At an all-purpose term of the Supreme Court of the State of New York held in and for the County of Albany at the Albany County Courthouse on the 11th day of September 2023.

SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

ANDREW M. CUOMO,

Plaintiff,

Index No.: 903759-23

-against-

DECISION & ORDER

NEW YORK STATE COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT,

Defendant.

APPEARANCES: Holwell Shuster & Goldberg LLP, New York (*Gregory J. Dubinsky*, of counsel); Glavin PLLC, New York (*Rita Glavin,* of counsel) for Plaintiff

Letitia James, *Attorney General*, Albany (*Shannan C. Krasnokutski & Ryan W. Hickey,* of counsel) for Defendant

Thomas Marcelle, J.

This matter traces its origins back to 2020. In the midst of the COVID-19 pandemic, then Governor Andrew M. Cuomo ("Cuomo") authored a book: American Crisis: Leadership Lessons from the COVID-19 Pandemic ("American Crisis"). The book has been drenched in controversy, politically and legally. This controversy—at least the legal side of it—is rehearsed nicely and in detail in a prior opinion (*Cuomo v New York State Joint Commn. on Pub. Ethics*, 76 Misc 3d 1036, 1037-1043 [Sup Ct, Albany County 2022]). The saga, however, continues.

The case currently before this court concerns renewed efforts to penalize the former Governor for writing American Crisis. Central to understanding the issues here is the Joint Commission on Public Ethics ("JCOPE"). JCOPE is New York's now defunct ethics commission. But in 2020, JCOPE was vital, and its approval was necessary for Cuomo to write his book (19 NYCRR 932.5). Accordingly, Cuomo sought and received JCOPE approval for his publication. Indeed, the book was released in October of 2020 to great fanfare—all was going well.

However, like the fortunes of war, the fortunes of politics "are liable to frequent fluctuations" (Miguel de Cervantes, Don Quixote, part 1, ch 8 p 59 [Joseph R. Jones ed., W. W. Norton & Company 1981] [1605])—Cuomo's political standing nosedived and he ultimately resigned from office. After leaving office, JCOPE formally charged Cuomo with ethics violations concerning American Crisis. JCOPE demanded that Cuomo "disgorge profits associated with his book, . . . [and be enjoined] from retaining future profits [from it] . . ." (*Cuomo*, 76 Misc 3d at 1038).

But before JCOPE could hold the required hearing on the charges, the Legislature axed JCOPE. JCOPE was terminated because it lacked sufficient independence to enforce ethics laws, or so believed the Legislature. To compensate for this perceived deficiency, the Legislature wanted to create a truly independent body to monitor, investigate and in some cases punish people for ethics violations. Accordingly, Executive Law § 94 was enacted and it established a new ethics commission "responsible for administering, enforcing, and interpreting New York state's ethics and lobbying laws" Executive Law § 94 [1] [a]). This new ethics commission, the Commission on Ethics and Lobbying in Government (the

"commission"), decided to prosecute the former Governor on the charges previously brought by JCOPE.

Cuomo wants the court to halt this prosecution. He argues that since the commission operates without government oversight or control, it offends New York's Constitution. He moves the court for a preliminary injunction to stay enforcement. And of course, the defendant, the independent ethics commission, lauds this independence and finds its existence altogether proper. The commission has cross-moved for summary judgment seeking a declaration that the law which created the commission, Executive Law § 94, is constitutional.

The court will address the commission's cross-motion for summary judgment. As the commission notes, and the court concurs, the case presents a pure question of law and no facts need be determined. Thus, since "the record before [the court is] sufficient . . . such that the rights of the parties can be determined as a matter of law," the court will issue a judgment so declaring (*11 King Ctr. Corp. v City of Middletown*, 115 AD3d 785, 787 [2d Dept 2014]).

Before resolving the legal issues presented by this case, an understanding of the commission and how it works, at least a digested one, is requisite.[1]

Under Executive Law § 94, the commissioners exercise power. Thus, the statutory analysis begins with the commissioner's appointment procedure. Elected officials initiate the process by selecting potential commissioners (Executive Law § 94 [3]). The selection system is diversified—the Governor selects three, the Senate Majority Leader selects two, the Speaker of the Assembly selects two, the Attorney General, the Comptroller, the Senate Minority Leader,

[1] The statute is complex, and the commission does many things. The court's statutory analysis focuses on the parts that concern plaintiff's immediate plight and aspects of the statute that bear little on the outcome of this present motion are neither addressed nor mentioned.

and the Assembly Minority Leader each select one (*id.*). Thus, the commission is composed of 11 members.

However, just because an elected official selects a person to be a commissioner does not make them one. The selectee must first be "appointed" by the Independent Review Committee ("IRC") (*id.* [3] [d]). The deans of New York's fifteen law schools comprise the IRC (*id.* [2] [c]).[2]

The IRC is charged with reviewing the "background and expertise" of candidates, and any candidate who the IRC "deems to meet the qualifications necessary for the services required . . . shall be appointed as a commission member" (*id.* [3] [d]). Executive Law § 94 does not define the term "qualifications necessary for the services required." Rather, the IRC creates "a procedure by which it will review and select the commission members" (*id.* at [3] [g]). Finally, the Legislature permitted the IRC's proceedings to not "be subject to public scrutiny" (*see id.* [3] [k]).

Once the IRC has appointed the commissioners, the commission can begin its work. The commission administers and enforces New York's ethics laws, including Public Officers Law §§ 73, 73-a, 74; Lobbying Act, Legislative Law Article 1-A; and the "Little Hatch Act", Civil Service Law § 107 (collectively, the "ethics laws") (*id.* [1] [a]; [10]). Together, these laws reach both private and public individuals.

[2] The Cornell Law School together with Columbia Law School, New York University School of Law, St. John's University School of Law, University at Buffalo School of Law, Albany Law School, Syracuse University College of Law, Fordham Law School, Brooklyn Law School, Cardozo Law School, CUNY School of Law, Touro College Law Center, Pace University School of Law, Deane School of Law, and New York Law School constitute the State's law schools. The law schools are either located in cities or large dense population centers except for Cornell which is isolated in bucolic Tompkins County.

The statute lays out a precise method for the commission to enforce these laws. To start with, the commissioners do not investigate potential violations. Rather, they appoint an Executive Director, who, with the assistance of staff, "review[s] and investigate[s] . . . any information . . . where there is specific and credible evidence [of] a violation of [the ethics laws]" (*id.* at [6] [a] [i]; 10 [d]). After the investigation, staff submits a report to the commission "recommend[ing] … closing . . . the matter as unfounded or unsubstantiated, [proposing] settlement, [issuing] guidance, or moving the matter to a confidential due process hearing" (*id.* [10] [f]).

The commission then responds to the report. If it determines "that there is credible evidence of a violation of the laws under its jurisdiction, it shall provide [the targeted individual] . . . a due process hearing" (*id.* [10] [h]) "before an independent arbitrator ['IA']" (*id.* [10] [i]).

The IA's role is quite limited. At the conclusion of the due process hearing, the IA "make[s] findings of fact and a recommendation as to the appropriate penalty to be assessed" (19 NYCCR 941.13 [a], *see* 941.7 [b]). These findings lack binding force. Indeed, the commission need not heed the IA's findings at all. Rather, the commission may "adopt the findings of fact and recommendation of the hearing officer in whole or in part, or it may reverse, remand and/or dismiss the hearing officer's finding of fact and recommendation based upon the record produced at the hearing" (19 NYCCR 941.13 [c]). In short, the IA merely compiles a paper record for the commission to review de novo.

After all is said and done by staff and the IA, the commission, by majority vote, determines if a "substantial basis [exists] to conclude" that an individual has violated an ethics law (Executive Law § 94 [10] [p]). Further, if the commission finds that an individual has

knowingly or intentionally violated certain ethics laws (which are applicable here), the commission *may*, but is not required to, impose penalties.

These penalties can be quite substantial. Executive Law § 94 vests the commission with the ability to levy "a civil penalty in an amount not to exceed ten thousand dollars" and assess a penalty equal to the "value of any gift, compensation or benefit received as a result of such violation" (*id.* [10] [n] [ii]). The commission possesses wondrous discretion in setting the civil penalty. It may penalize a person based on "*any* . . . factors the commission deems appropriate" (*id.* [10] [n] [v] [emphasis added]). It must also be noted that the commission may deploy the penalty against current or former members of the executive branch and private individuals, but not against the Legislature or its staff (*id.* [10] [p] [i]).

This statutory backdrop sets the stage to resolve the legal issues. The question presented is whether the Legislature gave the commission authority that rightly belongs to the executive branch; and if so, whether such a transfer violates the separation of powers doctrine.

Starting with the elementary: New York's Constitution ("Constitution") divides power among three branches of government. The Constitution "regulate[s], define[s] and limit[s] the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers" (*People ex rel. Burby v Howland*, 155 NY 270, 282 [1898]).

Although this doctrine does not appear explicitly in the Constitution, separation of powers has "deep, seminal roots in the constitutional distribution of powers among the three coordinate branches of government" (*Cohen v State of New York*, 94 NY2d 1, 11 [1999]). "The concept of the separation of powers is the bedrock of the system of government adopted by this State" (*Matter of Soares v Carter*, 25 NY3d 1011, 1013 [2015] [internal quotation marks omitted]). Accordingly, the Constitution gives each branch distinct roles: the legislative branch

creates the law (NY Const, art III, § 1); the executive branch enforces the law (*id.* Art IV, § 1); and the judicial branch interprets the law and decides cases and controversies that arise under the law (*id.* Art VI, § 1).

At the outset, Cuomo and the commission quarrel over whether federal law bears on the question of the Governor's power. The commission says, and rightly so, that the New York Constitution, unlike its federal counterpart, lacks a unitary executive. Instead, New York divides executive sovereignty among different executives (NY Const art IV & V, § 1). If this case involved a conflict over the allocation of power among or between the various executives, federal authority would be near useless. But rival executive officers' scrapping over their domains has nothing to do with this case. Executive Law § 94 provides no role for any executive authority other than nominating commissioners.

In the present context, federal law certainly informs the court on the meaning of the Governor's executive power. In fact, Alexander Hamilton described "the federal executive power as congruent with the powers of the Governor of New York under the 1777 State Constitution" (*LeadingAge N.Y., Inc. v Shah*, 32 NY3d 249, 291 [2018]). Unsurprisingly, the Court of Appeals has consistently cited both the Federalist Papers and federal cases to interpret New York's separation of powers and what the executive power bestows upon the Governor (*see, e.g.*, *La Guardia v Smith*, 288 NY 1 [1942]; *Rapp v Carey*, 44 NY2d 157 [1978]; *Nicholas v Kahn*, 47 NY2d 24 [1979]; *Matter of County of Oneida v Berle*, 49 NY2d 515 [1980]; *Subcontractors Trade Assn. v Koch*, 62 NY2d 422 [1984]; *Under 21, Catholic Home Bur. for Dependent Children v City of New York*, 65 NY2d 344 [1985]; *Cohen*, 94 NY2d 1; *LeadingAge New York, Inc.*, 32 NY3d 249 [2018]; *see also Matter of Hebel v West*, 25 AD3d 172, 178 [3d Dept 2005]).

Therefore, the court concludes that history concerning the framing of the presidential duty to faithfully execute laws (US Const, art II § 3) and federal caselaw interpreting that authority, while not controlling of the court's interpretation of the Governor's identical duty, are informative and persuasive precedent. Thus, this court, as the Court of Appeals has done for the last eight decades, will use federal precedent as a guide to define the boundaries of executive power and to determine any trespass by the Legislature.

With that side issue settled, the case pivots towards unraveling the constitutional problem. Resolution starts with defining the Governor's powers. The Constitution vests the "executive power" in the Governor and commands her to "take care that the laws are faithfully executed" (NY Const, art IV, § § 1, 3).

Certainly, not all the commission's missions are executive in nature. The commission possesses certain responsibilities consistent with being a public watch dog. The commission may investigate, issue reports, and make referrals on ethics issues (Executive Law § 94 [10] [d]). These functions rank as government oversight—alerting the public to corruption in their government. While the Legislature normally performs these tasks, it may, leaving aside potential delegation problems, assign a particularized chore in this arena to an independent body. A body absolved from the taint of partisanship may aid the Legislature's oversight mission by adding an element of trust to its findings. Such may be the case with the commission. In other words, the people might credit the commission's findings about a public official's misdeeds precisely because the commission, in theory, lacks political bias, animus, or allegiance.

Now, of course, the commission's job exceeds mere reporting. The commission has the jurisdiction to punish (Executive Law § 94 [p] [ii]). This power, the power to punish an ethics violator, impermissibly encroaches upon the executive's providence—or so plaintiff argues.

The argument has force. For no function cuts more to the heart of the executive's constitutional prerogative than its discretion to seek the imposition of penalties. An executive's determination whether to bring or abandon enforcement actions and how vigorously to pursue them "falls within the discretion of the Executive Branch" (*TransUnion LLC v Ramirez*, 141 S Ct 2190, 2207 [2021]). Thus, while the Legislature defines a penalty and the court possesses the judgment over the severity of the penalty, neither branch may compel the executive to enforce a penalty (*Soares*, 25 NY3d at 1013).

Consequently, in deciding whether or not to punish ethics violators and the severity of any punishment, the commission is executing (i.e., enforcing) Executive Law § 94—there is no escaping this conclusion. If investigating a person, charging him, holding an administrative hearing on his culpability, and ultimately imposing penalties and mandating forfeiture of property are not executive operations, in which branch do such powers reside? Neither the courts nor the Legislature do such things—and no fourth branch of government exists.[3]

Therefore, the court concludes that the commission's enforcement of the ethics laws through civil penalties and forfeiture is the exercise of executive power belonging to the executive branch. Moreover, and in some senses more importantly, the court concludes that the

[3] The best that may be said is certain aspects of the commission's enforcement role are quasi-judicial—it determines facts, applies a rule of law to those facts, and thus arrives at a decision. However, there is "nothing 'inherently judicial' about 'adjudication'" (*Freytag v Commr.*, 501 US 868, 909 [1991] [Scalia, J., concurring]). The "commissioners" are not judges and judges do not investigate people to bring charges against them. Moreover, the judicial branch is a reactionary branch—judicial proceedings are not initiated by a judge. The commission bears little resemble to the judicial system.

commission's unreviewable discretion not to enforce the ethics laws in a particular circumstance or against a particular individual is the exercise of executive branch power (*United States v Texas*, 143 S Ct 1964, 1971 [2023]).

These conclusions set up the next issue—can the commission punish people for violating the ethics laws in the absence of accountability to the Governor? Plaintiff says no. He posits that the separation of powers forbids the commission from exercising executive authority without being answerable to the executive—a reasonable proposition.

Testing Cuomo's position starts with the basics. Since the Governor "is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, [is] that as part of his executive power he should [direct] those who . . . execut[e] . . . the laws" (*Myers v United States*, 272 US 52, 117 [1926]). This authority is fundamental and has been considered so since the founding of the nation—"if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws" (James Madison, 1 Annals of Cong 463 [1789]).

The commission violates this core constitutional tenant by operating beyond the Governor's reach. The Governor has no capacity to control the commission by populating it with her appointees. She may not call commissioners to have them explain their actions, nor may she remove commissioners who misuse their office or fail in their duties (Executive Law § 94). Indeed, the whole reason for the commission's existence is to be independent from any government control—an objective which Executive Law § 94 surely accomplishes. Thus, since the Governor "is not the one who decides whether [commission] members are abusing their offices or neglecting their duties[,] [s]he can[not] ensure that the laws are faithfully executed" (*Free Enter. Fund v Pub. Co. Accounting Oversight Bd.*, 561 US 477, 496 [2010]).

Consequently, Executive Law § 94 infringes upon the Governor's prime constitutional directive.

The commission has an answer—an answer it says ameliorates any legal impediment to its existence. To begin with, the commission accurately notes that while the powers of the branches of government are separate, they work in a coordinate, overlapping, and for the most part harmonic fashion. Thus, "the duties and powers of the legislative and executive branches cannot be neatly divided into isolated pockets . . ." (*Bourquin v Cuomo*, 85 NY2d 781, 784 [1995]).

Consistent with this general rule, the commission points to historical practices which it argues legitimizes its use of executive branch power without any obligation to the executive branch. In particular, it contends that New York historically has allowed the Legislature to appoint members of commissions even when such commissions perform executive functions.

To support its position, the commission leans heavily on *Soares v State of New York*, 68 Misc 3d 249 (Sup Ct, Albany County 2020)—perhaps a bit too heavily. *Soares* dealt with a separation of powers challenge to the Commission of Prosecutorial Conduct (CPC). The CPC withstood a separation of powers attack because (1) the legislative appointees to the CPC constituted a minority of the CPC and (2) the CPC did not possess executive branch authority.

Neither of the two elements that sustained CPC's legitimacy are present here—this case is not *Soares*. Addressing the former basis first, the *Soares* court found a deeply rooted "practice of granting the legislature the right to . . . appoint *a minority* of members to boards and commissions carrying executive functions . . ." (*id.* at 275 [emphasis added]). Of course, here, the Legislature nominates six commissioners, which constitute a majority of the eleven-

member commission. This is a critical difference between this case and *Soares*, and indeed, drives the latter's precedential value towards zero.

Moreover, and more importantly, CPC has limited power. Its authority only extends to admonishment, public censure, and recommendations for removal that the Governor reviews de novo. Accordingly, as the *Soares* court found, "the matters entrusted within the CPC's authority do not intrude on the Governor's constitutional prerogatives" (*id.* at 277).

Not so here—the commission decides if and how severely to punish ethics violators. Thus, the commission is more than a watch dog, it is an attack dog. A dog that barks is one thing; a dog that bites is quite another. One can be ignored, the other not so much. Indeed, in the estimation of other state courts, when an independent ethics commission has the capacity to impose penalties, it crosses an impermissible constitutional line (*compare Parcell v State*, 228 Kan 794, 797 [1980] [finding the independent commission legitimate because it only reports on ethics violations committed by both the executive and legislative branches and does not enforce compliance with the act or penalize violators thereof], *with Commn. on Ethics v Hardy*, 125 Nev 285 [2009] [concluding that because the ethics commission had the power to fine ethics violators, the commission was constitutionally flawed]).

Therefore, since the Governor nominates a minority of the commissioners and the commission can impose civil penalties which intrudes upon the Governor's constitutional prerogatives, the *Soares* decision has no persuasive impact on this case.

With *Soares* placed aside, the commission takes another stab at historical practices to defend its legitimacy. The commission says, and accurately so, that entities fulfilling executive functions, such as the Board of Elections and the Game Gaming Commission have members/commissioners who are nominated by the Legislature and appointed by the Governor

(*see generally* Election Law § 3-100 [providing for the creation of the "New York state board of elections"] and Racing, Pari-Mutuel Wagering and Breeding Law § 102 [providing for the creation of the "New York state gaming commission"]).

This is an analogy worth considering. The strength of this analogy rests, of course, upon the Governor's ability to appoint commissioners. Alas, here, it is non-existent. Rather, the IRC, a group of private actors, appoints the commissioners, not the Governor (Executive Law § 94 [3] [d]). Thus, the commission's analogy collapses.[4]

Now, the basic problem with historical pattern arguments is that the commission is an anomaly. Never in New York's history has the Legislature conceived a body that exercises executive authority where the Governor's role is confined only to nominating a minority of that body. Moreover, nothing in the record suggests that private operators (like a bunch of deans) have ever been allowed to vet and appoint nominees against a standard invented by those same private operators. Indeed, the court pressed the commission at oral argument to present an example in the history of the United States where such a situation exists or has ever existed—the interrogatory was futile, and no examples or precedents were offered at the time of oral argument nor via the multiple rounds of supplemental briefing that followed.

Even if the court could slog pass the appointment process and locate it at the outer edges of the historical shadows of New York's somewhat chaotic appointment practices, the removal process for commissioners is equally, if not more, problematic than the appointment method. Indeed, removal restrictions on the executive pose a greater constitutional evil than

[4] It should be noted that the Governor possesses the explicit power of removal for members the Gaming Commission (Racing, Pari-Mutuel Wagering and Breeding Law § 102 [7]) and the implicit power of removal for commissioners of the Board of Elections (Public Officers Law § 33 [1]).

appointment defects—as between the ability to hire and fire those who implement the laws, "the unfettered ability to remove is the more important" (Michael W. McConnell, The President Who Would Not Be King, at p 167 [2020]). Removal power allows the executive to control how the laws are enforced. "Once an officer is appointed, it is only the authority that can remove him, . . . that he must fear and, in the performance of his functions, obey" (*Bowsher v Synar*, 478 US 714, 726 [1986] [internal citation omitted]).

The ability to remove administrative officers, therefore, is essential for the Governor to faithfully execute the laws. "Just as the [Governor's] selection of administrative officers is essential to the execution of the laws by him, so [is] his power of removing those for whom he … [is] responsible. To hold otherwise … would make it impossible for the [Governor] ... to take care that the laws be faithfully executed" (*Seila Law LLC v Consumer Financial Protection Bureau*, 140 S Ct 2183, 2198 [2020] [internal quotations and citations omitted]). Thus, "when the grant of the executive power … express[ly] mandate[s] to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power . . . the exclusive power of removal" (*Myers*, 272 US at 122).

Executive Law § 94 runs contrary to this elementary constitutional principle. Here, *only* the commission, by majority vote, may remove a fellow commissioner (Executive Law § 94 [4] [c]). This incestual removal process deprives the Governor from any say in discharging a commissioner. Consequently, Executive Law § 94 deprives her from honoring her constitutional duty to take care that the ethics laws are faithfully executed.

The removal power is no trifle. Where a removal defect exists, "a wholly unaccountable government agent asserts the power to make decisions affecting individual lives, liberty, and property. The chain of dependence between those who govern and those who endow them with

power is broken. Few things could be more perilous to liberty than some 'fourth branch' that does not answer even to the one executive official who *is* accountable to the body politic"—exactly so (*Collins v Yellen*, 141 S Ct 1761, 1797 [2021] [Gorsuch, J., concurring]).

As matters stand, it would seem that Executive Law § 94 is tumbling towards the inevitable declaration that it violates the separation of powers doctrine. The commission, however, sets up two firewalls to protect itself from being disintegrated. The commission argues that (1) there is no separation of powers violation since the Governor assented to any reduction or intrusion upon her duty to faithfully execute the laws (*Delgado v. State of New York*, 39 NY3d 242) and (2) a separation of powers violation occurs *only* where one branch usurps the power of another in order to enhance its own power; and here the Legislature did not aggrandize its own power, but merely created an agency independent of both the Legislature and the Governor (*Cohen* 94 NY2d 1). The court will address each argument.[5]

As to the first contention, the commission maintains that a separation of powers violation does not occur when one branch intrudes on another branch's power, if the scorned branch voluntarily assents to intrusion. In this case, since the Governor signed Executive Law § 94, she consented to let the commission enforce the ethics laws instead of her. Thus, as the argument goes, the Governor's abdication of her duty erases all separation of powers problems. The commission rests this conclusion, and indeed the bulk of its defense, on the shoulders of *Delgado*. Accordingly, a close inspection of *Delgado* is required.

Delgado centered around the constitutionality of the Committee on Legislative and

[5] Somewhat ironically, *Cohen* and *Delgado* refer to the federalist papers and United States Supreme Court precedent in grappling and interpreting New York's separation of powers—authorities which the commission asserts has no relevance in interpreting this separation of powers question.

Executive Compensation ("CLEC"). CLEC was "a *temporary* commission with a *discrete* purpose" (*Delgado*, 39 NY3d at 252 [emphasis added]). The enabling act which created CLEC charged it with making salary recommendations for various officials (part HHH of chapter 59 of the Laws of 2018). Now, the recommendations had heft. The enabling act provided that CLEC's recommendation concerning salary changes would become effective and have the force of law unless modified or abrogated by statute. The Court of Appeals addressed whether this scheme violated the non-delegation doctrine and, as is relevant here, the Governor's veto power. A plurality of the Court found no constitutional problem.

Context helps explain the plurality's decision. Normally, the Governor would have to sign into law or veto pay raises. However, instead of committing to an exact pay raise, the Governor committed to a process for setting salaries as established by the enabling act. The enabling act, of course, eliminated the Governor's ultimate ability to sign or veto pay increases. The question was whether the act unconstitutionally deprived the Governor of her veto power.

The *Delgado* plurality dispatched this constitutional issue. It noted that if the Governor found the process objectionable, he could have vetoed the enabling act (*Delgado* at 255). Instead, by "signing the enabling act, the Governor assented, having no objection to the Legislature's determination of what the law should be" (*id.* at 255). Therefore, the plurality held "that there [was] no unconstitutional assignment of power to the Committee by the enabling act under the circumstances presented here" (*id.* at 258).

However, the plurality noted some limiting principles that cabined its decision. First, it noted that "the Governor [did not] cede authority to propose different legislation in the future or to veto future legislation" (*id.* at 255). Furthermore, and "[c]ritically, the enabling act [was] not a broad assignment to a commission of the authority to revise general statutes governing a

substantive body of law without the requirements that such revisions be approved by the legislature and subject to review or veto by the Governor" (*id.* at 257). Finally, the plurality went out of its way to "caution courts [to closely scrutinize] the validity of enabling acts that result in the executive branch effectively waiving veto power" (*id.* at 255 n 9).

This case stands on different grounds than *Delgado*. *Delgado* was about enacting laws, primarily a legislative function in which the Governor plays a limited, though vital role. However, the Governor cannot make a law, but only stop its enactment by vetoing it. Thus, the veto works as a check on legislative power.

Here, what is at stake is not the law-making function but the law enforcement function. And they differ vastly. The duty to execute the laws is the Governor's power and the Legislature plays no part in it. Indeed, unlike the veto power, how the Governor discharges this duty cannot be overridden by the Legislature. *Delgado's* constitutional analysis of the executive's veto power therefore translates poorly to her duty to faithfully execute the laws.

Moreover, the commission's mandate looks nothing like CLEC's. Unlike CLEC, the commission is not a temporary commission charged with a narrow duty (*id.* at 252-253). Rather, the defendant commission has no expiration date and engages in a host of wildly diverse activities: It can investigate people based on a credible tip in the media including presumably a tweet on X (Executive Law § 94 [5]); it makes rules (*id.* [10] [o]); it issues advisory opinions (*id.* [7] [c]); it has a staff and an executive director (id. [6] [a] [i]); it issues subpoenas (*id.* [10] [c]); it can order a hearing (*id.* [10] [h]), and of course it can inflict penalties upon both public and private citizens (*id.* [10] [p]). Surely, such roving activities are fairly described as a broad assignment. Thus, the commission's ranging powers that endure sine die bear no resemblance to "a temporary commission with a discrete purpose" (*Delgado*

39 NY3d at 252). These facts distinguish this case from *Delgado* and renders *Delgado* a weak comparator.

Finally, the commission's assent argument extends well beyond the position that CLEC advanced in *Delgado*. Here, unlike *Delgado*, the Governor, by approving the commission, ceded not only her own authority but the authority of all future Governors. Perhaps the Governor thought it was good policy and/or good politics to relinquish her constitutional duty to enforce the ethics laws. She "cannot, however, choose to bind h[er] successors [to] diminish[ed] . . . powers" (*Free Enterprise Fund*, 561 US at 497).

Delgado fundamentally diverges from this case. *Delgado* ruled on a different gubernatorial power as applied to a temporary body and where the limitation of the Governor's power had no continuing or future implications. In the end, *Delgado* fails to protect the commission from Cuomo's separation of powers attack.

The commission's second line of defense revolves around the proposition that the separation of powers only prevents one branch from arrogating unto itself another branch's powers. The commission's argument starts with a generally correct operating premise—"one of the plain purposes of the separation of powers theory is to guard against one Branch seeking to maximize power" (*Cohen*, 94 NY2d at 13; *see Under 21, Catholic Home Bur. for Dependent Children*, 65 NY2d at 356). The commission then casts a second equally correct premise— the Legislature determined that the executive could not be trusted to enforce the ethics laws against itself and therefore, it spawned an agency independent of both the Legislature and the Governor. So far, so good.

From these premises, the commission wrenches this conclusion: while Executive Law § 94 subtracts powers from the Governor, it does not transfer any power to the Legislature. In other

words, the Legislature did nothing to "maximize [its own] power" (*Cohen*, 94 NY2d at 13). Voila—no constitutional concerns to be found here.

This argument has some appeal. And it might be somewhat persuasive but for one notable exception to the commission's enforcement powers. The commission can punish neither members of the Legislature nor its staff (Executive Law § 94 [10] [p] [i]). So, in essence, the Legislature birthed a commission with a majority of the commissioners being selected by the Legislature (*id.* [3]). Then, it armed the commission with executive branch power and further loaded the commission with stiff penal authority (*id.* [10] [n] [i]-[ii]). However, this legislative majority commission may aim and discharge its power, as far as government officials go, only at current and former executive branch officers.

Such particularized targeting tests the proposition that Executive Law § 94 did not give the Legislature a novel power. The Constitution provides the Legislature with two controls to tame a rogue executive—impeachment and the purse (NY Const, art V, § 24; art VII, § 4). Absent from our constitutional scheme is the ability for the Legislature to directly punish an executive officer for malfeasance by imposing civil fines and penalties. And as far as the court can tell, no legislature in this nation, federal or state alike, has ever imposed such a penalty.

Thus, it is beyond cavil that the Legislature cannot directly impose civil penalties and mandate forfeiture upon the Governor or her officers for ethics violations. What the Legislature cannot do directly, it can do indirectly by way of an independent commission where it nominates the majority of the commissioners.

Moreover, once blessed, there is no limiting principle that would keep the Legislature from establishing a swarm of independent commissions (where it selects the majority of the commission) to enforce the laws instead of the Governor. Indeed, this was the very power that

the Continental Congress had under the Articles of Confederation (*see* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale LJ 541, 600 [1994] [noting that "the Articles differed in at least one major . . . respect from the Constitution: . . . Congress could 'appoint such other committees . . . as may be necessary for managing the general affairs of the United States …"). Ultimately, if the commission's position prevails, the Legislature "could act as effectively without [the Governor] as with h[er], by simply requiring [independent commissions] to execute its laws" (*Printz v United States*, 521 US 898, 923 [1997]). This would destroy the delicate balance of power between branches that the Constitution commands (*People ex rel. Burby v Howland*, 155 NY 270, 282 [1898]). As such, the court finds the commission's aggrandizement argument unpersuasive.[6]

While the court wanted to address the commission's point about aggrandizement, the separation of powers question neither rises nor falls on its resolution. This is because only "*one* of the plain purposes of the separation of powers theory is to guard against one Branch seeking to maximize power" (*Cohen*, 94 NY2d at 13 [emphasis added]).

The separation of powers is more than an allotment of duties among the branches. It also ensures that public officers assume responsibility for their decisions to keep them accountable to the people (*United States v Arthrex, Inc.*, 141 S Ct 1970, 1979 [2021]). As is applicable here, the duty to execute the laws identifies the executive officer who is responsible for enforcing the law, and if exercised poorly, the "[t]he people know whom to blame"

[6] Moreover, there is quite a danger to the democratic process posed by the commission's sweeping view of legislative power and crabbed interpretation of the separation of powers. Under the commission's theory, if one party controlled both houses and the Governor was of another party, the Legislature could create and then authorize its leaders to appoint all of the members of a body exercising core executive power—in essence undoing an election that divided partisan political power among the branches.

(*Morrison v Olson*, 487 US 654, 729 [1988] [Scalia, J., dissenting]). Indeed, "no principle is more clearly laid down in the Constitution than that of responsibility" (James Madison, 1 Annals of Cong. 462 [1789]). Without responsibility, there can be no accountability, and without accountability, the moorings that bind the government to the will of the people dissolves.

Under Executive Law § 94, there are two groups that exercise governmental power—the IRC and the commission. Neither group is answerable to the people.

First, the IRC—the IRC is a rather homogeneous club. It is comprised of the deans from New York's law schools (Executive Law § 94 [2] [c]). The deans exercise extraordinary power. They devise the criteria to determine who is qualified to serve as a commissioner (*id.* [3] [b]-[d]). These qualifications can be and are subjective.[7]

While the IRC publishes its criteria, exactly how and why the IRC chose the standards it did is and will remain a mystery—the IRC operates in secret. The Legislature decided that meetings and proceedings of the IRC would "not [be] open to the public," thus exempting it from the open meetings law (*id.* [3] [k]). Indeed, the Executive Law commands that "[d]uring

[7] The IRC's criteria come loaded with adverbs and adjectives (and of course a dose of academic jargon) that invites wholly subjective evaluation of a selectee. The IRC "maintains a high standard in determining the suitability of a [selectee]"and "consider[s] the following factors":
• Whether the nominee is of *undisputed* honesty, integrity, and character;
• Whether the nominee's past personal and professional conduct reflects adherence to the *highest* ethical standards, and that *their lived experience allows them to understand the range of perspectives* needed to *effectively* serve as a member of an ethics commission that has broad oversight of a large and diverse public workforce;
• Whether the nominee has *clearly* demonstrated ability to be impartial and independent, be fair and even-handed, and decide matters based solely on the law and facts presented;
• Whether the nominee has a demonstrated commitment to civic participation and public service.

the pendency of the review and approval or denial of the candidates" the IRC "maintain confidentiality in all [IRC] processes, reviews, analyses, approvals, and denials" (*id.* [3] [i]).

After setting its own criteria to determine if a selectee is qualified, the IRC questions the selectee privately, debates the selectee's qualifications behind closed doors and ultimately—i.e., in the parlance of Executive Law § 94—the IRC "appoints" commissioners to the commission.[8]

So, given this array of powers, the question becomes to whom or to which branch of government the IRC is obligated. The deans of the IRC do not swear an oath like all other public officers (*see* Executive Law § 94 [3] [l]; NY Const, art XIII, § 1, Public Officers Law § 10). The deans operate unconstrained by the confines of public scrutiny (Executive Law § 94 [3] [k]). Nothing in the statute provides for judicial review of the IRC's decision (*compare* id. [3] *with* [10] [o] [providing for CPLR Art 78 review of the commission's enforcement decisions]). No government officials can seek to remove or impeach a dean from the IRC (*see id.* [3] [i]). In short, the deans exercise power immune from review and judgment. Thus, the deans' allegiance lies solely with their respective academic institution and to each other—they are neither responsible to the voters nor their elected representatives.

The exercise of governmental power unbounded by government oversight may seem like an innovative idea, but it is one unmentioned in the Constitution. Moreover, whether the

[8] Like the development of the standard to judge a commissioner's suitability to serve, the public is kept in the dark as to why the IRC rejects or appoints a potential commissioner—at least as a matter of what Executive Law § 94 requires of the IRC. Two caveats: (1) the IRC, although not required by statute, graciously decided to let the elected leaders know, should it reject a selectee, why it rejected a selectee; and (2) to the extent that the IRC creates records of the appointment process (although no records are required to be made), the public may request to review records but only *after* the IRC *appoints* a selectee (Executive Law § 94 [3] [k]).

IRC's governmental authority is deemed executive or legislative or both, it matters not—"when it comes to private entities, . . . there is not even a fig leaf of constitutional justification. Private entities are not vested with legislative Powers . . . [n]or are they vested with the executive Power . . ." (*Department of Transportation v Association of American Railroads*, 575 US 43, 62 [2015] [Alito, J., concurring] [internal citations and quotations omitted]). Simply, if the Legislature could hand off governmental authority to private operators, "it would dash the whole [constitutional] scheme . . . and enable intrusions into the private lives and freedoms of Americans … with[out] the consent of their elected representatives" (*National Federation of Independent Business v OSHA*, 142 S Ct 661, 669 [2022] [Gorsuch, J., concurring]).

The IRC owes no duty to the people, which breaks the chain between those who govern and the governed. Simply put, the Legislature may not transfer to a private party power that the people gave to the government (*see TransUnion LLC*, 141 S Ct at 2207 [noting that private parties "are not accountable to the people and are not charged with pursuing the public interest"]). Consequently, the IRC flunks the separation of powers test imposed by the Constitution.

Turning to the commission, it fairs no better than the IRC. As discussed previously, the commission, by design, yanks enforcement responsibility of the ethics laws from the Governor. Again, as previously discussed, since a commissioner can only be removed by fellow commissioners (and not the Governor), the commission answers to no elected officers.

This arrangement runs counter to a republican form of government. Our government derives its sovereignty from the people and requires officials who have authority over the people to be accountable to them. Consequently, the authority by which the Governor and the bureaucracy command the people "acquires its legitimacy . . . through a clear and effective

chain of command down from the [Governor], on whom all [New Yorker's] vote" (*Arthrex, Inc.*, 141 S Ct at 1979 [internal citations and quotations omitted]). Accordingly, "the Governor is the agent of the people of the State of New York, deriving h[er] power from them and directly responsible to them [and it is she who must enforce the ethics law]" (*Rapp v Carey*, 44 NY2d 157, 174–175 [1978] [Cooke, J., dissenting in part]).

Here, however, the commission divests the Governor of her authority. Our Constitution, which so carefully allocates power among the three branches, will not permit those powers to be transferred to independent commission amounting to an unsanctioned fourth branch of government.

The government belongs to the people of the State of New York. They established it, and only they can alter it. And from time to time, they have—including the creation of an independent redistricting commission (NY Const, art III, § 4 [b]). If the people should choose to be governed by those who are not politically accountable to them or their Governor, who swear no oath of allegiance to them, and who come as a class composed of urban academics and who are not reflective of the cross-section of the people whom they govern, the people may do so. But it is for the people to decide and only the people. Here, the Legislature has done by statute what was required to be done by constitutional amendment.

Therefore, the court holds that the commission's administration and enforcement of the ethics laws is the exercise of executive power belonging to the executive branch. Consequently, the court declares that Executive Law § 94 (10) and Executive Law § 94 (14) violate and are contrary to the New York State Constitution. In addition, any and all power and authority of the commission derived from or ancillary or incidental to Executive Law § 94 (10)

and Executive Law § 94 (14), including but not limited to Executive Law § 94 (5) (a & c), the court declares unconstitutional.

This does not quite end the matter. The Legislature provided a saving clause: "If any part or provision of this section is adjudged by a court of competent jurisdiction to be unconstitutional or otherwise invalid, such judgment shall not affect or impair any other part or provision or the application thereof to any other person or organization, but shall be confined in its operation to such part or provision" (Executive Law § 94 [12]).

The fact that Executive Law § 94 contains a severability clause creates a presumption in favor of severability; however, that presumption is overcome by "strong evidence that the Legislature intended otherwise" (*St. Joseph Hosp. of Cheektowaga v Novello*, 43 AD3d 139, 146 [4th Dept 2007] [internal quotations omitted]). Generally speaking, a severability clause does not apply where the invalid provision was "the core" of the regulation and "interwoven inextricably through the entire regulatory scheme" (*New York State Superfund Coalition v New York State Dept. of Envtl. Conservation*, 75 NY 2d 88, 94 [1989]). The commission's core purpose—to "administer[], enforce[e], and interpret[] New York State's ethics and lobbying laws" has been taken from it (Executive Law § 94 [1] [a]). Nevertheless, if the commission believes that it ought to survive bereft of the ability to perform any act consistent with enforcing or administering the ethics law, it needs to tell the court.

Therefore, it is

Ordered that Plaintiff ANDREW M. CUOMO'S demand that the Defendant NEW YORK STATE COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT's investigatory and enforcement authority be declared unconstitutional is granted to the extent that the court declares that Executive Law § 94 (10) and Executive Law § 94 (14) (together

with any and all power and authority of the commission derived from or ancillary or incidental to these provisions including but not limited to Executive Law § 94 (5) (a & c)) violate and are contrary to the New York State Constitution; and it is further

Ordered the Defendant NEW YORK STATE COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT is restrained and enjoined from doing an act inconsistent with the court's declaration; and it is further

Ordered the Defendant NEW YORK STATE COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT shall have ten (10) days from the date of this Order to request that the court schedule briefing and argument on the question of severability and should Defendant fail to make such a request, Executive Law § 94 will be deemed void in its entirety.

The foregoing constitutes the Decision and Order of the court.

DATED: September 11, 2023

Thomas Marcelle
Supreme Court Justice

09/11/2023