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NEW YORK STATE'S OFFICE OF THE SPECIAL PROSECUTOR: A CREATION BORN OF NECESSITY

*Maurice H. Nadjari**

ON September 19, 1972, Governor Nelson A. Rockefeller of New York, acting pursuant to state constitutional¹ and statutory² authority, issued a series of Executive Orders³ which directed the State's Attorney General to:⁴

. . . attend in person, or by one or more of [his] assistants or deputies, an Extraordinary Special and Trial Term of the Supreme Court . . . to be held in and for [each of the counties comprising part of the City of New York] . . .

for the purpose of investigating and prosecuting past, present, and future corruption relating to or in any way connected with the enforcement of law and administration of criminal justice in the City of New York.

What the Governor had done, in fact, was to direct the Attorney General to appoint a Special Prosecutor, as a Special Deputy Attorney General, and to create the Office of the Special State Prosecutor. Moreover, the Governor took the extraordinary step of giving the Attorney General power superseding those which New York City's five district attorneys have within their respective counties as to the specific subject matter jurisdiction encompassed within the Orders.⁵

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1. N.Y. CONST. art. IV § 3. This section imposes on the Governor a constitutional obligation to "take care that the laws are faithfully executed."

2. N.Y. EXEC. LAW §§ 63(2), 63(8) (McKinney 1972).

3. Executive Orders Nos. 55 (New York Co.), 56 (Bronx Co.), 57 (Queens Co.), 58 (Kings Co.), 59 (Richmond Co.) 9A N.Y.C.R.R. §§ 1.55-.59 (1972) (hereinafter collectively referred to as the Executive Orders). The orders are identical except for reference to a specific county. Order No. 55 as amended is reproduced in Appendix A.

4. *Id.*, para. I.

5. Normally, pursuant to provisions of N.Y. COUNTY LAW § 700(1), (McKinney 1972), prosecution of crimes cognizable by the courts of a county is vested exclusively in the elected district attorney of the county, while prosecution by the Attorney General is limited only to those few situations where statutory provisions specifically grant power to the Attorney General. The Governor's action pursuant to N.Y. EXEC. LAW § 63(2) (McKinney 1972) in granting broader prosecutorial power to the Attorney General, and of stripping the county district attorneys of prosecutorial jurisdiction by superseding his powers is therefore extraordinary.

In yet another series of Executive Orders, the Governor appointed an Extraordinary Special and Trial Term of the State Supreme Court in and for each of New York City's five counties.⁶ The Governor specified that the Extraordinary Terms were to continue for as long as was necessary so that the Attorney General could continue to bring action in accordance with his earlier orders. Governor Rockefeller then designated the Honorable John M. Murtagh⁷ to hold the Extraordinary Special and Trial Terms in each of New York City's counties.

In the Executive Orders of September 19, 1972, however, the Governor gave the Special Deputy Attorney General power far more extensive than those ordinarily possessed by a prosecutor. Paragraph I of the Executive Orders vests in him prosecutorial powers, while paragraph II grants him broad commission powers. In paragraph II the Governor, pursuant to Section 63(8) of the Executive Law, found it in the public interest to require the Attorney General to "inquire into matters concerning the public peace, public safety and public justice with respect to" corruption insofar as it relates in any way to law enforcement or criminal justice administration in New York City.⁸ This provision of the Executive Law grants the Attorney General's office subpoena powers, permits the holding of hearings, and mandates that upon request, all public officers and employees give him "all information and assistance in their possession and within their power" in connection with his inquiries.⁹

The subject matter jurisdiction of the Governor's Executive Orders to the Attorney General is, at once, both broad and specific. The broader grant of jurisdiction covers:

- (a) any and all corrupt acts and omissions by a public servant or former public servant occurring heretofore or hereafter in the [City] of New York in violation of any provision of

6. Executive Orders Nos. 61 (New York Co.), 62 (Bronx Co.), 63 (Queens Co.), 64 (Kings Co.), 65 (Richmond Co.) 9A N.Y.C.R.R. § 1.61-.65 (1972). The orders are identical except for references to a specific county. For constitutional and statutory authority upon which this series of orders is based see N.Y. CONST. art. VI, § 27 and N.Y. JUDICIARY LAW § 149 (McKinney 1968). Executive Order No. 61 is reproduced in Appendix B *infra*.

7. Justice of the Supreme Court of the State of New York, First Judicial District.

8. See Executive Orders, *supra* note 3, and Appendix A, *infra*.

9. N.Y. EXEC. LAW § 63(8) (McKinney 1972). This section permits the Governor to direct the Attorney General to inquire into matters concerning the public peace, public safety, and public justice. The Attorney General or his deputies are given broad investigatory powers by the statutory provision, subject to the check that detailed weekly reports be made to the Attorney General and the Governor.

State or local law and arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(b) any and all acts and omissions and alleged acts and omissions by any person occurring heretofore or hereafter in the [City] of New York in violation of any provision of State or local law and arising out of, relating to or in any way connected with corrupt acts or omissions by a public servant or former public servant arising out of, relating to, or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(d) any and all acts and omissions and alleged acts and omissions occurring heretofore or hereafter to obstruct, hinder or interfere with any inquiry, prosecution, trial or judgment

. . . .¹⁰

In defining "corrupt acts and omissions," the orders contain greater specificity: "unauthorized exercise of official functions;"¹¹ failure to perform duties imposed by law, rules or regulations or duties inherent in the nature of the office;¹² acts constituting violations of Penal Law¹³ provisions which define the crimes of coercion,¹⁴ larceny,¹⁵ official misconduct,¹⁶ obstructing governmental administration,¹⁷ bribery involving public servants and related offenses,¹⁸ perjury and related offenses,¹⁹ other offenses relating to judicial and other proceedings,²⁰ criminal solicitation,²¹ conspiracy,²² attempt,²³ and criminal facilitation²⁴ with respect to the substantive crimes, and any and all offenses that may be properly joined with these criminal violations.²⁵

The temporal jurisdiction of both series of Executive Or-

10. Executive Orders, *supra* note 3, paras. I (a), I (b), I (d); see Appendix A *infra*.

11. *Id.* para. III (c)(1).

12. *Id.* para. III (c)(2).

13. *Id.* para. III (c)(3).

14. N.Y. PENAL LAW § 135.60, 135.65 (McKinney 1967).

15. N.Y. PENAL LAW art. 155 (McKinney 1967).

16. N.Y. PENAL LAW § 195.00 (McKinney 1967).

17. N.Y. PENAL LAW § 195.05 (McKinney 1967).

18. N.Y. PENAL LAW art. 200 (McKinney 1967).

19. N.Y. PENAL LAW art. 210 (McKinney 1967).

20. N.Y. PENAL LAW art. 215 (McKinney 1967).

21. N.Y. PENAL LAW art. 100 (McKinney 1967).

22. N.Y. PENAL LAW art. 105 (McKinney 1967).

23. N.Y. PENAL LAW art. 110 (McKinney 1967).

24. N.Y. PENAL LAW art. 115 (McKinney 1967).

25. Executive Orders, para. III (5), *supra* note 3, and Appendix A *infra*.

ders,²⁶ is extensive. Except where no pre-order indictments had been filed, and regardless of whether or not an investigation had been commenced either prior or subsequent to the original dates of the Executive Orders, the Attorney General's new prosecutorial powers extend to all acts or omissions alleged to have occurred both before and after that date.²⁷ Moreover, since the Governor's Executive Orders contain no expiration date, both the Special Prosecutor's jurisdiction and the Extraordinary Terms' lives are without specified limit as to duration. Thus, both the Special Prosecutor's Office and the Extraordinary Terms have continuous, temporal jurisdiction until terminated by some future gubernatorial orders, or ideally, until they have become self-expiring by eliminating all corruption and allegations or suspicion of corruption involving New York City's criminal justice system.

New York's Executive Law does not mandate that the Governor state his reasons for requiring the Attorney General to act in criminal proceedings wherein a district attorney's authority is to be superseded.²⁸ Nor is he required to do so when directing the Attorney General to conduct an inquiry.²⁹ However, in the exercise of gubernatorial discretion to assure faithful execution of the laws, there may be a requirement that there be some "reasonable relationship between the action taken by the Governor, through the Attorney General, and the proper discharge of the executive function."³⁰ Thus, in his Executive Orders of September 19, 1972 the Governor referred to the recommendation of the Commission to Investigate Allegations of Police Corruption in the City of New York, popularly known as the Knapp Commission.

The Knapp Commission cited various factors which justified its recommendation that a Special State Prosecutor be appointed: the immediate need to supplement the agencies charged with combatting police corruption, the basic weakness in existing approaches to police corruption in their primary reliance on policemen to do investigative work, a general public distrust of the system for dealing with complaints against police, accusations of

26. See notes 3 to 6 *supra* and accompanying text.

27. Executive Orders, paras. I, IV, *supra* note 3, and Appendix A *infra*.

28. N.Y. EXEC. LAW § 63(2) (McKinney 1972).

29. N.Y. EXEC. LAW § 63(8) (McKinney 1972).

30. Matter of DiBrizzi, 303 N.Y. 206, 216, 101 N.E.2d 464, 469 (1951). The case involved a challenge of a gubernatorial order pursuant to now N.Y. EXEC. LAW § 63(8) (McKinney 1972), requesting the Attorney General as part of the New York State Crime Commission to hold an inquiry concerning "public peace, public safety and public justice" and to investigate the relationship between organized crime and government.

corruption among prosecutors, lawyers, and judges, the need for a public demonstration that society is committed to a war on corruption, the jurisdictional inadequacies of a city agency, and the correlative necessity for city-wide jurisdiction, the need for independence, and the need for immediate action.³¹

In making its recommendation the Knapp Commission stated:³²

To meet these needs, we recommend that the Governor, acting with the Attorney General pursuant to § 63 of the Executive Law, appoint a Special Deputy Attorney General with jurisdiction in the five counties of the City and authority to investigate and prosecute all crimes involving corruption in the criminal process.

The powers of such Deputy Attorney Generals are traditional and well established. They include the power to use the grand jury and employ all investigative techniques incident to grand jury proceedings. They also include the power to suggest grand jury presentments and make other public reports.

The proposed Special Deputy Attorney General should use these powers to the widest extent.

In a press release issued at the same time as the Executive Orders calling for a Special State Prosecutor, the Governor emphasized, however, that he was not relying solely on the Knapp Commission's findings and recommendations. He stated that his action was taken in response to the Knapp Commission's findings, fortified by the disclosures and recommendations of many others including the Mayor of New York City, the Chairman of the Joint Legislative Committee on Crime, the Chairman of the State Commission of Investigation, and the United States Attorneys for the Southern and Eastern Districts of New York.³³ That the Governor thus had a sufficient basis for the discretionary exercise of executive power is unquestionable. Indeed, this combination of supportive disclosures and recommendations from law enforcement agencies and officers encouraged the Governor in

31. See COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION IN THE CITY OF NEW YORK, SUMMARY AND PRINCIPAL RECOMMENDATIONS, 13-16 (August, 1972).

32. *Id.* at 15-16 (emphasis added).

33. Statement by Governor Nelson A. Rockefeller (Special Prosecutor/N.Y.C.) (Sept. 19, 1972); Transcript of Press Conference of Governor Nelson A. Rockefeller held at the Gotham Hotel, New York, N.Y. (Sept. 19, 1972).

issuing his Executive Orders to reach the following conclusion:³⁴

I have taken this action in recognition of a fundamental reality: that under the present circumstances, only an independent agency with city-wide authority, assigned a clear and specific mission and armed with full prosecuting power and independent investigative capacity, can break through the natural resistance of government agencies to investigate themselves or their close allies, can overcome the forces of inertia, and can finally deal a decisive blow to narcotics, crime and corruption in New York City.

By his actions and statements, the Governor recognized and accepted as fact reports that existing agencies and means to investigate and prosecute corruption in New York City's criminal justice system, as well as those responsible for ensuring the integrity of that system, whether by structure or operation, were patently inadequate for the necessary public confidence and trust in that system. The Governor further emphasized the seriousness of the situation as a matter of state concern because of its symbolic impact on other aspects of government: ". . . if we have corruption in the criminal justice process, how are we going to stamp out corruption anywhere in government . . . [?] We're going right to the heart of the problem . . ."³⁵

Such fundamental questioning of the efficacy of existing structures and means to deal with problems of corruption within the criminal justice system requires both an overview of the problem and a specific examination of the adequacy of means to examine, investigate, and take appropriate action with respect to judges, district attorneys, lawyers in private practice, and law enforcement officers.

I. OFFICIAL CORRUPTION: THE INADEQUACY OF TRADITIONAL SOLUTIONS

Today, corruption in government and in law enforcement has, on a national scale, become a public scandal of both awesome and chilling proportions. Corruption problems have afflicted, to a greater or lesser extent, all levels of government and all aspects of the criminal justice system across the country. As if this corruption *per se* were not sufficiently troublesome, it may

34. Statement by Governor Nelson A. Rockefeller (Special Prosecutor/N.Y.C.), *supra* note 33 at 2.

35. Transcript of Press Conference, *supra* note 33 at 8-9.

be even more problematic to the ordinary citizen than would appear from a surface view. It is too well established to have to again document that this corruption is necessary for organized crime to flourish.³⁶

New York State has been plagued by its share of corruption in law enforcement and government. Corruption has been exposed in such diverse places as New York City, Albany, Buffalo, Newburgh, and Suffolk County.³⁷ Moreover, it is universally agreed that the degree of corruption uncovered is only a small portion of the criminal activities which actually exist. But how does New York usually attempt to deal with this problem?

Traditionally, in this State, the corruption problem has been strictly within the province of the local county prosecutor. This approach has meant that local prosecutors deal with individual corruption problems on a case by case basis as they arise. On occasion, a Special Prosecutor might be appointed for limited investigation to deal with specific problems,³⁸ but this too has meant a piecemeal approach without any long-range, comprehensive strategy to attack the corruption problem on a statewide or multi-jurisdictional basis. There simply has never been a well-planned, broad based, continuing attempt to meet the corruption problem throughout New York.

The practice of leaving the corruption problem to locally elected county prosecutors has revealed a number of serious defects in current methods, the most basic of which has been the lack of commitment and effort on the part of local officials to aggressively investigate official corruption. This situation may have several explanations.

With ever expanding criminal case loads, local county prosecutors lack the resources to adequately investigate and prosecute their political superiors and associates. Assistant district attorneys, whose appointment or discharge are in the personal discre-

36. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* at 191 (Feb., 1967).

37. See COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION IN THE CITY OF NEW YORK, *COMMISSION REPORT*, (1972); Buffalo, *THIRD ANNUAL REPORT OF THE TEMPORARY COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK* (1961); Syracuse, *THIRD AND FIFTH ANNUAL REPORTS*, (1961, 1963). Indictments have recently been tried in Suffolk County and Newburgh, New York. The Albany Police Department is now being investigated by the Temporary Commission of Investigation.

38. See, e.g., 1938 Public Papers of Governor Lehman 301; 1926 Public Papers of Governor Smith 266. See also, *In re Turecamo Contracting Co.*, 260 App. Div. 253, 21 N.Y.S. 2d 270 (2d Dep't 1940).

tion of the district attorney, without required reference to any merit system or fixed standards and often subject to political influence, are unlikely to actively pursue investigations and prosecutions of the very same people who may be able to influence or control their career progress.

Other defects in the current system include the fact that while the corruption problem is not restricted by county boundaries, the geographic jurisdiction of the local district attorney is so delimited. The reliance of the local prosecutor on police to conduct the field investigations of all his cases, together with the resulting practical difficulties involved in investigating the police and judges upon whom he depends and with whom he works, throttles the local prosecutor's investigatory and prosecutorial efforts. All of these defects apply to some extent to the major structure and means existing in New York State for attacking corruption both within the criminal justice system and in government, i.e., investigation and prosecution within his county by a locally elected district attorney.

New York State also provides several other structures and methods for receiving complaints, investigating, and taking action with respect to corruption by those involved in the criminal justice processes. In trying to determine whether there exists a long-term necessity for a Special Prosecutor with broad geographic jurisdiction to handle corruption problems, it is important to examine the alternate means now provided under New York State law for attacking official corruption by those responsible for investigating, deterring, prosecuting and punishing criminal behavior.

A. *Judicial Corruption*

The New York State Constitution and statutes provide, as a supplement to ordinary criminal proceedings, several methods of removal as a disciplinary measure in order to deal with problems of corruption and abuse of judicial office.³⁹ Each carries its own procedural variations as to investigation, specification, presentation, and trial of charges. Removal methods include:

39. See Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U. L. Rev. 149 (1966); TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, THE JUDICIARY 41-57 (1967) [hereinafter cited as TEMPORARY STATE COMMISSION, THE JUDICIARY]. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON THE CONSTITUTIONAL CONVENTION, REMOVAL OF JUDGES (1967).

1. Impeachment by the legislature.⁴⁰
2. Legislative Removal Proceedings by concurrent resolutions (for Judges of the Court of Appeals and Justices of the Supreme Court).⁴¹
3. Legislative Removal Proceedings by the Senate after gubernatorial recommendation (for Judges of other constitutional courts including, but not limited to the County Court, Criminal Court of the City of New York, and District Court and such other inferior courts as the legislature may determine).⁴²
4. Removal by the Court on the Judiciary.⁴³

40. N.Y. CONST. art. VI, § 24. An absolute majority of the Assembly has the power to vote formal impeachment charges. The Court for the Trial of Impeachments consists of the President of the Senate, all or a majority of the Senators, and all or a majority of the judges of the Court of Appeals. Members of the Court take an oath to try the impeachment according to the evidence, and conviction requires the concurrence of two-thirds of the members present. Judgment may extend no further than removal or removal and disqualification, but the party impeached remains susceptible to indictment and punishment according to law. The constitution does not define or specify grounds for removal by impeachment. Presumably, whether the grounds are sufficient for impeachment may be determined for each case as part of the impeachment proceedings.

It is to be noted that acquittal on impeachment does not prevent criminal conviction on bribery. *See People v. Stillwell*, 81 Misc. 456, 142 N.Y.S. 628 (Sup. Ct. 1913).

41. N.Y. CONST. art. VI § 23(a), (c). Removal may be accomplished by concurrent resolution of both houses of the legislature, if two-thirds of all members elected to each house concur therein. Removal must be for cause. The judge or justice must be served with a statement of the cause alleged, and must have had an opportunity to be heard.

"Cause" is not defined by the Constitution, but has been construed in several cases involving the removal of judicial officers. *See Friedman v. State*, 24 N.Y.2d 528, 249 N.E.2d 369, 301 N.Y.S. 2d 484, 493 - 495 (1969), *appeal dismissed*, 397 U.S. 317, (1969); *Matter of Osterman*, 13 N.Y. 2d (a), (p) (Ct. on the Judiciary 1963); *Sarisohn v. App. Div.*, 2d Dept., Sup. Ct. of St. of N.Y., 265 F. Supp. 455, 458 (E.D. N.Y. 1967); *Matter of Kane v. Rudich*, 256 App. Div. 586, 587, 10 N.Y.S.2d 929, 930 (2d Dep't 1939).

42. N.Y. CONST. art. VI, § 23 (b), (c). Removal may be accomplished by an absolute two-thirds concurrence of members of the Senate after recommendation of the Governor. Removal must be on cause. The judge or justice must be served with a statement of the cause alleged, and must have had an opportunity to be heard.

43. N.Y. CONST. art. VI, § 22(a-h). This constitutional provision establishes the Court on the Judiciary composed of the Chief Judge of the Court of Appeals, the Senior Associate Judge of the Court of Appeals, and one Justice of the Appellate Division of the Supreme Court of each judicial department. The Court on the Judiciary, upon affirmative concurrence of not less than four members of the court, has the power to remove for cause and disqualify from public office judges of constitutional courts after due notice and hearing.

The Court on the Judiciary may be convened by the Chief Judge of the Court of Appeals on his own motion, and must be convened by the Chief Judge on written request by the Governor or by a Presiding Justice of an Appellate Division or by a majority of the Executive Committee of the New York State Bar Association. After the Court on the Judiciary has been convened and removal charges preferred, but before a hearing commences, written notice must be given to the Governor and legislature. The Court on the Judiciary then may be superseded by commencement of impeachment proceedings.

5. Removal by the Appellate Division.⁴⁴

In addition, the constitution and state laws which create the Administrative Board of the Judicial Conference grant the Board significant powers, and charge it with responsibility for the administrative supervision of the courts.⁴⁵ These supervisory powers allow the Administrative Board to investigate complaints against judges and about the administration of justice.

Even in combination, however, these multiple powers and structures appear to be of limited utility as the means to investigate, try, and punish judicial corruption. The legislative powers of judicial removal have been used only twice, once by impeachment and once by Senate removal on recommendation of the Governor.⁴⁶ Neither instance occurred in this century. The power of removal by joint legislative resolution has never been used. In general, legislative removal proceedings may be considered an inadequate answer to the judicial discipline problem because they are "cumbersome, often political, with no right of appeal."⁴⁷

The Court on the Judiciary is given power to designate attorneys to act as counsel to conduct the proceedings, summon witnesses, and use subpoena power for purposes of investigation and trial. The Court has power to make its own rules and procedures for investigation and trial.

44. N.Y. JUDICIARY LAW § 429 (McKinney Supp. 1972). A judge of the courts for the City of New York, and of specified other inferior courts may be removed for cause as provided by the Constitution, and be disqualified from holding future office by the Appellate Division of the Supreme Court. The Appellate Division may order proofs upon any proceedings under the provision, to be taken before a referee appointed by the court. The Appellate Division is also granted power on its own motion or on petition, to investigate or cause to be investigated, the inferior courts and their judges, and to designate a Justice of the Supreme Court or to appoint a referee to conduct such investigations.

This section of the Judiciary Law is a statutory enactment of the powers of removal and retirement after due notice and hearing granted to the Appellate Divisions by N.Y. CONST. art. VI, § 22 (i).

45. N.Y. CONST. art. VI, § 28. This section provides for the Administrative Board of the Judicial Conference, comprised of the Chief Judge of the Court of Appeals, as chairman, and the Presiding Justices of the Appellate Divisions, with the authority and responsibility for the administrative supervision of the unified court system. The N.Y. JUDICIARY LAW, § 212(6) (McKinney 1968) specifies one function of the Administrative Board to be: "The examination of the operation of the courts and the state of their dockets, investigation of criticisms, complaints and recommendations with regard to the administration of justice in such court system and the disposition of such complaints, criticisms and recommendations." By § 213(4) of the N.Y. JUDICIARY LAW (McKinney 1968) the Administrative Board is also given power to hold hearings and conduct investigations, and in conjunction therewith, subpoena power is granted.

46. See TEMPORARY STATE COMMISSION, *THE JUDICIARY*, *supra* note 39 at 45; Cannon, *The New York Court on the Judiciary, 1948 to 1963*, 28 *Albany L. Rev.* 1 at 2 n.6 (1964).

47. See COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION, *Removal of Judges for Disability and Misconduct*, in ASSOC. OF THE BAR OF THE CITY OF NEW YORK, *supra* note

In addition, procedures for legislative removal do not provide means for any self-initiated or on-going system of receipt or investigation of complaints or charges against members of the bench. Moreover, the limitations of impeachment to removal and disqualification, with reservation of liability to indictment and punishment according to law,⁴⁸ might well create a situation where following either a successful or unsuccessful attempt at impeachment, the People's case in any future proceedings might be so disclosed as to make obtaining a criminal conviction exceedingly difficult.

Indeed, the nature of the legislature itself is inherently incompatible with the exercise of its removal powers. It is a policy making rather than an adjudicative body. Its very size makes it ill-suited for the orderly conduct of trials. Furthermore, many of its members are not lawyers, but rather men with other interests more easily subjected to partisan considerations than to the performance of a neutral judicial role.

The Court on the Judiciary procedure has been used on six occasions since its creation in 1948: Twice, judges have been removed.⁴⁹ In one instance two judges were "rebuked and reprimanded" but not removed,⁵⁰ and, on two convenings, the proceedings were closed as moot because of the accused judge's formal resignation and representation amounting to future disqualifications.⁵¹

The Court on the Judiciary is convened only on an ad hoc basis. It has neither continuous existence nor a permanent staff, and it makes its own rules of procedure.⁵² True, the Court may perform its function well once a particular case has caused it to be convened. Its structure, however, hinders the Court in two important areas: First, it cannot be an effective watchdog over judicial conduct. Second, it cannot investigate all complaints concerning judicial misconduct.

39 at i-ii; See Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, *supra* note 39 at 163.

48. See note 40 *supra*.

49. Matter of Friedman, 12 N.Y. 2d (a) (Ct. on the Judiciary 1963); Matter of Osterman, 13 N.Y. 2d(a) (Ct. on the Judiciary 1963).

50. Matter of Sobel (Liebowitz), 8 N.Y. 2d(a) (Ct. on the Judiciary, 1960).

51. Matter of Schweitzer, 29 N.Y. 2d (a) (Ct. on the Judiciary 1972); Matter of Michael M. D'Auria, Ct. on the Judiciary convened April 2, 1971, proceedings mooted by resignation July 28, 1971 (unreported). The Court on the Judiciary was last convened April 12, 1973, in *Matter of Joseph J. Pfingst*, which remains *sub judice* (unreported).

52. See Matter of Schweitzer, 29 N.Y. 2d (a) (Ct. on the Judiciary 1972).

Criticism has been leveled at the procedures of the Court on the Judiciary for several reasons: Once the Court is convened, the matter under consideration becomes public. This situation makes confidential investigation difficult and creates adverse publicity for its subject, who may then suffer possibly premature public censure. The Court also has been questioned because it performs both prosecutorial and judicial functions, thus making it difficult for it to insure its own impartiality. Other criticisms rest on the grounds that there is no appeal from the Court's decision, that the members of the Court, because they are all elected officials, may be subject to partisan pressures, and that the powers of the Court may be superseded by the legislature on the basis of political considerations.⁵³

The Appellate Divisions' powers to remove judges or hear cases involving charges against judges have been the judicial discipline procedures most often used. On at least twenty-three occasions, the Appellate Divisions have held hearings which have resulted in at least five removals of judges and six condemnations or reprimands.⁵⁴ On receipt of a complaint or on its own motion, the Appellate Division either may take action by appointing a referee to take evidence, by conducting an investigation itself, or by appointing a justice of the Supreme Court or a referee to conduct an investigation of inferior courts or judges.⁵⁵ The Appellate Division, after a hearing, may then confirm, modify or reject any report it receives.

As in the Court on the Judiciary situation, the Appellate Division may be criticized on the grounds that it may be performing both prosecutorial and judicial functions in connection with its removal powers and that, since all of the judges are elected officials, they may be subjected to extra-judicial pressures. The Appellate Divisions also lack sufficient resources to be effective anti-corruption instrumentalities. While the Presiding Justice of an Appellate Division⁵⁶ may himself investigate complaints made against judges, or assign complaints for investigation to the Court

53. See generally note 39 *supra*. The fact that the decision of the Court on the Judiciary is not appealable does not necessarily mean that it cannot be attacked in a collateral proceeding. *Friedman v. State*, 24 N.Y. 2d 528, 301 N.Y.S. 2d 484 (1969), *appeal dismissed*, 397 U.S. 317 (1970).

54. See Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, *supra* note 39 at 186-187; see, e.g., *In re Sarisohn*, 29 A.D. 2d 91, 286 N.Y.S. 2d 336 (2nd Dep't. 1967) *aff'd.*, 22 N.Y. 2d 808, 292 N.Y.S. 2d 907 (1968).

55. See N.Y. JUDICIARY LAW § 429 (McKinney Supp. 1972).

56. See N.Y. JUDICIARY LAW §§ 71, 85 (McKinney 1968).

Administrator⁵⁷ or the Administrative Judge of the Department,⁵⁸ the Appellate Divisions have neither permanent staffs nor fixed procedures for the investigation of these complaints.

Two other formal judicial structures exist within the State of New York for dealing with problems of judicial corruption or misconduct. The Administrative Board of the Judicial Conference, comprised of the Chief Judge of the Court of Appeals and the Presiding Justices of the Appellate Divisions, is vested by the New York State Constitution with the authority and responsibility for administrative supervision of the court system.⁵⁹ The Administrative Board's functions in discharge of its constitutional duty encompass broad investigatory powers, including:⁶⁰

The examination of the operation of the courts and the state of their dockets, investigation of criticisms, complaints and recommendations with regard to the administration of justice in such court system and the disposition of such complaints, criticisms and recommendation.

In performing this function the Board is granted specific power to "hold hearings and conduct investigations,"⁶¹ as well as the necessary subpoena power for its effectuation.⁶² In addition, the Judicial Conference of the State of New York, itself, is granted certain powers and responsibilities including that of advising and assisting the Administrative Board.⁶³

The existence of these two structures, even with their broad statewide powers of investigation, however, does little to correct the weaknesses in New York State's overall system of dealing with problems of judicial corruption and misconduct. The Administrative Board lacks continuous existence and a permanent investigatory staff. Though the power exists to investigate complaints and hold hearings, the lack of a permanent mechanism or staff compromises whatever usefulness the Board might have in systematically and confidentially investigating and dealing with complaints.

57. See N.Y. JUDICIARY LAW § 215 (McKinney 1968).

58. See N.Y. JUDICIARY LAW § 217 (McKinney 1968).

59. N.Y. CONST. art. VI, § 28. See N.Y. JUDICIARY LAW § 210-213 (McKinney 1968).

60. N.Y. JUDICIARY LAW § 212(6) (McKinney 1968).

61. N.Y. JUDICIARY LAW § 213(4) (McKinney 1968).

62. *Id.*

63. N.Y. JUDICIARY LAW §§ 224-229, (McKinney 1968). It should be noted that it was a resolution of the Judicial Conference of the State of New York which led the Chief Judge of the Court of Appeals to convene the Court on the Judiciary in *Matter of Sobel* (Leibowitz), 8 N.Y. 2d (a) (Ct. on the Judiciary 1960).

Another potential problem is that participation of the Chief Judge of the Court of Appeals in the Administrative Board's investigation of complaints may require his disqualification in particular cases referred by the Board to the Court on the Judiciary. These factors have led the authors of a leading study on remedies for judicial misconduct to conclude that although the Administrative Board may be well suited for the more serious case, ". . . it is unlikely that the board could expand its operations in the discipline and disability area."⁶⁴

Of course, any judge suspected of engaging in any criminal conduct may be the subject of criminal investigation and prosecution by a grand jury or district attorney of the county in which such conduct is alleged to have occurred.⁶⁵ If the alleged acts are corrupt within the meaning of the Governor's Executive Orders,⁶⁶ and are alleged to have occurred within New York City, the Special State Prosecutor may then exercise his powers. Under certain circumstances, and if related to organized crime activities, the Deputy Attorney General in charge of the statewide Organized Crime Task Force⁶⁷ may also play an important investigatory and prosecutorial role.

Nevertheless, as the primary prosecutorial responsibility would normally rest with a local district attorney, there exist grave doubts as to the efficacy of this safeguard.⁶⁸ A district attorney must maintain close working relationships with local judges who will try the criminal prosecutions he brings, and these relationships may be seriously jeopardized if his investigations of judges, or of a particular judge, become publicly known. It should be reiterated that because the district attorney is a locally elected official, as are the judges, he may be influenced by extra-legal considerations when undertaking investigation of judges' conduct.

In summary, New York State's system of dealing with judicial corruption and misconduct has some serious faults. The existing structures for judicial removal, putting aside the inherent inadequacies of the legislative impeachment process, do leave a

64. Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, *supra* note 39 at 190.

65. N.Y. COUNTY LAW § 700 (McKinney 1972); N.Y. CRIM. PRO. LAW § 190.55 *et seq.* (McKinney 1971).

66. Executive Orders, *supra*, note 3, and Appendix A *infra*.

67. N.Y. EXEC. LAW § 70-a (McKinney 1972).

68. See discussion *supra*, Section I.

void requiring a more permanent structure to investigate and prosecute complaints of judicial misconduct and corruption. The void might well be filled by a permanent Office of the Special State Prosecutor which would be empowered with statewide jurisdiction. Indeed, the current judicial remedies suffer with certain weaknesses because of the non-existence of any permanent structural mechanism or professional staff for dealing with the problems of corruption.

This lack of any permanent, fixed structure for confidentially handling complaints concerning judges means that complaints may proceed through the system or get lost in a variety of ways, that there is no staff capable of conducting an on-going investigation over a period of time, that there are no self-initiated investigations but only responses to specific complaints, that ad hoc staff appointed for particular cases do not necessarily have sufficient prosecutorial skills or background, that complainants may not come forward because of their fear of reprisals without guarantees of confidentiality, and, that the aggrieved may not know with any degree of certainty where to go with their complaints. An institutionalized mechanism, the existence and availability of which would be known to the public, and which would remedy these problems is sorely needed.

Finally, the structures themselves are subject to more fundamental criticisms in three areas: jurisdiction, public confidence, and politics.

First, the jurisdiction of judicial mechanisms for investigating and removing judges is limited only to examining and investigating the judges whose conduct or activities have been called into question. What is lacking is authority either to commence an investigation without first having received a complaint or proceeding against corruptors in ways other than those provided for under the Appellate Division's statutory powers over attorneys.⁶⁹ If existing mechanisms are to be truly effective and if their actions are to have a deterrent impact, they must have that authority.⁷⁰

Second, the efficacy of judicial mechanisms and remedies may be questioned because they allow judges to investigate and

69. See N.Y. JUDICIARY LAW § 90 (McKinney 1968).

70. See COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION IN THE CITY OF NEW YORK, SUMMARY AND PRINCIPAL RECOMMENDATIONS 21 (August, 1972). The jurisdiction of judicial mechanisms must be broadened to allow them to take action against those who try to influence judges as well as against the judges improperly influenced.

judge other judges without examination by or appeal to outside agencies. Existing structures and procedures vest the judiciary with investigatory, prosecutory, adjudicatory, and appellate review powers when it comes to dealing with judges. This apparent insulation from outside, non-judicial agencies in policing judges may create problems of public confidence requiring some new method of examining complaints against judges,⁷¹ especially at a time when allegations against members of the bench are rife.⁷²

A persuasive argument might also be made that because of fraternal empathy, judges may not diligently pursue allegations against their brethren. This is so not only because judges wish not to offend their colleagues, but also because of the fear that such investigation and prosecution would bring the bench into disrepute.

The last area of criticism of existing judicial remedies is that they may not be free of political influence since the judges of the Court of Appeals and the justices of the Supreme Court are elected officials.⁷³ The mere fact that New York State's judges are elected can be subject to censure, especially since existing means of candidate selection woefully lack sufficient mechanisms for screening and scrutinizing nominees. A weakness such as this permits exertion of considerable control by local party officials. Some have found this system of judicial selection itself to be a significant institutional defect in the New York system of judicial discipline: "[T]he officials involved are subject to political pressures, and although their personal integrity may enable them to resist such pressure, the system itself cannot insulate them because they are elected."⁷⁴

B. *Corruption in District Attorney's Offices*

The district attorney is an elected county law enforcement official whose office is mandated in the New York State Constitution.⁷⁵ The functions, duties, and powers of the office are nowhere

71. See *id.* at 13-14. An analogy is the Knapp Commission's argument that the investigation of allegations against policemen by policemen creates a crisis of public confidence.

72. See *id.* at 15; Newfield, *The Ten Worst Judges in New York City*, New York Magazine, Oct. 6, 1972, at 32; N.Y. Times, Sept. 25, 1972, at 1, col. 6; N.Y. Times, Nov. 20, 1972, at 27, col. 1; N.Y. Times, Nov. 27, 1972, at 18, col. 1.

73. N.Y. CONST. art. VI 2(a), 6(c).

74. Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, *supra* note 39 at 190.

75. N.Y. CONST. art XIII, 13.

specified in the constitution; they must be left to history, conflicting judicial interpretations,⁷⁶ and statute.⁷⁷ The state legislature has mandated the duties of the office in the following language:⁷⁸

It shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed.

This duty is reinforced by several provisions of the Criminal Procedure Law whereby the district attorney is allowed to be present during proceedings of a grand jury,⁷⁹ is, along with the court, made the legal advisor of the grand jury,⁸⁰ is allowed to choose witnesses for the grand jury,⁸¹ and is required or authorized, depending upon the circumstances, to present evidence to a grand jury.⁸²

When considered together, the statutes and case law make the district attorney the prosecutorial and chief law enforcement officer of the county within which his jurisdiction is confined, and vest him with considerable discretion as to the manner in which he exercises his powers.⁸³ Except in those cases where the Governor has issued a superseding order pursuant to provisions of the Executive Law,⁸⁴ or where specific statutory provisions vest prosecutorial powers in the Attorney General,⁸⁵ the prosecutorial power

76. See *Matter of Turecamo Contracting Co.*, 260 App. Div. 253, 21 N.Y.S.2d 270 (2d Dep't. 1940); *Application of Cranford Material Corp.*, 174 Misc. 154, 20 N.Y.S.2d 865 (Sup. Ct., 1940); *People v. Dorsey*, 176 Misc. 932, 29 N.Y.S.2d 637 (Queens County Ct. 1941); *But see People v. Tru-Sport Publishing Co.*, 160 Misc. 628, 291 N.Y.S. 449 (Sup. Ct. 1936). See generally, Pitler, *Superseding the District Attorneys In New York City—The Constitutionality and Legality of Executive Order No. 55*, 41 Fordham L. Rev., 517, 518-522 (1973).

77. N.Y. COUNTY LAW § 700(1) (McKinney 1972).

78. *Id.*

79. N.Y. CRIM. PRO. LAW § 190.25(3)(a) (McKinney 1971).

80. N.Y. CRIM. PRO. LAW § 190.25(6) (McKinney 1971).

81. N.Y. CRIM. PRO. LAW § 190.50(2) (McKinney 1971).

82. N.Y. CRIM. PRO. LAW § 190.55(2) (McKinney 1971).

83. See *Johnson v. Boldman*, 24 Misc.2d 592, 203 N.Y.S.2d 760 (Sup. Ct. 1960); *McDonald v. Goldstein*, 191 Misc. 863, 83 N.Y.S.2d 620 (Sup. Ct. 1948) and *Application of Coleman*, 1 Misc.2d 685, 148 N.Y.S.2d 753 (Sup. Ct. 1956), as to the discretionary power of the district attorney.

84. N.Y. EXEC. LAW § 63(2) (McKinney 1972). See *People v. Hopkins*, 182 Misc. 313, 47 N.Y.S.2d 222 (Ct. Gen. Sess. 1944); *Application of Cranford Material Corp.*, 174 Misc. 154, 20 N.Y.S.2d 865 (Sup. Ct. 1940); *People v. Dorsey*, 176 Misc. 932, 29 N.Y.S.2d 637 (Queens County Ct., 1941).

85. See, e.g., N.Y. EXEC. LAW §§ 63(10), 63(13), 70,70-a (McKinney 1972); N.Y. GEN. BUS. LAW § 340 *et seq.* (McKinney 1968); N.Y. TAX LAW, § 1 *et seq.* (McKinney 1966); N.Y. EDUC. LAW § 6512 *et seq.* (McKinney 1972).

of the district attorney, within the county in which he is elected, is exclusive. This exclusivity creates an almost insurmountable obstacle under existing law, absent gubernatorial intervention, to the investigation and prosecution of corruption when the district attorney or one of his favored assistants is the subject of suspicion or complaint.

To be sure, a corrupt district attorney will not prosecute himself, and no one else in the county is empowered to conduct such a prosecution unless the Governor so orders. Obviously, it would be very embarrassing for a district attorney to have to prosecute or investigate the conduct of his assistants, especially since their appointment and removal are at his discretion and pleasure.⁸⁶ The situation with respect to investigation and prosecution of district attorneys and their assistants is further complicated by the fact that as elected officials, district attorneys owe deference to their party's local political leaders who would certainly look with disfavor on public notoriety.

Nevertheless, some control mechanisms exist under current constitutional and statutory provisions which allow for investigations of and proceedings against district attorneys for their misconduct. The New York State Constitution contains two provisions, one permissive⁸⁷ and the other mandatory,⁸⁸ which the Governor may invoke to remove a district attorney from his office. Section 13(a) of Article XIII grants the Governor power to remove a district attorney within his term, but requires that before removal the district attorney be given a copy of the charges against him and an opportunity to be heard in his defense. Section 13(b) of Article XIII requires the Governor, after due notice and an opportunity to be heard, to take such action against district attorneys for failure to prosecute violations by public officers:⁸⁹

Any district attorney who shall fail faithfully to prosecute a person charged with the violation in his county of any provision of this article which may come to his knowledge, shall be removed from office by the governor. . . .

The constitution further directs the legislature to make provisions "by law for the removal for misconduct or malversation in office of all officers, except judicial, whose powers and duties

86. N.Y. COUNTY LAW § 702 (McKinney 1972).

87. N.Y. CONST. art. XIII, § 13(a).

88. N.Y. CONST. art. XIII, § 13(b).

89. *Id.*

are not local or legislative and who shall be elected at general elections. . . ."⁹⁰ Since the district attorney is an officer who, under provisions of the County Law, is elected at general elections and has powers and duties which are neither local nor legislative,⁹¹ he is subject to the removal procedures established by the legislature.

The legislature has established procedures for gubernatorial removal of public officers in the Public Officers Law. Under the statutory procedures, the Governor himself may conduct an investigation of charges and take evidence at a hearing to determine their truth, or he may direct that the investigation or hearing, or both, be conducted by a Supreme Court justice or County judge, or by a commissioner. The Governor is further empowered to direct the Attorney General or a district attorney to assist in conducting the investigation or hearing, and if neither are so directed, the Governor or his designee may employ counsel and other necessary personnel. The Governor may further direct his designee to report to him the evidence and the material facts deemed by the designee to be established. The officer accused and his counsel have the right to be present at the hearing. They may be present during the investigation if invited. All evidence which is in any report to the Governor or is used as a basis of determination must be presented at the hearing. These procedures were established for exercise of the Governor's removal powers and they provide one mechanism to investigate the conduct of a district attorney and to discipline misconduct or malfeasance in office.⁹²

Another mechanism for investigating a district attorney's conduct is provided by the Criminal Procedure Law. One of the functions of the grand jury under this statute is to hear and examine evidence concerning misconduct, nonfeasance and neglect in public office, whether criminal or otherwise, and to take action with respect to such evidence.⁹³

One course of action the grand jury may follow is the filing of a report "[c]oncerning misconduct, nonfeasance or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action. . . ."⁹⁴ In theory of course,

90. N.Y. CONST. art. XIII, § 5.

91. N.Y. COUNTY LAW §§ 400, 700 *et seq.* (McKinney 1972).

92. N.Y. PUB. OFFICERS LAW § 34 (McKinney 1952).

93. N.Y. CRIM. PRO. LAW §§ 190.06 and 190.05 (McKinney 1971).

94. N.Y. CRIM. PRO. LAW § 190.85 (1)(a) (McKinney 1971).

the grand jury itself could conduct an investigation into charges of misconduct against a district attorney by using its power to call witnesses,⁹⁵ and utilizing the court as its legal advisor.⁹⁶ However, it is almost inconceivable that a grand jury, absent a superseder order by the Governor,⁹⁷ could successfully conduct such an investigation because of the normally close working relationship between it and the district attorney.⁹⁸ In addition, the absence of its own professional staff makes the grand jury a poorly outfitted investigatory body.

The Attorney General could also undertake investigation and prosecution of misconduct by a district attorney,⁹⁹ if the Governor issues an Executive Order superseding the district attorney's local prosecutorial power. Upon approval and direction of the Governor, the Attorney General might also conduct such an investigation while inquiring into "matters concerning the public peace, public safety and public justice."¹⁰⁰

The Temporary Commission of Investigation, popularly known as the State Investigation Commission, is granted power to conduct investigations into the "faithful execution and effective enforcement" of laws, "the conduct of public officers," and "[a]ny matter concerning the public peace, public safety and public justice."¹⁰¹ Upon request of the Governor the Commission is required to conduct investigations and otherwise assist him in connection with the removal of public officers, and the Commission is mandated, when it finds cause for criminal prosecution or removal of a public officer for misconduct, to refer the evidence to the appropriate prosecuting officials.¹⁰² The Commission, however, even with its broad investigatory powers, does not fill the void. In short, New York simply lacks any statewide agency or official with power both to investigate and prosecute corrupt officials within the criminal justice system without having to go to other outside officers or agencies for assistance.

A district attorney is further subject to investigation and discipline by the Appellate Division of the Supreme Court.¹⁰³ The

95. N.Y. CRIM. PRO. LAW § 190.50(3) (McKinney 1971).

96. N.Y. CRIM. PRO. LAW § 190.25(6) (McKinney 1971).

97. N.Y. EXEC. LAW § 63(2) (McKinney 1972).

98. See N.Y. CRIM. PRO. LAW § 190 *et seq.* (McKinney 1971).

99. N.Y. EXEC. LAW § 63(2) (McKinney 1972).

100. N.Y. EXEC. LAW § 63(8) (McKinney 1972).

101. The Commission was created pursuant to Unconsolidated Laws § 7501, *et seq.*, Ch. 898 of the Laws of 1958, N.Y. UNCONSOL. LAW § 7501 *et seq.* (McKinney 1961).

102. N.Y. UNCONSOL. LAWS § 7502 (McKinney 1961).

103. N.Y. JUDICIARY LAW § 90(2) (McKinney 1968).

Appellate Division is granted powers to "censure, suspend from practice or remove from office any attorney . . . who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice. . . ." ¹⁰⁴ The justices of the Appellate Division may require another district attorney within the judicial department to prosecute the proceedings, or they may appoint any attorney to conduct the preliminary investigation and prosecution. Other statutory provisions give the accused a right to be heard, require the proceedings to be confidential unless charges are sustained, and grant a right of appeal from any Appellate Division final order to the Court of Appeals. ¹⁰⁵

Though the legislature has granted the Appellate Division broad powers of discipline extending to the removal of attorneys, including district attorneys, the structure is inadequate to be an effective method of investigating corruption in a district attorney's office. This is so because the Appellate Division's disciplinary powers are complaint oriented. Here too, there is no permanent staff of experienced investigators capable of initiating or conducting an on-going investigation and a possibly complicated prosecution. Here too, because both the justices and the district attorneys are elected officials, there may not be sufficient institutional insulation between them to ensure unfettered investigation and prosecution.

In summary, despite the existence in New York State of several methods to investigate the conduct of a district attorney, and to take action for misconduct or malfeasance in office, there remain considerable inadequacies in the overall structure. First, complaints may be received and investigations undertaken by a multitude of officers or bodies, each with its own procedures for dealing with complaints. The processing of the complaints or allegations very much depends not on which particular body is best suited for this task, but rather on the fortuitous location to which the complainant initially brings the complaint. Second, there exists no office or agency with a permanent staff for undertaking both investigations and prosecutions of suspected miscreant district attorneys, absent affirmative intervention by the Governor. Third, the degree of confidentiality of any investigation is largely dependent on the particular structure which receives a complaint, and the statutes governing that structure. Fourth, without gubernatorial intervention by way of superseding

104. *Id.*

105. N.Y. JUDICIARY LAW § 90 (McKinney 1968).

a district attorney, it is almost impossible to prosecute a district attorney for misconduct or malfeasance. Finally, the agencies and officers currently empowered to examine and take action based on a district attorney's conduct in office may not have sufficient institutional insulation from partisan considerations.

C. Corruption By Attorneys

Recently, there have been numerous accusations of corruption against lawyers by both the Knapp Commission and bar associations.¹⁰⁶ However, district attorneys, due to the considerable work pressures on their offices, generally are loathe or unable to commit the investigatory or legal manpower necessary to properly dispose of complicated complaints made against attorneys.

Attorneys, like any other private citizens, are subject to the ordinary criminal processes of the State for their corrupt acts or omissions. In addition, attorneys are subject to the power and control of the Appellate Divisions of the Supreme Court, which may investigate or cause to be investigated their conduct, and may take appropriate action based on its findings.¹⁰⁷

The Appellate Divisions' supervisory powers extend to taking action against any attorney who is guilty of professional misconduct, malpractice, fraud, deceit, crimes or misdemeanors, or any conduct prejudicial to the administration of justice.¹⁰⁸ The Appellate Division justices may designate a district attorney to prosecute the proceedings or appoint any attorney to conduct a preliminary investigation and prosecute any disciplinary proceedings.¹⁰⁹

Two other mechanisms may be used to investigate attorneys' conduct. The suspected corrupt conduct of any attorney may be investigated by the State Investigation Commission in connection with "any matter concerning. . . public justice",¹¹⁰ and where it appears to the Commission that there is cause for prosecution, it is required to refer the evidence to the appropriate prosecutor.¹¹¹ Similarly, the Attorney General, with the approval and direction of the Governor, may look into the conduct of attorneys when inquiring into matters concerning public justice.¹¹²

106. See COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION, SUMMARY, *supra* note 31 at 15; See also Kiley, *ABA's Delegates Support Probe of Watergate Lawyers*, 170 N.Y.L.J. 28, August 9, 1973, at 1.

107. N.Y. JUDICIARY LAW § 90(2) (McKinney 1968).

108. *Id.*

109. N.Y. JUDICIARY LAW § 90(7) (McKinney 1968).

110. N.Y. UNCONSOL. LAWS § 7502(1) (McKinney 1961).

111. *Id.*

112. N.Y. EXEC LAW § 63(8) (McKinney 1972).

In summary, there exists under the laws of New York means adequate to the task of investigating and prosecuting attorneys suspected of corrupt activities. They are, however, rarely used; hence, they are ineffective as a structural deterrent to misconduct among members of the bar. Given a Special State Prosecutor's Office, however, with jurisdiction limited to corruption-related offenses, and with a permanent investigative and prosecutorial staff, this situation could be changed.

D. Police Corruption

The Knapp Commission found police corruption to be widespread throughout New York City.¹¹³ The Commission found that a basic weakness in approaches dealing with this problem is that "all agencies regularly involved with the problem rely primarily on policemen to do their investigative work."¹¹⁴ This criticism was leveled at the Police Department's internal structures, the district attorneys in the five counties, and the Department of Investigation. The Commission further found with respect to the district attorneys that "there is the additional problem that they work so closely with policemen that the public tends to look upon them—and indeed they seem to look upon themselves—as allies of the Department"¹¹⁵ creating a general public distrust of the way in which allegations against police are handled. It was this public distrust of having policemen investigate policemen, and of the efficacy of making complaints against policemen to the district attorneys that led the Knapp Commission to recommend that the Governor, acting with the Attorney General, appoint a Special State Prosecutor.

While it is true that law enforcement officers are subject to the ordinary criminal processes, including prosecution by the district attorney of the county in which their alleged misconduct or malfeasance occurs, the Knapp Commission, in an attempt to determine how effectively those processes were being used, studied the activity of the five district attorneys in New York City in prosecuting and disposing of police corruption cases.¹¹⁶ When one compares the widespread corruption which the Commission

113. COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION, SUMMARY, *supra* note 31 at 1-3.

114. *Id.* at 13.

115. *Id.* at 14.

116. COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION IN THE CITY OF NEW YORK, COMMISSION REPORT, *supra* note 37 at 249-253 (1972).

found existent with the activity of the district attorneys and the relatively mild punishments imposed by the courts upon convicted police officers, the effectiveness of existing criminal processes in rooting out police corruption, and bringing corrupt police to justice is certainly left open to question.

There may be many explanations for this phenomenon, some of which are: the reliance on police to investigate police, a sympathetic outlook of district attorneys toward police, the difficulties of committing time and manpower to long-range or on-going investigations, the case-oriented approach of the district attorneys, problems related to investigative techniques, jurisdictional limitations, or a combination of these factors. Whatever the reason, the Commission was led to recommend that an independent prosecutor, capable of being wholly independent of other law enforcement agencies, with all his efforts being devoted to combating corruption, and with a more extensive geographical jurisdiction, would be better suited to deal with corruption in law enforcement than would the local district attorneys.¹¹⁷

Statutes grant several other agencies or officers besides the district attorney's office powers to investigate corruption in law enforcement. Grand juries may investigate police corruption under their authority to hear and examine evidence "concerning the alleged commission of any offense prosecutable in the courts of the county, and concerning any misconduct, nonfeasance or neglect in public office by a public servant, whether criminal or otherwise."¹¹⁸ The State Investigation Commission, by statutory mandate, has the statewide duty and power to investigate corruption in law enforcement while inquiring into the faithful execution and effective enforcement of law, the conduct of public officers and employees, and public justice.¹¹⁹ Although it lacks prosecutive, quasi-judicial, or administrative functions, the State Commission has frequently exercised its investigatory powers in the area of police corruption.¹²⁰ The Attorney General, by gubernatorial direction and approval, may be ordered to investigate, or investigate and prosecute, charges relative to the administration

117. *Id.* at 255-258, 15-61.

118. N.Y. CRIM. PRO. LAW § 190.55 (1) (McKinney 1971).

119. N.Y. UNCONSOL. LAWS § 7502 (McKinney 1961).

120. See TEMPORARY COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, FOURTEENTH ANNUAL REPORT at 73-77, 122-207 (1972); ELEVENTH ANNUAL REPORT (1969); NINTH ANNUAL REPORT (1967); THIRD ANNUAL REPORT (1961).

and enforcement of law.¹²¹ The Deputy Attorney General in charge of the statewide Organized Crime Task Force may investigate, or in certain circumstances investigate and prosecute, corruption in law enforcement when organized crime activity is involved, and is carried on either between two or more counties, or between this State and another jurisdiction.¹²² Lastly, the Governor may investigate law enforcement corruption pursuant to the exercise of his power to remove, on charges, the chief or commissioner of the police force of any of the sixty-two cities of the State.¹²³

A superficial glance might make it appear that there exists adequate overlapping statutory structures to ensure the necessary investigation and prosecution of corrupt law enforcement officials. These structures, however, have not proven to be sufficiently effective. Indeed, if these were performing satisfactorily, there would not have been recent official public criticism by the State Investigation Commission¹²⁴ and the Knapp Commission,¹²⁵ or journalistic criticism,¹²⁶ concerning the way corruption cases involving law enforcement officers are processed through and disposed of by the criminal justice system.

Moreover, had the situation been otherwise, it is unlikely the Governor would have felt it necessary to take two extraordinary steps: one directing the Attorney General to appoint a Special Prosecutor to investigate and prosecute corruption throughout the criminal justice system of New York City; and the other, ordering the State Commission of Investigation to establish a New York City unit to monitor, evaluate and make recommendations as to the conduct of elected and appointed public officials entrusted with the enforcement of the laws and the administration of justice in New York City.¹²⁷

121. N.Y. EXEC. LAW §§ 63(2), 63(8) (McKinney 1972).

122. N.Y. EXEC. LAW § 70-a (McKinney 1972).

123. N.Y. PUBLIC OFFICERS LAW § 33(2) (McKinney 1972) and § 34 (McKinney 1952).

124. See TEMPORARY COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, FOURTEENTH ANNUAL REPORT, *supra* note 120 at 158-190.

125. See COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION, COMMISSION REPORT, *supra* note 37 at 249-253, 255-258.

126. See Pileggi and Pearl, *What Happens When Cops Get Caught*, New York Magazine, Vol. 6 No. 3, at 23-29 (July 23, 1973).

127. See Statement by Governor Nelson A. Rockefeller (Special Prosecutor/N.Y.C.) (Sept. 19, 1972), *supra* note 33.

CONCLUSION

The preceding examination of the structures and means which exist under New York State law to deal with the problems of corruption in the criminal justice system leads to the inescapable conclusion that current methods allow for confused, disjointed, and duplicitous efforts with action very much dependent upon the way or ways in which complaints are received, and by whom they are received. For purposes of both investigation *and* prosecution, as distinct from investigation alone, the structures do not permit any well-planned, multi-county, or statewide, comprehensive attack on the problem without extraordinary intervention by the Governor or action by the state legislature.

Even if the Governor were willing to take such extraordinary actions, as he has done with the Executive Orders creating the Office of the Special State Prosecutor, it is unlikely that he would be willing to supersede the district attorneys in all sixty-two counties of the State as to some particular subject matter jurisdiction, however limited.¹²⁸ In 1945, Governor Dewey's counsel explained the standard required before invocation of a superseder: "action displacing a local official, particularly an elected one, by a State representative is not to be resorted to unless there is compelling evidence that the existing agencies are not performing or are incapable of performing their proper functions."¹²⁹ If the Governor were convinced that existing statewide agencies are incapable of performing their proper functions with respect to official corruption, it is preferable that the appropriate corrective action should be legislative rather than executive.

Previous efforts in attacking corruption in government and administration of criminal justice have been tradition-bound, inefficient, and entirely fragmented. Existing institutions are inadequate to resolve this recurring problem. Recognizing the shortcomings of current structures and means for dealing with corruption, coupled with the extent of corruption already exposed and suspected, the need for an Office of the Special State Prosecutor cannot be considered ephemeral, whether its jurisdiction is

128. It is to be noted that Governor Harriman denied a request to appoint a statewide special prosecutor on the grounds it would amount to superseding the district attorneys in all sixty-two counties without sufficient basis. See 1957 Public Papers of Governor Harriman 1139.

129. Pitler, *Superseding The District Attorneys In New York City — The Constitutionality and Legality of Executive Order No. 55*, *supra* note 76 at 526, citing 1945 Public Paper of Governor Dewey 369.

limited to New York City as is presently the case, or its geographic horizons are expanded. Indeed, such an Office would certainly be strengthened if institutionalized by statute as was accomplished with the Organized Crime Task Force,¹³⁰ and as was introduced for the Office of the Special State Prosecutor by amendment to Section 70a of the Executive Law during the 1973 legislative session.¹³¹

The Office would gain strength for numerous reasons:

First, the Office would become a permanent, perpetual agency whose life was not dependent solely upon the Governor's mandate.¹³²

Second, the Office would become a statewide agency with jurisdiction in all sixty-two counties, adding to its stature.

Third, statutory existence would resolve jurisdictional challenges to the Office.

Fourth, a permanent statewide agency would have superior personnel recruitment and career development capabilities.

Fifth, a statutory agency would have a greater public acceptance, would be more widely known, and would encourage increased public confidence.

Sixth, the existence of a permanent statutory agency with jurisdiction specifically directed to rooting out official corruption would serve as a greater deterrent to corrupt activity.

Seventh, a statutory agency would be better able to initiate and execute a well planned, comprehensive, and long-range attack on corruption.

Eighth, a statutory agency would make available this intensive law enforcement effort to all the people of the State, and not to New York City alone.

Ninth, a statutory agency would be able to better complement the activities of existing agencies and officers such as the State Investigation Commission, local prosecutors, and federal prosecutors.

The Office of Special State Prosecutor does have a vital and important role to play in New York State. Aside from its more publicized case by case functions of receiving and investigating complaints, bringing offenders to justice, and exonerating the

130. N.Y. EXEC. LAW § 70-a (McKinney 1972).

131. N.Y. Senate Bill 5860-A (1973-1974 Regular Sessions) (March 13, 1973).

132. See N.Y. EXEC. LAW § 63(2). Under existing statutes the Governor could terminate the Office of Special Prosecutor by finding it no longer required.

innocent, the Office can accomplish other equally, if not more important, objectives. It can help restore public confidence in the administration of justice and in government. The Office can make positive recommendations for reforms in existing institutions; court reforms, law reforms, reforms in judicial selections, reforms in the administration of justice, reforms in law enforcement, and, reforms in the corrections system. Moreover, the Office can help create a public awareness of needed changes in laws and in the organization, policies, and procedures of all agencies responsible for the administration of justice. These changes are necessary if the agencies are to deal effectively with crime. Examination of substantive laws must be undertaken to determine whether in some instances, because they are unenforceable or arbitrary, may contribute more to corruption than to protection of the public. With a permanent professional staff the Office can be of invaluable assistance in this area. Most important, the Office can help assure the people of the State that they have an incorruptible system of criminal justice. In the words of Governor Rockefeller this is fundamental to our society:¹³³

Thus an incorruptible system of criminal justice is basic to any hope of effectively coping with rising levels of crime.

Beyond this, an incorruptible system of criminal justice is essential to incorruptible government at all levels and to the confidence of the people in their government at all levels.

133. Transcript of Press Conference, *supra* note 33, at 5.

APPENDIX A

Executive Order No. 55:

**TO: THE HONORABLE LOUIS J. LEFKOWITZ
ATTORNEY GENERAL OF THE STATE OF NEW
YORK
STATE CAPITOL
ALBANY, NEW YORK**

I. Pursuant to article IV section three of the Constitution of the State of New York, the provisions of subdivision two of section 63 of the Executive Law and the statutes and law in such case made and provided, and in view of the recommendation of the Commission to Investigate Allegations of Police Corruption in the City of New York, I hereby require that you, the Attorney General of this State, attend in person, or by one or more of your assistants or deputies, an Extraordinary Special and Trial Term of the Supreme Court to be appointed by me to be held in and for the county of New York at the County Court House and any other term or terms of the Supreme Court in and for the County of New York, and that you, in person or by said assistants or deputies, appear before the grand jury drawn for said extraordinary term of said court, and before any grand jury or grand juries which shall be drawn or which shall have heretofore been drawn for any other term or terms of said court, for the purpose of managing and conducting in said court and before said grand jury and said other grand juries any and all proceedings, examinations and inquiries and any and all criminal actions and proceedings which may be had or taken by or before said grand jury and grand juries concerning or relating to:

(a) any and all corrupt acts and omissions by a public servant or former public servant occurring heretofore or hereafter in the County of New York in violation of any provision of State or local law and arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(b) any and all acts and omissions and alleged acts and omissions by any person occurring heretofore or hereafter in the County of New York in violation of any provision of State or local law and arising out of, relating to or in any way connected with corrupt acts or omissions by a public servant or former public servant arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(c) without limiting the foregoing provisions, any and all acts and omissions and alleged acts and omissions by any person occurring heretofore or hereafter in the County of New York in violation of any provision of State or local law and arising out of, relating to or in any way connected with the receipt, possession, or disposal of dangerous drugs by the Police Department of the City of New York, its officers, employees, or agents;*

(d) any and all acts and omissions and alleged acts and omissions occurring heretofore or hereafter to obstruct, hinder or interfere with any inquiry, prosecution, trial or judgment pursuant to or connected with this requirement;

and that you conduct, manage, prosecute and handle such other proper actions and proceedings relating thereto as may come before said court and that you conduct, manage, prosecute and handle all trials at said extraordinary term of court or at any term of said court at which any and all indictments which may be found and which may hereafter be tried, pursuant to or in connection with this requirement, and in the event of any appeal or appeals or other proceedings connected therewith, to manage, prosecute, conduct and handle the same; and that in person or by your assistants or deputies you, as of the date hereof, supersede and in the place and stead of the District Attorney of the County of New York exercise all the powers and perform all the duties conferred upon you by the statutes and law in such case made and provided and this requirement made hereunder; and that in such proceedings and actions the District Attorney of the County of New York shall exercise only such powers and perform such duties as are required of him by you or your assistants or deputies so attending.

II. Pursuant to subdivision 8 of section 63 of the Executive Law, I also find it to be in the public interest to require that you inquire into matters concerning the public peace, public safety and public justice with respect to the subjects which are within the scope of this requirement, and I so direct you to do so in person or by your assistant or deputies and to have the powers and duties specified in such subdivision 8 for the purposes of this requirement.

III. For purposes of this requirement the following terms have the following meanings:

(a) "Person" means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.

(b) "Public servant" means (a) any public officer or employee of the state or any political subdivision thereof or of any governmental instrumentality within the state, or (b) any person exercising the functions of any such public officer or employee. The term public servant includes a person who has been elected or designated to become a public servant.

(c) "Corrupt acts and omissions" includes, but is not limited to:

(1) any act or alleged act by a public servant relating to his office but constituting an unauthorized exercise of his official functions;

(2) any failure or alleged failure by a public servant to perform a duty which is imposed upon him by State or local law or administrative rule or regulation or is clearly inherent in the nature of his office;

(3) any and all acts or omissions or alleged acts or omissions constituting a violation of the following sections or of the sections within the following articles of the Penal Law:

- (i) Sections 135.60 and 135.65 (Coercion)
- (ii) Article 155 (Larceny)
- (iii) Sections 195.00 (Official Misconduct) and 195.05 (Obstructing governmental administration)
- (iv) Article 200 (Bribery involving public servants and related offenses)
- (v) Article 210 (Perjury and related offenses)
- (vi) Article 215 (Other offenses relating to judicial and other proceedings);

(4) any and all acts or omissions or alleged acts or omissions constituting a violation of Penal Law articles 100 (Criminal Solicitation), 105 (Conspiracy), 110 (Attempt), and 115 (Criminal Facilitation) with respect to offenses defined in paragraph (3);

(5) any and all other offenses that may be properly joined with offenses defined in paragraphs (3) and (4);

IV. This requirement shall not apply to the management and conduct of the prosecution of any indictment filed in said court on or before the date of this requirement.

Signed: Nelson A. Rockefeller

Dated: September 19, 1972

* *Ed. Note:* Paragraph (c) was added to the original Order by Executive Order No. 55.03 of December 28, 1972.

APPENDIX B

Executive Order No. 61:

**TO: THE HONORABLE LOUIS J. LEFKOWITZ
ATTORNEY GENERAL OF THE STATE OF NEW
YORK**

**STATE CAPITOL
ALBANY, NEW YORK**

WHEREAS, in my opinion, the public interest requires it:

I. NOW, THEREFORE, in accordance with Article VI Section 27 of the Constitution, statute and law in such case made and provided, I do hereby appoint an Extraordinary Special and Trial Term of the Supreme Court to be held at the New York County Criminal Court Building, 100 Centre Street, in the County of New York on the seventeenth day of October nineteen hundred seventy-two, at ten o'clock in the forenoon of that day and to continue for so long as it may be necessary for the purpose of any criminal, civil or other judicial action or proceeding which may be attended by the Attorney General or by one or more of his deputies or assistants and which may be held, conducted or given threat concerning or relating to the subjects within the scope of my executive order and requirement to the Attorney General, numbered fifty-five and dated September nineteen, nineteen hundred seventy-two, and all amendments thereto heretofore or hereafter promulgated, and for the purpose of conducting and handling such other proper acts, procedures, and matters relating thereto as may come before the court.

II. I do hereby designate the Honorable John M. Murtagh, a Justice of the Supreme Court of the State of New York, First Judicial District, to hold the said Extraordinary Special and Trial Term as hereinbefore appointed and described and among other things to cause to be drawn according to law a grand jury or grand juries to serve the said Extraordinary Special and Trial Term of the Supreme Court.

III. I do further direct that copies of the notice of the appointment and the designation hereinabove made and provided for shall be released and distributed to the general press.

**Signed: Nelson A. Rockefeller
Dated: October 13, 1972**