally dishonest local governments.

Pursuant to what is now section 33 and 33-a of the executive law (then section 23), the governor was already constitutionally and statutorily empowered to remove corrupt executive agency personnel in his employ, as well as certain local officials. These removal powers, however, required the governor to provide such executive agency personnel or local officers with charges upon which the governor sought removal, together with an opportunity for the officer to be removed to be heard.

The Moreland Act needs to be seen in conjunction with its intended purposes and with this removal powers of the governor. Accordingly, it was intended to work in conjunction with these removal provisions, to enable the governor to uncover through investigation, information he or she would need to present charges for removal. As the governor has no legal authority to remove a member of the state legislature, the purpose of the Moreland Act, at the time of its creation, and since, has never been to empower the governor to investigate, or build a case for prosecution against, members of the state legislature.

Since its inception, the Moreland Act has been used several times, always under the purposes for which it was intended. These include:

- 1909 – Governor Charles Evans Hughes establishes a Moreland Commission to Examine and Investigate the State Board of Embalming Examiners.
- 1915 – Governor Charles Whitman establishes a Moreland Commission to Examine and Investigate the Management and Affairs of the Office of the Fiscal Supervisor of State Charities, the State Board of Charities, the Site, Buildings and Grounds Commission, the Building Improvement Commission, and the Salary Classification Commission.
- 1927 – Governor Al Smith establishes a Moreland Commission to Examine and Investigate the Department of State relative to Census Operations.
- 1928 – Governor Al Smith establishes a Moreland Commission for Investigation of the Workmen's Compensation Law Administration.

- 1951 – Governor Thomas Dewey establishes a Moreland Commission to investigate and take action concerning the relationship between organized crime and Government.
- 1953 – Governor Thomas Dewey establishes a Moreland Commission to Study, Examine and Investigate State Agencies in Relation to Pari-Mutuel Harness Racing.
- 1961 – Governor Rockefeller establishes two Moreland Commissions, one for a Bingo Control Inquiry, and a second on Public Welfare.
- 1963 – Governor Rockefeller, establishes a Moreland Commission on the Alcoholic Beverage Control Law.
- 1976 – Governor Hugh Carey establishes a Moreland Commission to Investigate Nursing Homes
- 1987 – Governor Mario Cuomo establishes a Moreland Commission on Government Integrity
- 2012 – Governor Andrew Cuomo establishes a Moreland Commission to investigate New York utilities' response to Hurricane Sandy.
- 2013 – Governor Andrew Cuomo establishes a Moreland Commission to investigate Public Corruption.

Shortly after its enactment, in 1915, the Attorney General described the scope and purpose of the Act in Opinion 353 when he said”

***“The Governor is held responsible in a general way for the efficiency, management and standard of all such departments, boards, bureaus and commissions during his terms, and it was deemed wise by the legislature to invest him with the power to examine and investigate all such governmental agencies, to the end that if inefficiency, corruption or abuse had worked into the same which would result in loss or injury to the state, or would cast reflection upon his administration, he could adopt such methods as appeared to be necessary to correct such abuse and restore any such public agency to its intended usefulness ...”.***

This pronouncement, once again, links the intent of the law to the justification of the governor’s power to remove, so as to clean up any activity in his executive branch that would otherwise negatively ***“cast reflection upon his administration”***.

This context is maintained under present law just as it was back in 1915. For the Moreland Act, found today as section 6 of the executive law, is still intended for the governor, through his executive branch, in conjunction with his constitutional and statutorily conveyed removal powers, to be empowered to conduct examinations and inspection into his own executive agencies and local governments.

Entitled ***“Examination and inspection by the governor”***, the current section 6 of the executive law specifically provides that:

***“The governor is authorized at any time, either in person or by one or more persons appointed by him for the purpose, to examine and investigate the management and affairs of any department, board, bureau or commission of the state”.***

As can be seen, this provision clearly has the intent of targeting entities under the governor's executive purview, and does not extend, by its terms, to any part of the state legislature, or any of its individual members.

The Moreland Act, under the target limitation ***"of any department, board, bureau or commission of the state"***. Further provides that the ***"governor and the persons so appointed by him are empowered to subpoena and enforce the attendance of witnesses, to administer oaths and examine witnesses under oath and to require the production of any books or papers deemed relevant or material"***. Although this subpoena and production power is without question broad and substantive, it must be viewed in context of the targeted entities and purpose of the Act. As the act does not, by its terms, extend to the examination or investigation of the state legislature, or any of its individual members, any subpoena or production power, for the purpose of examining and investigating the management and affairs of such targeted departments, boards or commissions, would not be applicable to the state legislature, or any of its individual members.

The remainder of the Moreland Act relates to the payment of Commission employees and operations when it provides:

***"Whenever any person so appointed shall not be regularly in the service of the state his compensation for such services shall be fixed by the governor, and said compensation and all necessary expenses of such examinations and investigations shall be paid from the treasury out of any appropriations made for the purpose upon the order of the governor and the audit and warrant of the comptroller."***

***Notwithstanding any inconsistent provision of any general, special or local law, charter, administrative code or other statute, service rendered by a person appointed by the governor pursuant to this section shall not constitute or be deemed state service or re-entry into state service under the civil service law, the retirement and social security law or under any charter, administrative code, or other general, special or local law relating to a state or municipal retirement or pension system so as to suspend, impair or otherwise affect or interfere with the pension or retirement status, rights, privileges and benefits of such person under any such system or to interfere with the right of such person or his beneficiary to receive any pension or annuity benefits or death benefits by reason of the selection of any option under any such system."***

Although no court action can be found which addresses this issue, it should be noted that an argument can be made that a legislative check against the empowerment and operation of a Moreland Commission could be made within the terms of these paragraphs. For when the Act specifies that ***compensation and all necessary expenses of such examinations and investigations shall be paid from the treasury out of any appropriations made for the purpose"***, such could be held to implicitly require legislative ascent for the operation and conduct of such a commission, by means of its express approval of ***"an appropriation made for the purpose"***.

Although it is undisputed that the governor, under the provisions of the Moreland Act, has been given wide authority by the Courts to extend its investigation and subpoena powers provided under the Act, when a Commission conducts an examination and investigation upon a target within his executive purview, it is strongly contended that such cases must involve matters within the governor's executive authority, and that the provisions of the Moreland Act cannot be boot strapped to examine and investigate areas overseen by the legislative branch.

An example of this wide authority, held to be within the executive purview, can be seen in 1951, when Governor Dewey issued an Executive Order to establish the New York State Crime Commission to investigate and take action concerning the relationship between organized crime and any unit of government anywhere in the state. Like the instant case of the Commission on Public Corruption, Governor Dewey, in forming his Commission, relied on both his inherent Constitutional Powers under Article IV, Section 3, as well as the Moreland Act (now section 6 of the executive law, then section 8) as well as the statutory powers conferred under Article 5 of the executive law (now subdivision 8 of section 63, then subdivision 8 of section 62).

When the Deputy Attorneys General issued subpoenas to Staten Island alleged organized crime boss, and President of Local 920 of the AFL Longshoreman's Association, Alex DiBrizzi, he brought an action to quash. After being denied in Supreme Court and the Appellate Division, the Court of Appeals, in the reported case of *In re DiBrizzi*, 330 NY 206 (1951) failed to quash subpoenas, finding the subpoenas and the Commission valid.

In issuing its opinion in *DiBrizzi*, the Court of Appeals found that ***"This is a general investigation into organized crime and its relation to government. As an incident thereto, it may be that the existence of specific, individual crimes will be uncovered, but that will merely be collateral and subordinate to the main object of inquiry. The purpose of the investigation is to secure information to guide executive action, not to indict or punish any individuals"*** (Id at 216-217).

Although the mechanisms and justification for the establishment of the Commission in *DiBrizzi* (Article IV of the Constitution, and sections 6 and 63 of the executive law), do parallel the establishment of Governor Cuomo's Commission to Investigate Public Corruption, it should note that this case is very distinguishable. The purpose and intent of Governor Dewey's New York State Crime Commission was to investigate and take action concerning the relationship between organized crime and any unit of government anywhere in the state. By specifying the term "unit of government" this Commission was targeting the traditional Moreland Act purview of executive agencies and local governments, where the governor has the legal power to remove the public officers involved. This was not a Commission targeted at the state legislature, which is in no legal way can be deemed to be a unit of government under the governor's purview.

Conversely, Governor Cuomo's Commission to Investigate Public Corruption targets the state legislature, by seeking to investigate two state entities, the State Board of Elections, which regulates and has the power to investigate state legislators as candidates, and the Joint Commission Public Ethics, which regulates and has the power to investigate state legislators with respect to their financial disclosure, their conduct under the public officers law, and their relationships with lobbying organizations.

Additionally, although the State Board of Elections is technically defined as an executive agency (see section 3-100 of the election law), with its 4 commissioners appointed by the governor (2 on the recommendation of political parties and 2 - with one each on the joint recommendation of the legislative leaders of the same political party), such commissioners serve for a designated term (2 years), and the governor has no express statutory authority to remove the same. Moreover, the Joint Commission on Public Ethics, although established within the Department of State, it is nowhere classified as an executive agency (see section 90 of the public officers law), and has only six of its 14 commissioners appointed by the governor (with the balance directly appointed by the leaders of the legislature), with the governor also maintaining no express statutory authority to remove the same.

The very nature of Governor Cuomo's Commission to Investigate Public Corruption gives rise to very troubling issues concerning the separation of powers doctrine. For the formation of this Cuomo Public Corruption Commission, unlike the Dewey New York State Commission, does not seek to eliminate crime or corruption from the State Board of Elections, or from the less than nine month old Joint Commission on Public Ethics, but instead seeks to misuse the executive power of the state to target, threaten, intimidate or prosecute members of the state legislature. This is especially apparent when the Commission was formed only ten days after the legislature rejected the Governor's proposed draconian ethics reform legislation.

As a result, Governor Cuomo's new Commission thereby presents a far different factual circumstance than the *DiBrizzi* case, in which private individuals were issued subpoenas with respect to their interface with state agencies and public authorities under the governor's complete executive purview.

In *DiBrizzi*, Governor Dewey, was seeking to remove those personnel under his control from his executive agencies that "***cast reflection upon his administration***". Nowhere in *DiBrizzi* was Governor Dewey seeking to misuse his investigation into organized crime's relationship with executive agencies as a veiled subterfuge to obtain information in which to threaten, intimidate or prosecute members of the state legislature.

Governor Cuomo, on the other hand is not seeking to remove any personnel from his executive agencies that "***cast reflection upon his administration***", rather, he is seeking to misuse his executive power to threaten, intimidate or prosecute members of the state legislature, so as to remove political obstacles to obtaining his unpassed legislative agenda.

## Part 2-C: The Governor's Article 5 Authority Claims

In addition to the aforementioned provisions of the State Constitution and the Moreland Act, Governor Cuomo also rested the legal authority of his Executive Order establishing the Commission to Investigate Public Corruption on article V of the executive law, more specifically, subdivision 8 of section 63.

Unlike the heads of other civil departments of the state, both the Attorney General (Department of Law) and the Comptroller (Department of Audit and Control) pursuant to article V, section 1 of the state constitution, are overseen by independently elected officials, who run statewide at the same time, serve a contemporaneous term, and have the same legal qualifications for holding office, as the governor.

Pursuant to article V, section 1 of the state constitution, the administrative duties of the Attorney General and the Comptroller are assigned to such offices, and their departments, by the legislature, pursuant to statute.

Article 5 of the executive law (sections 60 to 74), statutorily details the duties of the Attorney General and his Department of Law, while article IV of the executive law (sections 40 to 50) statutorily details the duties of the Comptroller and the Department of Audit and Control.

Due to the fact that the Attorney General and Comptroller, are separately elected, statewide office holders, the oversight and operation of their departments are given a significant degree of legal autonomy from the governor.

Despite this autonomy, due to their inherent executive missions, both the Attorney General and the Comptroller, are legally deemed to be a part of the executive branch of government, The statutory duties proscribed for their departments by the legislature, in accordance to the directive of Article V, section 1 of the state constitution, thereby requires the legislature to balance this autonomy with a necessary interaction and inter-cooperation with the governor. Such is the unique role of elected department heads of state government.

This balance is evident when examining article 5 of the executive law, outlining the role and duties of the Attorney General and the Department of Law.

Specifically, section 63 of the executive law establishes the general duties of the office of the Attorney General and the Department of Law.

Subdivision one of such section provides that the Attorney General shall:

***“Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state”.***

Subdivision two of such section 63 further provides a mechanism to convey upon the Attorney General and his deputies certain criminal prosecution powers, by authorizing that the Attorney General to:

***“Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement; in which case the attorney-general or his deputy so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform; and in any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending”.***

Subdivision four of section 63 empowers the Attorney General himself to prosecute certain public corruption charges, by providing that he is legally empowered to:

***“Cause all persons indicted for corrupting or attempting to corrupt any member or member-elect of the legislature, or the commissioner of general services, to be brought to trial”.***

It should be noted, that on its face, this power, expressly designated pursuant to subdivision 4 of section 63 of the executive law, to prosecute these specific corruption cases, does not extend to the prosecution of legislators themselves, but only to persons indicted for corrupting or attempting to corrupt them.

In his Executive Order, establishing the Commission to Investigate Public Corruption, the Governor cites and relies upon empowering the Attorney General pursuant to subdivision 8 of section 63 of the executive law.

This provision provides as follows:

***“Whenever in his judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety and public justice. For such purpose he may, in his discretion, and without civil service examination, appoint and employ, and at pleasure remove, such deputies, officers and other persons as he deems necessary, determine their duties and, with the approval of the governor, fix their compensation. All appointments made pursuant to this subdivision shall be immediately reported to the governor, and shall not be reported to any other state officer or department. Payments of salaries and compensation of officers and employees and of the expenses of the inquiry shall be made out of funds provided by the legislature for such purposes, which shall be deposited in a bank or trust company in the names of the governor and the attorney-general, payable only on the draft or check of the attorney-general, countersigned by the governor, and such disbursements shall be subject to no audit except by the governor and the attorney-general. The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under***

*oath before himself or a magistrate and require that any books, records, documents or papers relevant or material to the inquiry be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules. If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a misdemeanor. It shall be the duty of all public officers, their deputies, assistants and subordinates, clerks and employees, and all other persons, to render and furnish to the attorney-general, his deputy or other designated officer, when requested, all information and assistance in their possession and within their power. Each deputy or other officer appointed or designated to conduct such inquiry shall make a weekly report in detail to the attorney-general, in form to be approved by the governor and the attorney-general, which report shall be in duplicate, one copy of which shall be forthwith, upon its receipt by the attorney-general, transmitted by him to the governor. Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the governor or the attorney-general the name of any witness examined or any information obtained upon such inquiry, except as directed by the governor or the attorney-general, shall be guilty of a misdemeanor”.*

This subdivision is the primary legal authority, under which Governor Cuomo has established the Commission to Investigate Public Corruption.

It allows the governor to direct the Attorney General to inquire into matters concerning the public peace, public safety and public justice. This has been viewed by the courts as a very broad delegation of authority, as set forth in the Court of Appeals in *Friedman v. Hi-Li Manor Home for Adults*, 42 NY2d 408, 413-515 (1977), as follows:

*“ Subdivision 8 of section 63 of the Executive Law, which confers a power to subpoena witnesses, books and papers, provides: ‘Whenever in his judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety and public justice’.*

*The predecessor statute (Executive Law, s 62, subd. 8) was enacted during World War I, when the Legislature recognized that a war emergency might create a need for such authority to obtain information concerning sabotage in effect a standby authority for circumstances in which there might not be time or opportunity for the normal functioning of the legislative process (L.1917, ch. 595).*

*After World War I, the authority was continued notwithstanding that the Attorney-General recommended repeal of the statute. Until today, however, there have been but three occasions in which our court has been asked to sustain investigations conducted under the authority of subdivision 8 of section 63 and its predecessor.*

*In Matter of Di Brizzi (Proskauer), 303 N.Y. 206, our court held that recourse to the section could be had to combat organized crime in government. In Matter of Greenspon v. Stichman, 12 N.Y.2d 1079, we rejected a challenge to an investigation under the section of 'the relationship between misconduct or corruption in office by public officials and the faithful execution of the laws by units of government in the State'. Most recently we held that the section could be read as including authority for the investigation of the nursing home industry ( Matter of Sigety v. Hynes, 38 N.Y.2d 260)".*

*This latter holding was based on a combination of compelling factors: the State's recognized responsibility for the care of the elderly, the quantum of financial support for such care that came from the public treasury, and the existence of widespread corruption in the industry. It was vigorously argued then, however, that authority for such investigation was not properly to be found in subdivision 8 of section 63.*

*It would seem evident that the course much to be preferred with respect to State-wide investigations of this sort would be the enactment of specific, ad hoc legislative authority for particular inquiries. Thereby need and scope of the inquiry could be determined by the elected representatives of the people, reflecting an informed, current evaluation of the circumstances (cf., e.g., Executive Law, s 70-a State-wide Organized Crime Task Force).*

*We are now urged to conclude that, inasmuch as authority has been found in the section for investigation of the nursing home industry, authority should also be found for inquiry into private proprietary homes for adults. Similarities between these two areas of activity are evident. To a large extent the consumers of care and service come from the same sector of our State's population. Historically the great bulk of financial support has and does come from the public treasury, formerly in direct grants to the homes, now in indirect but equally significant subsidy routed through the residents of the homes. The operation of the homes is subject to the supervision of the State Board of Social Welfare (Executive Law, ss 750, 751, 758; see Social Services Law, former ss 21, 22, 35-a). ...*

*In view of the particular complex of circumstances, and especially the close similarity to nursing homes, we conclude that authority may be found in subdivision 8 of section 63 for the inquiry the Attorney-General, as directed by the Governor, is conducting into the operations of private proprietary homes for adults. In reaching the conclusion we do in this case we should not be understood as viewing subdivision 8 of section 63 as any reservoir of latent authority for investigations, however desirable they may be thought to be, into other areas of legitimate governmental concern or responsibility. Quite the contrary. In perspective we perceive recourse to this section as having been intended only when for compelling reasons reliance cannot or should not necessarily be placed on specific, individualized grants of authority from the Legislature; initially it was even argued that it took a peril such as sabotage which threatened the very existence of the State to activate the authority of this section ( Matter of Di Brizzi (Proskauer), 303 N.Y. 206, 214 supra)".*

As can be seen from the Court's reasoning, the scope of what issues will be deemed to constitute matters concerning the public peace, public safety and public justice, authorizing the Attorney General to examine and investigate pursuant to an Executive Order directing the Attorney General to do so pursuant to subdivision 8 of section 63, are likely to be found within an ambit which is broad and encompassing.

In a confrontation between the executive and legislative branches however, where the Attorney General, as an instrument of the governor, seeks to use this broad authority conferred under subdivision 8, section 63 to investigate, subpoena and compel production of witnesses and records of legislators or their staff, there could prove two compelling, albeit untested defenses.

First is that the executive branch, through the Governor and the Attorney General, should not be permitted to misuse their power of investigation, either under the state constitution or sections 6 or 63 of the executive law, to threaten, intimidate or prosecute members of the state legislature, so as to remove political obstacles to obtaining an unpassed legislative agenda, in accordance with preserving and maintaining the checks and balances, of the separation of powers between the branches of New York State Government.

Second, that the provision contained within subdivision 8, section 63, that states that ***"Payments of salaries and compensation of officers and employees and of the expenses of the inquiry shall be made out of funds provided by the legislature for such purposes"***, should be viewed as conferring upon the legislative branch the inherent power to immediately arrest the conduct of any such investigation of the Governor's Commission, as the legislature has never provided funds for the purposes of paying compensation of officers and employees and of the expenses of the Commission's investigation. It might be therefore argued, that the funds generally appropriated to the Department of Law, were not specifically provided for the purpose of this Commission's conduct, as required by this subdivision, and accordingly, that the necessary legislative authorization, required by the legislature when enacting the investigation authorization contained within this subdivision, has not been satisfied.

Finally with regards to this section, it should be noted that subdivision 13 of section 63, expressly authorizes the Attorney General to ***"Prosecute any person for perjury committed during the course of any investigation conducted by the attorney-general pursuant to statute"***. This would thereby add one more additional weapon the arsenal of the Attorney General in the conduct of investigations and prosecutions under this section of law.

### **Part Three: The Legal Importance of America's and New York's Legacy of Distrust of Power**

The Founders understood that the lynchpin of liberty was the proper management of power. This was not just a philosophical understanding, born from reasoned scholarship in the enlightenment. It was a practical, first hand understanding as well. As witness to history, the founders saw with their own eyes, as America was transformed. From 1763 to 1776, the American Colonies transitioned from a prosperous, free and growing land, to that of a jurisdiction facing the wrath of the most powerful nation on earth.

Upon the conclusion of the Seven Years War (known as the French and Indian War in America), Great Britain changed its demeanor towards its American Colonies, from neglectful empire, preoccupied with other events closer to their home, to dominating ruler, seeking to impose its will upon its impertinent subjects. Living through this change, and in many ways helping to exacerbate it, the Founders bore witness to the actual hardships, that concentrated power, in the misguided hands of an unchecked government, could bring.

This experience of the Founders, both philosophical and practical, gave rise to a specific perspective in the Constitutional creation of both our state and national governments. This perspective held that the truest path to tyranny was the concentration of power, especially in the hands of a single person. Devoted to the concept of true republican government, where elected representatives would serve upon the consent of the governed, the Founders knew, that disbursement of power, in multiple hands, with checks and balances to prevent abuse, would produce the best results possible for the themselves and their posterity.

James Madison, the father of the United States Constitution, stated this principle succinctly in Federalist No. 47, when he commented:

***“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”***

In the same argument, Madison acknowledged New York's respect for this concept when citing its 1777 State Constitution, he stated:

***“The constitution of New York contains no declaration on this subject; but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments”***

It was in light of this understanding, that the Founders crafted our governments in both America and New York. Although they realized that power was an essential element of effective government, they also knew that only through proper management of such power, could liberty and freedom be maintained. This proper management would be accomplished by two means: Disbursement, and separation of power with checks and balances. Legally, this strategy was instituted by way of the following:

- **That the ultimate power of the government, known under law as its sovereignty, would be vested not within the government, but in the people themselves. It is pursuant to this threshold principle, which had never been accomplished prior to this before in human history, that the power of the government was broadly disbursed, back to its ultimate beneficiaries, the people themselves.**

- **That there would be established within the government, three separate, independent, competing and co-equal branches. Upon this principle, the power of the legislature, executive and judiciary would not vest in the same hands, but rather would be disbursed among the three qualities of government, each within their function, checked and balanced against each other.**

It was upon this legacy and distrust of concentrated power, that the government of both New York and the United States were founded.

Essential to this legacy still today is the separation of powers, where each branch cannot unilaterally force the imposition of its own will upon the other. This is a legal doctrine as old as the state itself, and upon which the very freedom and continued liberty of the citizens of New York depend.

The actions of Governor Cuomo, in establishing the Commission to Investigate Public Corruption, as a conduit to threaten, intimidate or prosecute members of the state legislature, so as to remove political obstacles to obtaining his unpassed legislative agenda, presents a serious challenge to the separation of powers in New York. It portends the very concern our Founders feared the most, in the concentration of unchecked, unbalanced power in the hands of a single person. As Madison said, such is the very definition of tyranny, and places every New Yorker at risk.

## **Part Four: New York Constitutional History**

The legislature, executive and judiciary are separate, independent, competing and co-equal branches of the government of New York State.

To determine their relationship to each other, and the proscribed limits of their powers, it is necessary to first examine the constitutional framework in which these branches were conceived and in which they operate.

The State of New York has a long and distinguished constitutional history.

It began when the Province of New York was first established by colonial charter in 1664. Previously a Royal Dutch Colony, New York was brought under the purview of British law, pursuant to this charter, by Charles II.

In 1683, New York expanded its formal legal standing as a colony of the British Empire, when the first New York Assembly adopted, and the British Crown (by means of the royally appointed governor) recognized, a new Charter of Liberties and Privileges.

It was under this 1683 charter, that New York's constitutional history began to take its present shape. Indeed, pursuant to Article I, Section 14 of the current State Constitution, the development of the common law and acts of the colonial legislature enacted under this 1683 charter, are still continued to the present day, unless inconsistent with current law.

This new 1683 Charter mirrored many of the attributes of the English Constitution, and reflected the spirit of the Magna Carta (interestingly enough known at that time in England as the Charter of Liberties). Following the model of the British national government, this new charter for New York vested the supreme legislative power jointly in the governor, council, and people met in general assembly (similar to the King in Parliament under the English Constitution). It further gave to every freeman the full right to vote for representatives, established trial by jury, required that no tax whatever should be assessed without the consent of the Assembly, and professed that no Christian should be questioned concerning his religion.

The 1683 Charter of Liberties and Privileges remained the controlling legal document under which New York government was organized over the next ninety-four years.

A prosperous and diverse colony, New York was slow to catch onto the spirit of independence. Although a leader in liberty (indeed Albany was one of the very spawning grounds of the famous Sons of Liberty who led the charge against the Stamp Act in 1765) most of its citizens held a deep loyalty to England, and wished to secure their rights and liberties within the British Empire instead of a separate and independent nation. Despite its overall reluctance to join in the pre-declaration revolutionary fervor experienced in New England and Virginia, however, New York was still an outspoken region in favor of liberty and freedom, and in that regards, provided a substantial delegation to both the First Continental Congress in 1774, and to the Second Continental Congress in 1776.

Just prior to the convening of the Second Continental Congress, news arrived from England that King George III had announced to Parliament that he would order the invasion of America, with thousands of British regular troops and thousands more hired mercenaries from Germany. This announcement, turned the tide in New York, causing popular opinion to move toward independence. It was in this atmosphere, that on May 10, 1776, with New York's Delegates present, upon its call to order in Philadelphia, the Second Continental Congress passed a resolution recommending that any colony lacking a proper revolutionary government, should form immediately one.

At the time, New York was such a colony, without a revolutionary government, and was still operating under its 1683 charter. All that, however, was about to change.

To assist colonies in forming their new state governments, John Adams, one of America's greatest colonial constitutional scholars, and a member of the Second Continental Congress, authored his famous *Thoughts on Government, Applicable to the Present State of the American Colonies*.

This Adams' essay, recommended a model framework, to form new state governments, for the conduct of their executive, legislative and judicial functions. This framework was based upon the foundational principle that all state governments must be republican in form, and contain three separate, independent, competing and co-equal branches that would provide checks and balances against each other. In his 3000 word essay, Adams declared:

***"We ought to consider what is the end of government, before we determine which is the best form. Upon this point all speculative politicians will agree, that the happiness of society is the end of government, as all divines and moral philosophers will agree that the happiness of the individual is the end of man. From this principle it will follow, that the form of government which communicates ease, comfort, security, or, in one word, happiness, to the greatest number of persons, and in the greatest degree, is the best."***

This model, offered by Adams, was based upon the historic governmental organization of Great Britain, but offered several significant changes. These changes would include:

- That new state governments should be established by a constitution, crafted locally, by elected representatives. This would differ from the British model where colonies were established by royal charter or act of Parliament.
- That sovereignty of these new states, would be vested in the people themselves, with the exercise of their just powers subject to the consent of the governed. This would differ from the British Constitution, that held sovereignty to be vested in the government itself, as a legacy of royal prerogative, within the King in Parliament.

- That each of these new states would maintain bicameral legislatures, where the upper house would be comprised of elected representatives. This would differ from the British system where the upper House of Lords of Parliament was appointed from the English nobility. It was also distinct from the proposal in Thomas Paine’s contemporaneously published pamphlet, *Common Sense*, which proposed a unicameral legislature.
- That Executive (Governor) of each state would be popularly elected. This would differ from the English Constitutional system, where all executive power was vested in a heretical monarch or their appointed minister.
- That the different “qualities” or “functions” of each state government (executive, legislative and judiciary) three separate, independent, competing and co-equal branches that would provide checks and balances against each other. This concept was distinctly different from that under which the governance of Great Britain operated. For although England clearly followed the Roman model of three distinct functions of government (executive, legislative and judiciary), such were not seen as either independent, co-equal branches, nor tasked with providing checks and balances against the operations of each other. Rather, these functions were all constitutionally viewed as mere qualities of government, through which a singular sovereign power was administered.

On July 10, 1776, within days of the Second Continental Congress issuing the Declaration of Independence, delegates met in White Plains, to begin crafting New York State’s first constitution. Using the model offered by Adams in his *Thoughts on Government*, John Jay, Robert Livingston, and Gouverneur Morris began to draft a document, for the consideration of the convention delegates. After repeated debate, adjournments and changes of location, the convention finally finished its work, at Kingston, New York, on Sunday evening, April 20, 1777, and adopted New York’s historic first State Constitution with only one dissenting vote.

The Constitution so produced, was a combination document, containing its own Declaration of Independence, and outlining the structure of the new state government. It called for the establishment of a popularly elected, bicameral legislature (Senate and Assembly), a popularly elected governor, and an independent judiciary.

Following the Adams’ principles, the first New York State Constitution established three separate, independent, competing and co-equal branches of government, that would allow for checks and balances against each other. It placed the sovereignty of the state, outside the three branches of government, in the people themselves, and provided that the just powers of the state would be subject to the consent of the governed.

After the adoption of the original State Constitution in 1777, New York has since held constitutional conventions in 1821, 1846, 1894, 1915, 1938, and 1967. The efforts of the 1915 and 1967 conventions were rejected by the voters, and the 1821, 1846, 1894, and 1938 conventions, did not actually create new constitutions, but merely made amendments to their previous counterparts.

Additionally, other than modifying lengths of the terms of offices, and making adjustments to the actual functions and duties of the executive, legislative and judiciary branches themselves, none of the amendments made since the time of the first state convention, have ever altered the original Adams' construct embodied within the 1777 State Constitution, so that New York State government still operates with three separate, independent, competing and co-equal branches of government, that provide for checks and balances against each other.

This fact has become a quintessential element of the liberty and freedom protected by our state government.

Ten years after the establishment of the first New York State Constitution, in 1787, after the American Revolution was concluded, a national convention was held in Philadelphia to draft a Constitution for the United States.

Originally authorized for the purpose of only amending the then pre-existing Articles of Confederation, this National Convention quickly broadened its mission to provide for the creation of an entirely new Constitution, that would develop a plan for a new national government, with a federal system, that recognized a federal union with a limited but supreme national government, and broad states' rights and powers.

Also produced largely upon the template of the 1776 Adams' model, this new United States Constitution reiterated America's commitment to republican government, to operate within a framework of three separate, independent, competing and co-equal branches of government, that would provide for checks and balances against each other.

To make the principle of republican government clear, the founders not only assured that the new national government would be based on the Adams republican model, but they also expressly required that every state must always do so as well. Accordingly, Section four of Article IV of the United States Constitution provides:

***“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.”***

This clause, which would become known as the Guarantee Clause, relates to this principle held by the founders, that not only must sovereignty rest outside the actual government, within the people themselves, but that such republican government could only exist within a framework of three separate, independent, competing and co-equal branches of government, that provide for checks and balances against each other.

Specifically, as explained by Alexander Hamilton in Federalist Number 43, this Guarantee Clause was designed to assure that the states would not ever have the option of establishing a state government headed by a monarchy, and that the sovereign power of the states, would be subject to the checks and balances of both their people, as the ultimate sovereigns, as well as by the separate, independent, competing and co-equal branches within their governments.

This guarantee clause was the embodiment of the founders' distrust of power within the hands of any one single entity, executive, legislative or judicial, and preserved for posterity their understanding, forged from the experience of the abuses of the non-separate, non-independent, non-competing, non-independent "qualities" of Parliament, that it is only upon the checks and balances of a sovereign people, and the separate, independent, competing and co-equal branches, that true liberty and freedom can be maintained in a representative republic.

It is interesting to note, that most likely because every state is essentially based off the Adam's model for republican government (with the possible slight exception of Nebraska which maintains a unicameral legislature), the Guarantee clause has rarely been a source of litigation or controversy. Indeed, in the two major cases in which it has been raised as an issue, *Luther v. Borden*, 48 U.S. 1 (1849) and *Pacific States Telephone and Telegraph Company v. Oregon*, 223 U.S. 118 (1915), the United States Supreme Court has held that the Guarantee Clause presents a non justiciable issue, being a political question for Congress to determine, based upon its exclusive authority to admit States to the Union.

A more recent, contrary interpretation of this issue, which casts an alternate light on the justiciability of the Guarantee Clause, was, however, signaled in *New York v. United States*, 505 U.S. 144 (1985), when Justice Sandra Day O'Connor wrote in her decision:

*"The view that the Guarantee Clause implicates only non justiciable political questions has its origin in Luther v. Borden . . . This view has not always been accepted. In a group of cases decided before the holding of Luther was elevated into a general rule of non justiciability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were nonjusticiable: . . . More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions . . . Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances . . . We need not resolve the difficult question today. Even if we assume that petitioners' claim is justiciable; neither the monetary incentives provided by the Act nor the possibility that a State's waste producers may find themselves excluded from the disposal sites of another State can reasonably be said to deny any State a republican form of government".* Id. at 184.

Moreover, as Justice O'Connor intimated, many legal commentators have also intimated that the language of the Guarantee Clause may well not be held by modern courts to the non justiciability standard last expressed nearly a century ago. For to do so, these commentators claim, would offer this Clause moot, with no enforceability whatsoever, and thereby inviolate the same by judicial fiat.

Regardless of the outcome of this question of justiciability of the Guarantee Clause, however, it is beyond doubt that the Founders, both of our federal and state constitutions, held two distinct thresholds for republican government, that the Guarantee Clause was meant to embody: First, that sovereignty must reside outside the structure of government, in the people themselves, and second, that any such government must maintain separate, independent, competing and co-equal branches.

## Part Five: Separation of Powers under New York's Constitution

The legal principle which flows from the principle that representative, republican government must be based upon the operation of separate, independent, competing and co-equal branches, is known as the Separation of Powers Doctrine. New York's State Constitution illustrates this doctrine throughout its provisions.

Article III of the New York State Constitution establishes a separate, independent, co-equal, competing legislative branch of state government..

- Section 1 of this Article expressly provides that: ***"The legislative power of the state shall be vested in the senate and assembly"***.
- Section 6 further declares that: ***"Neither the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he or she shall have been elected"***.
- Section 9 of this Article states that: ***"Each house shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualifications of its own members"***.
- Section 11 establishes that: ***"For any speech or debate in either house of the legislature, the members shall not be questioned in any other place members"***.
- Section 13 of this Article provides that: ***"The enacting clause of all bills shall be "The People of the State of New York, represented in Senate and Assembly, do enact as follows," and no law shall be enacted except by bill"***.

These provisions offer a clear and distinct legal pronouncement, that the legislative branch is intended to be separate, independent, competing and co-equal with the executive and judicial branches.

Similarly, Article IV of the New York State Constitution also establishes a separate, independent, co-equal, competing executive branch of state government.

- Section 1 of this Article expressly provides that: ***"The executive power shall be vested in the governor"***.
- Section 3 of this Article sets forth most of the express executive powers and duties of the governor when it declares that:
  - ***"The governor shall be commander-in-chief of the military and naval forces of the state."***

- *The governor shall have power to convene the legislature, or the senate only, on extraordinary occasions. At extraordinary sessions convened pursuant to the provisions of this section no subject shall be acted upon, except such as the governor may recommend for consideration.*
- *The governor shall communicate by message to the legislature at every session the condition of the state, and recommend such matters to it as he or she shall judge expedient.*
- *The governor shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed.*
- *The governor shall receive for his or her services an annual salary to be fixed by joint resolution of the senate and assembly, and there shall be provided for his or her use a suitable and furnished executive residence”.*

• Section 7 describes the governor’s role with the legislature in the making of laws when it states that:

- *“Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor; if the governor approve, he or she shall sign it; but if not, he or she shall return it with his or her objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it.*
- *If after such reconsideration, two-thirds of the members elected to that house shall agree to pass the bill, it shall be sent together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of the members elected to that house, it shall become a law notwithstanding the objections of the governor. In all such cases the votes in both houses shall be determined by yeas and nays, and the names of the members voting shall be entered on the journal of each house respectively.*
- *If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him or her, the same shall be a law in like manner as if he or she had signed it, unless the legislature shall, by their adjournment, prevent its return, in which case it shall not become a law without the approval of the governor.*
- *No bill shall become a law after the final adjournment of the legislature, unless approved by the governor within thirty days after such adjournment.*

- *If any bill presented to the governor contain several items of appropriation of money, the governor may object to one or more of such items while approving of the other portion of the bill. In such case the governor shall append to the bill, at the time of signing it, a statement of the items to which he or she objects; and the appropriation so objected to shall not take effect. If the legislature be in session, he or she shall transmit to the house in which the bill originated a copy of such statement, and the items objected to shall be separately reconsidered.*

- *If on reconsideration one or more of such items be approved by two-thirds of the members elected to each house, the same shall be part of the law, notwithstanding the objections of the governor.*

- *All the provisions of this section, in relation to bills not approved by the governor, shall apply in cases in which he or she shall withhold approval from any item or items contained in a bill appropriating money”.*

- Section 8 of this Article describes the governor’s rule making ability when it provides that: *“No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state. The legislature shall provide for the speedy publication of such rules and regulations by appropriate laws”.*

Article V of the New York State Constitution establishes a separate, independent, co-equal, competing judicial branch of state government. In accordance with this Article the judicial power of the state vests with the courts.

- Section 1 of this Article establishes the court system in New York when it provides:

- *“There shall be a unified court system for the state. The state-wide courts shall consist of the court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate’s court and the family court”.*

- *“The court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate’s court, the family court, the courts or court of civil and criminal jurisdiction of the city of New York, and such other courts as the legislature may determine shall be courts of record”.*

- *“All processes, warrants and other mandates of the court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate’s court and the family court may be served and executed in any part of the state”.*

A review of these three Articles, along with portions of Article VII (which describe the governor's and legislature's role in the annual state budget), together with all the statutes and case law established thereunder, demonstrates that New York's Constitutional structure provides for three separate, independent, competing and co-equal branches of government, in line with the Adams republican model.

The New York Courts have a long history of recognizing that the Separation of Powers Doctrine is critical to the protection of a free people from the abuses of government, and is one of the inviolable principles of the law. In Rapp v. Carey, 44 NY2d. 157 (1978) the Court of Appeals, in a similar factual situation to the issue presented, expressed its opinion in a case involving the overreach of the governor, compromising the powers of the legislature, by means of executive order. Such decision stated:

***“The executive power of the State, vested in the Governor, is broad (see NY Const, art IV, §§1, 3; Executive Law, arts 2, 3). In his capacity to oversee, even beyond his responsibility to operate, the Governor may investigate the management and affairs of any department, board, bureau, or commission of the State (Executive Law, § 6). This investigatory power, which includes the power to subpoena witnesses, as well as to require the production of books and papers, and which authorizes the Governor to delegate the investigatory function to persons appointed by him for that purpose, permits the Governor to exercise considerable vigilance, but not necessarily direction, in protecting against conflicts of interest. The Constitution and statutes thus recognize explicitly the need for and the power in the Governor to oversee, but again not necessarily to direct, the administration of the various entities in the executive branch.***

***The Governor may also direct the Attorney-General to inquire into matters ‘concerning the public peace, public safety and public justice’ (Executive Law, § 63, subd 8). Implementation of this power is illustrated by Governor Dewey's creation in 1951 of the New York State Crime Commission to investigate the relationship between organized crime and State government (see Matter of Di Brizzi [Proskauer], 303 NY 206, 211-216).***

***There are, however, limits to the breadth of executive power. The State Constitution provides for a distribution of powers among the three branches of government (see NY Const, art III, §1; art IV, § 1; art VI). This distribution avoids excessive concentration of power in any one branch or in any one person. Where power is delegated to one person, the power is always guided and limited by standards. In fact, even the Legislature is powerless to delegate the legislative function unless it provides adequate standards (Packer Coll. Inst. v University of State of N. Y., 298 NY 184, 189). Without such standards there is no government of law, but only government by men left to set their own standards, with resultant authoritarian possibilities.***

*Defendants cite numerous instances, reaching far back into the State's history, in which the Governor has acted by 'executive order', although not usually so denominated. But, until 1950, none of those orders had any rule-making component. They were emergency measures later submitted to the Legislature for ratification, actions taken pursuant to an unchallenged constitutional or statutory power of the Governor, or proclamations without significant legal effect. (See, e.g., 3 Lincoln, Messages from the Governor, pp 38-40 [proclamation calling Legislature into Extraordinary Session].) After 1950, there were a number of different types of orders which were seemingly cast in a rule-making mold, but were repetitive of existing legislation as to standards and implemented the enforcement of those standards by voluntary arrangements, directions for co-ordination, or the interposition of mediatory bodies (see, e.g., Executive Order Establishing Code of Fair Practices, 1960 Public Papers of Governor Nelson A. Rockefeller, p 1130; Executive Order for Resolution of Employee Complaints, 1950 Public Papers of Governor Thomas E. Dewey, p 613). Assuming they were valid, as they undoubtedly were in large measure, the order in this case goes beyond any of them.*

*It is true that in this State the executive has the power to enforce legislation and is accorded great flexibility in determining the methods of enforcement (see NY Const, art IV, §3). But he may not, as was recently said of the Mayor of the City of New York, 'go beyond stated legislative policy and prescribe a remedial device not embraced by the policy' (Matter of Broidrick v Lindsay, 39 NY2d 641, 645-646). And, as noted in the Broidrick case, decided unanimously by this court, the flexibility allowed the executive in designing an enforcement mechanism depends upon the nature of the problem to be solved (id., p 646). Where it would be practicable for the Legislature itself to set precise standards, the executive's flexibility is and should be quite limited". Id. at 162-163.*

It should be noted that the Separation of Powers Doctrine, concerning excessive powers deployed by the executive branch, does not concern just the governor's actions alone, but has also been extended to include the actions of the attorney general as well. In *Grasso v. Spitzer*, 42 AD3d 126 (1<sup>st</sup> Dept. 2007), aff'd 11 NY3d 64 (2008), the court held:

*"As an elected representative of the executive branch, the Attorney General unquestionably is entitled to deference from the judiciary in the exercise of his powers. What the Court of Appeals has stated of the Governor is true as well of the Attorney General: '[ t]he executive has the power to enforce legislation and is accorded great flexibility in determining the methods of enforcement' (Rapp v. Carey, 44 N.Y. 2d 157, 163, 404 N.Y.S. 2d 565, 375 N.E. 2d 745 [ 1978] [citation omitted] ). As the Court immediately went on to stress, however: 'But he may not, as was recently said of the Mayor of the City of New York, ' go beyond stated legislative policy and prescribe a remedial device not embraced by the policy' ( Matter of Broidrick v. Lindsay, 39 N.Y. 2d 641, 645- 646 [ 385 N.Y.S. 2d 265, 350 N.E. 2d 595] [ 1976] )" (Rapp v. Carey, 44 N.Y. 2d at 163, 404 N.Y.S. 2d 565, 375 N.E. 2d 745).*

***The reason he may not, of course, is the “constitutional principle of separation of powers ..., [which] requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies” (Bourquin v. Cuomo, 85 N.Y.2d 781, 784, 628 N.Y.S.2d 618, 652 N.E.2d 171 [1995] [citations omitted]; see also Sheehy, 73 N.Y.2d at 636, 543 N.Y.S.2d 18, 541 N.E.2d 18 [rejecting implied right of action as ‘inconsistent with the evident legislative purpose underlying the [statutory] scheme’ and refusing to “overrid[e] this legislative policy judgment”]).***

***Notably, in the fourth cause of action, the Attorney General asserts that Grasso's retention of the allegedly unlawful compensation “is against equity, good conscience and public policy.” Only the Legislature, however, can eliminate the fault-based requirements of the N-PCL in the name of sound public policy. Id. 141-142.***

As can be seen from the cases addressing this subject, although the Courts provide significant deference to the all the branches in the performance of their duties, the Doctrine of Separation of Powers has long been recognized as a baseline of jurisprudence in this state and nation.

As aforementioned, each branch, when confronted with another branch encroaching on its powers or domain can avail itself to either self help, or application for relief to the courts.

The Court of Appeals has held that it is often the role of the courts to determine when a branch of state government has exceeded its authority and unconstitutionally encroached into the domain of another. A pronouncement of this role of the judiciary branch came in Saratoga County Chamber of Commerce v. Pataki, 100 NY2d 801 (2003), when the Court found:

***“Article III of the State Constitution vests the Senate and the Assembly with the legislative power of the State, while article IV vests the executive power in the Governor and article VI vests the court system with the judicial power (see N.Y. Const., art. III, § 1; art. IV, § 1; art. VI, § 1). We have recognized that these “separate grants of power to each of the coordinate branches of government” imply that each branch is to exercise power within a given sphere of authority (Clark v. Cuomo, 66 N.Y.2d 185, 189, 495 N.Y.S.2d 936, 486 N.E.2d 794 [1985] ). Stated succinctly, the separation of powers ‘requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies’ (Bourquin v. Cuomo, 85 N.Y.2d 781, 784, 628 N.Y.S.2d 618, 652 N.E.2d 171 [1995] [citing Matter of New York State Health Facilities Assn. v. Axelrod, 77 N.Y.2d 340, 349, 568 N.Y.S.2d 1, 569 N.E.2d 860 (1991) ]).***

***This is not to say that the functions of government can be neatly boxed into judicial, executive and legislative categories. The distinctions are often elusive, and the fluid functioning of government requires that the interactions among the three branches be allowed some ‘play in its joints’ (Bain Peanut Co. of Tex. v. Pinson, 282 U.S. 499, 501, 51 S.Ct. 228, 75 L.Ed. 482 [1931]; see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 [ 1952] [Jackson, J., concurring]; Matter of Richardson, 247 N.Y. 401, 410, 160 N.E. 655 [1928] ).***

***It thus falls to the courts, and ultimately to this Court, to determine whether a challenged gubernatorial action is “legislative” and therefore ultra vires. In this case we have no difficulty determining that the Governor’s actions were policy-making, and thus legislative in character”.*** Id. at 821-822.

But the legal doctrine of Separation of Powers is not simply restricted to the state courts alone. In addition to the previously discussed federal question of the fulfillment of the federal constitutional requirement that all states must maintain a “republican form of government”, the federal courts have also issued holdings that state courts follow with respect to the very nature of separation of powers.

In a landmark case on the Doctrine of Separation of Powers, the United States Supreme Court, in the concurring opinion of Justice Frankfurter in Youngstown Co. v. Sawyer, 343 U.S. 579 (1952), concerning the issuance of an executive order by the president, expounded on this principle, holding:

***“The Founders of this Nation ... acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.***

***To that end they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. ... The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority”.*** Id. at 595

Although the Youngstown case involved the Separation of Powers Doctrine with respect to the federal government, it has been recognized in numerous Court of Appeals decisions to apply in New York. See Oneida County v. Berle, supra, Rapp v. Carey, supra, Nicholas v. Kahn, 47 NY2d 24 (1979), and Saratoga County Chamber of Commerce v. Pataki, supra.

As a result of the foregoing, it can be seen, that although there is a strong legal recognition of the Separation of Powers Doctrine, both in New York and nationally, any determination by a court as to whether an action of a branch of government has unconstitutionally encroached upon the powers of another is a very fact sensitive matter. Because such facts can be seen from the platform of many political perspectives, to which judges are not immune, any such court action, although legally justified, would be dependent upon the willingness of the court deciding the same, to see such in a unbiased light.

## Part Six: Conclusion

A review of the Governor's July 2, 2013 Executive Order establishing the Commission to Investigate Public Corruption raises several serious constitutional, legal and policy issues.

The Governor justifies his action by relying upon a reading of Article IV, section 3 of the constitution, as well as the Moreland Act (section 6 of the executive law) and the cross designation authority of the Attorney General under subdivision 8 of section 63 of the executive law.

Pursuant to his perceived authority, the governor has directed the Commission to investigate the management and affairs of the State Board of Elections, weaknesses in existing laws, regulations and procedures relating to the regulation of lobbying, and weaknesses in existing laws, regulations and procedures relating to addressing public corruption, conflicts of interest, and ethics in State Government. He has further empowered Commissioners to be cross designated as Deputy Attorney Generals, with full subpoena and investigation powers, and the ability to bring prosecutions for any illegal activities their investigation may uncover.

Reportedly, Commission subpoenas have already been issued and delivered to investigation targets, and monies expended in furtherance of its operations.

The question thus presented is: **Does the Governor have the Constitutional and Legal Authority to Establish the Commission to Investigate Political Corruption and What Recourse Does the Legislature Have With Respect to The Commission's Activities?**

The question of the governor's legal authority relies on two interrelated legal concepts. First, does the constitution, the Moreland Act, and or subdivision 8 of section 63 of the executive law, give the governor and the attorney general the legal authority to do what the Governor's Executive Order directs, and second, is the Doctrine of Separation of Powers able to legally prevent the governor and attorney general from carrying out such directives.

Because the courts do provide deference to the other branches in the performance of their duties, a review of the law on these subjects does not present a dispositive answer. What complicates the matter further, is that the fact that the Governor's true motives for the Commission, to target, threaten, intimidate or prosecute members of the state legislature in order to get them to enact his legislative agenda, is obviously not contained within the terms of the Executive Order. Such intent must be proven in order to have a court strike down the Commission itself, or its actions, and such proof is obviously not easy.

A plain reading of the Governor's constitutional authority in section 3, Article IV of the state constitution, does not appear to support his justification for establishing the Commission and its investigation. If such were the case, there would have never been a need for the to enact section 6 or subdivision 8 of section 63 of the executive law.

Similarly, an historical review of the intent and purposes of the Moreland Act, also appears to not be consistent with the Governor's intent of the Commission. The Moreland Act does not authorize a governor to investigate the legislature, or its reasons for not enacting ethics legislation. It does allow the governor to investigate his own executive agencies, but he has never alleged corruption within the State Board of Elections or the 8 month old Joint Commission on Public Ethics, and there is an argument that both the Board of Elections and the Joint Commission are not agencies even that could be covered by Moreland, as the governor cannot remove their commissioners.

Conversely, however, the law does seem to provide substantial authority for the Governor's executive order pursuant to subdivision 8 of section 63 of the executive law. The DiBrizzi case seems to track many areas where the governor seeks to justify his actions, and in such case the Court of Appeals upheld Governor Dewey's Executive Order. The major distinguishing factor is, however, that Governor Dewey's Commission never targeted the state legislature or its members. There is also the issue that subdivision 8 of section 63 does have the requirement that the compensation and expenses of the Commission must be expended from monies appropriated for that purpose, perhaps providing a legislative check on their actions. This has never been tested, as no previous commission has ever targeted the state legislature or its members.

The last issue is can the Commission and its activities be stopped under the Doctrine of Separation of Powers. The case history, albeit never tested directly on point, appears mixed. The Doctrine firmly established in law. In cases such as Rapp v. Carey and Grasso v. Spitzer, the courts have held that the executive has overstepped their bounds. In others, however, they have held the governor to be within his executive purview. It has been decided on very fact specific determinations. The present case would therefore, most likely, come under similar fact perspective scrutiny. As the governor at that point would most likely contend that his motives were not to go after the legislature, it would be up to the courts to find otherwise. A rather heavy burden.

One determination is however clear. As the Attorney General is the investigator and prosecutor of this Commission, he is clearly conflicted in any representation of either legislative house. As a result, in accordance with Article 2 of the public officers law (sections 17, 18 and 19), the Senate and its members, would clearly be entitled to retain outside counsel and have the cost of the same provided by the state. As a result, if a legal challenge to the Governor's Commission is foreseen, such counsel should be retained at the highest possible level and at the earliest opportunity.