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PERILOUS EXECUTIVE
POWER—PERSPECTIVE ON SPECIAL
PROSECUTORS IN NEW YORK

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In New York, the term “special prosecutor” has come to comprise a number of offices which may supersede or act concurrently with local prosecutors normally charged with responsibility for criminal investigations and prosecutions. At the local level, the criminal trial court may, pursuant to New York County Law section 701, on a term-by-term basis, appoint a “special district attorney” to handle prosecutions during the temporary absence, inability, or disqualification of the elected district attorney. Such appointments, limited in scope and duration to particular cases in which the district attorney is disqualified or otherwise unable to act, raise few questions of constitutional import or public controversy. In marked contrast are the statutory provisions authorizing appointment of special prosecutors or investigators at the state level. Here, overlapping legislative and constitutional mandates, and the absence of specific standards for review have generated jurisdictional disputes of constitutional magnitude, at times calling into question the efficacy, integrity, and ongoing viability of the State’s criminal justice system.

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1. N.Y. COUNTY LAW § 700 (McKinney 1972).
3. Id.
4. See N.Y. EXEC. LAW § 63(2) (McKinney 1982); N.Y. EXEC. LAW § 70 (McKinney 1982); N.Y. EXEC. LAW § 70-a (McKinney 1982); N.Y. EXEC. LAW § 6 (McKinney 1982); N.Y. UNCONSOL. LAWS §§ 7501-7502 (McKinney 1979); N.Y. JUD. LAW § 177-a to -e (McKinney 1983).
This controversy has marked the tenure of most of the special agencies—investigative and prosecutorial—included in the public’s roster of state special prosecutors, even those with exclusively investigative powers. The focus of much recent constitutional inquiry, litigation, and public commentary involving special prosecutorial powers has been the implementation of section 63(2) of the state’s Executive Law, which, alone in the panoply of state special prosecutors, requires the state attorney general, at the direction of the Governor, to supersede the authority of any district attorney in the investigation and prosecution of a particular criminal proceeding or action.

The exclusive, and we would argue, perilous powers of investigation and prosecution available to state officers under this provision, together with the charged circumstances surrounding the allegations and investigations in which request for its implementation occur, raise questions of ongoing significance to the constitutional structure and effective operation of the state’s criminal justice system.

Hence, this Article will address the power of superseding prosecutors under New York Executive Law, section 63(2). Initially, the state statutory and constitutional frameworks to section 63(2) will be discussed, followed by an analysis of the circumstances in which that section has been implemented. In the concluding sections, recommendations will be made concerning future application, and the impact of the New York experience on the use of special prosecutors in other jurisdictions.

Under the New York State Constitution, the offices of Governor, attorney general, and district attorney are all elective constitutional positions, with terms of office, methods of election and removal, and certain responsibilities specified in explicit constitutional provisions. Included in article IV of the constitution, generally defining the powers and duties of the executive branch, is a broad constitutional mandate establishing the Governor’s responsibility for law enforcement. The New York State Constitution does not, however,

6. N.Y. EXEC. LAW § 63(2) (McKinney 1982).
7. Id.
8. Id.
9. N.Y. CONST. art. IV, §§ 1, 3, 4; N.Y. CONST. art. V, §§ 1, 4; N.Y. CONST. art. XIII, § 13.
10. N.Y. CONST. art. IV, § 3 (providing, inter alia, that the governor “shall take care that the laws are faithfully executed”).
in setting forth the Governor's powers or in establishing the offices and powers of the attorney general and the district attorneys, identify with particularity the specific investigative and prosecutorial duties involved in routine enforcement of the criminal laws. Nor does it allocate responsibilities among the Governor, attorney general, district attorneys, or other constitutional officers.\footnote{11}

Rather, delineation and allocation of law enforcement responsibilities has been left to the Legislature, which has made specific provision for various investigative and prosecutorial duties in the several statutory provisions which define the duties of the constitutional officers, particularly those of the attorney general\footnote{12} and the district attorneys.\footnote{13} As will be seen, the same legislative provisions also identify specific law enforcement authority vested in the Governor. These are generally intertwined with the powers of the attorney general, and will be discussed in that connection.

As presently codified in section 63 of the Executive Law, the duties of the attorney general identify several specific areas of criminal law enforcement in which the attorney general may have direct involvement. In addition to the prosecutorial power defined under Executive Law section 63(2), they also include several other broad investigative or prosecutorial powers often associated with the office of a so-called state special prosecutor: the power, at gubernatorial or state agency request, to investigate and prosecute criminal offenses which occur within the authority or business of state agencies;\footnote{14} the power, also upon gubernatorial direction or approval, to investigate matters involving public peace, public safety, and public justice;\footnote{15} and the power to prosecute cases of perjury committed during the course of any such investigations or prosecutions.\footnote{16} In addition,
under section 63, the attorney general has authority to prosecute offenses in several specifically defined areas of law: the corruption of members of the Legislature\(^{17}\) and criminal violations of anti-discrimination laws;\(^{18}\) and to investigate, review complaints, or take civil action in cases involving misappropriation of public funds\(^ {19}\) and fraudulent or illegal business activities.\(^ {20}\)

The exercise of the attorney general’s powers under section 63 to investigate, prosecute, or institute civil proceedings in cases involving these statutorily defined categories of offenses is a matter of the attorney general’s discretion. Gubernatorial request, approval, or direction, however, is a precondition for the exercise of the broad prosecutorial and investigative powers delineated in Executive Law sections 63(2) and 63(8). This provides one legislatively defined avenue for invocation of the Governor’s constitutional mandate to “take care that the laws are faithfully executed” in the enforcement of criminal laws.\(^ {21}\)

There are other legislatively created avenues for gubernatorial action as well. Under Executive Law section 70-a enacted in 1970,\(^ {22}\) the Governor, in conjunction with the attorney general, is specifically empowered to appoint a special deputy attorney general to head a special subdivision of the Department of Law, staffed outside civil service channels and denominated the Organized Crime Task Force, with authority to investigate organized crime activities carried on between counties or between New York and another state, to assist district attorneys in local efforts against organized crime, and, upon the further approval of the Governor and the district attorney, to supersede any district attorney in the prosecution of intercounty or interstate organized crime cases.\(^ {23}\) Under section 6 of the Executive Law, also known as the Moreland Act, the Governor is empowered to investigate, in person or by appointed commission, the management or affairs of any state agency.\(^ {24}\) In addition, under legislation first enacted in 1958 and renewed periodically thereafter, there exists a Temporary State Commission of Investigation, with members appointed, variously, by the Governor and legislative leaders.

\(^{17}\) N.Y. Exec. Law § 63(4) (McKinney 1982).
\(^{18}\) N.Y. Exec. Law § 63(10) (McKinney 1982).
\(^{19}\) N.Y. Exec. Law § 63(11) (McKinney 1982).
\(^{20}\) N.Y. Exec. Law § 63(12) (McKinney 1982).
\(^{21}\) N.Y. Const. art. IV, § 3.
\(^{22}\) N.Y. Exec. Law § 70-a (McKinney 1982).
\(^{23}\) Id.
\(^{24}\) N.Y. Exec. Law § 6 (McKinney 1982).
charged with the responsibility for conducting investigations concerning law enforcement, the conduct of public officers, and matters involving public peace, safety, and justice.\textsuperscript{25} Under the Commission’s enabling legislation, the Governor is specifically empowered to direct the commission to investigate issues relating to the removal of public officers, the amendment of legislation relating to law enforcement, and the management of state agencies.\textsuperscript{26}

The statutory provisions framing the criminal law enforcement involvements of the attorney general and the Governor share salient qualities bearing comment. First, while the scope of the investigations or prosecutions they permit appear to be quite broad, the empowering statutes specify the particular investigative or prosecutorial powers authorized to be used in each category or kind of involvement.\textsuperscript{27} The specific powers include the taking of testimony, the issuance of subpoena, the granting of immunity, the power to make grand jury presentations, and the conduct of and degree of cooperation required of other state or local agencies.\textsuperscript{28} A second quality which the officials share is that the mandates and triggering circumstances often overlap, with the result that the Governor and the attorney general may, at least in theory, have a number of possible statutory avenues within which to initiate or conduct an investigation or prosecution in appropriate circumstances.\textsuperscript{29} Many of the mandates are quite specific, permitting investigations only within particular state agencies, or only in cases involving issues of statewide impact such as inter-county organized crime.\textsuperscript{30} Finally, many of the mandates appear to contain internal checks against abuse, requiring joint action on the parts of several constitutional officers—Governor and attorney general,\textsuperscript{31} Governor and legislative leaders—\textsuperscript{32} in the

\begin{itemize}
\item \textsuperscript{25} N.Y. UNCONSOL. LAW §§ 7501-7502 (McKinney 1979).
\item \textsuperscript{26} N.Y. UNCONSOL. LAW § 7502(2)(a), (2)(c), (3) (McKinney 1979).
\item \textsuperscript{27} See supra note 4.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Compare N.Y. EXEC. LAW § 63(2), (3), (8) (McKinney 1982) (defining the duties of the attorney general) with N.Y. EXEC. LAW § 6 (McKinney 1982) (authorizing the Governor to inspect and examine the management of any state department, bureau or agency) and N.Y. UNCONSOL. LAW § 7501(1), (2) (McKinney 1979) (the Governor may appoint two members of the commission consisting of four members).
\item \textsuperscript{30} N.Y. EXEC. LAW §§ 6, 63(3), 70-a (McKinney 1982). See also N.Y. EXEC. LAW § 70 (McKinney 1982) (permitting investigation of crimes against the electoral franchise).
\item \textsuperscript{31} N.Y. EXEC. LAW §§ 70-a, 63(2), (3) & (8) (McKinney 1982).
\item \textsuperscript{32} N.Y. UNCONSOL. LAW § 7501(2) (McKinney 1979) (the governor appoints two members of the commission, the temporary president of the senate appoints one, and the speaker of the assembly appoints one to provide four members for the commission).
\end{itemize}
creation of a particular agency or commissions and the ongoing exercise of particular investigative or prosecutorial powers.

In contrast to the number, specificity, overlap, and interconnectedness among the statutory provisions for state level criminal law enforcement stands the blunt declaration of the powers of the district attorney found in New York County Law section 700 where a district attorney’s responsibilities begin with the duty “to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed.”\(^{33}\) On its face, this language appears to grant the district attorney exclusive responsibility for criminal prosecutions at the county level, thereby presenting a clear potential for conflict with the special prosecutorial powers delineated in Executive Law section 63(2).\(^{34}\) The apparent potential for conflict is enhanced by express identification in various provisions of the state Criminal Procedure Law (CPL), of the district attorney as the officer responsible, in criminal prosecutions, for specific procedural initiatives. These functions include: application for warrants,\(^{35}\) and grand jury presentations,\(^{36}\) examination of witnesses\(^{37}\) and the conduct of appeals.\(^{38}\) Many of these, particularly the power of grand jury appearance, are expressly granted to state special prosecutors or prosecutorial agencies appointed under various sections of the Executive Law.\(^{39}\)

Nevertheless, the apparent exclusivity of the district attorney’s prosecutorial mandate, as articulated in New York County Law section 700\(^{40}\) and the cited CPL provisions, is undercut by the definitional provision of the CPL, which includes within the meaning of the term “district attorney,” the attorney general, or an assistant deputy, or special deputy attorney general “where appropriate.”\(^{41}\) This provision, which was enacted in 1974 to eliminate technical challenges to the authority of actions undertaken by deputy attorney generals acting pursuant to the special prosecutorial provisions of the Executive Law,\(^{42}\) provides clear statutory recognition of the concur-

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34. See supra note 6 and accompanying text.
35. N.Y. CRIM. PROC. LAW § 690.35 (McKinney 1984).
36. N.Y. CRIM. PROC. LAW §§ 190.25, 190.55 (McKinney 1982).
38. N.Y. CRIM. PROC. LAW § 460.10 (McKinney 1983).
39. N.Y. Exec. Law §§ 70, 70-a(7), 63(2) (McKinney 1982).
40. N.Y. COUNTY LAW § 700 (McKinney 1972).
42. 1974 N.Y. LAWS 250. See Practice Commentary N.Y. CRIM. PROC. LAW § 1.20
rent and sometimes superseding authority of the attorney general to prosecute crimes, even at the county level, when properly appointed to do so under the Executive Law.

While section 1.20(32) of the Criminal Procedure Law is a relatively recent enactment, it merely codifies, in explicit statutory terms, a lengthy history of local prosecutorial responsibility on the part of the attorney general and his staff. This historical responsibility is derived from the common law powers of the colonial attorney general, and has been exercised—first exclusively and then concurrently with the district attorney—since the foundation of the state's government in 1777. A brief historical review establishes the sources and persistence of the attorney general's local prosecutorial powers.

The office and title of attorney general in New York dates back to the English colonial era, when an attorney general, designated by the colonial Governor and then by the crown, exercised prosecutorial powers modeled on and derived from the common law duties of the officer of the same title in England. These duties included the responsibility “to prosecute all actions necessary for the protection and defense of the property and revenues of the crown, and, by information, to bring certain classes of persons accused of crimes and misdemeanors to trial.” This reasoning followed the English model wherein, according to Blackstone, the attorney general “represents the sovereign, in whose name all criminal process issue, and [has] power to prosecute all criminal offenses . . . .” It is significant that the office of the district attorney was unknown in the law of the colony.

Although the first State Constitution of 1777 made no provision for the office of attorney general, the constitutional convention itself appointed Egbert Benson to serve as attorney general. That office was subsequently filled as an existing office, by appointees of the

44. Id. at 518-19.
45. Id.
47. Kramer, 33 Misc. at 213, 68 N.Y.S. at 386 (citing People v. Miner, 2 Lans. 397 (1868)).
48. Id. at 213, 68 N.Y.S. at 386 (citing 3 W. BLACKSTONE, COMMENTARIES *27).
constitutionally created Council of Appointment.\textsuperscript{50} 

Upon the adoption of the first constitution, the attorney general assumed the common law role of representative of the people in criminal prosecutions, and remained the sole state officer to exercise such powers until 1796, when the Legislature provided for the appointment of assistant attorney generals to take charge of criminal prosecutions in certain districts outside the city and county of New York.\textsuperscript{51} The 1796 legislation expressly suspended the attorney general's responsibility for having to personally attend to criminal prosecutions in the districts, unless required to do so by the Governor or a supreme court justice.\textsuperscript{52}

The office of district attorney was first constitutionally established in 1821, with a provision for the appointment of that officer within each county by the county court.\textsuperscript{53} The constitution of 1821 also recognized the office of attorney general as an existing state office, and specified the manner of the attorney general's appointment.\textsuperscript{54} The 1821 constitution did not, however, specify the incumbent's powers or his responsibilities.\textsuperscript{55} Nonetheless, under statutory law remaining in effect until 1827, the district attorney was expressly obligated to assist the attorney general in the conduct of local prosecutions when the attorney general's special prosecutorial intervention was required by the Governor or the supreme court.\textsuperscript{56} While the requirement that the district attorney furnish assistance in cases prosecuted by the attorney general was deleted in 1827,\textsuperscript{57} both the 1827 legislation and the codification of state law in the Revised Statutes of 1829 expressly established the power of the attorney general to conduct prosecutions within any county at the request of the Governor or a supreme court justice.\textsuperscript{58}

The constitution of 1846, which first provided for the election of a district attorney by the electorate of each county, again made no mention of the district attorney's duties or powers.\textsuperscript{59} The same constitution also made the attorney general an elective office, on a state-

\textsuperscript{50} Id. at 519. See Kramer, 33 Misc. at 213-14, 68 N.Y.S. at 386.
\textsuperscript{51} See Pitler, supra note 43, at 519; Kramer, 33 Misc. at 214, 68 N.Y.S. at 387.
\textsuperscript{52} Kramer, 33 Misc. at 214, 68 N.Y.S. at 387.
\textsuperscript{53} See Pitler, supra note 43, at 520.
\textsuperscript{54} Id. at 519.
\textsuperscript{55} Kramer, 33 Misc. at 216, 68 N.Y.S. at 388.
\textsuperscript{56} Id.
\textsuperscript{57} See Pitler, supra note 43, at 520; see also supra notes 22-23 and accompanying text.
\textsuperscript{58} Pitler, supra note 43, at 520.
\textsuperscript{59} Kramer, 33 Misc. at 215-16, 68 N.Y.S. at 388. See Pitler, supra note 43, at 520.
wide basis; but unlike its silence as to the powers of the district attorney, it expressly provided that the attorney general should have the duties then in effect or otherwise prescribed by the Legislature. Pursuant to chapter 683 of the Executive Laws of 1892, these duties continued to include the power of the attorney general to conduct local prosecutions when requested to do so by the Governor or a supreme court justice. Thus, by implication, it appears that in 1846 when these offices took elective constitutional form, the constitutional scheme at least implicitly permitted the allocation of local prosecutorial powers to the district attorney and the attorney general.

These constitutional provisions relating to each office have essentially remained unchanged. Similarly, it appears that the statutory identification of the local prosecutorial powers of the district attorney as well as the statutory authority for local prosecutions by the attorney general at the Governor’s behest remained in effect without substantial change from 1827 to 1894. It also appears that the extraordinary power of the attorney general to prosecute locally upon request was exercised on various occasions throughout the 19th century. This lends support to the continuing viability of the early 19th century statutes authorizing special prosecutions.

Moreover, in 1894, in response to then Governor Flower’s expressions of doubt concerning the legality of grand jury appearances by an attorney general acting as special prosecutor, the provisions of the Executive Law authorizing special prosecutions were amended expressly to include grand jury appearance among the attorney general’s special prosecutorial powers. The amending legislation, however, also expressly relegated the district attorney to the role of the attorney general’s assistant when the attorney general undertook a local prosecution at the Governor’s direction, thereby in effect reinstating the power of superseder deleted in 1827. Subsequent amendments to the Executive Law of 1899 and 1900, requiring the

60. Kramer, 33 Misc. at 215-16, 68 N.Y.S. at 388.
61. Id. at 216, 68 N.Y.S. at 388. See Pitler, supra note 43, at 521.
63. See Pitler, supra note 43, at 520-21; supra notes 42-43 and accompanying text.
64. Pitler, supra note 43, at 520-21.
65. Id.
66. Id. See Kramer, 33 Misc. at 216-17, 68 N.Y.S. at 388-89.
67. Pitler, supra note 43, at 520; Kramer, 33 Misc. at 216-17, 68 N.Y.S. at 388-89 (quoting The Executive Law, ch. 68 of the Laws of 1894, § 52(2)).
68. Kramer, 33 Misc. at 216-17, 68 N.Y.S. at 388-89.
attorney general or a deputy to act as special counsel to prosecute crimes against the elective franchise, also specifically empowered the special prosecutor to appear before a grand jury. 69 These amendments made explicit the general concurrency of the local and state officer prosecutorial jurisdiction, with the proviso that unless the governor directed otherwise, either officer's jurisdiction would become exclusive once a prosecution had been initiated. 70

These turn-of-the-century legislative enactments served to reiterate and reinforce, within the framework of the new state constitution of 1894, the continuing viability of the historic allocation of local prosecutorial powers to the local office of the district attorney and the statewide office of the attorney general. 71 In 1900, a trial court addressed the constitutionality and legality of a provision of the Executive Law permitting a grand jury appearance by an assistant attorney general conducting an election law prosecution. The court, relying on the constitutional and statutory history of the attorney general's prosecutorial role, found that the attorney general's common law power to conduct local prosecutions had not been abrogated by statute. 72 The court, therefore, concluded that the attorney general's prosecutorial role remained an inherent and ongoing feature of the attorney general's office which by legislatively imposed constraint, could now become activated only upon the direction of the Governor. 73

Legislative and judicial analysis in the twentieth century has just as explicitly reinforced the concurrent allocation of prosecutorial powers established in the previous century by approving the attorney general's exercise of powers of subpoena, 74 grand jury presentation, 75 superseder, 76 and applications for post conviction relief to ensure that judgment is enforced. 77 Since the constitutionality of the attor-

69. Id. at 217-18, 68 N.Y.S. at 389.
75. Cranford, 174 Misc. at 154, 20 N.Y.S.2d at 865.
77. Bennett v. Merritt, 173 Misc. 355, 18 N.Y.S.2d 146 (1940), aff'd, 261 A.D. 824, 25
ney general's prosecutorial powers has been laid to rest, the recent focus of litigation and judicial inquiry has since repeatedly turned to the appropriateness and limits of the exercise of such powers in particular cases. Judicial review of the constitutional history in such cases had repeatedly affirmed the concurrence of prosecutorial powers and has thereby laid the foundation for judicial declarations of unwillingness to identify specific constitutional bounds to the invocation of the attorney general's prosecutorial powers at gubernatorial request.

With respect to section 63(2), judicial discussion as to the appropriateness and scope of special prosecutions have begun with recognition of the fact that the provisions of the Executive Law authorizing the Governor to initiate a special prosecution set no explicit limits or requirements on the circumstances under which the Governor may act. Similarly, the courts have found little guidance in the broad constitutional mandate that the Governor "shall take care that the laws are faithfully executed." According to one trial court, the broad language of both the statute and the constitution implicitly permits the Governor to require a special prosecution under section 63(2) on the essentially subjective precondition that he "believes such action is warranted." Similarly broad appellate formulations suggest that the reasonableness or necessity of executive action is not subject to judicial review, particularly where the Governor's appointing order specifies a mere colorable basis for the exercise of the appointment power under the broad authority of article IV section 3 and Executive Law section 63(2).

While other appellate benches have articulated a principle of

N.Y.S.2d 784, aff'd, 286 N.Y. 647, 36 N.E.2d 690 (1941).
80. N.Y. CONST. art. IV, § 3.
81. Berger, 86 Misc. 2d at 728, 383 N.Y.S.2d at 172. Cf. People ex rel. Saranac Land and Timber Co. v. Extraordinary Special and Trial Term of the Supreme Court, 220 N.Y. 487, 490, 116 N.E. 384, 385 (1917) (refusing to interfere with the Governor's power to appoint an Extraordinary Term of the Supreme Court whenever "in his opinion the public interest so requires").
reviewability or suggested that a reasonableness standard of review of executive action may apply, it is apparent that there are difficulties in effective application of a reasonableness standard in light of the ease of fashioning the minimal recitals of reasonableness necessary to pass judicial muster.

Similarly, judicial review of other constitutional doctrines which might create arguable structural limitations on the Governor's powers to require a special prosecution under section 63(2), for example, the doctrine of separation of powers and the concept of home rule, have yielded no judicially recognized constitutional constraint on the gubernatorial appointment of a superseding special prosecutor. As Judge Cooke has pointed out in his concurrence in *Mulroy v. Carey*, the doctrine of separation of powers, as embodied in the state and federal constitutions, works only to reinforce the Governor's powers by precluding judicial review of the legislative declaration of state policy in enacting section 63(2). It also precludes the review of any exercise of executive discretion by the Governor making a 63(2) appointment in the absence of a showing of a violation of some other constitutional or legal right. Other case law suggests that any dissonance between the powers of the superseding attorney general and the responsibilities of the district attorney are intrabranch conflicts, as both the attorney general and district attorney are members of the executive branch.

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85. *Mulroy*, 58 A.D.2d at 207, 214, 396 N.Y.S.2d at 929, 933. Even those benches which have reserved the possibility of judicial review in a proper case or suggested a rational basis standard for review of gubernatorial discretion have not identified specific instances of abused discretion. See, e.g., *Mulroy*, 43 N.Y.2d at 819, 373 N.E.2d at 369, N.Y.S.2d at 570; *Turecamo*, 260 A.D. at 253, 21 N.Y.S.2d at 270.
86. See, e.g., *Mulroy*, 43 N.Y.2d at 819, 373 N.E.2d at 369, 402 N.Y.S.2d at 571 (Cooke, J., concurring). See generally Pitler, *supra* note 43, at 527-29 (discussing the home rule provision of the New York State Constitution as a potential limitation on the Governor's right to appoint a special state prosecutor).
88. *Id.* The separation of powers doctrine contemplates that the political process will serve as a means for voters or their elected representatives to check any abuses of power by the Executive. *Id.* Three vehicles available within the political process are elective change, constitutional amendment or corrective legislation. *Id.* It is only when these processes do not provide adequate relief against any abuses of the Governor's power to order a superseder that Judge Cooke favors judicial intervention. *Id.*
89. See *People v. Rallo*, 39 N.Y.2d 217, 347 N.E.2d 633, 383 N.Y.S.2d 271 (1976);
The courts' interpretation of the concept of home rule appears to preclude its use to bar or limit the use of the power of appointment or superseder.\footnote{Steinman v. Nadjari, 49 A.D.2d 456, 375 N.Y.S.2d 622 (1975), cert. denied, 429 U.S. 922 (1976). Moreover, separation of powers as a federal right may not be applicable. See Dreyer v. Illinois, 187 U.S. 71, 83-84 (1902).} This may be understandable given the historic identification of criminal prosecutions as a matter of statewide interest, and the express constitutional reservation to the legislature of the power to intervene in the affairs of local governments through enactment of general law, a category into which section 63(2) clearly falls.\footnote{See Hyman, \textit{Home Rule in New York 1941-65: Retrospect and Prospect}, 15 BUFFALO L. REV. 335, 343-45 (1965); Pitler, supra note 43, at 527-29.}

Finally, neither the constitutional status of the office of district attorney nor the inclusion in the constitution of explicit executive power to remove a district attorney have been found to be structural barriers to the enactment or exercise of the Governor's superseder power. The courts agree that the constitutional history of prosecutions in the state, as well as the constitutional allocation to the office of the Governor of the power to remove a district attorney, mandate the conclusion that the governor's powers under section 63(2), as presently enacted, vests ultimate responsibility for allocating prosecutorial power between the district attorney or a special prosecutor under the aegis of the attorney general solely in the discretion of the Governor.\footnote{See, e.g., In re Turecamo Contracting Co., 260 A.D. 253, 21 N.Y.S.2d 270 (1940).} The breadth of this power has been a matter of some concern and defendants have attacked its legality.\footnote{See, e.g., Mulroy, 58 A.D.2d at 207, 396 N.Y.S.2d at 929.} Courts have been hesitant to declare it a power without some conceivable bounds,\footnote{See Pitler, supra note 43, at 522-24.} and, even more critically, executive officers have been concerned about the scope of this power when called upon to exercise it.\footnote{See, e.g., Mulroy, 58 A.D.2d at 207, 396 N.Y.S.2d at 929.}

Gubernatorial expressions of concern about the use of special prosecutors have marked the modern history of the office. As early as 1860, Governor Morgan, in his annual message to the legislature, noted the financial burden to the state entailed in the use of special prosecutors, and recommended that there be stricter limitations on the availability of the special prosecutorial power as well as on

county funding of any special prosecutor appointed at county request.96

In 1874, legislation was adopted which precluded state funding of special prosecutors appointed to assist local district attorneys at their request.97 This apparently resolved some of the financial concerns expressed by Governor Morgan and focused subsequent expressions of gubernatorial concerns on fundamental questions involving the legality and propriety of special prosecutions.98

Thus, in 1893 Governor Flower grounded his hesitations to approve citizen requests for appointment of a state special prosecutor to investigate alleged election crimes on doubts concerning the legality of a special prosecutor's appearance before the grand jury and the consequent validity of any indictment.99 Governor Flower subsequently approved legislation in 1894 specifically granting a special prosecutor the right to grand jury presentation, as well as the authority to supersede or to require assistance from local prosecutors.100 Nevertheless, in his approval message, Governor Flower expressed strong reservations concerning the use of special prosecutors in other than extraordinary emergency situations, which were based on an analysis of the constitutional allocation of powers.

This bill confers such sweeping and exclusive power upon the Executive that I hesitated to affix my signature to it . . . .

The law . . . is designed for extraordinary emergencies and should not be exercised except under peculiar circumstances, or upon the request of the district attorney himself . . . . The district attorney is a constitutional officer. He is charged with the prosecution of all penal offenders. If he does not discharge his duty properly he may be removed by the Governor after being given an opportunity to answer the charges made against him. This power of removal is a wise one, and ought, in itself, to be a sufficient safeguard and the one most in harmony with the spirit of our institutions and our laws.

Instances occasionally happen, however, where there is no evasion or neglect of duty on the part of the district attorney, no maladministration of office, but where, by reason of personal or local complications, the interests of a thorough and impartial prosecution

97. Id.
98. See Pitler, supra note 43, at 521.
demand that the Attorney General should supersede the district attorney. Such cases the bill under consideration would provide for. But they are rare, and resort to this statute, therefore, ought to be equally rare.  

Theodore Roosevelt and Frank W. Higgins, the two governors immediately following Governor Flower, appear to have shared his hesitation about special prosecutions, making little use of the power to appoint special prosecutors despite the turn of the century legislative enactments and judicial interpretations which effectively expanded or buttressed executive power to appoint and conduct special prosecutions without legislative or judicial oversight. While many succeeding governors have been less reluctant to authorize superseding special prosecutions, they have repeatedly emphasized the extraordinary nature of the superseder power and the extraordinariness of circumstances in which its use is warranted. Governor Dix, for example, noted that the power should be exercised only in a "public emergency," and according to Governor Smith, the district attorney could be superseded only in "extreme cases" and not "as a

102. But see Pitler, supra note 43, at 522-24. "Governor Flower's conservatism on the issue of superseder was not shared by his successors." Id. at 523.
104. 1912 PUB. PAPERS OF GOVERNOR DIX 322.
105. 1919 PUB. PAPERS OF GOVERNOR SMITH 331.
matter of principle or as a matter of sentiment.”\textsuperscript{108} Counsel to Governor Dewey repeatedly denominated the appointment of a special prosecutor as an “extraordinary procedure,” one not to be resorted to in the absence of clear and compelling evidence of gross misconduct in office.\textsuperscript{107}

A related gubernatorial theme concerning special prosecutions has been the need for clear or compelling evidence, and a clear delineation of the circumstances in which superseder is required before an order directing special prosecution is warranted. Governor Smith’s 1919 statement is illustrative:

In my judgment [the power of superseder] should be exercised . . . only when the Governor is satisfied beyond question that the interests of the public demand such exercise, and when the Governor is satisfied beyond question that the district attorney is either disqualified or is wilfully [sic] neglecting to perform his duty, or is guilty of corrupt or illegal conduct.\textsuperscript{108}

Similarly, to intervene in local law enforcement Franklin Roosevelt noted he would require a “definite presentment . . . made by a responsible agency”\textsuperscript{109} to persuade him not only that the law has been violated but equally that the local officials have failed to do their duty in connection therewith; action by state authorities must be predicated on definite allegations relating to local misgovernment and on definite allegations relating to the failure of local investigations.\textsuperscript{110}

According to Governor Lehman, a special prosecutor could only be designated for “a specific purpose,” and only if “the district attorney has failed to discharge the duties of his office or is otherwise precluded or hampered in doing so.”\textsuperscript{111} In 1957, Governor Harriman strongly opposed giving the district attorney broad and unlimited prosecutorial authority.\textsuperscript{112} More recently, Governor Rockefeller, establishing the Office of Special Prosecutor for Corruption in the New York City Criminal Law Enforcement System in 1972, emphasized

\begin{itemize}
\item \textsuperscript{106} 1920 \textit{PUB. PAPERS OF GOVERNOR SMITH} 486.
\item \textsuperscript{107} See 1945 \textit{PUB. PAPERS OF GOVERNOR DEWEY} 369; 1952 \textit{PUB. PAPERS OF GOVERNOR DEWEY} 468; 1953 \textit{PUB. PAPERS OF GOVERNOR DEWEY} 502.
\item \textsuperscript{108} 1919 \textit{PUB. PAPERS OF GOVERNOR SMITH} 331.
\item \textsuperscript{109} 1930 \textit{PUB. PAPERS OF GOVERNOR ROOSEVELT} 375.
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} 1934 \textit{PUB. PAPERS OF GOVERNOR LEHMAN} 452.
\item \textsuperscript{112} 1957 \textit{PUB. PAPERS OF GOVERNOR HARRIMAN} 1140; See Benjamin, \textit{A Department of Justice for New York State?}, \textit{EMPIRE ST. REP.}, Apr. 1985, at 16.
\end{itemize}
the multiplicity of investigative disclosures and agency recommendations he had reviewed before taking action, and the emergence from his review of the "fundamental reality" that the existing law enforcement agencies were patently inadequate to deal with the related problems of public corruption and public confidence in the criminal justice system.113 Most recently, Governor Mario Cuomo has consistently refused to supersede the locally elected district attorney, even in cases where the district attorney has so requested.114

At one level of analysis, the reservations of 20th century governors concerning use of the power of superseder stem from consideration of the practice, statements, and decisions of their predecessors. For example, Governor Smith, in considering a request for superseder, noted that historically the power had "seldom been exercised by the Governor and usually only in extreme cases."115 This historical analysis is echoed by Governor Lehman, Charles Breitel, Counsel to Governor Dewey, and by Governor Rockefeller's New York City prosecutor, variously identifying the "unusual" and "extraordinary" circumstances in which superseder orders have been promulgated and noting that the procedure is normally not resorted to in the absence of "compelling evidence."116

At a more fundamental level, however, the reservations of 20th century governors, like those of Governor Flower in 1894, have been grounded less on practice than on a common thread of analysis of the state's constitutional structure and its implications for the allocation and effectiveness of prosecutorial powers. For example, Governor Dix in denying an application for appointment of a special prosecutor in 1911, pointed out that the "District Attorney was put into office by a majority of the . . . county electorate. To supersede him in the discharge of his constitutional functions . . . because some citizens consider him too young and inexperienced and lacking in honor and integrity, would be subversive to the spirit of the Constitution."117 Governor Franklin Roosevelt grounded his reservations concerning special prosecution upon his observation that, under the prin-

115. 1919 PUB. PAPERS OF GOVERNOR SMITH 331.
116. See, e.g., 1934 PUB. PAPERS OF GOVERNOR LEHMAN 452; 1952 PUB. PAPERS OF GOVERNOR DEWEY 468; 1953 PUB. PAPERS OF GOVERNOR DEWEY 502. See also Nadjar, supra note 113, at 100-02.
117. 1912 PUB. PAPERS OF GOVERNOR DIX 322.
ciple of municipal home rule, "[t]he Governor has neither the power nor the right to interfere in local communities unless the charges presented are specific and unless the local authorities have failed to act. Such is the law." Governor Lehman's reservations focused on the "constitutional obligations" of the district attorney:

The district attorney has solemnly taken an oath of office to enforce the law . . . . I expect him to do just that. I have personally talked with the district attorney and he has given me his assurance that he will proceed without fear or favor. I cannot presume that the district attorney will be untrue to his trust or that he will flinch in doing his duty. There can be no failure to discharge his constitutional obligations before he has even been given a chance to act.

The governors' reservations about the use of superseding special prosecutors, and their identification of legal and constitutional sources for their reservations, contrast strongly and paradoxically with the breadth of special prosecutorial powers vested in the state executive by legislative enactment and judicial interpretations of statutory and constitutional authorities. Most 20th century governors, have, in fact, been quite reluctant to issue superseding orders. Instead, they have adhered closely to the conservative practices of their predecessors and the equally conservative interpretations of their constitutional powers identified in their public statements, despite repeated legislative and judicial assurances of the legality of superseder orders in all but the most extreme, and as yet unspecified, circumstances. Examination of recent instances in which the power of superseder has been used will highlight the theme of gubernatorial conservatism pervading the governors' own analyses of the power and will help to illuminate the fundamental concerns and wisdom underlying gubernatorial hesitation to use the powers so broadly generated and liberally defined by the other two branches of state government.

As noted above, the State Special Prosecutor for the Investigation of Corruption in the Administration of Criminal Justice in the City of New York was first appointed in 1972, at the direction of Governor Rockefeller. In issuing the executive orders creating the

118. 1930 PUB. PAPERS OF GOVERNOR ROOSEVELT 375.
119. 1942 PUB. PAPERS OF GOVERNOR LEHMAN 418.
120. See supra note 4 and accompanying text.
121. See supra notes 84-85 and accompanying text.
122. See supra notes 115-18 and accompanying text.
123. 1972 PUB. PAPERS OF GOVERNOR ROCKEFELLER 669; N.Y. COMP. CODES R. &
special prosecutor's office and defining its mandate, the Governor acted not only upon the recommendation of the Knapp Commission—an investigative commission created in 1970 by then New York City Mayor John Lindsay to, inter alia, examine allegations of police corruption in the city— but also upon the urging or invitation of the Mayor, the Chairman of the Joint Legislative Committee on Crime, the Chairman of the State Commission of Investigation, and the United States Attorneys for the districts including New York City. The Knapp Commission report relied on by Governor Rockefeller specifically identified the following as barriers to local prosecution of crimes related to the police corruption charges investigated by the commission: the existence of territorial, resource, and manpower constraints limiting the jurisdiction and effectiveness of local agencies, and, more fundamentally, the inherent conflict and mounting public distrust involved in the use of local police and criminal justice agencies to investigate and prosecute charges against themselves. In a statement issued in support of his 1972 superseder orders, the Governor emphasized the need for an independent agency, with broad investigative and prosecutorial powers, to overcome both the ineffectiveness of self-investigation by local agencies and the problem of growing public distrust in the regular criminal justice processes.

In the course of the now fifteen-year life of the special anti-corruption prosecutor's office, there have, of course, been a variety of problems and criticisms which have surfaced in relation to the office's mandate and operation. In 1976, criticism of the initial appointee's controversial use of prosecutorial powers led to his replacement by the new Governor. Throughout the history of the office, instances of jurisdictional conflict between the special prosecutor and various district attorneys have prompted recommendations that the special prosecutor's mandate be revised to provide that prosecutorial powers be exercised concurrently with the local district attorneys. It has also been suggested that, on its current annual budget averaging some $2 million, the special prosecutor's record of prosecutions

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124. See Pieter, supra note 43, at 517 n.4.
126. Id. at 100-01.
127. Id. at 102.
129. Id. at 31-32.
Nevertheless, it is also generally agreed that, despite the problems, the special anti-corruption prosecutor has had a salutary effect on the criminal justice system in New York City, which, it is felt, no longer is plagued by the systematic pervasive corruption identified in the Knapp Commission report. The successes, however qualified, of the anti-corruption special prosecution can be attributed to a number of factors, including the office's citywide jurisdiction, its investigative resources, and the efforts made in recent years to work cooperatively with the local district attorneys in effectuating the special prosecutor's power of superseder. The primary source of effectiveness, in fact, appears to rest in the broad support for the special prosecutor's work, not only among the public agencies which initially called for state intervention but also within the offices of the local district attorneys. Furthermore, the underlying recognition that, given the complexity and pervasiveness of the problems of corruption identified by the Knapp Commission report, and the multiplicity of jurisdictional barriers to effective local approaches to resolution, only an independent state office, with independent investigatory and prosecutorial powers, could restore public confidence in New York City's law enforcement system, enabling local law enforcement agencies to carry on in the routine processes of law enforcement.

Other so-called state special prosecutors created in the 1970's are presently in operation as well. The Office of State Special Prosecutor for Nursing Homes, Health and Social Services was established by executive order in 1975 to investigate and prosecute nursing home fraud. Its authority, however, derived from New York Executive Law section 63(3), (8), does not include supersedeure of local prosecutors. Furthermore, the problems it addresses—with both civil and criminal remedial powers, buttressed by federal

130. Id. at 30.
131. Id. at 30-31.
133. See Dorman, supra note 128, at 30. See also Dondi, 40 N.Y.2d 8, 351 N.E.2d 650, 386 N.Y.S.2d 4 (illustrating the special prosecutors' working relationship with local district attorneys).
134. See Dorman, supra note 128, at 31-32.
136. For an example of the working relationship, see People v. Hochberg, 87 Misc. 2d 1024, 386 N.Y.S.2d 740 (1976).
137. N.Y. EXEC. LAW § 63(8) (McKinney 1982).
138. N.Y. EXEC. LAW § 63(10) (McKinney 1982).
legislation and regulations governing the operation of state medicaid fraud investigative units—are concededly beyond the routine capabilities, and the authority, of local law enforcement agencies. Its tenure, therefore, has not been marked by the kind of controversy, and the public constitutional challenges, surrounding the appointment and activities of the New York City anti-corruption prosecutor or other superseding prosecutions in the State’s history.\(^{139}\)

The Office of Prosecution for Special Narcotics Parts in New York City is headed by a special assistant district attorney appointed by the five New York City district attorneys pursuant to an emergency narcotics plan established by legislation in 1971.\(^{140}\) This office, too, has sparked minimal controversy, because careful legislative specification of the necessity for the emergency program,\(^{141}\) and the powers of the Special Prosecutor and the special narcotics parts of court,\(^{142}\) helped dispel constitutional challenges to the citywide jurisdiction of narcotics prosecutions conducted by the special prosecutor.\(^{143}\) Specific statutory authority also underlies the work of the Organized Crime Task Force (OCTF), the fourth of the state’s statutory special prosecutorial agencies.\(^{144}\) The specific statutory mandate of the OCTF limiting the agency’s jurisdiction to investigation and prosecution of intercounty and interstate organized crime activities, requiring both the Governor and the district attorney to consent before the OCTF may convene a grand jury investigation or initiate a prosecution within a county,\(^{145}\) together with the widespread recognition of investigative prosecutorial difficulties involved in organized crime cases, have worked to minimize areas of conflict with local prosecutors and also helped to mute other sources of public constitutional challenge to the task force’s operations.\(^{146}\) While the effective cooperative working arrangements among state and local agencies envisioned by the legislature have not always developed, and while jurisdictional impediments, particularly the county based

139. See Dorman, supra note 128, at 34-35.
140. 1971 N.Y. LAWS 462 (enacting N.Y. JUD. LAW § 177-a).
141. See N.Y. JUD. LAW § 177-a (McKinney 1983) (declaration of legislative findings and intent).
142. See id.
144. N.Y. Exec. LAW § 70-a (McKinney 1982).
145. Id.
structure of the grand jury and intelligence gathering functions, have limited the investigative work of the task force, it has pioneered investigative and prosecutorial strategies which local agencies have not previously had the resources or personnel to develop.\textsuperscript{147}

As noted above, the specific legislative mandates of these agencies, including the specific provision for concurrent or cooperative powers, would appear to defuse much of the controversy historically surrounding the appointment and operation of special prosecutors. The contrast may be highlighted by consideration of one further instance of appointment of a special prosecutor in New York State, this one involving investigation and prosecution relating to three criminal cases arising in the borough of Queens in December 1986,\textsuperscript{148} more commonly known as the Howard Beach incident.\textsuperscript{149} In the wake of the racial attack in which one black man died and others were injured,\textsuperscript{150} attorneys for the surviving victims refused to allow their clients to give testimony in the course of the Queens County investigation of the incident, charging that the police and the Queens district attorney had mishandled the investigation by suppressing accounts of the incident which highlighted its racial motivation.\textsuperscript{151} Their charges were echoed by members of the black community, who called for a special prosecutor to investigate both the Howard Beach incident and other crimes in which racial issues surfaced.\textsuperscript{152} The city anti-corruption prosecutor's efforts to open an inquiry into the victims allegations were unsuccessful in moving the reluctant victims to testify,\textsuperscript{153} and the investigation and the victim's counter-charges appeared to have reached a state of impasse,\textsuperscript{154} arousing public concern, in black and white communities, about the effectiveness and integrity of New York City's criminal justice system.\textsuperscript{155}

It was at this point that Governor Cuomo met with Queens District Attorney John Santucci and agreed that, in light of the breakdown in investigative processes and the escalating public rhetoric

\begin{itemize}
\item \textsuperscript{147} See Dorman, \textit{supra} note 128, at 33-34.
\item \textsuperscript{149} So called because the racial attack occurred in Howard Beach, Queens.
\item \textsuperscript{150} N.Y. Times, Jan. 5, 1987, at B1, col. 1.
\item \textsuperscript{151} N.Y. Times, Jan. 14, 1987 at A1, col. 1.
\item \textsuperscript{152} N.Y. Times, Jan. 13, 1987, at B1, col. 3.
\item \textsuperscript{153} N.Y. Times, Jan. 5, 1987, at B3, col. 1.
\item \textsuperscript{155} N.Y. Times, Jan. 13, 1987, at B1, col. 3.
\end{itemize}
concerning the inability of public institutions to respond to citizens’ criminal justice needs, the Governor would designate a special prosecutor to conduct the Howard Beach investigation. The appointment was at the request of the district attorney and was conditioned on having the cooperation of the reluctant witnesses. The aim was to break the investigative impasse and to quell concerns over the responsiveness and integrity of the criminal justice system. Thus on January 13, 1987, Executive Order No. 89 named Charles Hynes, New York City’s special anti-corruption prosecutor, as special prosecutor in the Howard Beach incident. Coincidently, while the Governor rejected as dangerously broad, requests that the special prosecutor be given sweeping powers to investigate and prosecute other incidents statewide in which possible racial motives were involved, he established a statewide Task Force on Bias-Related Violence with power to conduct hearings and make recommendations to him on the best methods for dealing with this type of incident.

Following the designation of the special prosecutor, the reluctant witnesses in the Howard Beach incident did cooperate with the special prosecutor’s investigation, and on the basis of the evidence surfacing in the investigation, indictments, including murder and manslaughter charges, were subsequently filed. At the same time, allegations of racial involvement in other crimes in New York City were met with prompt assurances of fair investigation by local authorities. Additionally, the panel exploring bias-related violence which had been appointed by the Governor began to conduct hearings in which charges concerning race-related crimes or race-tainted investigations could be considered. It is to be hoped that, with the cooperation of the city district attorneys, the appointment of the Howard Beach prosecutor, and the efforts made to meet the broader concerns of the state’s minority leadership, the crisis of public confidence in the criminal justice process—and in the responsiveness of public institutions in general—which was evident in the Howard Beach incident will have been averted and, indeed, permanently.

defused.

The Queens appointment clearly occurred in a situation of crisis proportions, where emotions, and particularly fears, ran close to the surface. The calls for, and opposition to, the appointment of a special prosecutor were in part tactical but in larger part reflective of underlying strains in either side's willingness or ability to credit claims and concerns of the other. The success of a special prosecutor in such circumstances depended not so much on his independence and superseding powers as on the cooperation of the black community and the local authorities in agreeing that the appointment and operation of a special prosecutor would be mutually acceptable. Given the crisis conditions, such agreement could not be worked out in the legislative arena, where acceptable conditions for the operation of the Organized Crime Task Force and the Special Narcotics Prosecutor had been defined in the 1970's; rather, the Governor's negotiating efforts laid the groundwork of cooperation which enabled the special prosecutor to proceed without the challenge or constitutional controversy which has plagued other gubernatorially designated prosecutors.

Previous analyses have suggested that New York's governors have advanced generally conservative interpretations of their special prosecutorial appointment powers in large part because of their unwillingness to become involved in issues involving local or party politics. Nevertheless, the instances of special appointment discussed above indicate that to identify gubernatorial hesitations simply as reluctance to tangle with local or partisan issues is to oversimplify the fundamental concerns with institutional effectiveness necessarily governing executive action, both in the specific area of law enforcement and in the Governor's broader mandate to assure that all state laws are faithfully executed.

In the first place, it bears pointing out that governors are rightfully concerned about state involvement in local or partisan issues where entanglement in those issues can paralyze the Governor's authority or call into question the effectiveness and validity of state as

166. See Pitler, supra note 43, at 522.
167. N.Y. CONST. art. IV, § 3.
well as local agencies. Particularly with the appointment of a special prosecutor, who supersedes a locally elected official and thereby is charged with sole and discretionary responsibility for contact with local citizens at the most fundamental levels, the Governor is rightfully concerned that the special gubernatorial appointee be enabled to exercise the authority of his or her office expeditiously and effectively, without obstructive opposition from competing local forces, without widespread local doubt about the legality of the prosecutor’s actions, and without generating more general public concern that the processes of government, both local and state, are ineffective.  

In this respect, governors have wisely been conservative in utilizing the appointment power in cases involving local partisan disputes, awaiting invitation by local authorities before appointing a superseding special prosecutor, or working with the Legislature to legislate the establishment of special prosecutorial offices which must, by the terms of their mandates, work in cooperation with local authorities. Likewise, governors have made efforts to tailor the mandates of their prosecutorial designees to meet the identified problem in local law enforcement which prompted state intervention, without unnecessarily depriving qualified local authorities of their rightful powers and thus generating local opposition.

Overbreadth in the specification of special prosecutorial powers also invites debilitating jurisdictional disputes, while underinclusiveness might prevent the special prosecutor from pursuing criminal activity crucial to the overall achievement of prosecutorial goals. Reluctance to enmesh the power and prestige of the state in doubt about its authority or efficacy at the local level is a powerful conservative force. However, an even more fundamental source of gubernatorial concern about the use of special prosecutors derives from the Governor’s constitutional responsibility to assure the enforcement of law, including the fulfillment of the constitutional and statutory mandates of local law enforcement authorities and adherence to statutory and constitutional legal processes.

168. For a case in which the special prosecutor’s jurisdiction was upheld against attack by the district attorney, see In re Hennessy, 48 N.Y.2d 863, 400 N.E.2d 294, 424 N.Y.S.2d 352 (1979), aff’g 67 A.D.2d 1089, 415 N.Y.S.2d 163 (1979).
169. See supra notes 156-57 and accompanying text.
171. See supra notes 159-60 and accompanying text.
172. N.Y. Const. art. IV, § 3.
173. See supra notes 9-13 and accompanying text.
As Governor Harriman's counsel pointed out, the Governor is responsible in the first instance "to strengthen the hands of the district attorneys and all law enforcement officers wherever possible;" the power of superseder must be reserved for cases of negligence or incompetence rendering local law enforcement suspect or ineffective. Taking this analysis one step further, Governor Cuomo has noted that "the privilege and duty of elective office [local and statewide, is] so important to our society that its operation should not be suspended except under the most compelling circumstances ..." The Governor's statement imparts constitutional philosophy and an inherently practical underpinning: however limited in scope, challenges to the integrity of a local law enforcement officer tend to raise public doubts about law enforcement operations in general and other operations within the offending officer's sphere in particular; and to give the gubernatorial stamp of approval to such challenges, potentially crippling other routine operations of the local law enforcement system and the authority of statewide law enforcement agencies as well, clearly requires—particularly in the absence of invitation by the challenged officer—a compelling showing of conflict, mismanagement, or broad public distrust creating systemic problems or a state of impasse in local law enforcement processes. Thus, abstention from precipitant interference with local officers is not only a matter of constitutional balance, in recognition of the constitutional allocation of law enforcement responsibilities to local and state officers, and the implicit cooperation and mutual reinforcement entailed in that allocation; it is also a matter of implicit recognition of the practical ramifications of gubernatorial interference for the effectiveness of law enforcement at local and state levels.

Precipitant interference with local law enforcement creates the potential for atrophy of local law enforcement officers' ability to deal with criminal activity within their jurisdiction and a concomitant loss of accountability.

Likewise, within the Governor's law enforcement mandate is the responsibility for enforcing laws providing for local remedies to problems in local law enforcement. In cases involving criminal prosecutions, these remedies include the provisions of the County Law authorizing a superior criminal court to appoint a special dis-

174. 1957 PUB. PAPERS OF GOVERNOR HARRIMAN 1140.
176. N.Y. CONST. art. IV, § 3.
trict attorney if the district attorney is disqualified in a particular case, and provisions of the Criminal Procedure Law authorizing application for a change in venue if a defendant is unable to receive a fair trial locally. While it has been held that the superseder power may override a superior court special appointment, the existence of a local remedy within the regular course of the legislatively defined criminal justice process must give the Governor pause as he considers, within his constitutional responsibility to enforce the law, the use of extraordinary powers, particularly where the standard for intervention in a prosecution at the local level under statutory procedures is already a high one, that of requiring a showing of actual prejudice before the responsibilities and routine procedures of criminal prosecutors are disturbed. Again, prior consideration of the statutory remedies with local application is a matter of constitutional balance, a recognition not only of the constitutional role of local officials but of the constitutional power of the Legislature to establish primary law enforcement procedures and to identify the officials responsible for their exercise.

The structural barriers to precipitant gubernatorial intervention into local law enforcement processes identified above—the quest for consensual solutions to alleged conflicts in local law enforcement, the need for compelling evidence of conflict amounting to systemic impasse, prior review of statutory remedies to law enforcement problems which may be applicable at the local level, the need to tailor mandates to fit the presenting problems—all suggest the existence of a pattern of inherent procedural barriers also governing governors’ consideration of requests for appointment of a special prosecutor which bear further comment and articulation. While there appear at present to be no judicially articulated due process limitations on the Governor’s discretionary authority to issue superseder orders, gubernatorial experience with superseding orders, and gubernatorial recognition of the constitutional and structural

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178. N.Y. CRIM. PROC. LAW § 230.20 (McKinney 1982).


180. Schumer, 60 N.Y.2d at 55, 454 N.E.2d at 526, 467 N.Y.S.2d at 186 (holding that “[t]he objector [to the public prosecutor] should demonstrate actual prejudice or so substantial a risk thereof as could not be ignored”).

framework within which such orders are made, indicate that regularity, consistency, and articulated standards for decision making in the consideration and granting of superseder applications are essential to effective exercise of the Governor's power to issue such orders and the special prosecutors' prosecutorial powers. In fact, in the aftermath of the Howard Beach appointment, Governor Cuomo took steps to regularize his office's consideration of applications for special prosecutors, including the designation of a review committee within his office to consider, in each case in which a special prosecutor is requested, the evidence and nature of the problem, the opinions of local law enforcement agencies, the existence of alternative remedies, and, where state intervention is considered necessary, options for narrow and specific definition of the special prosecutor's mandate. This effort is also designed to forge cooperative working arrangements with local authorities and to minimize areas of conflict, ambiguity, and the unnecessary challenge to the ongoing and primary authority of local agencies in carrying out their routine law enforcement responsibilities. It is felt that the existence of a regular procedure and consistent standard for review of special prosecutor requests will serve to highlight the extraordinary nature of the power and to add a level of review assistance to the Governor's exercise of the appointment power.

The role of the special prosecutor is necessarily an important one in our government, at federal, state and local levels. The appointment of a special prosecutor assures the public that those responsible for enforcing the law cannot break it with impunity and that, whatever the weakness of individual officeholders, the rule of law will prevail. This is a role that may become particularly critical to public confidence in our government in an era in which allegations of illegal operation and venality affect government authority at all levels. Given the importance of the role, it is essential that the appointment of a special prosecutor be protected with substantive and procedural barriers, including extreme caution in the identification of systemic problems requiring special prosecution, in the evaluation of claims and counterclaims in particular cases, in the consideration of the least intrusive remedies sufficient to meet an identified law enforcement gap, and in the definition and articulation of a special prosecutor's specific mandates, jurisdiction, and powers. The perils of local law enforcement gone awry, and the dangers in unnecessary

182. This review process was instituted by Governor Cuomo.
use of special prosecutorial powers—including, at the most fundamental levels, breakdown in existing law enforcement processes, breakdown in public confidence in the criminal justice system, and concomitant challenges to the ability of elective government to maintain order in a civil society—require no less.