

WHOSE BOARD OR COMMISSION IS THIS
ANYWAY?

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I. INTRODUCTION

The New York State Constitution contains what appears to be an innocuous and facially simple provision that governs the

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appointment of state department heads, boards, and commissions. Article V, Section 4 of the state Constitution reads,

Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards and commissions, excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law.¹

In short, the Constitution has a general requirement that department heads, commission members, and board members are to be nominated by the governor and confirmed by the state Senate unless otherwise required by the state Constitution. This provision has, with some modifications, been in the Constitution for nearly a century, and it should theoretically be easy to apply.² In practice, however, there have proven to be significant questions. What offices are subject to this provision? Whose board or commission is subject to the gubernatorial nomination and Senate confirmation requirement?

II. THE EXECUTIVE BRANCH IN THE EARLY TWENTIETH CENTURY

Entering the twentieth century, New York State's executive branch of government was extremely broken. There were seven statewide elected officials; besides the governor and the lieutenant governor,³ New York's executive branch had the comptroller, attorney general, secretary of state, treasurer, and the state engineer and surveyor.⁴ The only other individual officers specified by Article V of the New York State Constitution were the superintendent of public works⁵

¹ N.Y. CONST. art. V, § 4. This Section was approved by the people in 1925. *See* 2 N.Y. STATE CONST. CONVENTION COMM., AMENDMENTS PROPOSED TO NEW YORK CONSTITUTION: 1895-1937, at 331 (1938); *see also* S. Conc. Res. 53, 1923 Leg., 146th Sess., 1923 N.Y. Laws app. at 1758; S. Conc. Res. 23, 1925 Leg., 148th Sess., 1925 N.Y. Laws app. at 1147. *See generally* ROBERT ALLAN CARTER, NEW YORK STATE CONSTITUTION: SOURCES OF LEGISLATIVE INTENT (2d ed. 2001).

² *See* N.Y. CONST. art. V, § 4.

³ The governor and the lieutenant governor ran separately at this time. *See* N.Y. CONST. of 1894, art. IV, § 3; 14 N.Y. STATE TEMP. COMM. ON THE CONST. CONVENTION, STATE GOVERNMENT 90 (1967) [hereinafter 1967 CONSTITUTIONAL CONVENTION REPORT]. It was not until 1953 that the governor and lieutenant governor were required to run jointly. *See* 1967 CONSTITUTIONAL CONVENTION REPORT, *supra*, at 90; N.Y. CONST. art. IV, § 1.

⁴ N.Y. CONST. of 1894, art. V, § 1.

⁵ *Id.* art. V, § 3.

and the superintendent of state prisons.⁶ Both officials were to “be appointed by the Governor . . . with the advice and consent of the Senate” and, while the superintendent of public works was to serve their term concurrently with the governor, the superintendent of state prisons held a five-year term.⁷

Several boards from New York’s 1846 Constitution were carried over into the twentieth century. They were the Land Office, the Canal Board, and the Canal Fund.⁸ These Boards were composed of many statewide elected officials, other than the governor.⁹

Overall, however, much of state government was not covered by the state Constitution; this left the Legislature on its own to create a hodgepodge of executive agencies without any governing or organizing principles. “The constitution in the late 1800s did not grant the governor control over most agencies. The governor did not appoint most agency heads and could not remove them. Agencies did not have to submit written reports to the governor.”¹⁰ The Legislature added to this imbroglio with “the creation of a tangle of boards, commissions, and independent and practically irremovable officers, so that the governor [wa]s in fact stripped of real executive control over those who [we]re regarded by popular opinion as his subordinates.”¹¹

To put it mildly, New York State’s executive branch was messy and chaotic.¹² As early as 1821, New York Governor DeWitt Clinton had said, “If the ingenuity of man had been exercised to organize the appointing power in such a way as to produce continual intrigue and commotion in the State, none could have been devised with more effect than the present arrangement.”¹³

⁶ *Id.* art. V, § 4.

⁷ *Id.* art. V, §§ 3, 4. This was at a time when the governor served a two-year term. *Id.* art. IV, § 1.

⁸ See N.Y. CONST. of 1846, art. V, § 5; N.Y. CONST. of 1894, art. V, § 5.

⁹ See N.Y. CONST. of 1894, art. V, §§ 1, 5. The speaker of the Assembly was also a member of the Land Office. *Id.* art. V, § 5.

¹⁰ Jeffrey M. Stonecash, Mark D. Brewer, R. Eric Petersen & McGee Young, *Politics, Alfred Smith, and Increasing the Power of the New York Governor's Office*, 85 N.Y. HIST. 149, 153 (2004).

¹¹ BUREAU OF MUN. RSCH., THE CONSTITUTION AND GOVERNMENT OF THE STATE OF NEW YORK: AN APPRAISAL 4 (1915). See *id.* at 34 chart 1, for the methods of appointing the heads of various offices, commissions, and boards in New York during the early twentieth century. There were sixteen different methods of appointing administrative officers. See THOMAS SCHICK, THE NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1915 AND THE MODERN STATE GOVERNOR 15 (1978).

¹² See BUREAU OF MUN. RSCH., *supra* note 11, at 4.

¹³ John A. Fairlie, *The State Governor. II.*, 10 MICH. L. REV. 458, 459 n.10 (1912).

By the time of New York's 1915 Constitutional Convention, "New York's administrative structure had become a tangled maze of departments, bureaus, and commissions—152 in all. Although the governor had the constitutional responsibility of [serving as the] chief executive, he was, in reality, merely one participant in a continual struggle for executive leadership."¹⁴

In reviewing the executive branch at the 1915 Constitutional Convention, the Convention's Committee on Governor and Other State Officers "found that there [we]re 152 of those divisions, commissions and boards, in most cases totally uncorrelated, and it seems at least to the majority of the Committee unscientific in arrangement."¹⁵

Former President William Howard Taft, speaking to the delegates at the 1915 Convention, said of the New York State executive branch:

The study of the State government, like this of New York, with 150 different commissions spread all over the State, only arouses in me the same feeling that I have with respect to our methods of conducting our courts: profound admiration for the political adaptability of the people to make a machine work that nobody who had any real business sense would think would work under any other conditions.¹⁶

In short, government in New York State was "thoroughly fractionalized."¹⁷

Into this maze of bureaucratic fractionalization came the Progressive Movement.¹⁸ One of the aims of the Progressive Movement was to increase "effectiveness and efficiency in government."¹⁹ This involved a combination of holding elections for a smaller number of offices, consolidating bureaucracy, and creating an executive budget and additional authority for the governor.²⁰ The

¹⁴ Ronald C. Moe, *The 1915 Constitutional Convention*, 28 PROC. ACAD. POL. SCI. 192, 194 (1967).

¹⁵ DOCUMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK: DOCUMENT NO. 11, at 2 (1915) [hereinafter DOCUMENT NO. 11].

¹⁶ *Id.* at 3.

¹⁷ See HERBERT KAUFMAN, POLITICS AND POLICIES IN STATE AND LOCAL GOVERNMENTS 40 (Found. of Mod. Pol. Sci. Ser., Robert A. Dahl ed., 1963).

¹⁸ See Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 496–97 (2017).

¹⁹ See *id.* at 496.

²⁰ See *id.* at 496–97, 498, 508. While not considered progressive, see Norman R. Williams, *Direct Democracy, the Guaranty Clause, and the Politics of the "Political Question" Doctrine: Revisiting Pacific Telephone*, 87 OR. L. REV. 979, 1009 (2008), former President Taft may have said it best: "I would reduce them and then I would put them all under the Governor, or under

Progressive Movement believed that more effective government resulted from greater efficiency in the management of government agencies.²¹

III. THE 1915 NEW YORK STATE CONSTITUTIONAL CONVENTION

At the beginning of the second decade of the twentieth century, the New York State Democratic Party was in firm control of state government.²² The national Republican Party had ruptured in the 1912 presidential election, with the progressives in the party supporting Theodore Roosevelt while the conservatives supported incumbent President Taft.²³ The New York Democrats, in order to perpetuate their advantage, decided to speed up the vote on a new constitutional convention.²⁴ Their attempt backfired. The referendum on whether to hold a convention barely passed in April 1914, and by the time of the vote for delegates at the general election in November 1914, the state Republicans were united.²⁵ The Democrats, however, found themselves divided in the wake of the intra-party repercussions stemming from the impeachment and removal of Democratic Governor William Sulzer in the fall of 1913.²⁶ The Republicans overwhelmingly won the battle for delegates at the 1915 Convention, winning 116 of the 168 seats to the Convention.²⁷

While it was an extremely conservative group of Republican delegates,²⁸ it was also an extremely distinguished and elite group,

somebody that should have the power. The only way you can run a government efficiently and economically is to have the responsibility on some one as to the total expenditure," DOCUMENT NO. 11, *supra* note 15, at 4.

²¹ See Seifter, *supra* note 18, at 496–97. See generally BENJAMIN PARKE DE WITT, THE PROGRESSIVE MOVEMENT: A NON-PARTISAN, COMPREHENSIVE DISCUSSION OF CURRENT TENDENCIES IN AMERICAN POLITICS 319–40 (Citizen's Libr. of Econ., Pol. & Socio. Ser., Richard T. Ely ed., 1915).

²² SCHICK, *supra* note 11, at 36.

²³ See *id.*; LEWIS L. GOULD, FOUR HATS IN THE RING: THE 1912 ELECTION AND THE BIRTH OF MODERN AMERICAN POLITICS 45–46 (2008).

²⁴ See Peter J. Galie & Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285, 1298 (2001).

²⁵ See SCHICK, *supra* note 11, at 36, 38.

²⁶ See *id.* at 37; Matthew L. Lifflander, *The Impeachment of Governor Sulzer*, N.Y. ARCHIVES, Spring 2010, at 18, 18, 20. See generally 1 PROCEEDINGS OF THE COURT FOR THE TRIAL OF IMPEACHMENTS: THE PEOPLE OF THE STATE OF NEW YORK BY THE ASSEMBLY THEREOF AGAINST WILLIAM SULZER, AS GOVERNOR (1913); 2 PROCEEDINGS OF THE COURT FOR THE TRIAL OF IMPEACHMENTS: THE PEOPLE OF THE STATE OF NEW YORK BY THE ASSEMBLY THEREOF AGAINST WILLIAM SULZER, AS GOVERNOR (1913).

²⁷ See SCHICK, *supra* note 11, at 38; see also *Republicans Will Aid Constitution*, N.Y. TRIB., Nov. 5, 1914, at 5; *Republicans to Rule Constitutional Body: Claim Election of All Delegates at Large as well as Majority of District Members.*, KNICKERBOCKER PRESS, Nov. 5, 1914, at 1.

²⁸ See SCHICK, *supra* note 11, at 41.

with many of the delegates committed to good government principles.²⁹ The Republican Party in New York had been at the forefront of the progressive reorganization movement.³⁰ Republican Governor Charles Evans Hughes had advocated for reorganization unsuccessfully throughout the first decade of the twentieth century, and since that effort, both the Republicans and progressives within their ranks had called for the reorganization of the New York executive branch in their platforms.³¹

On most issues, the 1915 Convention was conducted with minimum partisanship, and executive reorganization was one of those issues.³² One of the proponents of executive reorganization on the Democratic side was the minority leader of the state Assembly, Alfred E. Smith.³³ Smith, who, prior to the 1915 Convention, was largely thought of as a Tammany loyalist, was the breakout Democratic star of the Convention.³⁴

“If Smith went to college in the Assembly, he did his postgraduate work at the constitutional convention of 1915.”³⁵ Elihu Root, who led the Republicans as the president of the Convention, called Smith “the member of this Convention whose attractive personality has so impressed itself on every member.”³⁶ “He was “the only man at the

²⁹ President of the Convention, Elihu Root said, “it is our inestimable privilege to do something here in moving our beloved State along the pathway towards better and purer government, a more pervasive morality and a more effective exercise of the powers of government which preserve the liberty of the people.” Elihu Root, Address of President Elihu Root in the Committee of the Whole on the Short Ballot Amendment (Aug. 30, 1915), in DOCUMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK: DOCUMENT NO. 50, at 18 (1915) [hereinafter Root Address].

³⁰ See RONALD C. MOE, CONG. RSCH. SERV., RL31446, REORGANIZING THE EXECUTIVE BRANCH IN THE 20TH CENTURY: LANDMARK COMMISSIONS 20 (2002).

³¹ See Stonecash et al., *supra* note 10, at 159–61; Root Address, *supra* note 29, at 3; see, e.g., DOCUMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK: DOCUMENT NO. 40, at 3–4 (1915) [hereinafter DOCUMENT NO. 40].

³² See Frank C. Moore, *Constitutional Conventions in New York State*, 38 N.Y. HIST. 3, 14 (1957).

³³ Moe, *supra* note 14, at 195; see David R. Colburn, *Governor Alfred E. Smith and the Red Scare, 1919-20*, 88 POL. SCI. Q. 423, 433 (1973).

³⁴ See DAVID M. ELLIS, JAMES A. FROST, HAROLD C. SYRETT & HARRY J. CARMAN, A HISTORY OF NEW YORK STATE 395–96 (rev. ed. 1967). For further information on the history and developments of Tammany Hall, see TERRY GOLWAY, MACHINE MADE: TAMMANY HALL AND THE CREATION OF MODERN AMERICAN POLITICS (2014).

³⁵ ELLIS ET AL., *supra* note 34, at 395.

³⁶ Root Address, *supra* note 29, at 9.

Convention who knew what he was talking about.”³⁷ He “emerged a political star.”³⁸

With a broad coalition at the Convention in support of executive reorganization,³⁹ the Convention proposed a drastic makeover of the executive branch. There were to be seventeen agencies included in a new Article VI of the Constitution.⁴⁰ The attorney general and the comptroller would head individual departments and would remain elected.⁴¹ There would be no elections for the secretary of state, the treasurer, or the state engineer and surveyor.⁴² The Department of Education would be under the control of the Board of Regents and would be independent of the governor.⁴³ The other agencies were largely deemed “executive in nature” and were to be appointed by the governor with “the advice and consent of the Senate.”⁴⁴ The agencies subject to gubernatorial nomination accompanied by Senate confirmation would be Accounts, Treasury, Taxation, State, Public Works, Health, Agriculture, Charities and Corrections, Banking, Insurance, Labor and Industry, Public Utilities, Conservation, and Civil Service.⁴⁵ The Constitution would also “g[i]ve the Governor the power to appoint and remove in his discretion the heads of all State departments whose appointment or election was not otherwise provided for in the Constitution.”⁴⁶ No new departments could be created, but the Legislature could assign new powers and functions to departments, officers, and boards established under the Constitution.⁴⁷

While there was significant support for the reorganization provisions in the proposed Constitution, there was less support for

³⁷ NORMAN HAPGOOD & HENRY MOSKOWITZ, *UP FROM THE CITY STREETS: ALFRED E. SMITH* 102 (1927) (quoting former New York County District Attorney Delancey Nicoll (*see* Book Note, 17 N.C. L. REV. 195, 199 (1939) (reviewing ROBERT N. WILKIN, *THE SPIRIT OF THE LEGAL PROFESSION* (1938)))).

³⁸ ROBERT A. SLAYTON, *EMPIRE STATESMAN: THE RISE AND REDEMPTION OF AL SMITH* 111 (2001).

³⁹ *See* Moe, *supra* note 14, at 193.

⁴⁰ *See* DOCUMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK: DOCUMENT NO. 52, art. VI, § 1, at 22 (1915) [hereinafter DOCUMENT NO. 52].

⁴¹ *See id.* art. VI, §§ 2, 3, at 22.

⁴² *See* DOCUMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK: DOCUMENT NO. 54, at 5 (1915). The state engineer and surveyor position was to be eliminated and its function transferred to the Public Works Department, whose head would not be elected. *See id.*

⁴³ *See* DOCUMENT NO. 40, *supra* note 31, at 6.

⁴⁴ *See id.* at 7.

⁴⁵ *See* DOCUMENT NO. 52, *supra* note 40, art. VI, §§ 3–13, 15–17, at 22–24.

⁴⁶ N.Y. STATE CONST. CONVENTION COMM., *PROBLEMS RELATING TO EXECUTIVE ADMINISTRATION AND POWER* 162 (1938) (emphasis omitted).

⁴⁷ *See id.* at 145–46.

other provisions, especially the reapportionment provision, which left New York City with limited electoral representation.⁴⁸ The drafters of the proposed Constitution made the decision to submit the Constitution as one unified document, and the unified proposal was broadly rejected by the electorate.⁴⁹

IV. AL SMITH'S ASCENSION

One proponent of executive reorganization who did not give up hope on its future passage was Al Smith. For the rest of his public life, Smith championed the cause of executive reorganization.⁵⁰ He had the opportunity to bring about executive reorganization when he was elected governor of New York State in 1918.⁵¹ On the day of his inauguration, January 1, 1919, Smith called for the immediate creation of a Reconstruction Commission, which would deal with pressing problems affecting New York State after World War I.⁵² Three weeks later, Governor Smith appointed the thirty-six-member blue ribbon, non-partisan Reconstruction Commission.⁵³

The Reconstruction Commission, through its committees, issued a series of reports.⁵⁴ Its Retrenchment Committee, with Robert Moses

⁴⁸ See Moe, *supra* note 14, at 193; *Constitution Snowed Under by 400,000: Immense Adverse Vote Rolled Up all over State. Tammany Aids Defeat in City: New York City Alone Gives 250,000 Majority Against Work of Convention.*, N.Y. TRIB., Nov. 3, 1915, at 1 [hereinafter *Constitution Snowed Under by 400,000*].

⁴⁹ See *Defeat of Constitution: New York City Rolls Up 245,000 Majority Against It. Bitterly Fought Up-State: Non-Partisan Vote in Republican Counties Against Further Centralization of Power. Amendments Failed Also: Result of Canal Proposal Still in Doubt—Democrats May Frame Next Constitution.*, N.Y. TIMES, Nov. 3, 1915, at 1 [hereinafter *Defeat of Constitution*]. New York City residents overwhelmingly objected to the reapportionment model, and upstate voters were not particularly supportive of the added powers to be given to the governor. See *Constitution Snowed Under by 400,000*, *supra* note 48; *Defeat of Constitution*, *supra*. At the same election, New York voters also voted down women's suffrage. See *New York Turns Down Suffrage: Amendment Beaten by 295,668. Revised Constitution Defeated by 250,000. Fourteen Cities Elect Republican Mayors.*, BOST. DAILY GLOBE, Nov. 3, 1915, at 4.

⁵⁰ See Stonecash et al., *supra* note 10, at 163–78.

⁵¹ See *id.* at 164, 165–66.

⁵² See *Governor Smith Takes Office Amid Crowds' Acclaim: Brief, Impressive Ceremony in the Assembly Chamber Follows Spectacular Parade. Welcomed by Whitman: New Governor, in His Inaugural Message, Stresses Reconstruction Problems. Will Appoint Commission: Favors Abolishing State Police and Reforming Service Boards—For City Ownership.*, N.Y. TIMES, Jan. 2, 1919, at 1; PUBLIC PAPERS OF ALFRED E. SMITH, GOVERNOR: 1919, at 29–31 (1920) [hereinafter 1919 PUBLIC PAPERS OF GOVERNOR SMITH].

⁵³ See 1919 PUBLIC PAPERS OF GOVERNOR SMITH, *supra* note 52, at 48–51.

⁵⁴ See, e.g., COMM. ON DEMOBILIZATION, N.Y. STATE RECONSTRUCTION COMM'N, PRELIMINARY REPORT OF RECONSTRUCTION COMMISSION ON DEMOBILIZATION, WAR DEPARTMENT REGULATIONS AND UNEMPLOYMENT IN NEW YORK CITY (1919); N.Y. STATE RECONSTRUCTION COMM'N, REPORT OF GOVERNOR SMITH'S RECONSTRUCTION COMMISSION ON TERMINAL MARKETS IN NEW YORK CITY (1919); COMM. ON RETRENCHMENT, N.Y. STATE RECONSTRUCTION COMM'N, REPORT OF RECONSTRUCTION COMMISSION TO GOVERNOR ALFRED E. SMITH ON

serving as its chief of staff, issued its report on “Reorganization in the State Government” on October 10, 1919.⁵⁵ The report concluded that the governor should be held responsible for the administration of the executive branch.⁵⁶ The executive branch—which by then consisted of 187 separate agencies—should be reorganized “into a few great departments” based on major functions.⁵⁷ The governor should “have the power to choose the heads of departments who are to constitute his Cabinet and who are to be held strictly accountable to him through his power to appoint and remove.”⁵⁸ While there were some objections to the requirement of Senate confirmation for gubernatorial nominees, “[the Committee was] of the opinion that this check has on the whole worked well and should be retained.”⁵⁹

The Committee recommended the creation of nineteen individual departments in the state Constitution, and that

[t]he heads of all the departments and the members of all boards, commissions and councils mentioned in this article shall, unless otherwise provided in this Constitution, be appointed by the Governor by and with the advice and consent of the Senate and may be removed by him in his discretion.⁶⁰

Constitutional amendments to achieve the executive reorganization recommended by the Retrenchment Committee were introduced in the state Legislature in 1920.⁶¹ New York’s Constitution requires that constitutional amendments be passed by both houses of two separate elected Legislatures before going to the people for approval.⁶² Two of the executive reorganization resolutions achieved first legislative passage in 1920.⁶³

One resolution established eighteen specifically named departments and provided:

RETRENCHMENT AND REORGANIZATION IN THE STATE GOVERNMENT (1919) [hereinafter REPORT ON RETRENCHMENT AND REORGANIZATION]; HOUS. COMM., N.Y. STATE RECONSTRUCTION COMM’N, HOUSING CONDITIONS: REPORT OF THE HOUSING COMMITTEE OF THE RECONSTRUCTION COMMISSION OF THE STATE OF NEW YORK (1920).

⁵⁵ REPORT ON RETRENCHMENT AND REORGANIZATION, *supra* note 54, at vii.

⁵⁶ *Id.* at 4.

⁵⁷ *Id.* at 4, 6.

⁵⁸ *Id.* at 11.

⁵⁹ *Id.*

⁶⁰ *Id.* art. V, §§ 2, 5, at 396–97, 398.

⁶¹ Stonecash et al., *supra* note 10, at 165–66.

⁶² N.Y. CONST. art. XIX, § 1.

⁶³ See F.C. Crawford, *New York State Reorganization*, 20 AM. POL. SCI. REV. 76, 78 (1926).

Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards, commissions and councils mentioned in this article shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law.⁶⁴

The other resolution passed by the Legislature provided for twenty-one specifically named departments.⁶⁵ It also contained the same provision as the other passed resolution giving the governor appointment authority—with confirmation by the Senate—over the department heads and members of boards,⁶⁶ as mentioned in Articles V and VIII of New York's 1894 Constitution.⁶⁷

Governor Smith, however, lost his effort at reelection in 1920 when he was defeated by Republican Nathan Miller.⁶⁸ Governor Miller had no interest in executive reorganization, and the Legislature did not give second passage to either of the resolutions passed in 1920.⁶⁹

V. GOVERNOR SMITH'S RETURN TO OFFICE IN 1923

The gubernatorial election in 1922 featured a rematch between Nathan Miller and Al Smith.⁷⁰ This time, Smith proved victorious.⁷¹ Additionally, the Democrats—by one vote—became the majority party in the state Senate.⁷² This was the first time since 1914 that the Democrats controlled any house of the state Legislature.⁷³ Executive reorganization was back on the table in New York.

⁶⁴ S. Conc. Res. 1699, 1920 Leg., 143d Sess., sec. 1, §§ 2, 4, 1920 N.Y. Laws app. at 2512, 2513, 2514.

⁶⁵ S. Conc. Res. 1698, 1920 Leg., 143d Sess., sec. 1, § 2, 1920 N.Y. Laws app. at 2515, 2516. The three additional departments included Finance, Correction, and Charities. *Compare id.*, with S. Conc. Res. 1699, sec. 1, § 2, 1920 N.Y. Laws app. at 2513. Concurrent Resolution 1699 had combined Taxation and Finance into one agency and Mental Hygiene, Charities, and Correction into one agency. S. Conc. Res. 1699, sec. 1, § 2, 1920 N.Y. Laws app. at 2513.

⁶⁶ See S. Conc. Res. 1698, sec. 1, § 4, 1920 N.Y. Laws app. at 2516–17.

⁶⁷ See N.Y. CONST. of 1894, art. V, §§ 3, 4; *id.* art. VIII, § 12.

⁶⁸ Stonecash et al., *supra* note 10, at 166.

⁶⁹ See *id.*; Crawford, *supra* note 63, at 78.

⁷⁰ Stonecash et al., *supra* note 10, at 166.

⁷¹ *Id.*

⁷² See *Republicans Retain Control of Congress by a Narrow Majority; Lose State Senate by One Vote*, N.Y. TRIB., Nov. 9, 1922, at 1 [hereinafter *Republicans Lose State Senate by One Vote*]; HAPGOOD & MOSKOWITZ, *supra* note 37, at 168.

⁷³ See *Wilson-Sulzer Sweep New York: Tammany Will Have Complete Control of Government and Legislature—Third Party Remains Third. Mr. Wilson's Plurality 200,000: Rest of State Ticket Elected—Legislature More Democratic than It Was Two Years Ago—Majority of State's Delegation in Congress Remains Democratic—Up-State Cities Lost.*, N.Y. TRIB., Nov. 6, 1912, at 1; *Next Assembly Under Control of Republicans: Returns Indicate They Will Have 92 of 150*

Governor Smith, in his annual messages to the Legislature, called for constitutional amendments to reduce the number of statewide elected officials, establish an executive budget, and reorganize government by “the reduction of state departments to nineteen, each representing a major administrative activity[,] and . . . [by the] consolidation of administration and inspection of institutions.”⁷⁴ Soon after Smith’s message, the Democratic leaders in the Assembly and Senate introduced constitutional resolutions to reduce the number of elected statewide officers, to create an executive budget, and to reorganize the executive branch.⁷⁵ All three measures favored by Governor Smith were passed by the Senate quickly in February of 1923.⁷⁶ The measures then went to the Republican-controlled Assembly, where they languished.⁷⁷

Members on Party Division., EVENING WORLD, Nov. 5, 1913, at 3; *Whitman Sweeps State; Wadsworth In; Moose Vote Vanishes: Republicans Elect Practically Whole Ticket and Constitutional Delegates and Win Legislature in Sweeping Victory. Sulzer’s 85,000 Aids His Revenge: Tribunes Expose of Sullivan Scandal and Records of Three Democratic Governors Help in Overthrow of Tammany Rule.*, N.Y. TRIB., Nov. 4, 1914, at 1; *Almost a Clean Sweep for the Tammany Tickets; Regain Aldermen, 53 to 20: Woman Suffrage Loses in Three Biggest States—Republicans Retain Hold of State Legislature and Gain a Congressman. Swann and Smith Elected; Cropsey Wins Brooklyn*, EVENING WORLD, Nov. 3, 1915, at 1; *N.Y. Legislature Still Republican: Two to One Senate Lead Unchanged—Assembly Majority Fifty*, N.Y. TRIB., Nov. 8, 1916, at 4; *Assembly Held by Republicans with 93 Members: Democrats Elect Forty-Eight and Socialists Seven—All from Greater City.*, EVENING WORLD, Nov. 7, 1917 at 6; *Next Legislature Republican 2 to 1*, EVENING WORLD, Nov. 7, 1918, at 5; *Republicans Keep Hold on Assembly, Lone Woman Member Chosen Up State*, EVENING WORLD, Nov. 5, 1919, at 2; *Republicans Gain Nine in State Senate, Now Have Majority of 14; Democratic Membership Is Reduced from 21 to 11; Socialists Name One—Also Jump in Assembly: Republicans Have 117 out of 150 in the Lower House, Returns Indicate*, N.Y. TRIB., Nov. 4, 1920, at 6; *Republicans to Hold Big Lead in the Assembly: Elect at Least 82 of the 86 Members Outside of New York City; Gain of Two Is Made by Democrats*, N.Y. TRIB., Nov. 9, 1921, at 4; *Republicans Lose State Senate by One Vote*, *supra* note 72.

⁷⁴ PUBLIC PAPERS OF ALFRED E. SMITH, GOVERNOR: 1923, at 51 (1924). By 1923, there were 187 boards, offices, and commissions. Editorial, *Cut Out Politics Is Smith Program: Governor Declares State Cannot Have Efficient Rule Under the Present System. Wants Fewer Departments: Would Consolidate 187 Separate Boards, Offices and Commission into 19 Bodies. Calls for a Real Budget: Says the Executive Should Have Power to Reduce Items in Appropriation Bills.*, N.Y. TIMES, Feb. 11, 1923, at E1.

⁷⁵ See *Seek 4-Year Term for State Officers: Smith’s Measures Introduced, Proposing an Executive Budget and Short Ballot. Also Fewer Departments: Measures Are Constitutional Amendments and Immediate Adoption Is Urged.*, N.Y. TIMES, Jan. 11, 1923, at 23 [hereinafter *Smith’s Measures Introduced*].

⁷⁶ See *Senate Passes Smith Bill. It Would Amend Constitution—Rejection in Assembly Expected.*, N.Y. TIMES, Feb. 20, 1923, at 21. The reorganization bill was introduced by Senator James J. Walker, see *Smith’s Measures Introduced*, *supra* note 75; James F. Connors, *Senator Walker. A Tribute to His Skill as Leader of the State Senate.*, N.Y. TIMES, Mar. 26, 1923, at 12, and would become Concurrent Resolution 53, see generally S. Conc. Res. 53, 1923 Leg., 146th Sess., 1923 N.Y. Laws app. at 1758.

⁷⁷ See, e.g., *Republicans Defeat First Smith Bills: Assembly Accepts Adverse Report on Budget and Four-Year Term Measures.*, N.Y. TIMES, Mar. 22, 1923, at 4; *Say Smith Bills Will ‘Stay*

Governor Smith could not get all he wanted from the Assembly. Assembly leadership totally dismissed the increased terms for elected officials and the executive budget.⁷⁸ The state Assembly leadership, however, did not wholly reject the reorganization proposals but rather placed a series of conditions on Smith's overall reorganization proposal.⁷⁹ Consequently, Smith reached a compromise with Assembly leadership. The attorney general and the comptroller would continue to be elected.⁸⁰ The head of the Department of Education would be appointed by the Board of Regents.⁸¹ The Department of Farms and Markets (now the Department of Agriculture and Markets⁸²) would remain under the control of the Legislature.⁸³ A provision would be made in the Constitution for twenty specific departments; there would be a separate Department of Architecture.⁸⁴ While additional departments could not be added beyond the twenty-department limit, the Legislature could create "temporary commissions for special purposes."⁸⁵

Based on this compromise, eventually the Assembly unanimously passed the reorganization proposal.⁸⁶ At the same time, the Assembly leadership vowed that this reorganization piece was the sole part of the governor's constitutional plan that they would pass.⁸⁷

Dead: Republican Assembly Leaders Scoff at Likelihood of Conference Resurrection., N.Y. TIMES, Mar. 30, 1923, at 2 [hereinafter *Republican Leaders Say Smith Bills Will 'Stay Dead'*].

⁷⁸ See *Republican Leaders Say Smith Bills Will 'Stay Dead'*, *supra* note 77.

⁷⁹ See *Smith Is Victor at First Meeting with Republicans: Assembly Leaders Agree to Short Ballot and 20 Consolidated Departments. Concessions on Both Sides: Governor Retains the Power of Naming Heads with the Consent of Senate. Whole Program May Win: Two Reconstruction Amendments Already Killed, Will Be Taken Up Next Week.*, N.Y. TIMES, Mar. 29, 1923, at 1 [hereinafter *Smith Is Victor at First Meeting with Republicans*]; *Compromise Ends Deadlock on Smith Short Ballot and Office Consolidation Plan*, KNICKERBOCKER PRESS, Mar. 29, 1923, at 1 [hereinafter *Compromise Ends Deadlock*].

⁸⁰ *Smith Is Victor at First Meeting with Republicans*, *supra* note 79.

⁸¹ *Id.*

⁸² See N.Y. AGRIC. & MKTS. LAW § 550 (2015).

⁸³ See *Compromise Ends Deadlock*, *supra* note 79.

⁸⁴ *Smith Is Victor at First Meeting with Republicans*, *supra* note 79; *Compromise Ends Deadlock*, *supra* note 79; *Smith Makes Peace with Republicans: Agrees in His Conference with Assembly Leaders on Several Concessions in Reconstruction Bills—Politics Barred in School System: State Commissioner May Be Selected Hereafter by the Board of Regents*, N.Y. TRIB., Mar. 29, 1923, at 1.

⁸⁵ See *Compromise Ends Deadlock*, *supra* note 79.

⁸⁶ *Governor Will Hold Lawmakers to May 4 to Insure Program: Believes Public Opinion During Extra Week Will Bring Assembly to Terms. Both Houses Speeding Up: Republicans Adopt Smith's Plan for Reorganization of State Departments. Say "That's All He Gets": Senate Passes His Water Power Bill—Assembly Puts Through Measures Sure to Die.*, N.Y. TIMES, Apr. 18, 1923, at 1.

⁸⁷ *Id.* One Republican leader said, "The Governor and the Democratic Senate can take it or leave it as they see fit—it's none of our funeral." *Id.*

The Senate, in 1923, with one Republican voting in the negative, similarly voted in favor of the Assembly's compromise language.⁸⁸

As passed in 1923, the resolution contained the following language:

Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards and commissions mentioned in this article, excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law.⁸⁹

After Smith's reelection as governor in 1924, the executive reorganization again came before the Legislature for its second passage.⁹⁰ By that time, both houses of the Legislature were controlled by Republicans.⁹¹ Since nearly all the Republicans had voted for the first resolution in 1923, both houses easily passed the reorganization proposal.⁹² There was no debate in either chamber, and the resolution even passed the Assembly unanimously.⁹³

⁸⁸ See *Senate Passes 2 Bills on Smith's Program: Short Ballot Proposal and the Department Consolidation Measure Are Adopted.*, N.Y. TIMES, May 1, 1923, at 23.

⁸⁹ S. Conc. Res. 53, 1923 Leg., 146th Sess., sec. 1, § 4, 1923 N.Y. Laws app. at 1758, 1760.

⁹⁰ See PUBLIC PAPERS OF ALFRED E. SMITH, FORTY-SEVENTH GOVERNOR OF THE STATE OF NEW YORK: THIRD TERM 1925, at 72-73 (1927).

⁹¹ *Legislature Again Solidly Republican: Party Recovers Control of the Senate, with a Probable Majority of Four. Stronger in the Assembly: J. A. McGinnies of Chautauqua Is Slated for Speaker—One Woman Elected.*, N.Y. TIMES, Nov. 5, 1924, at 1.

⁹² See Stonecash et al., *supra* note 10, at 169 tbl.3.

⁹³ *Republicans Waver in the Tax Cut Fight; Slash Highway Fund: Smith Message Asks Recall of Cattle Bill—Assembly Agrees, Senate Refuses. Appeals Deluge Members: Voters Speak and Revolt Talk Is Heard—Nicoll Presents Income Levy Measure. Short Ballot Bill Won: Governor's Measure Reducing Elective Officers and Merging Bureaus Through Both Houses.*, N.Y. TIMES, Mar. 17, 1925, at 1; *Knight and Fearon in Clash on Fair: Latter Opposes Measure Putting State Commission Under Bureau Control. Dry Enforcement Bill In: Assembly Committee Reports Jenks's Enforcement Proposal, Which the Senate Probably Will Kill.*, N.Y. TIMES, Feb. 25, 1925, at 2. See generally S. Conc. Res. 53, sec. 1, § 6, 1923 N.Y. Laws app. at 1760.

In the 1925 referendum, the reorganization resolution—occasionally referred to as the short ballot referendum⁹⁴—passed easily with approximately 57.5% of the vote.⁹⁵

VI. THE HUGHES REORGANIZATION COMMISSION

Passage of the reorganization amendment still left open the task of changing the laws to fit within the new twenty-department structure. The Republican legislative leaders, partially to avoid Smith forming his own commission, established a special commission of their own to plan for the reorganization.⁹⁶ The Commission consisted of fifty-seven members, with former Governor and United States Supreme Court Justice Charles Evans Hughes selected as the chair of the body.⁹⁷

The Commission—which came to be called the Hughes Commission—quickly issued its report so that the Legislature could act on it in the 1926 session.⁹⁸ Besides the immediate issue of reorganization, the Commission recommended the establishment of

⁹⁴ See, e.g., *Bond Amendment Believed Safe, but Majority Is Falling: Returns Still Missing from 629 of a Total of 4,711 Districts Outside City. Delay Causes Discussion: But Figures Yet to Come, It Is Believed, Could Not Defeat Proposal. Other Majorities Big: Grade Crossings 204,755 in Lead; Short Ballot, 314,879—Judiciary, 403,927.*, N.Y. TIMES, Nov. 6, 1925, at 1; *Talk of Smith for Senate: Democrats Want Him to Put Reforms into Effect First. Then to Fight Wadsworth: Governor Is Silent, but Leaders Feel He Looms Bigger as a National Figure. Republicans See No Hope: Gloomy over Defeat, They Look in Vain for Means to Rebuild Crippled Machine.*, N.Y. TIMES, Nov. 5, 1925, at 1.

⁹⁵ See FLORENCE E.S. KNAPP, MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK 852–53 (1926).

⁹⁶ See *New Fight on Smith in Reshaping State: Republicans Pick Machold for Head of Board to Draw Up Reorganization Bills. A Foe to Governor's Plan: Smith's Friends Fear Politics May Delay Action at Session Despite Amendment Vote.*, N.Y. TIMES, Nov. 10, 1925, at 3; *Citizens Named to Help State Reorganization: Non-Partisan Commission Invited by Legislative Leaders to Assist in Plans for Bureau Consolidations—Root and Hughes Members: Group to Work on Plan Now, Assuming Amendment Is Adopted in November*, N.Y. HERALD TRIB., June 21, 1925, at 2.

⁹⁷ *Hughes Is Elected Reform Head; Asks the Aid of All: Wants No Partisan Taint to Enter into Reorganization Work. Placed in Full Control: Sees a Difficult Task Ahead—Grateful for Expressions of Confidence. Nominated by Machold: Republican Legislative Leaders Pledge Good Faith in Carrying Out Mandate.*, N.Y. TIMES, Nov. 20, 1925, at 1; see *Hughes Is Installed as Associate Justice of the United States Supreme Court, Which Opened October Term Today.*, PALESTINE DAILY HERALD, Oct. 10, 1910, at 7.

⁹⁸ See *Executive Budget Urged: Hughes Plan Is for 4-Year Term, but Sidesteps Election Year. Would End Water Board, but Opposes Giving to City Full Regulation of Transit System. Smith Reported Pleased: Republican Leaders Praise the Report and Promise to Speed Up Enabling Bill.*, N.Y. TIMES, Mar. 2, 1926, at 1 [hereinafter *Executive Budget Urged*].

an executive budget and four-year terms for statewide elected officers.⁹⁹

As to the reorganization, the Hughes Commission assigned a series of divisions and boards into the various new departments.¹⁰⁰ It recommended that the constitutionally-created Department of Military and Naval Affairs and the Department of Architecture not be utilized.¹⁰¹ Instead, the Department of Military and Naval Affairs should be a division within the Executive Department.¹⁰² Additionally, the Department of Architecture would be better placed within the Department of Public Works.¹⁰³ The Executive Department should be reserved for the staff duties of the governor and, besides the Division of Military and Naval Affairs, it should include the Division of State Police, the Division of the Budget, the Division of Standards and Purchases, and the Division of Inter-Departmental Relations.¹⁰⁴ A principal concern of the Hughes Commission was that the Executive Department might “degenerate into a mere ‘scrap basket’ or repository of miscellaneous functions—a result which would be quite inconsistent with its name and position on the list.”¹⁰⁵

All told, the Hughes Commission recommended that three departments, the Department of Law, the Executive Department, and the Department of Audit and Control, be headed by elected statewide officers.¹⁰⁶ Under the Constitution, four other agencies were not to be subject to the general constitutional requirement that the department head be selected by the governor, confirmed by the Senate, and subject to removal by the governor in a manner determined by law: the Department of Education, the Department of Civil Service, the Department of Agriculture and Markets, and the

⁹⁹ See N.Y. STATE REORGANIZATION COMM'N, REPORT OF THE STATE REORGANIZATION COMMISSION, Leg. 149-72, Reg. Sess., at 8, 12 (1926) [hereinafter HUGHES COMMISSION REPORT]; *Executive Budget Urged*, *supra* note 98.

¹⁰⁰ See HUGHES COMMISSION REPORT, *supra* note 99, at 8, 29–30, 39, 51, 54, 56, 61, 65.

¹⁰¹ See *id.* at 15, 34.

¹⁰² *Id.* at 8, 15.

¹⁰³ See *id.* at 34.

¹⁰⁴ *Id.* at 7–8.

¹⁰⁵ See *id.* at 7. The Commission also recommended that the Constitution be amended to authorize the governor to serve as the head of the Executive Department. *Id.* at 8. This was accomplished by an amendment to the Constitution which passed in 1927. See *Governor's Program Wins: Voters Follow His Lead in Balloting on All the Amendments. Chief Contest on No. 6: City Votes Three to One Against the Term Extender—Also Defeated Up-State. Eight Others Are Carried: Pay Rise Proposal Wins in City by 497,000, Giving It a State Majority of 420,000*, N.Y. TIMES, Nov. 9, 1927, at 1; S. Conc. Res. 1395, 1926 Leg., 149th Sess., sec. 1, § 4, 1926 N.Y. Laws app. at 1603, 1603.

¹⁰⁶ See *id.* at 7–8; see also *supra* text accompanying note 80.

Department of Charities.¹⁰⁷ For all other departments headed by one individual, the Hughes Commission recommended that they be “appointed by the Governor by and with the advice and consent of the Senate,” and should have the same tenure “as that of the Governor who appoints them.”¹⁰⁸

In terms of the boards and commissions that the Commission recommended placing inside departments, the Hughes Commission found no constitutional requirement that these boards or commissions be appointed by the governor with the advice and consent of the Senate.¹⁰⁹ This was in keeping with the language of the 1894 Constitution that required only department heads, boards, and commissions whose positions were specifically mentioned in Article V to be subject to this precondition.¹¹⁰

For instance, the Hughes Commission recommended the placement of the Racing Commission and the Athletic Commission within the Department of State.¹¹¹ Both Commissions had been composed of individuals who were selected by the governor without Senate confirmation.¹¹² Instead, the Hughes Commission suggested that the members on these Commissions should be appointed by the secretary of state, without senatorial involvement, and removable by the secretary of state “at pleasure . . . with the approval of the Governor.”¹¹³ The Commission also recommended that the Board of Port Wardens be placed within the Department of State and that board members “be appointed by the Secretary of State with the approval of the Governor,” without Senate involvement.¹¹⁴ Similarly, the Board of Canvassers would also be placed within the Department of State, and its members would be the attorney general, two members selected by the Senate, and two members selected by the Assembly.¹¹⁵ On this Board, there was to be no gubernatorial involvement whatsoever.¹¹⁶

The Hughes Commission recommended that the members of the Industrial Board, which handled worker’s compensation cases under

¹⁰⁷ See HUGHES COMMISSION REPORT, *supra* note 99, at 5–6.

¹⁰⁸ *See id.*

¹⁰⁹ *See id.* at 29–30, 32–33, 58–59.

¹¹⁰ *See* N.Y. CONST. of 1894, art. V § 3–4.

¹¹¹ HUGHES COMMISSION REPORT, *supra* note 99, at 32.

¹¹² *Id.*

¹¹³ *See id.* at 32–33.

¹¹⁴ *See id.*

¹¹⁵ *Id.* at 29–30.

¹¹⁶ *See id.*

the Department of Labor, continue to be appointed by the governor without Senate confirmation.¹¹⁷

Placed in the Department of Correction was the State Commission of Prisons, which consisted of seven members to continue to be appointed solely by the governor.¹¹⁸ The State Probation Commission was also placed in the Department of Correction.¹¹⁹ It consisted of four members selected by the governor, one member selected by the State Commission of Prisons, one member chosen by the State Board of Charities, and one member chosen by the commissioner of education serving *ex officio*.¹²⁰ Again, this was a commission that was to continue to not have any Senate confirmation requirement.¹²¹

The recommendations of the Hughes Commission were swiftly adopted by the Legislature. The Legislature passed the State Departments Law, which provided for the transfer of power to the newly created departments.¹²² Additional legislation passed in 1926 specified the powers of each individual department.¹²³

The actions taken by the Hughes Commission and the Legislature—with the concurrence of Governor Smith—demonstrate a consistent belief that the requirement of the Constitution, which provided that the governor could only appoint boards, commissions, and department heads pursuant to Senate confirmation, applied solely to positions actually mentioned in Article V of the Constitution. The requirement of gubernatorial nomination and Senate confirmation did not apply to those boards and commissions not mentioned in Article V of the Constitution. As a practical matter, the gubernatorial nomination plus Senate confirmation requirement only applied to heads of departments.

VII. THE 1938 CONSTITUTIONAL CONVENTION

Changes to Article V of the Constitution were not a major subject of New York State's 1938 Constitutional Convention. The Committee on Governor and Other State Officers viewed its duty "in conformity

¹¹⁷ *See id.* at 48.

¹¹⁸ *See id.* at 58–59.

¹¹⁹ *See id.* at 59.

¹²⁰ *Id.* at 58.

¹²¹ *See id.* at 58–59.

¹²² *See* State Departments Law, ch. 343, sec. 1, §§ 3–11, 1926 N.Y. Laws 606, 607–09. The State Department Law was repealed in 1953 by the Act of Apr. 4, 1953, ch. 484, sec. 1, 1953 N.Y. Laws 1235, 1235–36.

¹²³ For example, the powers of the Executive Department were specified by the Act of Apr. 22, 1926, ch. 546, § 30, 1926 N.Y. Laws 951, 952, and the powers of the Department of Taxation and Finance by the Act of Apr. 22, 1926, ch. 553, § 131, 1926 N.Y. Laws 973, 974–75.

with the spirit of the Convention to remove from the Constitution obsolete and unnecessary verbiage.”¹²⁴ Accordingly, “the committee . . . removed from [Articles IV and V] the unnecessary language, clarified existing language and . . . in a couple of instances made changes which are merely ordinary.”¹²⁵ In short, there was no significant attempt to change the substance of Article V.

The Committee’s amendments to Article V focused on very minor goals. The qualifications for attorney general and comptroller were to be amended to be the same as the qualifications for governor and lieutenant governor.¹²⁶ As recommended by the Hughes Commission, the Departments of Architecture and Military and Naval Affairs were to be removed from the list of constitutional departments.¹²⁷ The language dealing with the transition time needed for the 1925 amendments to take effect was to be excised from Article V, Section 3.¹²⁸ As to Article V, Section 4, the Committee recommended that the language in the sentence on nominations by the governor—with Senate confirmation—be changed so that the sentence would read:

Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards and commissions . . . , excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law.¹²⁹

¹²⁴ 3 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 2329–30 (1938) [hereinafter REVISED RECORD OF THE 1938 CONSTITUTIONAL CONVENTION]. State Senator Benjamin Feinberg was the chair of the Committee on Governor and Other State Officers. *Convention Seats to Fearon, Crane: Among Winners of Six Disputed Republican Seats in Unofficial Count—Feinberg Gets High Vote: Senator Tops All but Corsi and Moffat, Who Had Aid of the Labor Party*, N.Y. TIMES, Dec. 2, 1937, at 14; *Selections to Standing Committees of the Albany Convention*, N.Y. TIMES, Apr. 19, 1938, at 2.

¹²⁵ REVISED RECORD OF THE 1938 CONSTITUTIONAL CONVENTION, *supra* note 124, at 2329–30.

¹²⁶ *Id.* at 2330; *see* DOCUMENT NO. 16: THE CONSTITUTION OF THE STATE OF NEW YORK, AS REVISED, WITH AMENDMENTS PASSED BY THE CONSTITUTIONAL CONVENTION, WITH MARGINAL NOTES INDICATING SOURCE AND CHANGES art. V, § 1, at 61 (1938) [hereinafter AMENDMENTS PASSED BY THE 1938 CONSTITUTIONAL CONVENTION].

¹²⁷ REVISED RECORD OF THE 1938 CONSTITUTIONAL CONVENTION, *supra* note 124, at 2330; *see* AMENDMENTS PASSED BY THE 1938 CONSTITUTIONAL CONVENTION, *supra* note 126, art. V, § 2, at 61; *supra* text accompanying notes 101–102, 105.

¹²⁸ *See* AMENDMENTS PASSED BY THE 1938 CONSTITUTIONAL CONVENTION, *supra* note 126, art. V, § 3, at 62.

¹²⁹ *Id.* art. V, § 4, at 62; *see* REVISED RECORD OF THE 1938 CONSTITUTIONAL CONVENTION, *supra* note 124, at 2367–68.

The words “mentioned in this article” were to be omitted from the sentence.¹³⁰

The debate over the amendments to Article V was muted.¹³¹ Much of the concern voiced at the convention involved the possibility of new departments being added to the Constitution.¹³² Delegates suggested a Department of Real Estate and Mortgages¹³³ and a Youth Services Department.¹³⁴

Regarding the proposed language of Article V, Section 4, Delegate Feinberg said, “There was nothing done to Section 4 except a couple of words were struck out as being unnecessary. Are there any questions?”¹³⁵ That was the sole mention of the change in Section 4.¹³⁶

The Convention voted overwhelmingly in favor of all the changes recommended to Article V.¹³⁷ The amendments to Article V were approved by the electorate at the constitutional referendum.¹³⁸

The 1938 amendment to Article V, Section 4 established the basis for future questions about the application of the gubernatorial nomination plus Senate confirmation requirement. Was it still only applicable to the boards, commissions, and departments mentioned in Article V, which apparently was the intent of the authors of the amendments at the 1938 Convention? Or was it now, as literally written, a universal requirement applicable not only to heads of departments, but also to the members of all boards and commissions?

VIII. THE ROCKEFELLER REVISIONS

In the years after the 1938 Convention, the list of constitutional departments was expanded to include the Department of Commerce

¹³⁰ See AMENDMENTS PASSED BY THE 1938 CONSTITUTIONAL CONVENTION, *supra* note 126, art. V, § 4, at 62.

¹³¹ See generally REVISED RECORD OF THE 1938 CONSTITUTIONAL CONVENTION, *supra* note 124, at 2329–76.

¹³² See *id.* at 2331–37, 2340–44.

¹³³ *Id.* at 2332.

¹³⁴ *Id.* at 2344.

¹³⁵ *Id.* at 2367. There was a debate held about a possible amendment to Article V, Section 4, but it concerned the rather tangential topic of selecting referees for state courts. See *id.* at 2368, 2370–74.

¹³⁶ See *id.* at 2367–68.

¹³⁷ See *id.* at 2346, 2355, 2370, 2376; AMENDMENTS PASSED BY THE 1938 CONSTITUTIONAL CONVENTION, *supra* note 126, art. V, at 61–62.

¹³⁸ See MICHAEL F. WALSH, MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK 142–46 (1939).

and the Department of Motor Vehicles.¹³⁹ Thus, by the early 1960s, the number of named departments in the Constitution was returned to its original 1925 level of twenty.¹⁴⁰

Upon taking office in 1959, Governor Nelson Rockefeller made the decision that there was a need to revisit the Smith reorganization scheme of the 1920s.¹⁴¹ Rockefeller's secretary, William Ronan, commissioned a study of the executive branch of state government.¹⁴² Ronan's report agreed with the basis of the Smith rationale that the governor needed to be the responsible party for the performance of the executive branch.¹⁴³

To deal with changing times and needs and the overall expansion of state government since the 1920s,¹⁴⁴ the Ronan Report recommended that "[t]he Constitution should be amended to provide that there should be no more than [twenty] civil departments of State government. The specification of department names and the assignment of functions should be reserved for statutory enactment."¹⁴⁵ The report found that, besides the twenty named departments, "there [we]re 116 other administrative units reporting to or appointed by the Governor".¹⁴⁶ These units included public authorities, interstate compact agencies, interdepartmental committees, autonomous agencies inside the Executive Department, boards and commissions outside other departments, and boards and commissions inside other departments.¹⁴⁷ There were also approximately ninety boards of visitors and other advisory boards and councils that were appointed by the governor.¹⁴⁸

The plan of the Ronan Report was that eighteen of the current twenty departments would be continued.¹⁴⁹ The two departments to be discontinued were the Executive Department, which would be

¹³⁹ PROPOSED REORGANIZATION OF THE EXECUTIVE BRANCH OF NEW YORK STATE GOVERNMENT: REPORT TO GOVERNOR NELSON A. ROCKEFELLER AND GOVERNOR'S MEMORANDUM TO THE LEGISLATURE 8-9 (1959) [hereinafter RONAN REPORT].

¹⁴⁰ See *id.* at 8-9, 13 fig.2; *supra* text accompanying notes 84, 86, 92, 95.

¹⁴¹ See PUBLIC PAPERS OF NELSON A. ROCKEFELLER, FIFTY-THIRD GOVERNOR OF THE STATE OF NEW YORK: 1959, at 31 (1960).

¹⁴² See RONAN REPORT, *supra* note 139, at 1; Robert H. Connery, *Nelson A. Rockefeller as Governor*, 31 PROC. ACAD. POL. SCI 1, 8 (1974).

¹⁴³ See RONAN REPORT, *supra* note 139, at 16; *supra* text accompanying notes 53-56. "The sweeping organizational changes [that were] made in 1927 were based on principles that, for the most part, are still valid today." RONAN REPORT, *supra* note 139, at 16.

¹⁴⁴ See RONAN REPORT, *supra* note 139, at 13 fig.2.

¹⁴⁵ *Id.* at 27.

¹⁴⁶ *Id.* at 9.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 27.

turned into executive offices, and the Department of Civil Service, which would become an executive office.¹⁵⁰ There would also be two added bodies: the Office of General Services and the Department of Municipal Affairs.¹⁵¹

The Ronan Report found that the fears of the Hughes Commission about the Executive Department being a “scrap basket”¹⁵² had proven true. It had become a “catch-all” with eighteen separate units.¹⁵³ It recommended that most of the units in the Executive Department be shipped to other departments.¹⁵⁴

The Ronan Report contained no substantive mention of the Senate’s confirmation of gubernatorial appointees,¹⁵⁵ no mention of Article V, Section 4, and hardly any mention of the Senate at all.¹⁵⁶

While not everything in the Ronan Report was approved by the Legislature,¹⁵⁷ the Legislature did approve many of the constitutional changes recommended in the report. These changes included a cap on the number of departments at twenty, with no specification of the departments included within this cap, and a possible creation of new executive offices of the governor rather than an Executive Department.¹⁵⁸ Since there would be no Executive Department with the creation of executive offices, there would no longer be a need to name the governor the head of the Executive Department.¹⁵⁹ No change was made in the Senate’s confirmation powers over department heads, boards, or commissions.¹⁶⁰ The constitutional resolutions were passed by the Legislature in 1960 and 1961 and

¹⁵⁰ *See id.* at 18–19.

¹⁵¹ *Id.* at 22, 57.

¹⁵² *See supra* text accompanying note 105.

¹⁵³ *Id.* at 18.

¹⁵⁴ *Id.*

¹⁵⁵ *See id.* at 12.

¹⁵⁶ *See generally id.*

¹⁵⁷ *See* Connery, *supra* note 142, at 8; Galie & Bopst, *supra* note 24, at 1310.

¹⁵⁸ *See* S. Conc. Res., 1961 Leg., 184th Sess., sec. 1, §§ 2, 3, 1961 N.Y. Laws app. at 2707, 2707–08.

¹⁵⁹ *See id.* sec. 1, § 4, at 2708. The Legislature never did change the Executive Department into executive offices; it remains the Executive Department. *See* N.Y. EXEC. LAW § 30 (McKinney 1951) (current through 2024); *see also* Roy L. Singer, *The Governor and Executive Reorganization*, in *ESSAYS ON THE NEW YORK CONSTITUTION: FROM THE SEMINAR IN PROBLEMS IN REVISING THE NEW YORK CONSTITUTION* app. at I-1, I-5 (1966).

¹⁶⁰ *See* S. Conc. Res., sec. 1, § 4, 1961 N.Y. Laws app. at 2708.

approved in a referendum held at the general election in 1961.¹⁶¹ Since 1961, there have been no substantive changes in Article V.¹⁶²

There has been little substantive change in the departments. There are currently nineteen departments,¹⁶³ but these nineteen departments are functionally similar to the twenty from 1959.¹⁶⁴ The only changes are that the former Department of Conservation was renamed the Department of Environmental Conservation,¹⁶⁵ the Department of Commerce was renamed the Department of Economic Development,¹⁶⁶ the Department of Public Works became the Department of Transportation, the Department of Social Welfare became the Department of Family Assistance, the Department of Correction was renamed the Department of Correctional Services, and the Departments of Banking and Insurance were consolidated into the Department of Financial Services.¹⁶⁷ Meanwhile, the number of boards and commissions continued to increase. The 2013

¹⁶¹ See *id.* at 2707–08; Charles Grutzner, *Upstate Vote Kills College Bond Plan*, N.Y. TIMES, Nov. 9, 1961, at 1 (“Amendment 2, permitting the reorganization of the executive branch of the executive branch of the government, was approved by 3 to 1.”).

¹⁶² Compare S. Conc. Res., sec. 1, §§ 2–4, 1961 N.Y. Laws app. at 2707–08, with N.Y. CONST. art. V. The 1967 Constitutional Convention recommended removing the cap on the number of civil departments and empowering the governor “to formulate and execute plans for the creation, abolition and consolidation of . . . the departments and agencies,” subject to legislative disapproval within sixty days. See 10 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK: PROPOSITIONS 184–85 (1967). It “gave the Governor very, very extensive powers to create, merge, organize, reorganize, consolidate, suggest and do everything and anything imaginable by any chief executive with regard to the executive branch of government, and in particular his departments and their functions and their duties.” See 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK: RECORD 711 (1967). The proposed 1967 Constitution, which was rejected by the voters, contained the following language:

The legislature may establish, reorganize or abolish the departments and agencies of the state, except as otherwise provided in this constitution. The governor may also exercise such powers by submitting plans for such purposes to the legislature in regular session on or before the first day of February in any year, and every such plan shall become effective as law on the date specified therein unless either the senate or assembly, within sixty calendar days of such submission, by resolution of a majority of the members elected thereto, has disapproved the same.

OFFICIAL TEXT OF PROPOSED CONSTITUTION OF THE STATE OF NEW YORK art. VI, § 6, at 34 (1967).

¹⁶³ See *State Government Structure*, N.Y. STATE: DIV. OF THE BUDGET, <https://www.budget.ny.gov/citizen/structure/index.html> [<https://perma.cc/DV3G-XEZ4>].

¹⁶⁴ Compare *id.*, with RONAN REPORT, *supra* note 139, at 9.

¹⁶⁵ Compare *State Government Structure*, *supra* note 163, with RONAN REPORT, *supra* note 139, at 9. See generally Act of Apr. 22, 1970, ch. 140, 1970 N.Y. Laws 866.

¹⁶⁶ Governor Rockefeller had recommended the name change from the Commerce Department to the Department of Economic Development in 1960, see PUBLIC PAPERS OF NELSON A. ROCKEFELLER, FIFTY-THIRD GOVERNOR OF THE STATE OF NEW YORK: 1960, at 1362 (1961), but the Department’s name was not changed until 1987, see generally Omnibus Economic Development Act of 1987, ch. 839, 1987 N.Y. Laws 3214.

¹⁶⁷ Compare *State Government Structure*, *supra* note 163, with RONAN REPORT, *supra* note 139, at 9.

report of the State Spending and Government Efficiency Commission reported that “[t]he organizational structure of the State includes a complex web of approximately 300 boards, commissions, councils, task forces created by State statute or Executive Order.”¹⁶⁸

Similarly, the Executive Department remains the same mish-mosh that it was at the time of the 1961 Ronan Report.¹⁶⁹ The New York Code of Rules and Regulations lists approximately thirty-four rule-making units within the Executive Department.¹⁷⁰ Andrew Cuomo, while running for governor in 2010, claimed that there were seventy-five units “stuffed into the department.”¹⁷¹ While some of the current units may be dormant,¹⁷² the fact is that the Executive Department remains the “scrap basket” that the Hughes Commission had warned of in 1926.¹⁷³

All told, there are seven departments mentioned in the Constitution: Audit and Control, Law, Mental Hygiene, Agriculture and Markets, Education, State, and Conservation.¹⁷⁴ All the other departments have been created by statute.¹⁷⁵

Besides the continued use of the Executive Department as a “scrap basket,” recent years have seen governors avoiding the confirmation process unless absolutely required. Rather than having confirmed commissioners in agencies headed by a single individual, governors have regularly utilized acting commissioners as the top deputies in agencies where the commissioner post is vacant.¹⁷⁶ Governors have

¹⁶⁸ SPENDING & GOV'T EFFICIENCY COMM'N, FINAL REPORT 43 (2013).

¹⁶⁹ See *supra* text accompanying note 153.

¹⁷⁰ See N.Y. COMP. CODES R. & REGS. tit. 9.

¹⁷¹ See Danny Hakim, *Cuomo to Propose Eliminating Many State Agencies*, N.Y. TIMES (May 21, 2010), <https://www.nytimes.com/2010/05/22/nyregion/22cuomo.html> [<https://web.archive.org/web/20241117060000/https://www.nytimes.com/2010/05/22/nyregion/22cuomo.html>]. See generally Gerald Benjamin & Zachary Keck, *Executive Orders and Gubernatorial Authority to Reorganize State Government*, 74 ALB. L. REV. 1611 (2011).

¹⁷² For example, the Office of Science, Technology and Academic Research, see COMP. CODES R. & REGS. tit. 9, subtitle X, State Energy Office, see *id.* tit. 9, subtitle BB, Office of Business Permits, see *id.* tit. 9, subtitle HH, and the Temporary State Commission on Local Government Ethics, see *id.* tit. 9, subtitle LL, are considered inactive. See STATE OF N.Y., FISCAL YEAR 2024: ENACTED BUDGET FINANCIAL PLAN, at T-110 to T-116 (2023).

¹⁷³ See *supra* text accompanying note 105.

¹⁷⁴ N.Y. CONST. art. IV, § 8; *id.* art. V, § 4; *id.* art. VIII, § 3; *id.* art. XVII, §§ 2, 4.

¹⁷⁵ See, e.g., N.Y. TRANSP. LAW § 11 (McKinney 1971) (providing for the creation of the Department of Transportation through statute).

¹⁷⁶ See, e.g., *Who's Running New York City? Good Question*, N.Y. TIMES (Apr. 21, 2019), <https://www.nytimes.com/2019/04/21/opinion/deblasio-president.html> [<https://web.archive.org/web/20241117071237/https://www.nytimes.com/2019/04/21/opinion/deblasio-president.html>]. Section 9 of the Public Officers Law sets out a process by which a deputy would assume the commissioner's powers when there is a vacancy in the office. That deputy “shall, unless otherwise prescribed by law, possess the powers and perform the duties of his principal during the absence or inability to act of his principal, or during a vacancy in his principal's office.” N.Y. PUB. OFF. LAW § 9 (McKinney 1909). A governor further has the ability

felt little necessity to have these acting commissioners confirmed by the Senate.¹⁷⁷

Part of this use of acting commissioners has been driven by the fact that the salaries of deputy commissioners for many years were far higher than the rate for commissioners established in section 169 of the Executive Law.¹⁷⁸ No deputy commissioner wanted to be named a commissioner if it meant a significant salary decrease. The use of deputies has become a backdoor method for governors to avoid Senate confirmation requirements, thereby eliminating possible contentious proceedings before the Senate.¹⁷⁹

IX. THE COURT CASES ON ARTICLE V, SECTION 4

It might have been anticipated that there would be court challenges to appointments made to boards and commissions where the appointees to these boards were not subject to gubernatorial nomination plus Senate confirmation. Political leadership might wish to challenge appointments made by their political opponents. Individuals who might be threatened by potential government action might challenge the action of a board or commission whose members had not been appointed in compliance with Article V, Section 4.

Yet, the first challenge to an appointment based on a potential Article V, Section 4 violation did not occur until 1995, a full seventy years after the provision was enacted.¹⁸⁰ The case arose out of unique circumstances. In November of 1994, Governor Mario Cuomo lost his reelection bid to Republican George Pataki.¹⁸¹ Cuomo was a

to do an end-run around the Senate because the outgoing commissioner, likely to act pursuant to the governor's influence, can under section 9, designate which deputy will replace the commissioner. *See id.* This is a far broader power for the governor than the ability to name a commissioner when the Legislature is out of session. *See id.* § 39. This use of deputies has apparently been a common occurrence in New York City government. *See, e.g., Who's Running New York City? Good Question, supra.*

¹⁷⁷ *See, e.g.,* Adilia Watson & Susanti Sarkar, *New York Gets New Acting Commissioner of State Child Welfare*, IMPRINT (Mar. 7, 2024, 5:16 PM), <https://imprintnews.org/youth-services-insider/new-york-gets-new-acting-commissioner-of-state-child-welfare-agency/247980> [<https://perma.cc/5SUD-267P>].

¹⁷⁸ *See* Jon Campbell, *Bosses Often Make Less than Their Subordinates in State Government*, ITHACA J., May 6, 2012. *See generally* N.Y. EXEC. LAW § 169 (McKinney 2019).

¹⁷⁹ *See, e.g.,* *Who's Running New York City? Good Question, supra* note 176; Watson & Sarkar, *supra* note 177. The use of deputies also makes it possible for governors to avoid trading political favors with the Senate over other potential appointments and possible legislative enactments. *See* T. Calabro, *Military Hostages of Senate Games*, HERALD (Sept. 7, 2023), <https://www.ourherald.com/articles/military-hostages-of-senate-games/> [<https://perma.cc/LR6W-GVV8>].

¹⁸⁰ *See* Cappelli v. Sweeney, 634 N.Y.S.2d 619, 621 (Sup. Ct. Kings Cnty. 1995); *supra* note 1 and accompanying text.

¹⁸¹ *See* Kevin Sack, *New York Voters End a Democratic Era*, N.Y. TIMES, Nov. 9, 1994, at A1.

Democrat, and the Republican Party controlled the state Senate.¹⁸² That fact meant that Cuomo could not utilize the Senate to confirm any late-term positions for his loyalists.¹⁸³ That relegated Cuomo to appointing individuals only to those boards or commissions where Senate confirmation was not required.¹⁸⁴

One of these boards was the five-member Unemployment Insurance Appeals Board in the State Labor Department.¹⁸⁵ Shortly before he left office, Cuomo appointed three members to this board, including Allen Cappelli as the chair of the board.¹⁸⁶ After Pataki became governor, his two commissioners of labor refused to authorize salary payments to the Cuomo appointees on the grounds that their positions lacked the requisite Senate confirmation under the state Constitution.¹⁸⁷ The appointees brought suit to recover their pay.¹⁸⁸

The trial court viewed this case, *Cappelli v. Sweeney*, simply as a dispute over the reach of Article V, Section 4.¹⁸⁹ Did the Constitution require Senate confirmation for members of the Unemployment Insurance Appeals Board?¹⁹⁰

Justice Demarest was initially faced with the argument by the Labor Department that Section 4 “[was] clear on its face and expressly require[d] . . . all members of all boards and commissions” to be confirmed by the Senate.¹⁹¹ She determined that the provision “though apparently specific in direction, is ambiguous in application when viewed in the context of Article V, which provides for the organization of the executive branch.”¹⁹² This ambiguity required a review of the legislative history of Article V.¹⁹³

Justice Demarest then reviewed the long history of the changing perspectives of the executive branch. Viewing the 1915

¹⁸² *See id.*

¹⁸³ *See* Michael Oreskes, *Cuomo’s Naming of Haddock Blocked*, N.Y. TIMES, June 16, 1983, at B4; Kevin Sack, *Cuomo Names 3 Supporters to State Board*, N.Y. TIMES, Dec. 30, 1994, at B4.

¹⁸⁴ *See, e.g.*, Sack, *supra* note 183.

¹⁸⁵ *See id.*

¹⁸⁶ *See id.* Cuomo likely would have regretted his selection of Cappelli. In 2002, Cappelli served as the campaign manager for State Comptroller Carl McCall, *see* Glenn Bain, *Party Focuses on State Contest: Democrats Split on Endorsements for N.Y. Governor*, J. NEWS, Feb. 8, 2002, at 1B, who ran successfully against Mario Cuomo’s son Andrew in the Democratic primary for governor, Shaila K. Dewan, *Cuomo Quits Race and Backs McCall for Governorship—Polls Predict Defeat: Clintons Play Role in Decision to Abandon the Campaign a Week Before Primary*, N.Y. TIMES, Sept. 4, 2022, at A1.

¹⁸⁷ *Cappelli v. Sweeney*, 634 N.Y.S.2d 619, 621 (Sup. Ct. Kings Cnty. 1995).

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *Id.* (emphasis omitted).

¹⁹² *Id.* at 622.

¹⁹³ *Id.*

Constitutional Convention debate and the 1919 Retrenchment Committee's reorganization report, she concluded that there was no intent to require conformation of all boards and commissions: "the intent was not to require Senate confirmation of each and every member of every subordinate bureau, board or commission within the departments, but that only those deemed members of the Governor's 'Cabinet,' 'heads of Departments' as provided in the Constitution, were to require such confirmation."¹⁹⁴

Justice Demarest minimized the effect of the 1938 amendment to Section 4 which repealed the limitation that only positions "mentioned in this article" required Senate confirmation.¹⁹⁵ She wrote that the language seemingly expanding the requirement of Senate confirmation was "merely unfortunate verbiage,"¹⁹⁶ and that all parties believed that the 1938 language repeal was "insignificant."¹⁹⁷ She concluded that the requirement that all boards and commissions be subject to Senate confirmation "was no longer necessary in 1938 . . . because the various 'boards and commissions' which it modified referred to those 187 boards, commissions, and bureaus existing prior to the restructuring which, by 1938, had been merged into the [twenty] named departments."¹⁹⁸

Accordingly, based on her view of the legislative history of Section 4, and the fact that the Legislature had never required Senate confirmation for the members of the Unemployment Insurance Appeal Board, she "conclud[ed] that article V, [section] 4 applies only to the 'heads' of the departments and not to subsidiary boards or commissions."¹⁹⁹

Justice Demarest further found that plaintiff appointees to the Unemployment Insurance Appeal Board lawfully occupied their positions,²⁰⁰ that they had a property right to their positions, and that their civil rights under the Fourteenth Amendment to notice and an opportunity for a hearing before being deprived of their salaries were violated.²⁰¹ Therefore, the petitioners stated a proper cause of action under 42 U.S.C. § 1983.²⁰²

¹⁹⁴ *See id.* at 625.

¹⁹⁵ *See supra* text accompanying note 130.

¹⁹⁶ *See Cappelli*, 634 N.Y.S.2d at 626.

¹⁹⁷ *Id.* at 625.

¹⁹⁸ *See id.*

¹⁹⁹ *Id.* at 627.

²⁰⁰ *Id.* at 630.

²⁰¹ *Id.*

²⁰² *Id.*

The State Labor Department appealed Justice Demarest's decision to the Second Department.²⁰³ A year later, a unanimous court affirmed the decision "for reasons stated by Justice Demarest at the Supreme Court."²⁰⁴

More than two decades later, the reach of the Senate confirmation requirement in Article V, Section 4 was raised in the case of *Soares v. State*.²⁰⁵ *Soares* was a broad-based challenge by the Albany County District Attorney—acting as a representative of all the state's elected district attorneys—of the constitutionality of the State Commission on Prosecutorial Conduct.²⁰⁶ This Commission was "to investigate and review the conduct of district attorneys . . . and assistant district attorneys."²⁰⁷ The Commission was to be composed of eleven members.²⁰⁸ Four were to be appointed by the governor.²⁰⁹ Three were to be appointed by the chief judge of the New York Court of Appeals, and each of the four leaders of the Legislature (which included the minority leaders in each legislative house) would have one selection.²¹⁰ None of the appointees to the Commission required Senate confirmation.²¹¹ The Commission was placed within the Executive Department.²¹²

Justice Weinstein concluded that the Commission statute was unconstitutional for intruding on the governor's exclusive power to remove district attorneys by granting temporary removal powers to the judiciary, for intruding on the power of the appellate divisions over attorney discipline by granting the Commission those same powers, and for improperly requiring justices to render advisory opinions and to serve outside the appellate division by creating an appeal pathway from the Commission to the judiciary.²¹³ On the Article V, Section 4 claim, however, Justice Weinstein found that there was no constitutional violation.²¹⁴

²⁰³ See *Cappelli v. Sweeney*, 230 A.D.2d 733 (App. Div. 2d Dep't 1996).

²⁰⁴ See *id.* at 733.

²⁰⁵ See *Soares v. State*, 121 N.Y.S.3d 790, 814–15 (Sup. Ct. Albany Cnty. 2020).

²⁰⁶ See *id.* at 799. The State Commission on Prosecutorial Conduct was created initially by chapter 202 of the 2018 Laws of New York, and later amended by chapter 23 of the 2019 Laws of New York. *Id.* at 800.

²⁰⁷ *Id.* at 799; see N.Y. JUD. LAW § 499-a (McKinney 2021).

²⁰⁸ JUD. LAW § 499-c(1).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See *id.*

²¹² *Id.* § 499-a.

²¹³ See *Soares v. State*, 121 N.Y.S.3d 790, 826–27, 830–31, 833 (Sup. Ct. Albany Cnty. 2020).

²¹⁴ See *id.* at 815–16.

The district attorneys had argued that the section required both gubernatorial nomination and Senate confirmation.²¹⁵ Justice Weinstein, however, found that under *Cappelli*, Section 4 “is meant to apply only to such commissions or boards that serve as ‘heads of departments’ in the executive branch,” not to subsidiary boards within the departments.²¹⁶ Since “the [Commission on Prosecutorial Conduct] is not the head of any of the [twenty] executive departments, under *Cap[p]elli* it must be considered an executive branch subsidiary commission, and thus not subject to article V, [section] 4.”²¹⁷

The district attorneys tried to distinguish their case from *Cappelli* by utilizing the fact that Justice Demarest’s decision in *Cappelli* was premised on the need for gubernatorial control over executive agencies.²¹⁸ Since the Commission on Prosecutorial Conduct had numerous appointees from the judiciary and the Legislature, this made the case different than *Cappelli*.²¹⁹ They also cited federal precedents that prevent non-executive entities from making appointments to executive agencies, finding that to do so violates separation of powers.²²⁰ Justice Weinstein disagreed, finding that the federal precedents were not controlling.²²¹ Additionally, “granting the legislature the right to nominate or appoint a minority of members to boards and commissions carrying executive functions is deeply ensconced within New York’s governmental structure.”²²² He concluded that:

New York separation of powers concerns are not controlled by federal precedent, and given the history and practice of this state, the limited powers assigned to the [Commission on Prosecutorial Conduct], and the traditional role played by the judiciary in regulating attorney conduct, no facial violation of separation of powers principles has been brought about.²²³

²¹⁵ *Id.* at 814–15.

²¹⁶ *Id.* at 815 (quoting *Cappelli v. Sweeney*, 634 N.Y.S.2d 619, 626 (Sup. Ct. Kings Cnty. 1995)).

²¹⁷ *Soares*, 121 N.Y.S.3d at 815.

²¹⁸ *See id.* at 815.

²¹⁹ *See id.* at 815–16.

²²⁰ *Id.* at 815 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

²²¹ *Soares*, 121 N.Y.S.3d at 816.

²²² *Id.* at 816–817.

²²³ *Id.* at 819.

The most recent case involving Article V, Section 4 concerned Gary Lavine,²²⁴ a member of the former Joint Commission on Public Ethics.²²⁵ When this Commission was repealed and replaced by the Commission on Ethics and Lobbying in Government, which is housed within the New York Department of State,²²⁶ Lavine was nominated by a legislative leader to serve as a member of the newly formed Commission.²²⁷ His nomination, however, was rejected by the Independent Review Committee,²²⁸ a group composed of the deans of the American Bar Association accredited laws schools in New York State.²²⁹ The Independent Review Committee had been created to verify the bona fides of each nominee.²³⁰

Lavine sued the State, claiming that the process of delegating the approval of nominees to a private group was unconstitutional.²³¹ It was either a violation of the Article V, Section 4 requirement for Senate confirmation or an “improper delegation of legislative power” to private individuals.²³²

The court quickly rejected the Article V, Section 4 question, citing the *Soares* case to find that Section 4 only applied to “heads of departments of the executive branch” or to the judiciary.²³³

As to the delegation issue, the court similarly found no constitutional violation.²³⁴ It found Court of Appeals precedent

²²⁴ See *Lavine v. State*, 184 N.Y.S.3d 571 (Sup. Ct. Onondaga Cnty. 2023).

²²⁵ See Thomas Kaplan, *Members of Overhauled State Ethics Panel Are Named*, N.Y. TIMES (Dec. 12, 2011, 10:27 PM), <https://archive.nytimes.com/cityroom.blogs.nytimes.com/2011/12/12/members-of-overhauled-state-ethics-panel-are-named/> [<https://perma.cc/47PD-WNHT>].

²²⁶ See N.Y. EXEC. LAW § 94(1)(a)–(b) (McKinney 2023).

²²⁷ *Senate Republican Leader Rob Ortt Names Gary Lavine to New State Ethics Commission*, N.Y. STATE SENATE (July 12, 2022), <https://www.nysenate.gov/newsroom/articles/2022/robert-g-ortt/senate-republican-leader-rob-ortt-names-gary-lavine-new-state> [<https://perma.cc/6FJD-CLNG>].

²²⁸ See Chris Bragg, *Panel Rejects 3 of the 10 nominees to New York’s New Ethics Body*, TIMES UNION, <https://www.timesunion.com/state/article/Panel-rejects-3-of-10-nominees-to-new-ethics-body-17415511.php>

[<https://web.archive.org/web/20241117224149/https://www.timesunion.com/state/article/Panel-rejects-3-of-10-nominees-to-new-ethics-body-17415511.php>] (Sept. 2, 2022, 3:34 PM).

²²⁹ *Lavine*, 184 N.Y.S.3d at 575. The process for approval of nominees by the Independent Review Committee was established by section 94(3) of the Executive Law.

²³⁰ See *id.*

²³¹ See *id.* at 574.

²³² See *id.*

²³³ See *id.* at 575–76 (citing *Soares v. State*, 121 N.Y.S.3d 790 (Sup. Ct. Albany Cnty. 2020)). It should be noted that if Article V, Section 4, applied, then Mr. Lavine’s nomination would have been invalid since he was nominated by a legislator and not the governor, an apparent violation of the Section. See N.Y. CONST. art. V, § 4.

²³⁴ See *Lavine*, 184 N.Y.S.3d at 576 (first quoting *Lanza v. Wagner*, 183 N.E.2d 670, 677, 679 (N.Y. 1962); and then quoting *Sturgis v. Spofford*, 45 N.Y. 446, 450 (N.Y. 1871)).

authorizing non-government actors to make appointments to public bodies.²³⁵ That was within the prerogative of the Legislature.²³⁶

The few cases that have construed Article V, Section 4 have construed the requirement very narrowly,²³⁷ making certain that it cannot be applied to subordinate boards and commissions within state departments.

X. CRITIQUING THE *CAPPELLI* DECISION

It is little surprise that the decisions of the courts interpreting Article V, Section 4 view the reach of the provision narrowly. There are dozens of boards and commissions in New York which are not subject to Senate confirmation requirements.²³⁸ There are numerous boards where government officials, other than the governor, provide the nominations.²³⁹ Requiring all or even some boards and commissions to be subject to gubernatorial nomination and Senate confirmation would mark a sea change in New York government. Nobody is anxious to open Pandora's box. The end results of these cases are certainly supportable.

Nonetheless, the reasoning for the foundational decision in *Cappelli* is less than satisfactory. The supreme court decision in *Cappelli*—adopted by the appellate division²⁴⁰—has numerous question marks, and these questions will likely lead to future issues and court challenges.

²³⁵ See *Lavine*, 184 N.Y.S.3d at 576 (quoting *Lanza*, 183 N.E.2d at 677; *Sturgis*, 45 N.Y. at 450).

²³⁶ See *Lavine*, 184 N.Y.S.3d at 576 (first quoting *Lanza*, 183 N.E.2d at 677; and then quoting *Sturgis*, 45 N.Y. at 450). The *Lavine* court's dismissal of the delegation argument would later be abrogated by *Cuomo v. New York State Commission on Ethics & Lobbying in Government*, which found that, in ruling unconstitutional the enabling statute of the Commission on Ethics and Lobbying in Government, the Independent Review Committee framework violated separation of powers principles by "revok[ing] the Governor's enforcement power with respect to the ethics laws." See *Cuomo v. N.Y. State Comm'n on Ethics & Lobbying in Gov't*, 210 N.Y.S.3d 822, 825, 826–27, 828 (App. Div. 3d Dep't 2024), *aff'g* 196 N.Y.S.3d 668, 672, 682–83 (Sup. Ct. Albany Cnty. 2023). The court did not address the Article V, Section 4 issues. See *Cuomo*, 210 N.Y.S.3d at 825.

²³⁷ *Cappelli* held that the confirmation requirements do not apply to subsidiary boards and commissions within state departments. See *supra* text accompanying note 194. *Lavine* held that the confirmation requirement applies to commissioners in state departments. See *supra* text accompanying note 233. While *Soars* held that confirmation requirements apply to the heads of departments, these requirements do not apply to subsidiaries therein. See *supra* text accompanying note 216.

²³⁸ See, e.g., *Cappelli v. Sweeney*, 634 N.Y.S.2d 619, 621–22, 627 (Sup. Ct. Kings Cnty. 1995); Sack, *supra* note 183.

²³⁹ Justice Weinstein pointed this out in the *Soares* case. See *Soares v. State*, 121 N.Y.S.3d 790, 816 (Sup. Ct. Albany Cnty. 2020).

²⁴⁰ *Cappelli v. Sweeney*, 230 A.D.2d 733 (App. Div. 2d Dep't 1996), *aff'g* 634 N.Y.S.2d 619.

Justice Demarest made several assertions that are somewhat striking. While she believed that the general requirement of Senate confirmation for boards and commissions is “apparently specific in direction, [it] is ambiguous in application when viewed in the context of article V.”²⁴¹ This is simply a non sequitur. How can it be possible for a provision that is specific on its face to turn into an ambiguity in practice, thereby requiring a full review of legislative history? This is the legal equivalent of putting the cart before the horse. New York courts are definitive in finding that, where language in an enactment is clear and obvious, the words must be given their plain meaning.²⁴² Courts do not resort to legislative history if the words of the enactment are “unequivocal.”²⁴³ Would it not have been preferable to argue that the result seemingly required by the language in Section 4—that all boards and commission members were to be nominated by the governor and confirmed by the Senate—was absurd and extraordinarily inconvenient on its face?²⁴⁴

Justice Demarest’s review of legislative history is also problematic. She frames the legislative history as a move of more than a century towards increased gubernatorial control over the entire executive branch, including boards and commissions.²⁴⁵ Yet, by framing this history as a quest towards increased executive control—thereby minimizing the constitutional role of the Senate—she omits any discussion involving the fact that many commissions have ex officio

²⁴¹ *Cappelli*, 634 N.Y.S.2d at 622.

²⁴² *See, e.g.*, *Buchbinder Tunick & Co. v. Tax Appeals Tribunal*, 795 N.E.2d 616, 618 (N.Y. 2003); *Patrolmen’s Benevolent Ass’n v. City of New York*, 359 N.E.2d 1338, 1340 (N.Y. 1976).

²⁴³ *See, e.g.*, *Sega v. State*, 456 N.E.2d 1174, 1178 (N.Y. 1983); *Van Amerogen v. Donnini*, 555 N.Y.S.2d 877, 879 (App. Div. 3d Dep’t 1990).

²⁴⁴ *See, e.g.*, *Zappone v. Homes Ins. Co.*, 432 N.E.2d 783, 786 (N.Y. 1982); *Hogan v. Culkin*, 221 N.E.2d 546, 549 (N.Y. 1966). *See generally* N.Y. STAT. LAW §§ 142, 145, 148 (McKinney 2024).

²⁴⁵ *See Cappelli*, 634 N.Y.S.2d at 623–26, 627. In the course of the discussion, she terms the 1919 Reconstruction Commission’s report on retrenchment and reorganization as the work of the notable Robert Moses. *See id.* at 624. *See generally* REPORT ON RETRENCHMENT AND REORGANIZATION, *supra* note 54. She identifies Moses as the chair of the Reconstruction Commission and terms its report on retrenchment and reorganization the “Moses Report.” *Cappelli*, 634 N.Y.S.2d at 624. Moses was the chief of staff to the Committee on Retrenchment. REPORT ON RETRENCHMENT AND REORGANIZATION, *supra* note 54, at vii. He was not a member of the Reconstruction Commission and could not have been its chair. *See id.* *Abram Elkus, who was soon to be named a judge of the New York Court of Appeals, see Appoints Mr. Elkus Judge. Governor Names Him for Vacancy in Court of Appeals.*, N.Y. TIMES, Nov. 13, 1919, at 3, was the chair of the overall Reconstruction Commission, *To Solve Problems of Reconstruction: Abram I. Elkus, Appointed by Governor Whitman to Head Commission, Discusses Arduous Work Ahead*, N.Y. TIMES, Feb. 2, 1919, at 11. Alfred Marling, who headed the New York State Chamber of Commerce, *Alfred E. Marling New Chamber Head: President of Horace S. Ely & Co. Elected to Succeed Eu-Genius H. Outterbridge. 150th Annual Meeting: J. Pierpont Morgan, George F. Baker, and Frank Trumbull Chosen Vice Presidents.*, N.Y. TIMES, May 3, 1918, at 17, was the chair of the Committee on Retrenchment, RETRENCHMENT AND REORGANIZATION, *supra* note 54, at 405.

members, members nominated by individuals (principally legislative leaders), and members nominated by the governor upon recommendations from individuals (again, principally legislative leaders).²⁴⁶ This left open the question of whether boards and commissions where the governor did not select its members were improperly formed because only the governor could name individuals to boards and commissions.²⁴⁷

Justice Demarest's efforts to explain the 1938 Constitutional Convention's changes to Section 4 are largely ineffective. She claims that the repeal of the modifying language "mentioned in this article," which determined which boards and commissions were subject to the gubernatorial nomination/Senate confirmation requirement, "included those diverse executive entities which preceded the new structure."²⁴⁸ Further, she "infer[red] that the reason the phrase 'mentioned in this article' was no longer necessary in 1938 is because the various 'boards and commissions' which it modified referred to those 187 boards, commissions, and bureaus existing prior to the restructuring which, by 1938, had been merged into the [twenty] named departments."²⁴⁹

Yet, the fact is that those 187 assorted boards and commissions were not mentioned by name in the 1925 constitutional amendments.²⁵⁰ Only the twenty individual departments were named.²⁵¹ There were numerous boards and commissions that remained free-floating outside of any department. The Ronan Report found that even after the 1925-1927 reorganization, "there were some [forty-seven] independent or semi-independent agencies."²⁵² Certain boards and commissions such as the Commission to Examine Laws Relating to Child Welfare, the Home Rule Commission, the Albany Port District Commission,²⁵³ and interstate commissions such as the

²⁴⁶ See *Cappelli*, 634 N.Y.S.2d at 623-26; see, e.g., *supra* text accompanying notes 120, 210, 227; *infra* notes 273, 282 and accompanying text.

²⁴⁷ That was the claim of the district attorneys in the *Soares* case; they argued that *Cappelli* did not govern the disposition of the case involving appointments to the Commission on Prosecutorial Conduct where the majority of the members were not selected by the governor. See *Soares v. State*, 121 N.Y.S.3d 790, 815 (Sup. Ct. Albany Cnty. 2020).

²⁴⁸ See *Cappelli*, 634 N.Y.S.2d at 625-26.

²⁴⁹ *Id.* at 625.

²⁵⁰ See generally S. Conc. Res. 23, 1925 Leg., 148th Sess., 1925 N.Y. Laws app. at 1147.

²⁵¹ See *id.* sec. 1, § 2, at 1148.

²⁵² See RONAN REPORT, *supra* note 139, at 8. Several of these agencies were temporary commissions. *Id.* The Ronan Report, in 1959, found fifteen boards and commissions—not including public authorities, interstate compact agencies, or interdepartmental committees—which were not inside departments. *Id.* at 9.

²⁵³ See Act of Mar. 25, 1925, ch. 192, sec. 1, § 2, 1925 N.Y. Laws 402, 402-03.

Lake Champlain Bridge Commission were not placed within any department.²⁵⁴

Moreover, Justice Demarest's rationale purportedly underlying the 1938 amendments leaves in limbo all commissions and boards created after 1938 that were not placed inside state departments. What would happen to the Tug Hill Commission, whose membership consists of a mix of gubernatorial and legislative employees?²⁵⁵ What would happen with the Gaming Facility Location Board,²⁵⁶ whose members are appointed by the State Gaming Commission?²⁵⁷ Since these entities could not have been mentioned in the constitution prior to 1938, should they not be covered by the Article V, Section 4 requirements? Are all post-1938 boards and commissions not housed in departments subject to the nomination and confirmation requirements of Article V, Section 4?

Justice Demarest's decision arguably renders meaningless the safe harbor provision in Article V, Section 4 exempting "temporary commissions for special purposes" from the nomination plus confirmation requirement.²⁵⁸ If warehousing a commission within a department exempts that commission from the requirement, you no longer need to create a temporary commission; rather, you only need to place it in an existing department.²⁵⁹

Moreover, much of the discussion in the *Cappelli* decision is marked by an air of unreality. These boards and commissions are

²⁵⁴ See RONAN REPORT, *supra* note 139, at 10–11 fig.1.

²⁵⁵ See N.Y. EXEC. LAW § 847-b (McKinney 1998) (having been established by the Act of June 8, 1972, ch. 972, 1972 N.Y. Laws 3837).

²⁵⁶ N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 109-a (McKinney 2022) (having been established by the Act of July 30, 2013, ch. 174, 2013 N.Y. Laws). This Board is not technically located within a department. See RAC. PARI-MUT. WAG. & BREED. LAW § 109-a.

²⁵⁷ See RAC. PARI-MUT. WAG. & BREED. LAW §§ 101(6), 109-a(1). There are a host of entities created under the Pari-Mutuel Wagering and Breeding Law (PML) which are structured without both gubernatorial nomination and Senate confirmation requirements. These include: the previously mentioned Gaming Facility Location Board, *see id.* § 109-a(1); the Franchise Oversight Board, *see id.* § 212; the New York Jockey Insurance Compensation Fund, *see id.* § 221(2)(a); three breeding funds, *see id.* §§ 252(1), 330(1), 431(1); several regional off-track betting corporations, *see id.* § 502(1); the New York City Off-Track Betting Corporation, *see id.* § 603(1); the Zweig Memorial Fund for Equine Research, *see id.* § 702; the Interstate Compact on Licensure of Participants in Horse Racing with Pari-Mutuel Wagering, *see id.* § 1106(a); *Interstate Compact on Licensure of Participants in Horse Racing with Pari-Mutuel Wagering*, BALLOTPEDIA, https://ballotpedia.org/Interstate_Compact_on_Licenses_of_Participants_in_Horse_Racing_with_Pari-Mutuel_Wagering [<https://perma.cc/Q6YX-Q88S>]; and the various community advisory committees established to approve downstate casinos, *see id.* § 1321-d(3)(a).

²⁵⁸ N.Y. CONST. art. V, § 4.

²⁵⁹ Read in this manner, the decision in *Cappelli* would clash with the traditional canon of legal interpretation that every word in an enactment is to be given effect. See N.Y. STAT. LAW § 231 (McKinney 2024).

not subsidiary agencies simply because their budget lines are formally located within a department.²⁶⁰ Most of these boards and commissions are not in any way subject to the control of their parent departments.²⁶¹ It is a legal fiction that they are subsidiaries. Incanting the words “in the executive department” in connection with a board or a commission does not make them subsidiaries. If the constitutional requirements of Article V, Section 4 can be defeated by a simple act of legislative legerdemain, that is hardly a requirement at all.²⁶²

XI. WHAT ARE THE IMPLICATIONS IF *CAPPELLI* IS FOLLOWED?

Assuming that *Cappelli* stands for the proposition that only commissioners of departments are subject to the gubernatorial nomination plus Senate confirmation process, the status quo would rule with one exception: the Executive Department. By statute, the governor is “[t]he head of the executive department.”²⁶³ Nonetheless, the Constitution requires Senate confirmation of all department heads.²⁶⁴ Yet, the Senate has not confirmed the governor as the head of the Executive Department.²⁶⁵ There is no individual duly appointed under the Constitution as the head of the Executive Department.²⁶⁶

The situation is now the same as it was in 1926 when the Hughes Commission recommended—and the people subsequently approved—a constitutional amendment that named the governor as

²⁶⁰ *Contra Cappelli v. Sweeney*, 634 N.Y.S.2d 619, 627 (Sup. Ct. Kings Cnty. 1995).

²⁶¹ For example, the Tax Appeals Tribunal is located within the Department of Taxation and Finance but its “powers, functions, duties and obligations . . . shall be separate from and independent of the authority of the commissioner of taxation and finance.” N.Y. TAX LAW § 2002 (McKinney 1987). The Public Employment Relations Board, similarly, is located within the Department of Civil Service but has little connection with the work of the Civil Service Commission. See N.Y. CIV. SERV. LAW § 205(6) (McKinney 2010) (“[N]either the president of the civil service commission nor the civil service commission or any other officer, employer, board or agency of the department of civil service shall supervise, direct or control the board in the performance of any of its functions or the exercise of any of its powers . . .”).

²⁶² Besides locating the commission or board in a department, the requirements of Article V, Section 4 could be defeated by simply appending the name “temporary” to its name. See N.Y. CONST. art. V, § 4. For example, the Temporary State Commission of Investigation was first established by the Act of Apr. 25, 1958, ch. 989, 1958 N.Y. Laws 2367. It remained active until 2009. See N.Y. UNCONSOL. LAW § 7501(1) (McKinney 2001).

²⁶³ N.Y. EXEC. LAW § 30 (McKinney 1951).

²⁶⁴ N.Y. CONST. art. V, § 4.

²⁶⁵ See *id.* art. IV, § 1; EXEC. LAW § 30.

²⁶⁶ See N.Y. CONST. art. IV, § 1.

the head of the Executive Department.²⁶⁷ In the interim, the Commission suggested that the governor name the chief secretary to the governor as the head of the Executive Department subject to Senate confirmation.²⁶⁸ This might be easily dismissed as a hyper-technical esoteric point, but a century ago, it was significant enough to warrant an amendment to the Constitution.

If *Cappelli* is read to require Senate confirmation both of department heads and boards and commissions not housed in a state department,²⁶⁹ then there would need to be amendments to the statutes creating these commissions to place them inside a state agency, such as the Executive Department or the Department of State. In the alternative, these boards and commissions could be deemed temporary,²⁷⁰ and the Legislature might place a sunset date or establish a review process which would govern the existence of these boards and commissions.

XII. WHAT IF ARTICLE V, SECTION 4 MEANS WHAT IT SAYS?

The language of Article V, Section 4 reads that “the members of all boards and commissions . . . shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law.”²⁷¹ What if that language was to be taken literally, as suggested by the Department of Labor in the *Cappelli* case and the plaintiff in the *Lavine* case?²⁷² What would be the resultant change in state government?

There would be, as suggested previously, the opening of Pandora’s box. What is a board or a commission anyway? Is the requirement of gubernatorial nomination plus Senate confirmation only applicable to government entities which have been formally denominated as boards or commissions? Does appellation govern over substance? Would this requirement similarly apply to the myriad of councils, regulating districts, task forces, committees, funds, corporations, tribunals, and offices in New York State? Would the requirement apply to public authorities, interstate compact

²⁶⁷ See HUGHES COMMISSION REPORT, *supra* note 99, at 8; *supra* text accompanying notes 122–123. The 1961 amendment to Article V, Section 4 repealed the language that the governor was the head of the Executive Department. See *supra* text accompanying note 159.

²⁶⁸ See HUGHES COMMISSION REPORT, *supra* note 99, at 8.

²⁶⁹ See *supra* text accompanying note 194.

²⁷⁰ See *supra* text accompanying notes 258–259.

²⁷¹ N.Y. CONST. art. V, § 4.

²⁷² See *Cappelli v. Sweeney*, 634 N.Y.S.2d 619, 622 (Sup. Ct. Kings Cnty. 1995) (citing *King v. Cuomo*, 613 N.E.2d 950 (N.Y. 1993); *Anderson v. Regan*, 425 N.E.2d 792 (N.Y. 1981)); *Lavine v. State*, 184 N.Y.S.3d 571, 575 (Sup. Ct. Onondaga Cnty. 2023).

entities, interdepartmental groups, and boards of visitors? Would it apply to boards or commissions whose roles are strictly advisory?

Given the requirement of gubernatorial nomination, what would happen to boards and commissions which have *ex officio* members, members nominated by individuals or state officers, or members nominated by the governor on recommendation of other people?²⁷³ Would that be constitutional under Article V, Section 4?

What happens as a result of the requirement that the governor must in some manner be able to remove the board or commission member? A governor cannot remove an *ex officio* member from a board or commission.²⁷⁴ Would that mean *ex officio* members are barred from serving on boards or commissions?

This could all play out chaotically throughout state government. For example, the state Cannabis Control Board was not formally created in a department,²⁷⁵ although the Office of Cannabis Management is in the Division of Alcoholic Beverage Control.²⁷⁶ The Cannabis Control Board currently has five members:²⁷⁷ the chairperson is selected by the governor with Senate confirmation;²⁷⁸ two members are selected by the governor without Senate confirmation;²⁷⁹ one member is selected by the speaker of the Assembly; and the final member is selected by the temporary president of the Senate.²⁸⁰ Could any of these appointments—apart from that of the chairperson—be valid under a literal interpretation of Article V, Section 4?

²⁷³ For example, the Health Research Science Board housed in the Department of Health has members directly appointed by the governor, by the four majority and minority leaders of the Legislature, and by non-voting members, three of whom serve *ex officio*. N.Y. PUB. HEALTH LAW § 2410(1)(a), (c) (McKinney 2007). Similarly, the State Council for Interstate Juvenile Supervision has *ex officio* members, members appointed by the governor, members appointed by the governor upon the recommendation of the speaker of the Assembly, the temporary president of the Senate, the chief judge of the Court of Appeals, and a member appointed directly from the New York State Bar Association. See N.Y. EXEC. LAW § 501-g(1) (McKinney 2011).

²⁷⁴ See, e.g., N.Y. PUB. AUTH. LAW § 2827 (McKinney 2010) (establishing that “every member of every authority or commission heretofore or hereafter continued or created by this chapter, *except ex-officio members*, . . . shall be removable by the public officer or public body which is empowered by this chapter to appoint such authority or commission member” (emphasis added)).

²⁷⁵ See N.Y. CANNABIS LAW § 7(1) (McKinney 2021).

²⁷⁶ *Id.* § 8. The Division of Alcoholic Beverage Control is located within the Executive Department. N.Y. ALCO. BEV. CONT. LAW § 10 (McKinney 2016).

²⁷⁷ See CANNABIS LAW § 7(1).

²⁷⁸ *Id.*

²⁷⁹ See *id.* § 7(2).

²⁸⁰ *Id.*

The same would hold true for the Martin Luther King, Jr. Commission.²⁸¹ This Commission is not formally within a state department and has gubernatorial appointees, five ex officio appointees, appointees selected by the governor at the request of the four legislative leaders, plus a requirement that remaining members are selected pursuant to executive order.²⁸² There is no Senate confirmation requirement, no provision is made for the terms of the members, and no process is in place for the removal of members.²⁸³

The short answer to what would happen if the gubernatorial nomination plus Senate confirmation requirement of Article V, Section 4 was applied literally is that there would be near chaos throughout the executive branch of New York State government. Wholesale changes to numerous entities throughout the state would be in order since many existing boards and commissions would not be in compliance with the constitutional requirement. The literal application of Article V, Section 4 would cause mischief and absurd results throughout the state government.

XIII. HOW BEST TO APPROACH ARTICLE V, SECTION 4

Given the objectionable results that would occur as a result of a literal application of Article V, Section 4, it is likely that the results in *Cappelli*, *Soares*, and *Lavine* were justified.

The reasoning behind *Cappelli*, however, is subject to serious questioning, especially its conclusion that the 1938 amendment to Article V, Section 4 simply exempted boards and commissions from the gubernatorial nomination plus Senate confirmation requirements because they were mentioned in the state Constitution and had been placed inside state departments.²⁸⁴ The fact is they were not mentioned in the Constitution, and not all pre-1938 boards and commissions were placed inside departments.²⁸⁵ By writing the decision in this manner, Justice Demarest placed in legal purgatory

²⁸¹ N.Y. EXEC. LAW § 329 (McKinney 1988). This Commission was created to “develop a plan for the commemoration and celebration of the third Monday in January of each year, the official state holiday honoring Dr. Martin Luther King, Jr.” *See id.* § 329(2).

²⁸² *See id.* § 329(1), (3). Somewhat similar to the Martin Luther King, Jr. Commission, in terms of appointees, is the New York State Martin Luther King, Jr. Institute for Nonviolence. It was established as a public corporation with members appointed by the governor, ex officio members, and members appointed by the governor at the request of the four legislative leaders. *See* EXEC. LAW § 322(1).

²⁸³ *See generally* EXEC. LAW § 329.

²⁸⁴ *See supra* text accompanying note 249.

²⁸⁵ *See supra* text accompanying note 250–254.

all boards and commissions created after 1938 which had not been placed inside departments.

A better approach to Article V, Section 4 might have been to say that the original 1925 language simply placed the gubernatorial nomination plus Senate confirmation requirement solely on the twenty departments. These were the only entities mentioned in Article V.²⁸⁶ The repeal of the words “mentioned in this article”²⁸⁷ was not designed to change this requirement. Delegate Feinberg, who led the committee that sponsored the repeal language, did not believe the language change had any substantive effect.²⁸⁸ He believed he was removing “unnecessary language.”²⁸⁹ Viewing the Feinberg language literally as something far more significant than an editing change causes incredibly absurd, inconvenient, and mischievous results throughout New York State government. It is best to read Article V, Section 4 as only applying to the heads of state departments.

Limiting the reach of Article V, Section 4 is in no manner an excuse for the current state of establishing and populating New York State’s boards, commissions, and agencies. Elihu Root, Alfred Smith, Robert Moses, and Charles Evans Hughes may have thought that they created a Panglossian world in New York State where the executive branch was both organized and rightsized,²⁹⁰ but that is hardly the case today. There is little rhyme or reason to the appointment and creation of state agencies.²⁹¹ The most significant agencies should be subject to Senate confirmation, but that is also not common. Why is the commissioner of Housing and Community Renewal appointed by the governor without any need for Senate confirmation?²⁹² Why can the governor appoint the members of the Unemployment Insurance Appeal Board without Senate confirmation²⁹³ while the members of the Workers’ Compensation Board require Senate confirmation?²⁹⁴ Why, despite the efforts and pleas of the Hughes Commission, the

²⁸⁶ See S. Conc. Res. 23, 1925 Leg., 148th Sess., sec. 1, § 2, 1925 N.Y. Laws app. at 1147, 1148.

²⁸⁷ See *supra* text accompanying note 130.

²⁸⁸ See REVISED RECORD OF THE 1938 CONSTITUTIONAL CONVENTION, *supra* note 124, at 2329–30; *supra* notes 124–125 and accompanying text.

²⁸⁹ See REVISED RECORD OF THE 1938 CONSTITUTIONAL CONVENTION, *supra* note 124, at 2329–30.

²⁹⁰ In a true Panglossian world, there might be no need for the Article V, Section 4 gubernatorial nomination plus Senate confirmation requirement; the Legislature could be trusted on its own to determine the best manner of appointing members to departments, boards, and commissions.

²⁹¹ See, e.g., *supra* text accompanying note 226; *supra* notes 257, 261 and accompanying text.

²⁹² See N.Y. PUB. HOUS. LAW § 11 (McKinney 1961).

²⁹³ See N.Y. LAB. LAW § 534 (McKinney 1982).

²⁹⁴ See N.Y. WORKERS’ COMP. LAW § 140 (McKinney 2022).

Ronan Report, and the State Spending and Government Efficiency Commission,²⁹⁵ is there still a series of boards, commissions, divisions, and agencies strewn within the Executive Department?²⁹⁶ New York State government agencies function almost as they did in 1915.²⁹⁷ To paraphrase former President Taft, the miracle surrounding New York State government is that it operates at all.²⁹⁸

What may be needed is an organized attempt to bring rationality to the structure of New York State agencies. Should there be an overall review—much like the Ronan Report or the Hughes Commission—to help shape the future of New York State agencies? We need a commission on commissions. Perhaps to ensure compliance with Article V, Section 4, it should be named the New York State Temporary Commission on Commissions.²⁹⁹

²⁹⁵ See *supra* text accompanying notes 105, 153, 168.

²⁹⁶ See *supra* text accompanying note 170. Again, as constituted, the Executive Department has no head approved by the Senate as required by Article V, Section 4. See *supra* text accompanying notes 263–266.

²⁹⁷ See discussion *supra* Part II.

²⁹⁸ See DOCUMENT NO. 11, *supra* note 15, at 3.

²⁹⁹ Any commission should also review the practice of using deputies to regularly serve as acting commissioners. In January of 1979, Governor Hugh Carey tried to evade the Senate confirmation requirement for commissioners and board members by naming sixty-eight commissioners when the Senate was in recess. See Bob Keeler, *It's Carey vs. Senate*, NEWSDAY, Jan. 3, 1979, at 5; E.J. Dionne Jr., *Carey Names Cooke Chief Judge; 68 'Recess' Appointments Also Set*, N.Y. TIMES, Jan. 3, 1979, at A1. Governor Carey's right to make the recess appointments was later limited by actions of the Senate and opinions from the attorney general and the comptroller. See OPINIONS OF THE ATTORNEY GENERAL FOR THE YEAR ENDING DECEMBER 31, 1979: ROBERT ABRAMS, ATTORNEY GENERAL 31–35 (1979); Bob Keeler, *Albany Buildup to a Showdown*, NEWSDAY, Jan. 14, 1979, at 6. By using designated deputies for vacant commissionerships, Carey's successors have been able to have their appointees evade Senate review. See *supra* text accompanying note 179.