

New York Law Journal  
Tuesday, August 13, 2019

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#### MONDAY, SEPT. 16

##### New York City Bar (CLE)

Event Title: Residential Real Estate Closings: What You Need to Know From Pre-Contract to Closing (Day One)  
6 p.m. - 9 p.m.  
3 CLE Credits:

Location: 42 West 44th St.  
Contact: Rosan Dacres  
212-382-6630  
rdacres@nycbar.org

#### TUESDAYS, SEPT. 17 & 24

##### New York City Bar (CLE)

Event Title: 16-Hour Bridge-the-

#### PERSPECTIVE

## It's Legally Perilous to Have a Commission Responsible for Election Laws

BY ROGER BENNET ADLER

The passage of legislation creating a New York State "Public Campaign Financing and Election Commission" to undertake election law reforms such as enacting public financing of state elections continues a worrisome and legally perilous practice of delegating the legislative function to a nine-member commission appointed by the governor and legislature.

What is significant is that this commission's authorizing powers allow it to both (1) enact, and (2) repeal, laws previously enacted unless the state Legislature overturns the commission's bills within a limited 20 day time period.

Rather than address legislative changes through "regular order" (i.e. a sponsor's bill which is referred to the appropriate legislative committee and passes both legislative houses and is signed by the governor) the commission has not been limited to merely recommending legislation—concededly an appropriate governmental function but has the power to repeal existing legislation. It is unclear if it could overturn prior Court of Appeals decisions upholding fusion voting (see *In re Callahan*, 200 N.Y. 59 [1910]; *Matter of Devane v. Touhy*, 33 N.Y. 2d 48 [1973]).

The attempt to empower an appointive commission to perform the "legislative function" of election law reform runs afoul of Article 3, Section 1 of the State Constitution, which reads: "The legislative power of this state shall be vested in the Senate and Assembly." No mention is made of the power to delegate this function. It contrasts with agency powers to enact regulations consistent with existing law, or to delegate to a commission regulations consistent with existing law and agency practice.

Of necessity, and based upon this constitutional foundation, it is solely the prerogative of the state Legislature to enact or repeal laws (*Bank of Chenango v. Brown*, 26 N.Y. 467). This, of necessity, places restraints on both the judiciary (*Hernandez v. Robles*, 7 N.Y. 3d 338, 366 [2006]) and executive branches of government, as a function of the "separation of powers."

When the "Salary Commission" raised the salaries of state legislators and statewide officeholders (without legislative approval), and imposed restrictions on earning

outside income as a condition of receiving a raise, it was also contrary to Article 3, Section 6 of the State Constitution. The delegation of "legislative functions" is clearly prohibited.

In *Delgado v. State of New York*, et. al., \_\_\_ Misc. 3d \_\_\_ [Sup. Ct. Albany County 6/7/19], Justice Ryba addressed the delegation of legislative power issue authorizing its exercise as long as the delegation was circumscribed by "reasonable safeguards and standards," but striking the Salary Commission's ban on outside income.

Simply put, there are no available legislative shortcuts around the State Constitution. The recent attempts to ignore it to raise legislative and executive salaries via an appointed commission is in clear violation.

She cited one Court of Appeals case (*Borreali v. Axelrod*, 71 N.Y. 2d 1 [1987]), and two Appellate Division decisions, (1) *Center for Judicial Accountability, Inc. v. Cuomo*, 167 A.D. 3d 1406, 1410 [2018], and (2) *Matter of Retired Public Employees Association, Inc. v. Cuomo*, 123 A.D. 3d 92, 97 [3rd Dept. 2014].

In *Borreali*, the Court of Appeals, in an opinion by Judge Titone, held that the "Public Health Council" overstepped its delegated authority when it promulgated a "comprehensive code" to govern tobacco smoking beyond it enabling statute (Public Health Law Section 225(5) (a), in enacting anti-smoking regulations, as a function of agency "rule-making powers." Only Judge Bellacosa dissented.

The *Matter of Retired Public Employees* case addressed a challenge to the application of Civil Service Law Section 167, construing a provision expressly authorizing the extension of modifications in contribution rates for health insurance payments by the state. Justice Peters noted that, while the Legislature cannot constitutionally delegate its legislative power to an agency or commission where there is a promulgate law, the power to adjust retirees' health insurance contribution rates was deemed not constitutionally infirm.

Finally, in the *Center for Judicial Accountability* case, the Appellate Division, Third Department, in an opinion by Justice Rumsey, upheld the delegation to the commission to increasing judicial salaries. The opinion noted the existence of a perceived "safeguard" — the Legisla-

ture's ability to reject any commission recommendations before the salary increases become effective.

More recently, the Appellate Division, Third Department, in *People v. Hodgson* \_\_\_ A.D. 3d \_\_\_ [3rd Dept. 2019] invalidated convictions secured by the "New York State Justice Center for People With Special Needs," rather than the duly elected county district attorney (County Law Section 700). Once again, the failure to scrupulously respect state law has ended poorly, potentially allowing wrongdoers to evade conviction.

Simply put, there are no available legislative shortcuts around the State Constitution. The recent attempts to ignore it to raise legislative and executive salaries via an appointed commission is in clear violation. Legislating is a time intensive undertaking, and frequently involves the powers of persuasion, patience and a willingness to compromise.

The notion that the legislative function can be conveniently "off-loaded" to a commission (thereby sparing some legislators a "hard vote") is a disingenuous and unconstitutional governing model. Political courage is not a large commodity. Indeed, John F. Kennedy's book "Profiles in Courage" did not have a large roster of profiles to discuss.

For those who subscribe to the "Rule of Law," the attempt to take what many perceive as cynical shortcuts, by ignoring the State Constitution, and legislating by proxy commissioners, is doomed to failure when judicially challenged. New York State must refrain from this cynical, and unlawful practice, which consciously avoids the State Constitution's clear and unequivocal words.

On July 22, 2019, the propriety of the commission was challenged in *Niagara County Supreme Court in Jastremski, et. al. v. the Public Campaign Financing and Election Commission of the State of New York*. We can likely anticipate a pre-answer motion to dismiss it. Nonetheless, the *Jastremski* case is an initial salvo in a legal struggle to vindicate the plain words of the State Constitution, and hold the Legislature constitutionally accountable.

Only time will tell if expediency will trump constitutional principal.

ROGER BENNET ADLER is a Manhattan-based solo practitioner and former counsel to the New York State Senate.

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