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Regulating the Regulators in New York State

Part I



The history of modern administrative regulation has been permeated by "an extended sense of crisis," striking at the very legitimacy of the administrative process. The performance of adjudicative, legislative and executive functions by a single administrative agency is simply not recognized by the constitutions that create the structure of our federal and state governments. Instead, the constitutional structure of government has been built on the opposite assumption—on the principle of separation of powers. This principle promotes a separation of responsibilities: the adjudicative, legislative and executive functions should each be performed by separate branches of government. The combining of these three separate governmental functions within one agency of government has created a "fourth" branch of government which is not held accountable by the traditional checks and balances contemplated by the principle of separation of powers.¹

The need to hold accountable

this "fourth" branch of government has produced numerous programs²

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¹ Freedman, *Crisis and Legitimacy in the Administrative Process* 27 STAN.L.REV. 1041, 1043-1056, (1975). The author describes and criticizes the traditional view of the separation of powers principle. See also *Matter of LaGuardia v. Smith*, 288 N.Y. 1, 5-6 (1942) and *Matter of Davies*, 168 N.Y. 89 (1901).

² R. PIERCE, S. SHAPIRO and P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS*, Ch. 2,3,4,5,6,7,8,9 (1985).

and even more numerous proposals³ designed to keep in check the adjudicative, legislative and executive activities of the administrative agencies. In New York State, there is an elaborate system in place for holding regulatory agencies accountable. It appears to be a system developed by happenstance rather than by design. It can not be discovered by looking it up in our statute books. It can only be found by examining court cases, executive orders, legislative resolutions, bill jackets and governmental reports and by interviewing participants in the system. It is a system with which people knowledgeable of state government is at least familiar. But it is a system of regulation which appears to be not well documented nor well studied. This paper attempts to describe the system for regulating the regulators in New York State.

Part I of this paper describes the system of regulation by the legislature, the executive, the comptroller and the judiciary. Part II examines the responsibilities of a recent addition to this regulatory system: the enlarged Office of Business Permits and Regulatory Assistance. In 1984, this executive agency was given the responsibility of overseeing the law-making activities of state agencies through the systematic review of proposed rules.⁴

Legislative Regulation of the Regulators

The New York State Legislature possesses the ultimate control over the activities of the state regulators. If both Houses of the Legislature disagree with a policy decision of a regulator, they can pass legislation to change the decision.⁵ If the Governor vetoes the legislation, the legislature still retains the power to regulate the regulators through its constitutional power to overturn a veto by two-thirds vote of each House of the Legislature.⁶ Even though passing legislation is no easy task,⁷ this threat along with the

power of the State Senate to veto gubernatorial nominations for heads of most agencies,⁸ gives the Legislature enormous influence over the priorities and activities of the state regulatory agencies, and therefore the power to keep agencies in check.

In order to effectively exercise this power, each House of the Legislature has organized its process of decision-making around the use of screening committees: standing committees, temporary and select committees, task forces, and temporary and permanent commissions.⁹ Even though the function of each of these committees is only to make recommendations to the members of each of their Houses, their recommendations can carry great weight to the extent the recommendations focus legislative, executive and public attention on specific issues and prompt agency reforms through executive, legislative or judicial action.

The system of standing committees forms the foundation for each House. Every issue that falls within the jurisdiction of the Legislature falls within the jurisdiction of a standing committee.¹⁰ Many of the standing committees in each House specialize in overseeing the activities of one or more regulatory agencies and in developing related legislative bills. The appropriate Senate committees also review gubernatorial nominations to the regulatory agencies.¹¹

Two of the most powerful standing committees are the Senate Finance Committee and the Assembly Ways and Means Committee. They review and can modify the Governor's budgetary recommendations for each regulatory agency, and they consider all bills which require new appropriations. The Senate Finance Committee also investigates gubernatorial nominations to each agency.¹² In order to strengthen its oversight of state agencies, the Assembly Ways and Means Committee recently began a

³ Brownlow Committee, President's Committee on Administrative Management, *Report of the Committee with Studies of Administrative Management in the Federal Government* (Washington, D.C., 1937).

Hoover Commission, U.S. Commission on Organization of the Executive Branch of the Government, *The Independent Regulatory Agencies: A Report with Recommendations* (Washington, D.C., 1949); U.S. Commission on Organization of the Executive Branch of the Government, *Legal Services and Procedures* (Washington, D.C., 1955).

Landis Report, *Report on Regulatory Agencies to the President-Elect*, U.S. Senate Comm. on the Judiciary, Subcomm. on Administrative Practice and Procedure, 86th Cong., 2d Sess. (Comm. print, 1960)

Ash Council Report, President's Advisory Council on Executive Organization, *New Regulatory Framework: Report on Selected Independent Regulatory Agencies* (Washington, D.C. 1971).

⁴ N.Y. A.P.A. Law §202-c (McKinney 1984).

⁵ This can be done by enacting a substantive statute, by modifying an agency's jurisdiction or by attaching a restriction to an agency's appropriations. Kaiser, *Congressional Action to Overtake Agency Rules: Alternatives to the Legislative Veto*, 32 AD. L. REV. 667, 687-696 (1980).

⁶ This is rarely done, however. N.Y. CONST. art. III, §14, art. IV §7. Givens, *A Primer on the New York State Legislative Process: How It Differs from Federal Procedure*, 57, N.Y. ST. J.B. 13 (April 1985).

⁷ J. ZIMMERMAN, *THE GOVERNMENT AND POLITICS OF NEW YORK STATE*, 135-153 (1981). See also Givens, *supra* note 6 at 8.

⁸ N.Y. CONST. art. V, §4.

⁹ Administrative Regulations Review Commission Perspective: Rulemaking and Legislative Oversight in New York State 24-27 (Albany, New York, Dec. 1978).

¹⁰ Zimmerman, *supra* note 7 at 132-135. The 1985 Senate had 31 standing committees. THE NEW YORK RED BOOK 137 (1985). The 1985 Assembly had 34 standing committees. *Id.* at 297-8.

¹¹ Zimmerman, *supra* note 7 at 187-189. For instance the activities of the New York State Public Service Commission falls within the jurisdiction of the Senate Energy Committee and the Assembly Committee on Corporations, Authorities and Commissions. Both committees consider bills and conduct studies concerning the operations of the Public Service Commission. The Senate committee also reviews gubernatorial nominations for appointment as a commissioner of the Public Service Commission. (See annual reports of the two legislative committees).

¹² N.Y. CONST. art. VII, §§ 1-7, NEW YORK RED BOOK *supra* note 10 at 353. See also Zimmerman, *supra* note 7 at 133-134, G. Shaffer, *Manual for the Use of THE LEGISLATURE OF THE STATE OF NEW YORK 1982-83*, 880 (1982). These two com-

new auditing program of conducting in-depth analysis "of the responsibilities, resources and overall performance capabilities of various state agencies."¹³

In addition to these standing committees, each House appoints temporary and select committees, task forces and temporary and permanent commissions¹⁴ to study select areas of concern and to recommend legislative bills for passage by the appropriate standing committees and the Legislature. Among the most important of these committees are the joint legislative groups. Due to their joint and bipartisan structure, their assessments and recommendations can carry significant weight.¹⁵ Three of these groups are of particular relevance here because each of them monitors and studies the operations of state agencies.

First, the Legislative Commission on Expenditure Review was created in 1969 for the primary purpose of evaluating the efficiency and effectiveness of agency programs.¹⁶ This Commission, whose members include the legislative leadership of both Houses, has issued over one hundred audits of specific governmental programs.¹⁷

Second, the Legislative Commission on Economy and Efficiency in Government was created in 1979 "for the purpose of recommending *methods* of improving administration and operations in the state government; . . . and establishing a *system* for the reporting of measurements related to the performance of state agencies . . ." (emphasis added)¹⁸ Its studies cover issues which cut across agencies' operations such as designing internal controls and inventorying the common and distinguishing features of state agencies.¹⁹

In contrast with the open-ended mandates of the standing committees, the Legislative Commission on Expenditure Review, and the Legislative Commission on Economy and Efficiency, the Ad-

ministrative Regulations Review Commission (ARRC)²⁰ was created to exercise "continuous oversight" of the process of rule making" delegated by the Legislature to governmental agencies.²¹ ARRC was given the specific task to examine adopted and proposed rules "with respect to: (i) statutory authority; (ii) compliance with legislative intent; (iii) impact on the economy and on the government operations of the state and its local governments, and (4) impact on affected parties."²² The staff of ARRC also determines whether the procedural requirements of the State Administrative Procedure Act has been followed. If the staff concludes it has any objections to a proposed rule, the staff contacts the agency to discuss and resolve its concerns.²³ In addition to this monitoring of the development of specific rules, the Commission conducts hearings on current topics,²⁴ prepares detailed studies,²⁵ drafts ARRC legislative bills and becomes involved with other bills,²⁶ and monitors the implementation of new laws.²⁷

Executive Regulation of the Regulators

The Governor of New York State possesses vast authority to control the activities of the regulatory agencies.²⁸ The State committees review the Governor's proposed budget on behalf of each of their respective Houses and jointly present a report expressing their general and specific findings regarding the Governor's proposed budget. See Report of the Fiscal Committees on the Executive Budget: Fiscal Year April 1, 1985 to March 31, 1986, State of New York (Albany, N.Y.).

¹³ The Committee's first report contained specific findings regarding the effectiveness of the Department of Environmental Conservation. J. Martens, The Department of Environmental Conservation . . . a program and budget history (a report from the New York State Assembly Ways and Means Committee, Jan., 1985)

¹⁴ *Supra* note 9 at 24-27.

¹⁵ The majority and Minority Leadership of each House usually selects the members of the joint legislative groups.

¹⁶ N.Y. LEGIS. LAW §82 (McKinney 1984). Schaffer, *supra* note 12 at 669. See also THE

NEW YORK RED BOOK *supra* note 10 at 161-162 and E. GLEASON & J. ZIMMERMAN, EXECUTIVE DOMINANCE IN NEW YORK STATE, 41-46 (1974).

¹⁷ Regarding membership, see N.Y. LEGIS. LAW §82 (McKinney 1984) and for a recent list of program audits see Legislative Commission on Expenditure Review, Preservation of Historic Resources 68 (May 1985).

¹⁸ 1979 N.Y. LAWS Ch. 50, 1981, N.Y. LAWS Ch. 50, THE NEW YORK RED BOOK *supra* note 10 at 360.

¹⁹ PREVENTING FRAUD WASTE ABUSE AND ERROR: INTERNAL CONTROL REFORM IN NEW YORK STATE (November 1983) and M. KIRCHGRABER, SOMETHING FOR EVERYONE: AN INVENTORY OF NEW YORK STATE AGENCIES (April 1984) (both published by Legislative Commission on Economy and Efficiency in Government).

²⁰ The Administrative Regulations Review Commission (ARRC) was first created by legislative resolution in 1977. New York State Legislature, Legislative Resolution - Senate No. 29 (1977). The Legislature made it a permanent commission in 1978. N.Y. LEGIS. LAW §5-B (McKinney 1984). Also, see generally ADMINISTRATIVE RULES: WHAT IS THE LEGISLATURE'S ROLE? (Senate Research Service, Task Force on Critical Problems, June 1976). Most states have mechanisms for legislative review of administrative rules. Jones, *Legislative Review of Administrative Rules: An Update*, vol. 7 (National Conference of State Legislatures April 1982). Jones, *Legislative Review of Regulations: How Well Is It Working?* (State Legislature, September 1982).

²¹ N.Y. LEGIS. LAW §87(1) (McKinney 1984); also see N.Y. EXEC. LAW §101-a (McKinney 1982).

²² N.Y. LEGIS. LAW §87(1) (McKinney 1984).

²³ 1983 Report of the N.Y.S. Administrative Regulations Review Commission, 10. The staff maintains a record on every rule proposed by an agency in case anyone inquires about a rule or the agency proposes to amend the rule. *Id.* at 10-11.

²⁴ See, for example: Legislative Veto Hearings, 1981 Annual Report of the Administrative Regulations Review Commission, 27-9 (Albany, N.Y.), and Hearings on Improving Regulatory Process, *supra* note 23 at 54-6.

²⁵ For example, see generally State Agencies and the State Administrative Procedure Act: A Study of Compliance (Albany, N.Y., July 1977) and Rules, Regulations and Red Tape: A survey of Business Problems with State Agencies (Albany, N.Y., April 1979).

²⁶ *Supra* note 23 at 57-62.

²⁷ Administrative Regulations Review Commission Perspective: The Process of Regulatory Reform 29-32 (Albany, N.Y., June 1982).

²⁸ See generally, A. HEVESI, LEGISLATIVE POLITICS IN NEW YORK STATE: A COMPARATIVE ANALYSIS, Ch. 4: The Governor as Law Maker (1975).

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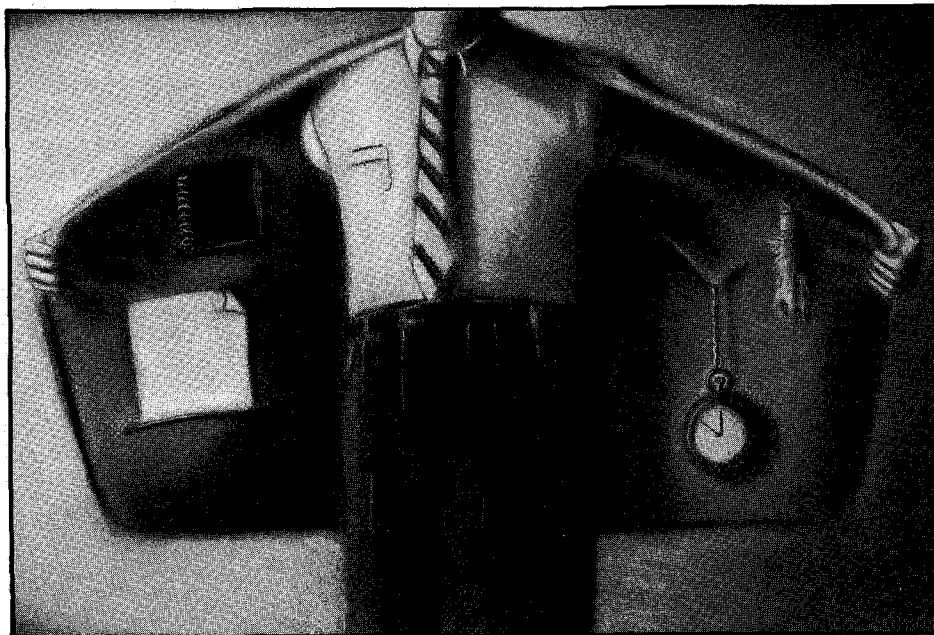
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Constitution vests the Governor with "executive power" including the critical powers to "take care that the laws are faithfully executed"²⁹ and to appoint the heads of all departments and members of all boards and commissions by and with the advice and consent of the Senate, except as otherwise provided in the state constitution. The Governor can remove appointees in a manner prescribed by law.³⁰

The Governor's constitutional authority has been reinforced by statute. The New York Executive Law specifically designates the Governor as the head of the executive department³¹ and because the Governor is held responsible for the efficiency and management of governmental agencies,³² the Executive Law authorizes the Governor "to examine and investigate the management and affairs of any department, board, bureau or commission of the state. . . ."³³ This executive power must, of course, be exercised in accordance with the state and federal constitutions and within the statutory authority delegated by the Legislature to each of the state agencies the Governor wants to regulate.

In implementing these executive responsibilities, Governor Cuomo, like his predecessors, has organized the Governor's Office in a manner designed to facilitate the regulation of the state regulatory agencies. Through the Governor's Secretary³⁴ and his assistants and program associates and the Governor's counsel³⁵ and his assistants, the Governor coordinates the development and implementation of the policy priorities of the state agencies. The Governor has assigned at least one program associate and one assistant counsel as a policy team to keep in touch with the governmental agencies within each team's subject matter jurisdiction.³⁶ These policy teams also work with the Governor's appointments office to help identify and screen gubernatorial appointments to the

regulatory agencies.

In addition to this not surprising internal structure, the Governor has established both specialized offices and temporary study commissions. Within the Executive Chamber, the Governor has appointed three super-commissioners, each one responsible for coordinating the activities of a "cluster" of agencies.³⁷ He first appointed a State Director of Criminal Justice, responsible for coordinating "programmatic and fiscal initiatives for State criminal justice agencies."³⁸ He then appointed a Director of Economic Development and formed an economic development subcabinet for the purpose of developing "the State's overall economic development strategies" and for supervising and directing their implementation by more than twenty agencies making up the subcabinet.³⁹ And this past year he appointed a Director of Housing, "responsible for overseeing the supervision, direction and management of the state's housing program."⁴⁰

The Governor also has established the Office of Management and Productivity for the purpose of assuring "that internal controls within and between State agencies meet uniformly high standards for safeguarding the State's finances and promoting efficient operations."⁴¹ Within the Department of State, the Governor established the Office of New York State Ombudsman for among other purposes to advise and assist the Governor in developing State programs designed "to meet the needs of the people of the State, . . . , to refer persons seeking advice, assistance and available services to the appropriate departments and agencies . . . [and] to investigate specific complaints concerning the delivery of services by State agencies. . . ."⁴²

The Governor has formed temporary study commissions to examine specific regulatory problems and to make recommendations for

gubernatorial, legislative and agency actions. These temporary commissions usually are composed of citizens and public officials with special expertise in the areas under study. Recent examples include the Temporary Commission on the Allocation of Power Authority Hydroelectric Power⁴³ and the Fact Finding Panel on the Shoreham Nuclear Power Facility.⁴⁴

In addition to these offices and commissions created by the Governor, a layer of executive branch regulation has been created by statute. Each statutory scheme is designed to keep agencies' activities in check by authorizing a separate executive office either to investigate or to direct the activities of state agencies.

For instance, the State Commission of Investigation was created and given the broad mandate to in-

²⁹ N.Y. CONST. art. IV, §3.

³⁰ N.Y. CONST. art. V, §4.

³¹ N.Y. EXEC. LAW §30 (McKinney 1982).

³² 1915 Op. Att'y Gen. 353 (1915).

³³ N.Y. EXEC. LAW §6 (McKinney 1982). J. ZIMMERMAN, *THE GOVERNMENT AND POLITICS OF NEW YORK STATE*, 191 (1981) on the Moreland Act.

³⁴ N.Y. EXEC. LAW §4 (McKinney 1982).

³⁵ *Id.*

³⁶ For instance, the Assistant Secretary for Energy and Environment works with the appropriate assistant counsel to coordinate the development of policy by the State Energy Office, the Department of Public Service and the Department of Environmental Conservation. See *THE NEW YORK STATE DIRECTORY* xii-ix, 103-113 (1985).

³⁷ 11 EMPIRE STATE REPORT 1 (Weekly ed. July 22 1985).

³⁸ Exec. Order No. 2 N.Y. EXEC. CODE Tit. 9, §4.2 (I)(7) (1983).

³⁹ Exec. Order No. 52 N.Y. EXEC. CODE Tit. 9 §4.52 (I) (1984).

⁴⁰ Exec. Order No. 67 N.Y. EXEC. CODE Tit. 9 §4.67(I)(6) (1985).

⁴¹ Exec. Order No. 27 N.Y. EXEC. CODE Tit. 9, §4.27 (1984).

⁴² Exec. Order No. 23, N.Y. EXEC. CODE Tit. 9 §4.23 (1983).

⁴³ Exec. Order No. 20, N.Y. EXEC. CODE Tit. 9 §4.20 (1983).

⁴⁴ Fact Finding Panel was proposed to be created by NYS Governor Cuomo (April 19, 1983).

investigate among other activities: "The faithful execution and effective enforcement of the laws of the state . . . ; the conduct of public officers and public employees . . . ; [and] the management of affairs of any . . . department, board, bureau, commission or other agency [of the state]."⁴⁵ The N.Y.S. Consumer Protection Board was created, among other, reasons "to coordinate the activities of all state agencies performing consumer protection functions, . . . to study the operation of consumer protection laws, . . . and to represent the interests of consumers . . . before . . . state . . . administrative and regulatory agencies."⁴⁶

More specialized statutory agencies for regulating the regulators also have been established. For instance, the statutory State Commission on Quality of Care for the Mentally Disabled was created, among other purposes, to "[r]eview the organization and operations of the department of mental hygiene and advise and assist the governor in developing policies, plans and programs for improving the administration of mental hygiene facilities"⁴⁷ The statutory Council for Mental Hygiene Planning was formed "to establish statewide goals and objectives for the provision of services" which fall within the jurisdiction of the Department of Mental Hygiene.⁴⁸ And the statutory Public Health Council was created, among other purposes, to prescribe the qualifications of public health personnel of the department (of health)"⁴⁹

Finally, the Governor's Division of Budget⁵⁰ performs a critical regulatory function. As former Governor Carey so pointedly put it on the fiftieth anniversary of the Division of Budget:

Laws are passed and programs inaugurated reflecting the combined wills of the administration and the Legislature. But it is the budget division that makes sure those programs operate honestly and

effectively in the best interest of the people of New York State.⁵¹

As the Governor's assistant for formulating the executive budget and for supervising its implementation,⁵² the Director of the Division of the Budget wields enormous power over the policy priorities and activities of the state agencies. During the annual budget preparation process, the Division of Budget shapes an agency's priorities by determining whether the priorities reflected in an agency's proposed budget are consistent with the Governor's and whether the program plans comply with federal and state laws and regulations and with the Division of Budget's policy guidelines. The Division also assesses the cost effectiveness of a proposed budget as well as coordinates priorities among other state agencies.⁵³

The Governor's constitutional control over the development of the budget should discourage most agencies from trying to circumvent the Governor and going directly to the Legislature to obtain approval for appropriations that deviate from the Governor's policy priorities. Any such effort can be blocked by the governor exercising his item veto power over any item increased or added by the Legislature. Then, the only way the Legislature can add the item back into the budget is by a two-thirds vote.⁵⁴

After the Legislature and the Governor approve the budget, the Division of Budget continues to shape agency priorities by imposing expenditure ceilings and personnel targets and by certifying the availability of appropriations in view of state fiscal goals and the need for a balanced budget.⁵⁵ Finally, in performing its budget preparation and implementation functions, the Division of Budget has been experimenting with a variety of budget-making techniques designed to determine whether agencies are acting consistently with the Governor's priorities.⁵⁶

The Constitutionally Independent Auditor of the Regulators: The State Comptroller

The State Comptroller has the significant oversight responsibility of an independent auditor of the regulators. The Office of State Comptroller is constitutionally independent of the executive, legislative and judicial branches. As an elected official, the State Comptroller is directly responsible to the electorate.⁵⁷

As part of his constitutional responsibilities, the Comptroller conducts audits of state agencies. He has construed this responsibility broadly. Rather than limiting these audits to financial audits, the Comptroller also conducts audits that assess the economy and efficiency of operations and the effectiveness of

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⁴⁵ N.Y. UNCONSOL. LAWS §7502 (McKinney 1979).

⁴⁶ N.Y. MENTAL HYG. LAW § 45.07(a) (McKinney 1978).

⁴⁷ N.Y. EXEC. LAW § 553 (McKinney 1982)

⁴⁸ N.Y. MENTAL HYG. LAW § 5.07 (a) (1) (McKinney 1978).

⁴⁹ N.Y. PUB. HEALTH LAW § 225(5)(a)&(b) (McKinney 1984).

⁵⁰ See generally the EXECUTIVE BUDGET IN NEW YORK STATE, A HALF-CENTURY PERSPECTIVE (Albany, N.Y. 1981).

⁵¹ Carey, *Message From the Executive Chamber*, EMPIRE 30 (1980).

⁵² N.Y. EXEC. LAW §180 (McKinney 1982).

⁵³ 50 Years of Executive Budgeting EMPIRE 15 (1980).

⁵⁴ N.Y. CONST. art. VII §4, 5; art. IV, §7.

⁵⁵ EMPIRE *supra* note 53 at 17 17 (1980) N.Y. STATE FIN. LAW §§42, 49, 51 (1984). Lane, *Legislative Oversight of an Executive Budget Process: Impoundments in New York*, 5 PACE L. REV. 226-230, 242-249 (1985).

⁵⁶ Overtime, the division of budget has used such techniques as zero based budgeting, management by objective, and the new key item reporting system. N.Y. STATE FIN. LAW §22-A (1984). *An Anatomy of the Budget Division and Its Role in the Budget Cycle*, *supra* note 53 at 15. Lawton, *Budgeting Techniques*, *supra* note 53 at 19.

⁵⁷ N.Y. CONST. art. V, §1; N.Y. STATE FIN. LAW §8 (1984).