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SUPERSEDING THE DISTRICT ATTORNEYS IN
NEW YORK CITY—THE CONSTITUTIONALITY
AND LEGALITY OF EXECUTIVE
ORDER NO. 55

ROBERT M. PITLER*

I. INTRODUCTION

ON September 19, 1972, Governor Nelson A. Rockefeller issued five executive orders¹ directing the Attorney General of the State of New York to appoint a special deputy attorney general to supersede each of the district attorneys in the five counties of New York City in all cases relating to corruption in the administration of criminal justice in that city. The orders were made pursuant to section 63 of the Executive Law² which is based on the Governor's constitutional obligation to assure that the laws are faithfully executed.³ In calling for the appointment of a special prosecutor, the Governor was acting on a recommendation made by New York City's Commission to Investigate Allegations of Police Corruption and the City's Anti-Corruption Procedure ("Knapp Commission").⁴

The purpose of this article is to consider the constitutionality and legality of the executive order. This will entail a brief survey of the historical development of the offices of district attorney and attorney general in New York, followed by an analysis of two potential limitations on the

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1. Executive Orders Nos. 55 (New York Co.), 56 (Bronx Co.), 57 (Queens Co.), 58 (Kings Co.), 59 (Richmond Co.) 9A N.Y.C.R.R. § 1.44 (1972) [hereinafter collectively referred to as Executive Order No. 55]. The orders are identical except for reference to a specific county.

2. N.Y. Exec. Law § 63(2) (McKinney 1972); see Exec. Order No. 55(I).

3. See N.Y. Const. art. 4, § 3.

4. Executive Order No. 55(I). The Knapp Commission was established in May, 1970 by Executive Order of New York City Mayor John V. Lindsay. Its primary function was to determine the nature and extent of police corruption in the City, examine the City's procedures for dealing with corruption, and to recommend changes and improvements in those procedures. Executive Order No. 11, § I, N.Y. City Record, vol. XCVIII, at 3583 (May 21, 1970). In its Summary and Principal Recommendations, issued August 3, 1972, the Commission proposed "that the Governor, acting with the Attorney General pursuant to § 63 of the Executive Law, appoint a Special Deputy Attorney General with jurisdiction in the five counties of the City and authority to investigate and prosecute all crimes involving corruption in the criminal process." Commission to Investigate Allegations of Police Corruption, Commission Report 15 (1972) [hereinafter cited as Commission Report].

Governor's power of superseder, viz., the right of localities to govern themselves, and a district attorney's right, under the state constitution, to notice and a hearing before he can be removed. The *Summary and Principal Recommendations* of the Knapp Commission, upon which the Governor relied as the basis for his executive order, will then be briefly discussed. Finally, the legal implications of the order will be analyzed.

II. THE OFFICES OF ATTORNEY GENERAL AND DISTRICT ATTORNEY IN THE STATE OF NEW YORK

A. *Evolution*

While the state government has exercised prosecutorial power since the colonial era, the earliest assignment of the responsibilities of prosecution extended only to the office of attorney general. The office of district attorney was a later, direct evolution from the office of attorney general.

The Dutch colony of New Netherland was governed by a Council of Five, under the executive aegis of a governor. Attached to the Council was an officer known as the "schout-fiscal," who served in a prosecutorial capacity, as well as performing the executive function of sheriff.⁵ The office continued in existence even after the English succeeded to the control of the colony in 1664. However, in the following year the prosecutorial function of the schout-fiscal was eliminated, and the office became, in practical effect, that of "sheriff," the title by which it was denominated under English rule.⁶

As English control became more firmly established in the New York Colony, the colonial form of government began more closely to parallel the English mode. Consequently, an attorney general was designated to exercise the prosecutorial function.⁷ By 1774, the office of "His Majesty's Attorney General of the Province" was similar to that of the chief prosecutor in England, and, as Governor William Tryon reported in that year, the King had "no Soliciter General nor Council in the Province, to assist the Attorney General upon any Occasion."⁸

In 1777, the government of New York was significantly altered by the

5. 1 C. Lincoln, *Constitutional History of New York State* 455 (1905) [hereinafter cited by volume as Lincoln]. The office of sheriff remained functional from 1626 until 1637. Beginning in 1638, due to two repressive regimes in the colony, the office remained either vacant or non-functioning until 1653. In that year, in response to public demand Governor Peter Stuyvesant appointed Cornelius Van Tinhoven, a local resident, who performed the combined functions of the modern sheriff and district attorney. Id. at 455-56.

6. Id. at 458-60.

7. 2 Lincoln 526.

8. Letter of Governor William Tryon to the Home Government, June 11, 1774, quoted in 1 Lincoln 37, 41; see J. Goebel & T. Naughton, *Law Enforcement in Colonial New York* 319-20 (1944); P. Hamlin & C. Baker, *Supreme Court of Judicature of the Province of New York 1691-1704*, at 121-23 (1959). See also 4 W. Blackstone, *Commentaries* *304.

termination of its colonial status and the adoption of its first constitution. Although the Constitution of 1777 made no provision for an office of attorney general, the Constitutional Convention appointed one Egbert Benson to this position.⁹ From 1777 until the adoption of New York's second constitution in 1821, the office of attorney general was filled by appointees of the Council of Appointment.¹⁰ With the adoption of the Constitution of 1821, the attorney general was nominated and appointed by joint action of the Senate and Assembly.¹¹

Notwithstanding this change in the method of appointment, the attorney general continued for a considerable period to prosecute criminal actions in the name of the state. However, the duties of his office were considerably reduced in 1796 by creation of the office of assistant attorney general.¹² These officers, appointed by the governor, generally attended to the criminal courts and conducted criminal prosecutions, although the attorney general retained this function in the county of New York.¹³ This method of prosecuting criminal cases continued until 1801, when the legislature statutorily created the office of district attorney,¹⁴ and prescribed his functions and duties. The office was essentially the same as the former assistant attorney general position.

Like the assistant attorneys general, district attorneys were appointed by the governor, and conducted criminal prosecutions within their districts in the name of the state. As under the assistant attorney general system, the prosecution of crimes within New York City remained the exclusive province of the attorney general.¹⁵

There were only insignificant changes in this system between 1801 and 1821. With passing years, more districts were created; in 1815 the county of New York was made a district; and in 1818 a statute was passed providing for a district attorney for each county.¹⁶

9. The Council of Appointment, which was responsible for the selection of all non-constitutional officers was composed of the governor, who had the right to nominate, but no other vote, and one senator from each district, selected by the Assembly. N.Y. Const. art. XXIII (1777). A dispute as to whether the governor possessed the exclusive right to nominate was resolved by the Constitutional Convention of 1801, which vested concurrent nominating power in the governor and each member of the Council. 1 Lincoln 612. Because the Council became so unrestrained and irresponsible in dispensing patronage, it was abolished by unanimous vote in the Constitutional Convention of 1821. *Id.* at 749. At that time the primary responsibility for appointing state officers was vested in the Legislature. N.Y. Const. art. IV, § 6 (1821).

10. 2 Lincoln 527.

11. N.Y. Const. art. IV, § 6 (1821).

12. Law of Feb. 12, 1796, ch. VIII, [1796] N.Y. Laws 265.

13. 2 Lincoln 529.

14. Law of Apr. 4, 1801, ch. CXLVI, [1801] N.Y. Laws 461.

15. *Id.*

16. Law of Apr. 21, 1818, ch. CCLXXXIII, [1818] N.Y. Laws 306; see 2 Lincoln 529.

Prior to 1821, the district attorneys of the state were appointed in the same manner as the attorney general and their predecessor assistant attorneys general, that is, by the governor with the advice and consent of the Council of Appointment.¹⁷ In 1821 that method was abolished by the new constitution, which mandated that district attorneys be appointed by the county courts,¹⁸ a method of selection essentially preserved until 1846 when the new state constitution provided for the popular election of district attorneys within their districts.¹⁹

B. *Relationship with the Office of Governor*

Another perspective for examining the history of the offices of attorney general and district attorney is gained through an analysis of the relationship between these offices and that of governor. Before the establishment of constitutional government in New York, the attorney general was under the direct control of the colonial governor or the monarch of the nation ruling the colony. The governor's control over the office was not significantly altered either by the first constitution in 1777 or by the 1796 creation of the office of assistant attorney general.²⁰

Similarly, the statute which created the office of district attorney in 1801 expressly directed that the attorney general could be required to conduct prosecutions in any county by "the person administering the government of this state, or any judge of the supreme court by writing under his hand."²¹ The district attorney, until the amendment of this statute in 1827,²² was required to assist the attorney general in such prosecutions in whatever way the latter deemed desirable.²³ While the practice of appointing special attorneys general to prosecute important

17. N.Y. Const. art. XXIII (1777).

18. Id. art. IV, § 9 (1821).

19. Id. art. X, § 1 (1846). The only real change from 1846 until the present was an 1894 constitutional provision that district attorneys in New York and Kings Counties were to be elected every two or four years, instead of every three years. Id. art. 13, § 13(a) (1894).

20. See Law of Feb. 12, 1796, ch. VIII, [1796] N.Y. Laws 265.

21. Law of Apr. 4, 1801, ch. CXLVI, [1801] N.Y. Laws 461, 462.

22. Law of Mar. 6, 1827, ch. VIII, [1827] N.Y. Laws 49. The purpose of the 1827 amendment is unclear, although one could speculate that the 1821 change in the state constitution, whereby district attorneys were appointed by county courts, made those offices independent of the attorney general and no longer subject to his control. Yet, as late as 1826, the governor continued to find it necessary in extraordinary cases for the attorney general to employ counsel to assist the local district attorneys. See Letter from Governor Clinton to State Assembly in State of New York, 3 Messages from the Governors 145 (Lincoln ed. 1909).

23. Law of Apr. 4, 1801, ch. CXLVI, [1801] N.Y. Laws 461.

cases continued throughout the nineteenth century,²⁴ there is little indication as to the exclusive nature of their function.²⁵

In 1894, because of doubts expressed by Governor Flower as to the legality of appearances by the attorney general before a local grand jury,²⁶ the Executive Law was amended to authorize such appearances.²⁷ The changes in the method of selection of district attorneys mandated by each successive change of the state constitution did nothing to alter the relationship between the local district attorneys and the state attorney general. Despite the doubts of Governor Flower, the power of the governor to order the attorney general to step in and prosecute at the local level has continued unaltered to the present day.²⁸ It should be noted that, at each stage in the evolution on the office of district attorney, the duties of the office have remained basically the same.²⁹

The significance of this history has been variously appraised. The substance of most judicial analyses, however, is basically that, while the prosecutorial functions of the office of attorney general have been in large part transferred to the office of the district attorney, the latter has not supplanted the former.³⁰

24. In his 1860 message to the Legislature, Governor Morgan discussed the financial burden on the state of paying the expenses of special attorneys general. He believed that the power to require the attendance of the attorney general on important occasions should remain, but that it should be placed under stricter limitations, and financed by the counties. State of New York, 5 Messages from the Governors 169 (Lincoln ed. 1909).

In an 1874 amendment to an appropriations bill, the Legislature precluded further payment for special attorneys general whose assistance was requested by the local district attorney, Law of May 5, 1874, ch. CCCXXIII, [1874] N.Y. Laws 386-87, but placed no limitations on the exercise of the governor's power to require the attorney general's attendance.

25. In precluding further state payment for special attorneys general in 1874, the Legislature spoke of the "assistance" of attorneys general at the request of local district attorneys, thereby referring to a situation not specifically provided for in the 1827 statute governing special designations. See note 22 *supra*.

26. See 1893 Public Papers of Governor Flower 438-39. The Governor's doubts were apparently fostered by his reluctance to supersede a local district attorney in what amounted to a political controversy. See 1894 Public Papers of Governor Flower 65.

27. Law of Feb. 28, 1894, ch. LXVIII, [1894] N.Y. Laws 162.

28. See N.Y. Exec. Law § 63(2) (McKinney 1972).

29. The language of the statute has been changed from time to time, however, to accommodate changes in the state courts. See N.Y. County Law § 700 (McKinney 1972).

30. See *In re Turecamo Contr. Co.*, 260 App. Div. 253, 257-60, 21 N.Y.S.2d 270, 274-76 (2d Dep't 1940); *Bennett v. Merritt*, 173 Misc. 355, 18 N.Y.S.2d 146 (Sup. Ct. 1940), *aff'd*, 261 App. Div. 824, 25 N.Y.S.2d 784 (2d Dep't), *aff'd*, 286 N.Y. 647, 36 N.E.2d 690 (1941) ("[t]he authority of the Governor to compel the Attorney-General to act does not negative the latter's authority, if any, to act voluntarily." *Id.* at 359, 18 N.Y.S.2d at 151); *People v. Brennan*, 69 Misc. 548, 127 N.Y.S. 958 (Kings County Ct. 1910); *People v. Kramer*, 33 Misc. 209, 68 N.Y.S. 383 (Ct. Gen. Sess. 1900). See also *People v. Tru-Sport Publ. Co.*, 160 Misc. 628, 636-39, 291 N.Y.S. 449, 458-61 (Sup. Ct. 1936). *Contra*, *People v. Dorsey*, 176

On the other hand, it could be argued that the Constitution of 1846 mandated that criminal prosecutions be handled on a purely local basis. This however, is not the case, since it was only the method of selection of district attorneys, and not the functions of the office or the relationship it bore to other offices within the state's system, that was changed by the 1846 Constitution.³¹

III. THE POWER OF SUPERSEDER

A. *Its Use in the Past*

Historically, the frequency and scope of a governor's use of the power of superseder has been dependent upon the nature of the problem, as well as his view of the nature of executive power and its relation to the needs of the local community as it affected the state at large. One constant pattern has been a fairly general reluctance to issue an executive order of superseder where party or local politics was involved. The power of superseder has been used rarely, and such is its design.

Prior to 1893 there was apparently no actual dispute over the governor's power to supersede a district attorney. In that year a group of citizens requested that a special deputy attorney general be appointed to investigate alleged election crimes committed in the town of Gravesend by the Chief of Police.³² At this time the applicable provision of the Executive Law provided that the attorney general "[w]henever required by the governor or a justice of the supreme court, attend the courts of oyer and terminer for the purpose of managing and conducting a criminal action or proceeding therein."³³ The Kings County District Attorney opined that a special prosecutor would not be authorized to appear before the grand jury. He therefore offered to appoint one or more honest lawyers named by Governor Flower as assistant district attorneys, in order to relieve the Governor of any embarrassment in designating persons who were unable to make a grand jury appearance.³⁴ Governor Flower accepted this proposal, and thereby obviated any potential legal problems of a grand jury appearance by a special deputy attorney general.³⁵ The Governor said that his "anxiety to avoid any miscarriage of

Misc. 932, 29 N.Y.S.2d 637 (Queens County Ct. 1941). "[T]he conclusion is inevitable that the powers of the Attorney-General are only those which are granted by our State Constitution and by enactments of our Legislature." *Id.* at 938, 29 N.Y.S.2d at 643.

31. See note 19 *supra* and accompanying text.

32. 1893 Public Papers of Governor Flower 429, 431.

33. Law of May 18, 1892, ch. DCLXXXIII, art. V, § 2 § 52(2), [1892] N.Y. Laws 1691, 1697.

34. 1893 Public Papers of Governor Flower 432.

35. *Id.* at 438.

justice was so great that [he] did not wish to take the risk of a quashing of an indictment through a technicality."³⁶

It would appear, however, that the real concern of Governor Flower stemmed from his reservations about exercising the power of superseder. These reservations were revealed in a memorandum on the occasion of the signing of the 1894 bill³⁷ which authorized a special deputy attorney general to appear before a grand jury and precluded the district attorney from prosecuting a matter in which his authority had been superseded. The Governor wrote:

This bill confers such sweeping and exclusive power upon the Executive that I hesitated to affix my signature to it, and have only concluded to do so upon the reflection that the measure is an improvement in certain respects upon the existing law relating to the same subject. . . .

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

Instances occasionally happen, however, where there is no evasion or neglect of duty on the part of the district attorney, no maladministration of office, but where, by reason of personal or local complications, the interests of a thorough and impartial prosecution demand that the Attorney-General should supersede the district attorney. Such cases the bill under consideration would provide for. But they are rare, and resort to this statute, therefore, ought to be equally rare.³⁸

Governor Flower's conservatism on the issue of superseder was not shared by his successors. In 1889, Governor Theodore Roosevelt signed into law an amendment of the Executive Law, which authorized the attorney general, when requested by the governor, to investigate whether crimes relating to the elective franchise were being faithfully prosecuted. The attorney general in his discretion, or at the order of the governor, could designate a deputy to prosecute all such crimes. In 1900, Governor Roosevelt ordered the attorney general to investigate and prosecute all persons who violated certain provisions of the Penal Law relating to the elective franchise,³⁹ and removed the New York County District Attorney

36. *Id.* at 439.

37. See note 27 *supra* and accompanying text.

38. 1894 Public Papers of Governor Flower 65.

39. 1900 Public Papers of Governor Roosevelt 83. Governor Roosevelt's papers contain no reference to the 1899 law, Law of Apr. 12, 1899, ch. CCCII, [1899] N.Y. Laws 655, specifically authorizing the attorney general to investigate and prosecute crimes against the elective franchise. This provision related only to "metropolitan election districts," which were constituted in the counties of New York, Kings, Queens, Richmond and Westchester. See Law of

from office.⁴⁰ Between 1910 and 1928, Governors Hughes,⁴¹ Dix,⁴² Whitman⁴³ and Smith⁴⁴ superseded local district attorneys on more than twenty occasions; only once was there refusal to supersede.⁴⁵ The orders usually related to specific crimes,⁴⁶ crimes committed by specific persons,⁴⁷ or the prosecution of specific indictments.⁴⁸

In 1928, Governor Smith issued a superseder order relating to all corrupt acts by public officers in Queens County and persons connected with such officers.⁴⁹ The order, however, was silent as to crimes committed after the date of the order. During Franklin Roosevelt's tenure in office no occasion arose which made it necessary to issue as broad an order as the 1928 superseder of Governor Smith, but the specific superseders continued.⁵⁰ Governor Roosevelt also had occasion to suggest to a district attorney that certain charges be resubmitted to the grand jury.⁵¹ When the district attorney requested the Governor to order a special deputy attorney general to be associated with the district attorney, the Governor refused the request with the observation:

I regret that I cannot comply with your request that I direct the Attorney-General to associate himself with you in the prosecution of these cases. In order to have the Attorney-General prosecute in matters of this kind, the ordinary and legal procedure is to supersede the District Attorney for that purpose.⁵²

July 16, 1898, ch. DCLXXVI, [1898] N.Y. Laws 1612. The attorney general could appoint a special deputy to take charge of such prosecutions in the appropriate court, or could request the governor to convene an extraordinary term of the supreme court. Law of Apr. 12, 1899, ch. CCCII, [1899] N.Y. Laws 655. If the latter course of action were undertaken, the law clearly provided for superseder of the affected district attorney. *Id.* If no extraordinary term were convened, the law was unclear whether the district attorney was superseded.

In 1916, the law was amended to provide that the jurisdiction conferred on the attorney general in the 1899 provision was concurrent with that of the county district attorney, but exclusive jurisdiction after a particular offense was to belong to the officer who first asserted it, unless the governor divested that officer of jurisdiction. Law of May 1, 1916, ch. CCCLIX, [1916] N.Y. Laws 966.

40. Matter of Gardiner, 1900 Public Papers of Governor Roosevelt 200.

41. 1910 Public Papers of Governor Hughes 282-88.

42. 1911 Public Papers of Governor Dix 477; 1912 Public Papers of Governor Dix 306.

43. 1915 Public Papers of Governor Whitman 336-39; 1917 Public Papers of Governor Whitman 418, 420-21, 423-24.

44. 1923 Public Papers of Governor Smith 358; 1926 Public Papers of Governor Smith 503; 1927 Public Papers of Governor Smith 221, 249.

45. See 1912 Public Papers of Governor Dix 317, 322. Governor Dix refused to honor a request that special counsel be appointed to supersede a district attorney who lacked experience.

46. See, e.g., 1917 Public Papers of Governor Whitman 421.

47. See, e.g., 1915 Public Papers of Governor Whitman 376.

48. See, e.g., 1926 Public Papers of Governor Smith 503.

49. 1928 Public Papers of Governor Smith 266.

50. See 1931 Public Papers of Governor Roosevelt 396, 397, 399.

51. *Id.* at 499.

52. *Id.* at 501.

In 1934 Governor Lehman observed that the power to supersede "is not exercised unless it appears that the district attorney has failed to discharge the duties of his office or is otherwise precluded or hampered in doing so."⁵³ Thus, when in 1935 the New York County Grand Jury requested the appointment of a special prosecutor to investigate and prosecute organized crime and vice, the Governor chose not to exercise his power of superseder. Instead, he requested the New York District Attorney to appoint an assistant district attorney, to be designated by the Governor. Governor Lehman stated that "[i]n all fairness to you [District Attorney Copeland] . . . from no source have I received criticism that you have failed to co-operate with the police department of the city of New York, or to present to grand juries all evidence submitted or available to you."⁵⁴ The Governor said he found it necessary to have a special prosecutor appointed because he strongly believed

that much will be gained by the designation of a special prosecutor of energy, ability, and of complete independence,—one in whom the people will have full confidence. Such a prosecutor would be in a position to give his full time to this vital investigation. Such a prosecutor would be able to devote himself to this special task in a manner that is not possible for any district attorney who is burdened with the tremendous mass of regular law enforcement functions.⁵⁵

The request by the Governor for appointment of a special prosecutor as an assistant district attorney was allegedly based upon his view that the power of superseder would have required a reasonably definite and limited order.⁵⁶ The district attorney subsequently complied with the request to appoint Thomas E. Dewey.

In 1938, Governor Lehman apparently no longer held the same view of the limited nature of superseder. In that year he ordered superseder of prosecution for both past and prospective criminal conduct involving the administration of criminal justice in Kings County.⁵⁷ This order had no expiration date and was subsequently read by the appellate division to expire at the conclusion of the incumbent district attorney's term in office.⁵⁸ Governor Lehman was also faced with situations calling for narrower orders of superseder.⁵⁹ However, on one occasion, after issuing an order superseding a district attorney for crimes in connection with

53. 1934 Public Papers of Governor Lehman 452.

54. 1935 Public Papers of Governor Lehman 681, 682.

55. *Id.*

56. *Id.*

57. 1938 Public Papers of Governor Lehman 301; see also 1942 Public Papers of Governor Lehman 403.

58. *In re Turecamo Contr. Co.*, 260 App. Div. 253, 259, 21 N.Y.S.2d 270, 276 (2d Dep't 1940).

59. 1933 Public Papers of Governor Lehman 399; 1936 Public Papers of Governor Lehman 599.

the death of a named individual,⁶⁰ he subsequently broadened the order to include crimes connected to the special prosecutor's investigation regardless of when they occurred.⁶¹ On another occasion, Governor Lehman refused to supersede the Bronx County District Attorney merely because of the latter's "close political and personal associations" with the subject of the grand jury investigation.⁶²

Governor Dewey twice rejected requests for orders of superseder,⁶³ but on the several occasions when he did grant such requests, it was with the broad construction of the scope of the superseder power that had marked the final years of Governor Lehman's administration.⁶⁴ The scope of such grants of superseder depended on whether they were directed at a specific crime, person, or activity, but in each grant there was authority to investigate and prosecute crimes committed both before and after the date of the executive order. Governor Dewey's view of the significance of the superseder power was expressed by his counsel, Charles Breitel, who explained on behalf of the Governor that the "action displacing a local official, particularly an elected one, by a state representative is not to be resorted to unless there is compelling evidence that the existing agencies are not performing or are incapable of performing their proper functions."⁶⁵

Although Governor Harriman extended the duration of one executive order issued by Governor Dewey,⁶⁶ and issued one very broad order of his own,⁶⁷ his philosophy of superseder was considerably different from that of his two immediate predecessors. Governor Harriman theorized that a local district attorney should be superseded only when shown to be actually incompetent or negligent.⁶⁸ For example, on one occasion he refused a request by a group of Republican legislators to appoint a state-wide special prosecutor, observing that such an order would amount to superseding the district attorneys in all sixty-two counties of the state without a sufficient basis either in New York County or in any other county.⁶⁹

60. 1935 Public Papers of Governor Lehman 418.

61. 1937 Public Papers of Governor Lehman 503.

62. 1942 Public Papers of Governor Lehman 417.

63. 1945 Public Papers of Governor Dewey 369; 1946 Public Papers of Governor Dewey 423.

64. 1943 Public Papers of Governor Dewey 271-77; 1944 Public Papers of Governor Dewey 355; 1949 Public Papers of Governor Dewey 438-44; 1952 Public Papers of Governor Dewey 456.

65. 1945 Public Papers of Governor Dewey 369.

66. 1955 Public Papers of Governor Harriman 414.

67. 1957 Public Papers of Governor Harriman 692.

68. *Id.* at 1140.

69. *Id.* at 1139.

Governor Rockefeller issued a narrow order of superseder late in his first term in office,⁷⁰ and another in 1969 pursuant to a request by the District Attorney of Kings County.⁷¹ In 1965⁷² and 1969⁷³ the Governor issued considerably broader orders, followed by a broad order in 1971 involving the prosecution of crimes arising from the uprising at Attica State Prison,⁷⁴ and the one under scrutiny in this article.

B. Possible Limitations

1. Home Rule

One arguable limitation on the governor's right to appoint a special state prosecutor is the constitutional concept of home rule,⁷⁵ a principle which was succinctly explained by the New York Court of Appeals in *People ex rel. Metropolitan Street Railway v. State Board of Tax Commissioners*.⁷⁶

Local functions, however, cannot be transferred to a state officer. The legislature has the power to regulate, increase or diminish the duties of the local officer, but it has been steadfastly held that this power is subject to the limitation that no essential or exclusive function belonging to the office can be transferred to an officer appointed by central authority.⁷⁷

From the outset, it should be borne in mind that nowhere in the home rule provision of the state constitution is there a guarantee of local control over criminal prosecution of state criminal offenses. Illustrative of this retention of power in the state is the fact that the City of New York is precluded by article 13, section 13(c) of the state constitution from abolishing the county offices of district attorney, judge or county clerk, although it is authorized to abolish any other county office. The reason for this provision lies in the history of these offices and the state function which they serve.⁷⁸

70. 1961 Public Papers of Governor Rockefeller 779.

71. 1969 Public Papers of Governor Rockefeller 864.

72. 1965 Public Papers of Governor Rockefeller 795.

73. 1969 Public Papers of Governor Rockefeller 859, 866.

74. See N.Y. Times, Sept. 16, 1971, at 1, col. 6.

75. See N.Y. Const. art. IX, § 1.

76. 174 N.Y. 417, 67 N.E. 69 (1903), aff'd, 199 U.S. 1 (1905). This case concerned the right of New York State to assess the value of franchises for purposes of taxing them. In upholding the state's right to assess, the Court of Appeals ruled that such assessment was not a local function in light of the unique nature of valuating franchise rights, a process which had never been undertaken by local authorities.

77. Id. at 434-35, 67 N.E. at 72.

78. It should be noted, however, that the term "state official" appears to be a key word, "impl[ying] variables depending upon the particular problem for which it is used." *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945) (Frankfurter, J.). Compare *Fisher v. State*, 10 N.Y.2d 60, 176 N.E.2d 72, 217 N.Y.S.2d 52 (1961) (state is not responsible for the tortious acts

In *Metropolitan Railway*, a case upholding the right of the state to assess the value of franchise rights as a preliminary to taxing them, the court examined the pre-1777 history of assessors and found that valuating franchises "is no part of local self-government as known to history"⁷⁹ This historical approach to home rule would warrant a similar conclusion when applied to the office of district attorney, which, as previously indicated, did not exist before the adoption of the first state constitution. Indeed, the office of district attorney, as we have come to know it, did not exist any earlier than 1821, and since 1796 the attorney general has been obliged by statute to prosecute criminal cases upon request of the governor.

An examination of the home rule question from a modern perspective likewise mandates the conclusion that the office of district attorney is a creature of the state. Current constitutional and statutory provisions describe district attorneys in terms not significantly different from those which have defined their office at all points in the history of the state. In addition, the traditional relationship between the office of the governor and the office of the attorney general has been preserved in section 63 of the Executive Law. Under this section the governor may require the attorney general to prosecute specific matters in the name of the state,⁸⁰ and it is axiomatic that the exercise of this power may result in an intrusion upon the office of the district attorney. This intrusion is neither unusual nor improper when viewed from a historical perspective.⁸¹

In further support of this conclusion, it must be noted that section 2(b)(2) of article nine of the state constitution is dispositive of any argument that section 63(2) of the Executive Law is an unconstitutional intrusion upon the power of local government to act in matters that concern the property, affairs or government of the local entity. Assuming *arguendo* that the power of superseder does relate to the affairs or government of a local entity,⁸² the constitution nevertheless authorizes

of an assistant district attorney since he is a local, rather than state, official), with *Spielman Motor Sales v. Dodge*, 295 U.S. 89 (1935) (district attorney is state officer for purposes of enjoining the enforcement of unconstitutional state statute) and *Ritter v. State*, 283 App. Div. 833, 122 N.Y.S.2d 334 (3d Dep't 1953) (indicating that district attorney is a state officer for purposes of prosecuting criminal charges). See also *Zimmerman v. City of New York*, 52 Misc. 2d 797, 276 N.Y.S.2d 711 (Sup. Ct. 1966); *People v. La Plante*, 207 Misc. 546, 137 N.Y.S.2d 893 (Franklin County Ct. 1955); *McDonald v. Goldstein*, 191 Misc. 863, 83 N.Y.S.2d 620 (Sup. Ct.), *aff'd* 273 App. Div. 649, 79 N.Y.S.2d 690 (2d Dep't 1948).

79. 174 N.Y. at 442, 67 N.E. at 75.

80. N.Y. Exec. Law § 63(2) (McKinney 1972).

81. See text accompanying notes 21-30 *supra*.

82. It is doubtful whether § 63(2) of the Executive Law does relate to the affairs of local governments. See *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705 (1929); *City of New York v. Village of Lawrence*, 250 N.Y. 429, 165 N.E. 836 (1929).

intervention by legislative action if it is undertaken as a matter of "general law,"⁸³ defined in the constitution as "law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages."⁸⁴ On its face, the superseder provision in the Executive Law is general in nature, and thus represents a valid exercise of the judicial function, even though in practice it may relate, in some measure, to local matters. It should also be noted, by way of emphasis, that the superseder provision is not in violation of the bill of rights of local governments,⁸⁵ nothing in which guarantees localities the right to have Penal Law violations prosecuted by local district attorneys.

Judicial interpretations of the home rule guarantees in the state constitution support the conclusion that these provisions do not encompass subjects of primarily state concern.⁸⁶ Thus, while the Governor's order requiring superseder is authorized by a general legislative grant of power to the executive, it would appear that the order could be sustained on the additional ground that it is based upon a legitimate state concern. It seems clear that the fair and proper administration of the state criminal justice system as it affects approximately eight million New York City residents, as well as those who conduct business there, is a matter for state attention, as is the apparent bribery of police officers by persons involved in narcotics traffic.⁸⁷ The latter problem indeed has state and even national ramifications, since New York City is thought to be a major import and distribution center for hard drugs. Similar concerns are posed by New York City's status as the nation and state's most important business center. Thus, it is difficult to argue that the Governor's order does not have as its basis a legitimate state concern.

2. Nonuse of the Attorney General's Prosecutorial Power

Before discussing the relationship between superseder and removal, another potential argument against the appropriateness of superseder should be considered. It may be that the infrequent use of superseder, as well as modern development of the district attorney as the principal, if not sole, executor of the prosecutorial function, has rendered the attorney general legally impotent to exercise such power. Research discloses that only one court has considered this argument, in the context of a motion

83. N.Y. Const. art. IX, § 2(b)(2).

84. *Id.* § 3(d).

85. See *id.* §§ 1-10.

86. See, e.g., cases cited note 82 *supra*. See generally Hyman, *Home Rule in New York 1941-1965 Retrospect and Prospect*, 15 *Buffalo L. Rev.* 335, 343-45 (1965).

87. See Commission Report 13-16.

to set aside an indictment because an assistant attorney general, pursuant to an order of superseder, was present during a grand jury proceeding although he was not authorized by statute to be present.⁸⁸ In denying the motion the court found that the common law right of the attorney general to appear before a grand jury continued to exist despite the absence of statutory authorization for such an appearance:

The cycle of problem[s] that confronts the administration of our criminal law has turned to the point where the need of a renewal of the use of the Attorney-General's common-law power may be said to be oft times apparent. This is illustrated by the charges contained in these indictments. Criminal acts and organizations no longer have a localized aspect and such operations, more than ever before, transcend restricted fields in their mutiny against the law. Geographical bounds no longer bar the way to the criminal as they were wont to do in the nineteenth century, and cases are easily envisioned where a district attorney and the grand jury may sorely need such assistance in the interest of public justice. The nonuser of those powers during the past century has not, in my opinion, destroyed them. . . . Custom and practice has doubtless made the [District Attorney's] duty paramount and accorded precedence in performance. Thus this power of the Attorney-General was rendered dormant for want of employment. Later enactments rearranged precedence when positive duty was assigned, coupled to the old power, and thereby the latter was expressly renewed for special causes. But through all of this transition, it is my opinion, the power itself was not destroyed though rendered latent. Therefore, in the cases here presented it seems to me that it was lawfully renewed and quickened by the action of the district attorney and the grand jury.⁸⁹

3. Removal versus Superseder

Another possible criticism of Governor Rockefeller's superseder order for New York City is that it divests the five district attorneys of the prerogatives of office without the benefits of notice and a hearing. The resolution of this problem turns on an understanding of the difference between superseder and removal. The relationship between these two powers has never been the subject of judicial scrutiny in this state. The state constitution specifically grants power to the Governor to remove a district attorney from office,⁹⁰ but only after notice and a hear-

88. *People v. Tru-Sport Publ. Co.*, 160 Misc. 628, 291 N.Y.S. 449 (Sup. Ct. 1936). For a discussion of the procedure for challenging an order requiring superseder, see text accompanying notes 130-70 *infra*.

89. 160 Misc. at 639, 291 N.Y.S. at 461; see *In re Cranford Constr. Co.*, 174 Misc. 154, 160, 20 N.Y.S.2d, 865, 871 (Sup. Ct. 1940) ("The executive order, however, does not create power to prosecute. It is the occasion for its exercise.")

90. The state constitution authorizes two types of removal. "The governor may remove any elective . . . district attorney . . . but before so doing he shall give to such officer a copy of the charges against him and an opportunity of being heard in his defense." N.Y. Const. art. XIII, § 13(a). This provision gives the governor discretion to determine when and if he must institute removal proceedings, and is to be contrasted with article XIII, § 13(b) of the constitution, which mandates removal by the governor of a district attorney who fails to

ing.⁹¹ Since the lineage of the Executive Law provision authorizing superseder can be traced to 1796, there is nothing to indicate that the removal provision of the state constitution was designed to replace the power of superseder. On its face, the limited superseder provision in the Executive Law does not appear to authorize what would amount to a removal without benefit of notice or hearing,⁹² and appears distinct from removal in several ways. First, removal of a district attorney implies complete divestiture of the duties and prerogatives, as well as compulsory forfeiture, of the office. Superseder, however, merely divests jurisdiction over certain specified offenses dealing with a specific problem. Second, the superseder order usually directs the district attorney to assist the deputy attorney general, thereby changing his function with respect to a limited class of cases but in no way removing him from office. Finally, removal implies dereliction of duty while superseder is based upon inability to perform a given function.

In concept, superseder is designed to provide an orderly and predictable vehicle to enable the Governor to fulfill his constitutional duty to "take care that the laws are faithfully executed."⁹³ The decision of whether to issue an order of superseder or merely to require an investigation is one which is left solely to the discretion of the Governor, limited only by the constitutional requirement that there be a "reasonable relationship between the action taken . . . and . . . the executive function"⁹⁴ to assure

prosecute a person holding office under state law who accepts a bribe to perform, or not to perform, an official function. Removal is similarly mandated by failure to prosecute an individual who has offered such a bribe.

91. *Id.* § 13(a)&(b).

92. See Exec. Law § 63(2) (McKinney 1972). "Of course, by an executive order calling upon the Attorney-General to enter a county the office of district attorney could not be stripped of all its power and the Attorney-General's office made perpetually the prosecuting office of a county." *In re Cranford Material Corp.*, 174 Misc. 154, 160, 20 N.Y.S.2d 865, 871 (Sup. Ct. 1940).

93. N.Y. Const. art. IV, § 3. See *In re Cranford Material Corp.*, 174 Misc. 154, 20 N.Y.S.2d 865 (Sup. Ct. 1940).

94. *Matter of DiBrizzi*, 303 N.Y. 206, 216, 101 N.E.2d 464, 469 (1951). Interestingly enough, while the Court of Appeals indicated that there was a standard by which to determine the validity of an order under N.Y. Executive Law § 63(3), it would appear that if the Governor were to give adequate notice and a hearing to a district attorney, and remove him pursuant to N.Y. Const. art. XIII, § 13(a), the judiciary would be precluded from reviewing that removal. *In re Guden*, 171 N.Y. 529, 64 N.E. 451 (1902). See also *Donnelly v. Roosevelt*, 144 Misc. 687, 259 N.Y.S. 356 (Sup. Ct. 1932). Although *In re Guden* was decided in 1932, and has never been overruled, there is some doubt as to its continuing validity, at least in situations where a district attorney is removed for exercising rights guaranteed by the United States Constitution. See, e.g., *Perry v. Sinderman*, 408 U.S. 593 (1972). Whether the judiciary may prohibit removal of a district attorney absent a determination based upon substantial evidence seems to be an open question, the answer to which depends on the con-

that the laws are faithfully executed. This standard is derived from *Matter of Di Brizzi*,⁹⁵ a New York Court of Appeals case upholding the legality and constitutionality of a governor's order requiring an investigation into the relationship between organized crime and government. While it may be argued that *Di Brizzi* dealt only with investigations, it is hard to understand why a different standard should be applied to superseder since the investigation of criminal activity is as much a function of the district attorney as the prosecution of crimes.⁹⁶

It is doubtful whether the Governor's discretion to exercise his executive power is subject to judicial review.⁹⁷ Since it seems clear that the power to issue superseder orders does meet the requirement of having a reasonable relation to the executive function, traditional principles of judicial review would seem to preclude a challenge to the Governor's order requiring superseder unless there is no basis for his conclusion. As the New York Court of Appeals has observed in the setting of an administrative law case:

Where there is conflict in the testimony produced before the Board, where reasonable men might differ as to whether the testimony of one witness should be accepted or the testimony of another witness be rejected, where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the Board. The courts may not weigh the evidence or reject the choice made by the Board where the evidence is conflicting and room for choice exists.⁹⁸

tinuing validity of *In re Guden*. Compare *Long Island College Hosp. v. Catherwood*, 23 N.Y.2d 20, 241 N.E.2d 892, 294 N.Y.S.2d 697 (1968), with *Guardian Life Ins. Co. v. Bohlinger*, 308 N.Y. 174, 124 N.E.2d 110 (1954). See also *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

When a district attorney is removed for failure to prosecute certain charges of bribery, it is possible that such removal will be reviewable in the courts for purposes of determining whether there was a sufficient and factual record upon which to predicate the removal. See *People ex rel. Munday v. Board of Fire Comm'rs*, 72 N.Y. 445 (1878). The procedure to be followed by the governor for removal under N.Y. Const. art. XIII, § 13(a) or (b) is set forth in N.Y. Pub. Officers Law § 34 (McKinney 1952).

95. 303 N.Y. 206, 101 N.E.2d 464 (1951).

96. Superseder has been upheld in situations involving improprieties of state police, *People v. Hopkins*, 182 Misc. 313, 47 N.Y.S.2d 222 (Sup. Ct. 1944), and corrupt practices in the enforcement of law by public servants in a given county, including the office of district attorney, *In re Turecamo Contr. Co.*, 260 App. Div. 253, 21 N.Y.S.2d 270 (2d Dep't 1940). See also *Bennett v. Merritt*, 173 Misc. 355, 18 N.Y.S.2d 146 (Sup. Ct. 1940), *aff'd* 261 App. Div. 824, 25 N.Y.S.2d 784 (2d Dep't), *aff'd*, 286 N.Y. 647, 36 N.E.2d 690 (1941).

97. See *In re Guden*, 171 N.Y. 529, 64 N.E. 451 (1902). See also *Ludecke v. Watkins*, 335 U.S. 160, 165 (1948); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). See generally 4 K. Davis, *Administrative Law Treatise* §§ 28.06, 28.07 (1958) [hereinafter cited as Davis].

98. *Stork Rest. Inc. v. Boland*, 282 N.Y. 256, 267, 26 N.E.2d 247, 252 (1940). See generally Davis § 29.03.

The evidence before the Knapp Commission, on which Governor Rockefeller relied in deciding to require superseder, is perhaps subject to many different inferences, conclusions and recommendations, but to suggest that it does not support the Governor's action is untenable. Any broader review by the judiciary would require that the judiciary, and not the Governor, decide when to require superseder, a result not intended by the state constitution or Executive Law, nor coveted by the judiciary.⁹⁹

Although no court has ever required a governor to justify the issuance of an executive order requiring superseder, there is respectable authority that such an order may be no broader than the mischief which caused it to be issued.¹⁰⁰ To determine whether the most recent order of superseder is overbroad, it is necessary to examine the *Summary and Principal Recommendations* of the Commission to Investigate Allegations of Police Corruption,¹⁰¹ commonly referred to as the Knapp Commission.

IV. THE KNAPP COMMISSION SUMMARY

A. *The Evidence*

After two years of investigation, the Knapp Commission reported that, while an appreciable number of New York City police do not engage in any corrupt activities,¹⁰² corruption in the Police Department was widespread.¹⁰³ Although the scope of the Commission's mandate for investigation was limited to allegations of police corruption, the *Summary* noted that police do not have a "monopoly on corruption."¹⁰⁴ The Commission found that "in every area where police corruption exists it is paralleled by corruption in other agencies of government, in industry and labor, and in the professions."¹⁰⁵

99. See cases cited note 97 supra. To the extent that a court is prepared to say that the order requiring superseder is in fact a removal, notice and a hearing is required, N.Y. Const. art. XIII § 13(a)&(b), followed, perhaps, by judicial review. See also note 94 supra.

100. See, e.g., *In re Turecamo Contr. Co.*, 260 App. Div. 253, 259, 21 N.Y.S.2d 270, 276 (2d Dep't 1940).

101. Commission Report, supra note 4, at 1-34. The "Summary and Principal Recommendations" of the Commission was issued on August 3, 1972, and incorporated as part of the Commission's final report, released on December 26, 1972, more than three months after the issuance of Governor Rockefeller's executive order.

102. *Id.* at 3.

103. *Id.* at 1.

104. *Id.* at 5.

105. *Id.* Less than a month before the appointment of the Commission, the New York Times charged widespread police corruption and official laxity in dealing with such corruption. N.Y. Times, Apr. 25, 1970, at 1, col. 1. Since the issuance of the Commission Summary, serious charges regarding members of the judiciary have been made in the news media. See, e.g., Newfield, *The Ten Worst Judges in New York City*, New York Magazine, Oct. 6, 1972, at 32; N.Y. Times, Sept. 25, 1972, at 1, col. 7. The Newfield article has aroused considerable con-

The Knapp Commission found that much of the difficulty in combating police corruption derives from the fact that all of the official agencies involved in ferreting out corruption must rely upon policemen for their investigative work. "In the case of the District Attorneys, there is an additional problem that they work so closely with policemen that the public tends to look upon them—and indeed they seem to look upon themselves—as allies of the Department."¹⁰⁶ The citizen wishing to complain about a policeman knows that the follow-up investigation will be done by other policemen and "New Yorkers just don't trust policemen to investigate each other."¹⁰⁷ Considerable evidence of this distrust was presented to the Knapp Commission:

Many people—sometimes represented by experienced lawyers—brought the Commission evidence of serious corruption which they said they would not have disclosed to the police or to a District Attorney or to the City's Department of Investigation. Even today, complainants who call the Commission and are told that the investigation has ended often refuse to take down the phone numbers of these agencies. It makes no difference whether or not this distrust is justified. The harsh reality is that it exists.

This distrust is not confined to members of the public. Many policemen came to us

trovery, and provoked several responses from the bar. See, e.g., N.Y.L.J., Dec. 4, 1972, at 1, col. 4. See also N.Y. Times, Nov. 20, 1972, at 27, col. 1 (special prosecutor investigating twenty justices for possible "favoritism" to organized crimes); N.Y. Times, Nov. 27, 1972, at 18, col. 1 (State Commission of Investigation investigating cases in which alleged mafia figures received lenient sentences); N.Y. Times, Nov. 19, 1972, at 40, col. 3 (Brooklyn District Attorney investigating disposition of case against alleged mafia member by named supreme court justice). The Queens County District Attorney's office has been the subject of considerable adverse publicity and charges of corruption. See, e.g., N.Y. Times, Aug. 14, 1972 at 20, col. 4. A federal grand jury was investigating alleged criminal charges against members of the Queens District Attorney's Office, N.Y. Times, Oct. 11, 1972, at 52, col. 1. In addition, an assistant district attorney of Queens County has recently been convicted in federal court of accepting a \$15,000 bribe to fix a criminal case. N.Y. Times, Jan. 31, 1973, at 39, col. 3.

The special prosecutor has commenced a grand jury investigation into the activities of the Queens County District Attorney's Office, resulting in at least one refusal to execute a waiver of immunity, N.Y. Times, Feb. 2, 1973, at 1, col. 3, as well as the appearance as a witness of the District Attorney himself before the grand jury. N.Y. Times, Feb. 24, 1973, at 1, col. 1.

Although the invocation of the privilege against self-incrimination by these assistant district attorneys has brought forth a call for their dismissal, such a dismissal would violate the Constitution. *Gardner v. Broderick*, 392 U.S. 273 (1968). However, if an assistant district attorney, in his capacity as a public servant, should "[refuse] to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, . . . the privilege . . . would not have been a bar to his dismissal." *Id.* at 278 (footnote omitted). The court in *Gardner* appears to be suggesting that any testimony at such an inquiry could not be used against the assistant district attorney in a criminal proceeding. See *Uniform Sanitation Men's Ass'n v. Commissioner of Sanitation*, 426 F.2d 619 (2d Cir. 1970) (Friendly, J.), cert. denied, 406 U.S. 961 (1972).

106. Commission Report 14 (emphasis added).

107. *Id.*

with valuable information which they consented to give us only upon our assurance that we would not disclose their identities to the Department or to any District Attorney.¹⁰⁸

The focus of the Commission's investigation was on the police rather than other constituents of the criminal justice system. Accordingly, the Commission's final report contained very little hard evidence of actual corruption or non-feasance of judges, prosecutors and other non-police personnel. Nevertheless, the public's fear of such conduct is a documented fact, and it is to this widespread notion that the Knapp Commission addressed its recommendation.

B. *The Recommendation*

"Any proposal for dealing with corruption must . . . provide a place where policemen as well as the public can come with confidence and without fear of retaliation."¹⁰⁹ The Knapp Commission observed that the widespread charges of corruption among prosecutors, lawyers and judges, as well as the police force, mandated the interposition of an office having jurisdiction to investigate and prosecute corruption in the entire criminal justice process. The prosecutorial function of this new office was, according to the Knapp Commission, essential to insure independence of the agencies which might come under its scrutiny.¹¹⁰ Since corruption transcends county lines and "District Attorneys' offices are reluctant to encroach upon each other's jurisdictions, *much less investigate each other's personnel*,"¹¹¹ the Commission concluded that city-wide jurisdiction was absolutely necessary.

Given their findings, and the need for a war on corruption, the Knapp Commission recommended

that the Governor, acting with the Attorney General pursuant to § 63 of the Executive Law, appoint a Special Deputy Attorney General with jurisdiction in the five counties of the City and authority to investigate and prosecute all crimes involving corruption in the criminal process.¹¹²

V. THE GOVERNOR'S ORDER

It should be emphasized that the impetus for the latest executive order requiring superseder resulted from a recommendation by a body appointed by the Mayor of the City of New York without any compulsion by the Governor of New York State.¹¹³ There is no evidence that even

108. *Id.*

109. *Id.*

110. *Id.* at 15.

111. *Id.* (emphasis added).

112. *Id.*

113. See *id.* at 35-36.

remotely suggests that the Governor exerted pressure, overtly or covertly, upon the Knapp Commission to request the appointment of a special deputy attorney general.

While the Knapp Commission Summary did not specifically recommend that the proposed special deputy attorney general have exclusive jurisdiction,¹¹⁴ the Governor's executive order does provide for such exclusive jurisdiction. Apparently, administrative difficulties and potential interference—intentional or unintentional—with investigations of official corruption mandated exclusive jurisdiction in a special prosecutor with absolute discretion to prosecute or investigate a given case or to direct a district attorney to perform either or both functions.

The Governor's executive order calls for the investigation and prosecution of corrupt acts connected in any way to the administration of the criminal justice system in New York City when committed by a public servant or any other individual whose conduct is in any way related to the corrupt act of a public servant.¹¹⁵ The order encompasses such corrupt acts whether they occurred before or after issuance of the order.¹¹⁶

The executive order's specification of corrupt acts relating to the administration of law in New York City appears no broader than a 1940 order upheld by the appellate division, second department, which called for investigation and prosecution of crimes relating to the enforcement of law in Kings County.¹¹⁷ That the order in the present situation encompasses the entire City of New York is justified by the Knapp Commission's findings that the corruption, as well as the public's shaken confidence in those who administer the criminal laws, was a city-wide problem with implications crossing county boundaries.¹¹⁸ Criminal justice

114. See *id.* at 14.

115. Executive Order No. 55(I)(a)&(b). The order also extends to any criminal acts of interference with the execution of any function authorized by the order. *Id.* (I)(c).

116. *Id.* (I)(a)-(c). The "theft" from the New York City Police Department of some four hundred pounds of narcotics, including eighty-one pounds of heroin involved in the "French Connection" case, see *N.Y. Times*, Dec. 15, 1972, at 1, col. 2; *id.*, Dec. 21, 1972, at 1, col. 3, resulted in a jurisdictional dispute between the special prosecutor and the elected district attorneys. See *id.*, Dec. 28, 1972, at 1, col. 7. Failure to adhere to the original executive order, which clearly vested jurisdiction over such a crime in the special prosecutor, resulted in an additional executive order specifically precluding the district attorneys from investigating the crime. See *id.*, Dec. 29, 1972, at 1, col. 3.

117. *In re Turecamo Contr. Co.*, 260 App. Div. 253, 21 N.Y.S.2d 270 (2d Dep't 1940). See also *People v. Dorsey*, 176 Misc. 932, 291 N.Y.S.2d 637 (Queens County Ct. 1941). It is true, however, that the orders in *Turecamo* and *Dorsey* specified the subject matter of the orders with greater specificity than the order under discussion, and were found to have as their principal purpose the investigation of the district attorney's office. *In re Turecamo Contr. Co.*, 260 App. Div. 253, 259, 21 N.Y.S.2d 270, 276 (2d Dep't 1940).

118. Commission Report 15. Governor Rockefeller, in his statement accompanying the executive order, stated: "I have taken this action in recognition of a fundamental reality:

corruption cases comprise an extremely low percentage of a prosecutor's caseload in New York City.¹¹⁹ Although somewhat refined distinctions must be made, it would seem the local prosecutors have been superseded in such a very narrow area that any resulting stigmatization of a district attorney can not be equated with the consequences of removal, and thus do not mandate notice and a hearing. It should be emphasized in this context that neither the Knapp Commission nor the Governor in his executive order raised any question of malfeasance on the part of the superseded district attorneys.

The Governor's superseder order empowers a special deputy attorney general to prosecute violations of local statutes, where such violations arise out of, or relate to, the administration of criminal justice in the City of New York.¹²⁰ While this provision of the order is clearly authorized by subdivision two of section 63 of the Executive Law, it would seem that in enforcing the New York City Administrative Code, district attorneys act not as state officials, but in a purely local capacity.¹²¹ The justification for superseding a district attorney in these circumstances might be the fear that prosecution under the Administrative Code would preclude prosecution for a greater offense under the Penal Law.¹²² The purpose of reserving a body of cases for prosecution as higher crimes would appear to bear a reasonable relationship to the executive function.

While the executive order specifically states that district attorneys

that under the present circumstances, only an independent agency with city wide authority, assigned a clear and specific mission and armed with full prosecuting power and independent investigative capacity, can break through the natural resistance of government agencies to investigate themselves or their close allies, can overcome the forces of inertia, and can finally deal a decisive blow to narcotics, crime and corruption in New York City." *N.Y. Times*, Sept. 20, 1972 at 28, col. 2.

119. During the judicial year 1969-1970, approximately 17,000 indictments were returned in New York City, 1971 Judicial Conference Report 314, and non-traffic misdemeanor arraignments numbered about 134,000. *Id.* at 326. In the course of its investigation, the Knapp Commission tabulated all corruption cases brought against police officers in recent years in New York City. See Commission Report 250-51. As the Commission reports: "In the four and a half years from the beginning of 1968 through the first six months of 1972, the five prosecutors initiated 136 Supreme Court and Criminal Court proceedings involving 218 defendants in police corruption cases." *Id.* at 251. Although no similar statistics are available with respect to cases of official corruption involving non-police personnel, it is reasonable to assume that the proportion of such cases to all prosecutions initiated in New York City is also quite low.

120. Executive Order No. 55(I)(a)&(b).

121. It is true, however, that the New York City Administrative Code is authorized only by virtue of the state constitution. *N.Y. Const. art. IX, § 2(c)(10)*; see *N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(11)* (McKinney 1969).

122. See *N.Y. Crim. Proc. Law § 40.40* (McKinney 1971).

are not superseded as to any indictments filed on or before September 19, 1972, the date of the order,¹²³ it seems clear that the special prosecutor is authorized to investigate the manner in which a prosecution was conducted, regardless of when the indictment was returned. Indeed, such investigations, and the potential prosecutions resulting therefrom are two of the prime purposes of the executive order.¹²⁴ Moreover, the special prosecutor is to be responsible for controlling all investigations of corruption pertaining to the criminal justice process in New York City, whether in progress before the date of the Governor's order, or undertaken after that date. While this may present some problems of coordination of investigations, the resolution of these difficulties is the responsibility of the special prosecutor under the order, and presumably such difficulties "can be reduced to a minimum by adherence to the executive orders."¹²⁵

In keeping with the view of the Knapp Commission that corruption in the criminal justice system cannot be fought effectively by the local district attorney's office, the Governor's order has no expiration date. In effect, this represents an opinion that such corruption is an institutional defect which cannot be cured by a mere change in personnel. Such was not the case in *In re Turecamo Contracting Co.*¹²⁶ There the court was concerned with an executive order authorizing the attorney general or his designee to prosecute and supersede the Kings County District Attorney for specific crimes, and in addition, to investigate and prosecute

any and all acts of misfeasance, malfeasance, non-feasance, misconduct or negligence committed in connection with the enforcement of law in the county of Kings by public officers, employees and any other person or persons, including the police, the district attorney of Kings county and any and all members of his staff and employees of his office, the officer or officers charged with the duty of selecting persons to serve as grand and petit jurors, the department of correction of the City of New York, the courts of criminal jurisdiction in Kings county and all judges, officers, attendants, agents or employees thereof, in violation of any general, local or special law of the State of New York; and any and all acts which may have been committed or which may be committed by any person or persons for the purpose of obstructing, hindering, or interfering with the enforcement of law in the County of Kings or with the actions or proceedings to be conducted pursuant to this order or the prosecution of any and all indictments resulting therefrom¹²⁷

Observing that the attorney general was in part directed to investigate

123. Executive Order No. 55(IV).

124. Id. I(a)-(c).

125. *In re Cranford Material Corp.*, 174 Misc. 154, 161, 20 N.Y.S.2d 865, 872 (Sup. Ct. 1940).

126. 260 App. Div. 253, 21 N.Y.S.2d 270 (2d Dep't 1940).

127. 1938 Public Papers of Governor Lehman 301-02.

the Kings County District Attorney himself, as well as members of his office, the court concluded that the order should terminate at the end of the incumbent district attorney's term in office, thereby ending the attorney general's authority to continue any prosecution or investigation commenced prior to that date. The court found that the executive orders were extremely broad, "but by reasonable intendment they may be taken to refer only to matters occurring during the incumbency of the district attorney holding office at the time of the Governor's mandate."¹²⁸

The orders in the instant case are broader than those involved in *Turecamo* and apparently a change in personnel will not cure the underlying institutional defect. While executive order fifty-five is quite broad, it would seem that the governor could continually amend the original order to encompass any specific controversy which may arise. Such additions would cure the problem (if any) of vagueness, but the judiciary would nevertheless have to determine whether the governor has authority to create a new state official. For, in effect, there is now a state prosecutor for crimes relating to the criminal justice system in New York City. The wisdom of creating a massive new bureaucracy for this purpose is certainly questionable. It may well be that the power of superseder was not intended to bring about such a result, although such result is consistent with Governor Rockefeller's perception of that power.¹²⁹

VI. RAISING THE ALLEGED INVALIDITY OF THE EXECUTIVE ORDER REQUIRING SUPSEDER

The method by which the validity of the superseder order may be raised and decided presents significant questions meriting at least brief consideration. Since a superseded district attorney would be personally aggrieved by the Governor's order, he doubtlessly would have standing to challenge that order,¹³⁰ probably by an article 78 proceeding in the nature of prohibition.¹³¹ A defendant indicted as the result of a grand jury presentation by the special prosecutor's office has standing to move to dismiss an indictment,¹³² or to make the traditional motion to vacate

128. 260 App. Div. at 259, 21 N.Y.S.2d at 276.

129. See text accompanying notes 70-74 supra.

130. See *St. Clair v. Yonkers Raceway, Inc.*, 13 N.Y.2d 72, 192 N.E.2d 15, 242 N.Y.S.2d 43 (1963); cf. *Donahue v. Cornelius*, 17 N.Y.2d 390, 396-97, 218 N.E.2d 285, 287-88, 271 N.Y.S.2d 231, 234-35 (1966); *In re Guden*, 171 N.Y. 529, 64 N.E. 451 (1902). See also *Sierra Club v. Morton*, 405 U.S. 727 (1972).

131. N.Y. C.P.L.R. art. 78 (*McKinney* 1972); cf. *Donahue v. Cornelius*, 17 N.Y.2d 390, 218 N.E.2d 285, 271 N.Y.S.2d 23 (1966).

132. See N.Y. Crim. Proc. Law § 210.20. See, e.g., *People v. Hopkins*, 182 Misc. 313, 47 N.Y.S.2d 222 (Ct. Gen. Sess. 1944); *People v. Dorsey*, 176 Misc. 932, 29 N.Y.S.2d 637 (Queens County Ct. 1941)

a subpoena¹³³ based upon the appearance before the grand jury of an assistant attorney general acting pursuant to the invalid order of superseder.¹³⁴

The language of the recently adopted Criminal Procedure Law, however, may increase the difficulty of deciding a motion to dismiss an indictment obtained by the special assistant attorney general. Like its predecessor, the Code of Criminal Procedure, the Criminal Procedure Law authorizes, *where appropriate*, the grand jury appearance of an assistant attorney general.¹³⁵ In addition, it sets forth grounds upon which a motion to dismiss an indictment may be based.¹³⁶

In the present situation, it would seem that the only traditional basis for the motion would be an allegation that the grand jury proceeding was rendered defective¹³⁷ by the appearance of an assistant attorney general pursuant to an invalid order requiring superseder, since such an unauthorized appearance would be "inappropriate" in terms of the statute.¹³⁸ For the motion to succeed, the law requires that the failure to conform to the law governing grand jury proceedings be such that the *integrity* of the grand jury proceeding is impaired *and prejudice* to the defendant may result.¹³⁹ In contrast, the Code of Criminal Procedure required that

133. See, e.g., *In re Turecamo Contr. Co.*, 260 App. Div. 253, 21 N.Y.S.2d 270 (2d Dep't 1940); *In re Cranford Material Corp.*, 174 Misc. 154, 20 N.Y.S.2d 865 (Sup. Ct. 1940).

134. A defendant ordinarily may not raise a question concerning the validity of an indictment by an article 78 proceeding in the nature of prohibition, N.Y. C.P.L.R. art. 78 (McKinney 1972), unless the trial court is exceeding its jurisdiction and the writ or order sought would furnish a more effective remedy than an appeal. Compare *Kraemer v. Suffolk County Ct.*, 6 N.Y.2d 363, 160 N.E.2d 633, 189 N.Y.S.2d 878 (1959) (issue of double jeopardy may be raised by seeking order of prohibition), with *Blake v. Hogan*, 25 N.Y.2d 747, 250 N.E.2d 568, 303 N.Y.S.2d 505 (1969) (issue of denial of speedy trial may not be raised by seeking order of prohibition). In some situations a question presented may be of such magnitude that utilization of prohibition is permissible. See, e.g., *Lee v. Erie County Ct.*, 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705, cert. denied, 404 U.S. 823 (1971) (whether a trial court could strike defense of insanity upon defendant's refusal to submit to a court-ordered mental examination could be raised by prohibition). To the extent that a defendant may argue that the invalid superseder order divested the grand jury, as well as the trial court, of jurisdiction, it is possible that such a question may fit within *Lee v. Erie County Ct.* "[I]t is far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed." *Appo v. People*, 20 N.Y. 531, 542 (1860). But see *People ex rel. Childs v. Extraordinary Trial Term*, 228 N.Y. 463, 127 N.E. 486 (1920) (failure to publish notice of governor's order as required by law not cognizable by writ of prohibition).

135. N.Y. Crim. Proc. Law § 190.25(3)(a) (McKinney 1971) (authorizing grand jury appearance of district attorney); *id.* § 1.20(32) (the term "district attorney" includes, where appropriate, assistant attorney general).

136. *Id.* § 210.20.

137. *Id.* § 210.20(1)(c).

138. See note 135 *supra*.

139. N.Y. Crim. Proc. Law § 210.35(5) (McKinney 1971).

an indictment be set aside when an unauthorized person was present during the grand jury proceedings¹⁴⁰ or when the indictment was "not found . . . to be as prescribed" by the Code of Criminal Procedure.¹⁴¹

Although the draftsmen of the Criminal Procedure Law manifested no intention to change prior law,¹⁴² the new provisions specifically require an effect on the integrity of the proceedings and potential prejudice to the accused, while the Code of Criminal Procedure required no showing of resulting prejudice to the defendant.¹⁴³ It would appear that under the Criminal Procedure Law, there will be considerable difficulty in establishing prejudice. For the purpose of discussing possible challenges to proceedings resulting from the superseder, it will be assumed, *arguendo*, that the executive order of superseder is invalid,¹⁴⁴ such invalidity resting on the concept that persons accused of crimes in, and residents of a given county are entitled to have their investigations and prosecutions conducted by elected officials. When that function is usurped by an individual appointed at the direction of the governor, in violation of state law, then the public is injured. While not every citizen may have standing to raise the question,¹⁴⁵ an individual criminal defendant is personally aggrieved¹⁴⁶ by an indictment obtained by an unauthorized appearance of an assistant attorney general. Although such an appearance would seem to constitute a legal defect sufficient to have required dismissal of the indictment under the old Code of Criminal Procedure,¹⁴⁷ it is unclear exactly how the defendant has been prejudiced as required under the Criminal Procedure Law,¹⁴⁸ unless a *per se* approach is adopted.

140. N.Y. Code Crim. Proc. § 313(2), Law of June 1, 1881, ch. CDXLII, [1881] N.Y. Laws 1, vol. II, at 82.

141. *Id.* § 313(1). In cases decided under these Code of Criminal Procedure provisions, courts have upheld the validity of indictments and subpoenas obtained by an assistant attorney general, provided that the assistant attorney general had authority to present evidence to the particular grand jury returning the indictment. See *People v. Hopkins*, 182 Misc. 313, 47 N.Y.S.2d 222 (Ct. Gen. Sess. 1944) (Convening of special and extraordinary term of Supreme Court in Dutchess County did not authorize assistant attorney general to obtain indictment in New York County); *People v. Dorsey*, 176 Misc. 932, 29 N.Y.S.2d 637 (Queens County Ct. 1941) (Superseder in Kings County did not authorize indictment in Queens County).

142. Staff Comment to McKinney's Proposed N.Y. Crim. Proc. Law § 110.40, at 187 (1967).

143. Compare *People v. Minet*, 296 N.Y. 315, 73 N.E.2d 529 (1947), and *People v. Scannell*, 36 Misc. 40, 72 N.Y.S. 449 (Sup. Ct. 1901), with *People v. La Brecque*, 198 Misc. 470, 98 N.Y.S.2d 843 (Sup. Ct. 1950).

144. But see text accompanying notes 113-29 *supra*.

145. *Posner v. Rockefeller*, 26 N.Y.2d 970, 259 N.E.2d 484, 311 N.Y.S.2d 15 (1970); *St. Clair v. Yonkers Raceway, Inc.*, 13 N.Y.2d 72, 192 N.E.2d 15, 242 N.Y.S.2d 43 (1963).

146. See cases cited note 130 *supra*.

147. See text accompanying notes 140-41 *supra*.

148. See text accompanying notes 135-39 *supra*.

The second element which must be satisfied before an indictment may be dismissed as defective—the impairment of the integrity of the proceeding¹⁴⁹—is even more difficult of proof. If the term “integrity” may be equated with legality, no serious problems arise since such a reading is consistent with the manifested intention of the legislature that the law is not being changed.¹⁵⁰ Although a more plausible reading might equate integrity with reliability,¹⁵¹ such a reading is not without difficulties. While the old Code did not require a finding of impairment of reliability to invalidate particular grand jury proceedings, some decisions appeared to turn on a determination that an individual’s unauthorized appearance before the grand jury did impair the integrity-reliability of the process.¹⁵² The difficulty of this standard is obvious. A defendant would be hard put to determine and prove whether, given the same evidence, the superseded district attorney would have presented the case to the grand jury or whether a grand jury acting under the guidance of the elected official would have returned an indictment.¹⁵³

An argument that there might have been good reason for the district attorney to decide against prosecution—for example, because the defendant would have agreed to testify against more important defendants—is not only virtually impossible to prove,¹⁵⁴ but also assumes that the special prosecutor’s failure to exercise his discretion in the same manner is a defect impairing the reliability of the grand jury process. This, of course, is an unwarranted assumption in that a determination of the integrity of

149. N.Y. Crim. Proc. Law § 210.35(5) (McKinney 1971); see text accompanying note 139 *supra*.

150. See Staff Comment to McKinney’s Proposed N.Y. Crim. Proc. Law § 110.40, at 187 (1967).

151. See *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966); cf. *Moskowitz v. Marrow*, 251 N.Y. 380, 389-90, 167 N.E. 506, 509 (1929).

152. See, e.g., *People v. La. Brecque*, 198 Misc. 470, 98 N.Y.S.2d 843 (Sup. Ct. 1950). Other cases invalidating indictments returned by a grand jury before which an assistant attorney general had made an unauthorized appearance seemed to rest on some form of jurisdictional defect in the grand jury proceeding. See, e.g., *In re Turecamo Contr. Co.*, 260 App. Div. 253, 21 N.Y.S.2d 270 (2d Dep’t 1940); *People v. Dorsey*, 176 Misc. 932, 29 N.Y.S.2d 637 (Sup. Ct. 1941). See also *Bennett v. Merritt*, 173 Misc. 355, 18 N.Y.S.2d 146 (Sup. Ct. 1940), *aff’d*, 261 App. Div. 824, 25 N.Y.S.2d 784 (2d Dep’t), *aff’d*, 286 N.Y. 647, 36 N.E.2d 690 (1941).

153. The Criminal Procedure Law places upon the defendant “the burden of proving by a preponderance of the evidence every fact essential to support the motion.” N.Y. Crim. Proc. Law § 210.45(7) (McKinney 1971). Thus it is incumbent on the defendant to prove that the integrity of the grand jury proceeding has been impaired by the appearance of the assistant district attorney.

154. The difficulty in assessing the various factors going to the integrity of the grand jury proceeding is illustrative of the impact of the burden of proof on the resolution of substantive issues. Cf. *People v. Berrios*, 28 N.Y.2d 361, 270 N.E.2d 709, 321 N.Y.S.2d 884 (1971).

the grand jury ordinarily focuses on the actions of the jury itself and the factors going to the reliability of its decision. An even more difficult argument for a defendant to advance is that, given the same evidence, a grand jury acting under the guidance of the district attorney would not have returned an indictment. This argument seems to impute dishonesty or incompetency to either the special prosecutor or the district attorney, an imputation no court should be prepared to make.

Given the difficulty of finding an indictment defective when returned by a grand jury before which a member of the special prosecutor's office has appeared, perhaps it would be preferable to read section 210.35(5) of the Criminal Procedure Law as requiring only "a legal defect which may result in prejudice" or a "defect that impairs the integrity of the proceeding," rather than, as is stated in that provision, a defect of such a nature that it "impairs the integrity [of a grand jury proceeding] and [from which] prejudice to the defendant may result." Such a reading is based upon the rationale that once a defect impairs the integrity of the fact-finding process, the defendant is prejudiced a fortiori, the provision being disjunctive, rather than conjunctive.¹⁵⁵ This analysis is supported by the distinct possibility that the terms "impairing the integrity of the proceeding" and "potential prejudice" may well have been intended to encompass only a situation in which both competent and incompetent evidence is introduced before the grand jury.¹⁵⁶ In such a case, the reliability of the decision to return an indictment is impaired only when, absent the incompetent evidence, there was insufficient evidence upon which to return the indictment.¹⁵⁷ Of course, even a disjunctive reading requires a showing of either prejudice or lack of integrity which cannot be established unless the defective order and subsequent grand jury appearance constituted prejudice per se. Although the showing of prejudice requirement is a departure from prior law¹⁵⁸ and the legislature manifested no intent to work such a change,¹⁵⁹ the language of the Criminal Procedure Law is quite clear and must be given effect.¹⁶⁰

155. Cf. *In re Estate of Weil*, 280 App. Div. 100, 111 N.Y.S.2d 828 (1st Dep't 1952), *aff'd*, 305 N.Y. 635 (1953); *Long v. Jerzewski*, 235 App. Div. 441, 257 N.Y.S. 371 (4th Dep't 1932).

156. For a discussion of what evidence is admissible before a grand jury, see R. Pitler, *Criminal Practice Under the CPL* 237 (1971).

157. See *People v. Eckert*, 2 N.Y.2d 126, 138 N.E.2d 794, 157 N.Y.S.2d 551 (1956). But see *People v. Barbour*, 152 Misc. 39, 273 N.Y.S. 788 (Sup. Ct. 1934) (standard is whether incompetent evidence influenced grand jury's decision to return an indictment). See also *Harrington v. California*, 395 U.S. 250 (1969).

158. See N.Y. Code Crim. Proc. § 313(1)&(2), Law of June 1, 1881, ch. CDXLI, [1881] N.Y. Laws, vol. II, at 82; *People v. Minet*, 296 N.Y. 315, 73 N.E.2d 529 (1947).

159. See note 142 *supra* and accompanying text.

160. Cf. *In re Smathers' Will*, 309 N.Y. 487, 494, 131 N.E.2d 896, 899 (1956); *People v.*

Another possible challenge to indictments obtained by the special attorney general merits mention. Although the Governor's power to convene a special and extraordinary term of the supreme court¹⁶¹ and to appoint the presiding justice is not open to dispute,¹⁶² it is possible that, because the order convening such a term in the present situation is so inextricably intertwined with the order requiring superseder, the putative invalidity of the latter strips the former of all legality.¹⁶³ An invalid order convening the special and extraordinary terms a fortiori renders a grand jury empanelled for that term unlawfully constituted, requiring dismissal of any indictment it returns.¹⁶⁴ The vitality of such an argument is doubtful, however, since the decision to appoint a special and extraordinary term of the supreme court is in the discretion of the governor.¹⁶⁵

One further provision of the Criminal Procedure Law requires dismissal of an indictment when "[t]here exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged,"¹⁶⁶ a provision designed to encompass jurisdictional or legal

Dethloff, 283 N.Y. 309, 315, 28 N.E.2d 850, 852 (1940); *Allen v. Stevens*, 161 N.Y. 122, 145, 55 N.E. 568, 574 (1899).

161. N.Y. Const. art. VI, § 27; N.Y. Judiciary Law § 149 (McKinney 1968).

162. See *People ex rel. Saranac Land & Timber Co. v. Supreme Court*, 220 N.Y. 487, 116 N.E. 384 (1917); *People v. Gillette*, 191 N.Y. 107, 83 N.E. 680 (1908). The unreviewable nature of the Governor's appointment of the presiding justice at the extraordinary term certainly calls into question notions of an independent judicial officer who acts as a buffer between the executive branch of government and the accused. Questions about judicial independence are no better illustrated than by the appointment in the instant situation. See N.Y. Times, Nov. 16, 1972, at 51, col. 6 (\$100,000 bail set in first bribery indictment against three police officers obtained by special prosecutor—a break with tradition of low bail for police officer absent any evidence of potential flight—upon the special prosecutor's expressed desire to "protect" the defendants from others who have reason to fear that defendants "will tell all"). Neither the court nor the prosecutor mentioned the material witness provisions of New York Law, N.Y. Crim. Proc. Law § 620.20(3)(a)-(c) (McKinney 1971), which apparently would authorize an order holding material witnesses without bail. See R. Pitler, *Criminal Practice Under the CPL* 590 (1971). For another aspect of the bail question, see *People ex rel. Bird v. Behagen*, 65 Misc. 2d 733, 320 N.Y.S.2d 696 (Sup. Ct. 1971) (bail refused after revocation thereof by presiding judge because of co-defendant's flight). Cf. N.Y. Post, May 14, 1971, at 2, col. 2 (jurors' description of presiding judge's conduct during trial). See also Schultz, *The Anatomy of a Murder Trial—the People v. William Phillips*, N.Y. Times, Dec. 17, 1972, § 6 (Magazine) at 4, 42.

163. Cf. *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60, 129 N.E. 202, 207 (1920). See also *People v. Mancuso*, 255 N.Y. 463, 473-74, 175 N.E. 177, 180-81 (1931).

164. N.Y. Crim. Proc. Law § 210.35(1) (McKinney 1971).

165. See text accompanying notes 97-99 *supra*.

166. N.Y. Crim. Proc. Law § 210.20(1)(h) (McKinney 1971). The only other provision that could arguably be applicable is § 210.20(1)(i), which authorizes dismissals at the discre-

defects not covered by other paragraphs of the applicable sections of the Criminal Procedure Law.¹⁶⁷ Although this section relieves a defendant of the burden of proving the likelihood of prejudice,¹⁶⁸ the only defect possible in this situation is the allegedly invalid executive order requiring superseder, because if convocation of the special and extraordinary term of the supreme court is legal, then the grand jury is legally constituted and no jurisdictional defect exists.¹⁶⁹

The only remaining argument against the validity of indictments obtained by the deputy attorney general is a potential defendant's right to be prosecuted by a proper official.¹⁷⁰ For this to work as a basis for dismissal, a court must be prepared to find that a defendant is within the class of persons to be protected from an order which is invalid *per se*. Thus, if the superseder is invalid only because it infringes the personal right of the district attorney not to be removed from office without notice of charges and a hearing, there is no legal impediment to the defendant's conviction.

It should be reemphasized that this discussion on the manner by which questions involving an invalid order of superseder may be raised is based upon the questionable assumption that the order is in fact defective.

VII. CONCLUSION

The constitutional history of New York State demonstrates that a district attorney, despite his local election in the county in which he serves, is a state executive officer performing a state function and is therefore subject to the exercise of the governor's executive power. Although the superseder order recently issued by the Governor is quite broad in superseding local district attorneys for crimes not yet committed, it is no broader than the mischief it seeks to prevent and is reasonably related to the constitutional duty of the Governor to assure that the laws are faithfully executed. The five district attorneys of the City of New York have been superseded in a narrow, albeit a very sig-

tion of the court. The question presented here, however, appears to be purely one of law-making authority, and is not an appropriate one for determination by judicial discretion. See *Hogan v. Culkin*, 18 N.Y.2d 330, 221 N.E.2d 546, 274 N.Y.S.2d 881 (1966).

167. R. Denzer, Practice Commentary to McKinney's N.Y. Crim. Proc. Law § 210.20, at 340.

168. Cf. *People v. Minet*, 296 N.Y. 315, 73 N.E.2d 529 (1947).

169. While most decisions in this area arise in the context of a motion to dismiss an indictment or vacate a subpoena based upon an unauthorized grand jury appearance, the courts' discussions are often in terms of a jurisdictional or legal defect apart from the nature of the appearance. See, e.g., cases cited note 152 *supra*.

170. "[T]he word 'prosecute' . . . connotes the beginning as well as the carrying on of a criminal action." *People v. Zara*, 44 Misc. 2d 698, 701, 255 N.Y.S.2d 43, 46-47 (Sup. Ct. 1964).

nificant, area of jurisdiction. The Mayor's Commission to Investigate Allegations of Police Corruption in New York City demonstrated that city-wide jurisdiction over this narrow area by a special deputy attorney general was absolutely necessary to return effective, impartial and honest administration of the criminal system to residents of the nation's most populous and important city. The integrity of such a criminal justice system both reflects on the state and affects it as a whole, and is undeniably a matter of state concern. The achievement of a just system is the very purpose for which power of superseder was intended.

Given the revelations in the Knapp Commission Report, it seems clear that Governor Rockefeller would have been derelict in his constitutional duty to "take care that the laws are faithfully executed,"¹⁷¹ had he failed to take action. The best course of action to be pursued was, however, a difficult problem. Perhaps an order to the State Commission of Investigation to conduct an inquiry into the administration of criminal justice in New York City would have sufficed. Yet, whatever the desirability of such an alternative, how would it have fulfilled the need to motivate individual citizens to disclose evidence of corruption to local prosecuting agencies? How could sanctions contained in the Penal Law serve their deterrent function if there was no real fear of prosecution? If corruption was as widespread as suggested by the Knapp Commission, would not another investigation merely restate the problem without bringing about a solution?

For the Governor to have failed to appoint a special prosecutor would have meant turning his back on an evil that threatened to destroy all public confidence in the criminal justice system, making administration of criminal law in New York City impossible. Furthermore, a failure to act might eventually have resulted in federal intervention similar to the action undertaken by the United States Attorney's Office in Chicago, a city probably at least as corrupt as New York, because purely political considerations there dictate a hands-off policy¹⁷² by the State's Attorney.

Immediately after issuance of the executive order requiring superseder, there was a threat of a legal proceeding challenging the validity of the order.¹⁷³ Given the legal principles and history discussed herein, it is doubtful that such action would have been ultimately successful.¹⁷⁴ How-

171. N.Y. Const. art. IV, § 3.

172. See Chicago Tribune, Oct. 13, 1972, § IA, at 1, col. 1. See also Wilson, He Threw the Rascals Out, N. Y. Magazine, Oct. 2, 1972, at 38 (detailing activities of United States Attorney in New Jersey who successfully prosecuted several Newark officials).

173. See N.Y. Times, Sept. 22, 1972, at 1, col. 1. Reportedly, Manhattan District Attorney Frank Hogan "reached the conclusion that . . . the Governor had exceeded his executive authority because he did not—and could not—show why the District Attorneys must be superseded." *Id.* at 33, col. 4.

174. See Remarks of N.Y. District Attorney Frank Hogan in N.Y.L.J., Dec. 8, 1972, at 1, col. 6.

ever, as in civil litigation, the mere threat appears to have accomplished its purpose of exerting pressure upon the special prosecutor to retreat from his position that he alone would be responsible for prosecuting all cases arising under the order.¹⁷⁵

Notwithstanding its expeditious use in this situation, the power of superseder is a two-edged sword, a power which could be unscrupulously used to immunize political friends and even to prevent scrutiny of corruption in a governor's own administration. This concern, apparently imaginary in 1973, nevertheless demonstrates that superseder without limitations could present very serious problems in the future. Thus, it does seem appropriate to insure access to the courts. Certainly, some narrow standard of review would not interfere too greatly with the executive power, and yet could protect the public from arbitrary and capricious executive action—a protection especially important in a state which has no recall provisions¹⁷⁶ and elects state officials only every four years.

In fact, it may be unfortunate that an action in the nature of prohibition will apparently not be taken, since it would settle questions surrounding the order of superseder before they could be raised by a defendant indicted by a special grand jury in an attempt to prevent his conviction or to delay the serving of sentence upon his conviction while the courts decide the issues. Moreover, because of possible standing to raise broader issues, it seems that a legal proceeding brought by a district attorney to challenge the superseder order would prompt more penetrating judicial scrutiny of the questions presented than would a proceeding brought by a criminal defendant. Perhaps in accommodating some of the less significant objections to his authority, the special prosecutor was motivated by a desire in effect to preclude any meaningful challenge to the executive order.

The special prosecutor can perform a vital function for the State and

175. The agreement between the Special Prosecutor and the District Attorneys of the five counties of New York City provides that the latter will be responsible for prosecuting the large majority of corruption cases whether based upon investigations commenced before or after the effective date of the order. *N.Y. Times*, Oct. 1, 1972, at 1, col. 4 "[T]he special prosecutor will conduct those investigations which he determines after he has reviewed them with the District Attorneys and given a reason for so doing." *Id.* at 35, col. 1. This in effect amends, if not radically changes, the terms of the executive order. See Remarks of District Attorney Hogan, reported in *N.Y. Times*, Oct. 12, 1972, at 1, col. 3. No written agreement on any given case will be kept, ostensibly to avoid any leaks. But who is going to remember the specifics of the prosecutors' consultations? While it is true that the implementation of the order requires clarification, especially to avoid duplicity in investigations as well as disclosure, such an accommodation could have been reached without requiring review by and explanations to the district attorneys before the special prosecutor may prosecute. It is difficult to speculate whether such an arrangement will "dry up" sources of information.

176. The constitution does, however, provide for impeachment. *N.Y. Const.* art. VI, § 24. See text accompanying notes 81-122 *supra*.

City of New York by returning justice to the criminal justice system in the City. Unfortunately, thus far the public reception from the superseded district attorneys has been less than warm.¹⁷⁷ The concessions made by the Special Prosecutor may so narrowly limit the scope of his duties that it becomes questionable whether a new bureaucracy in each of the boroughs is really necessary or desirable in terms of the finances involved and the ill-will engendered.¹⁷⁸ Moreover, if the new bureaucracy breeds ennui on the part of the public, this very important and necessary undertaking could be crippled before it begins.

The necessity for executive action in light of the corruption in New York City is beyond question. The wisdom of the measure taken, as well as the manner in which it was executed, may be open to debate, but the action itself was not illegal. The effectiveness of the measure, of course, must await the test of time.

177. See *N.Y. Times*, Sept. 20, 1972, at 28, col. 1.

178. While the fear that the special prosecutor will narrowly confine his duties may not be real, at least in highly publicized crimes relating to corruption, the constant public struggle for power between the superseded district attorneys and the special prosecutor could result in public contempt for all concerned. See note 116 *supra*. The special prosecutor's alleged "quest for publicity" has been a source of criticism. See *N.Y. Times*, Dec. 16, 1972, at 30, col. 2. See also Plate, *Who Is the New Super prosecutor Really After?*, *New York Mag.*, Jan. 29, 1973, at 29, 33.