

Third Department Rejects NY Ethics Commission as Unconstitutional

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New York lawmakers' creation of a replacement ethics watchdog in July 2022 unconstitutionally violated "bedrock" separation-of-powers principles, a unanimous midlevel appeals court in Albany determined on Thursday in a second-round win for former Gov. Andrew Cuomo, whose attorneys filed the complaint.

With the decision, the state Commission on Ethics and Lobbying in Government's investigative and enforcement authority has been erased by the Appellate Division, Third Department, affirming a September 2023 trial court ruling.

The commission will continue to operate via a stay of the lower court's order granted by the Third Department in September, said Chairman Frederick Davie.

Davie said the commission respectfully disagreed with the appellate court ruling and will continue to review all options, including, if appropriate, recommending interim legislation.

"We will work with the Attorney General's Office to promptly seek review in the Court of Appeals and to continue the stay of the lower court's order for the duration of the appellate process," Davie said.

Cuomo's lawyer in the case, Holwell Shuster & Goldberg LLP partner Gregory Dubinsky, said in a statement: "We are gratified that the Appellate Division unanimously agreed with Justice (Thomas) Marcelle and recognized that the Act creating COELIG usurped the power of the Governor and placed it in the hands of individuals who answer neither to the Governor nor the electorate."

A Cuomo spokesperson also issued a statement: "As

we've said from the very beginning, no one is above the law nor the constitution—including the Legislature and the executive chamber. The attorney general also never should have defended such a flagrantly unconstitutional law, but since it tracks with her personal politics, it's no surprise.

"This has been a three-year exercise to bend the law to fit the political will of those in charge and hopefully after this second-and unanimous-court decision, this partisan and baseless prosecution will finally end," the Cuomo statement added.

The ex-governor sued in his challenge of the commission's investigation into whether he should forfeit \$5 million he received for writing a book about his administration's efforts during the COVID-19 pandemic.

The present 11-member commission, a model created by Cuomo's successor, Gov. Kathy Hochul, is untethered to the state government structure because its members are chosen by 15 law deans who are not considered public officers.

Thursday's decision by Judge Mark L. Powers, whom Hochul appointed to the Third Department a year ago, noted that the commission doesn't have jurisdiction to impose penalties or discipline on legislative officials and staff, and may only prepare a written report and provide the same to the Legislative Ethics Commission.

Democratic lawmakers overhauled the commission vetting process in reaction to scrutiny of the former 14-member ethics panel, amid allegations of corruption, conflicts and leaking confidential information to the media.

The Appellate Division, Third Department's ruling acknowledged that lawmakers appeared to be "well-intentioned in its actions" that created the replacement body.

But it agreed with state Supreme Court Judge Thomas Marcelle's determination that the process unconstitutionally divested New York governors of their authority.

The appeals court wrote that the separation-of-powers principle requires that the Legislature make the critical

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policy decisions, while the executive branch implements those policies, and when a branch acts inconsistently with the powers of another or usurps its prerogatives, the doctrine of separation is violated.

The governor, attorney general and comptroller nominate five of the **commission** members, while legislative leaders nominate the other six, subject to the law deans' approval.

Hochul's office didn't immediately respond to a request for comment.

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