THE SCOPE AND LIMITS OF THE NEW JERSEY GOVERNOR'S AUTHORITY TO REMOVE THE ATTORNEY GENERAL AND OTHERS "FOR CAUSE"[#]

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I. INTRODUCTION

Hours before she resigned as New Jersey's Attorney General, Zulima Farber was fighting to retain her office.[1] The morning she resigned her post as the state's "chief law enforcement officer,"[2] Ms. Farber met with

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1. At least one press report noted that Ms. Farber, accused of violating the state's ethics code, *see infra* note 3, "launched a mini-campaign to retain her post, according to three sources familiar with her efforts. 'She wanted to stay in this job,' said one. 'She didn't want to resign.'" Carolyn Salazar et al., *'Lapse in Judgement' Costs Farber Her Job; AG Ends Fight to Stay on Amid Traffic Stop Scandal*, REC. (Bergen County, N.J.), Aug. 16, 2006, at A01, *available at* 2006 WLNR 14187937. According to one account, Governor Corzine "listened to [Ms. Farber's] pleas that she be punished with a fine, a letter of reprimand or some other sanction that would preserve her job." David Kocieniewski, *Attorney General Put Up a Fight Before Relenting and Resigning*, N.Y. TIMES, Aug. 17, 2006, at B1, *available at* 2006 WLNR 14217826. Ms. Farber continued to press to retain her post, deciding to resign only hours before Governor Corzine planned to publicly call on her to leave office:

> [On the morning of the day Ms. Farber resigned as Attorney General,] Mr. Corzine and Ms. Farber met in his office in the Gateway Center in Newark, the governor stopped short of directly asking for a resignation, but told her that he thought it would be best if she stepped down, according to his aides.
>
> Even then, Ms. Farber was unwilling to relent. By 3 p.m., as ranking legislators from both parties demanded that she step down, Mr. Corzine's staff told Ms. Farber's aides that the governor had scheduled a 4 p.m. news conference to call for her resignation. Only 15 minutes before Mr. Corzine was to step up to the lectern in his outer office at the State House on Tuesday, Ms. Farber's advisers told the governor that she had decided to resign and asked that the announcement be pushed back to 6 p.m. so they could appear jointly.

Id.

2. State of New Jersey, Office of the Attorney General, Attorney General Biography, http://nj.gov/oag/oag/ag_bio.htm (last visited Mar. 5, 2008). "The department is responsible for protecting the safety, security and quality of life of New Jersey residents and includes ten divisions as well as independent commissions and boards. The Attorney General oversees the state's criminal justice system, the Division of State Police, and defends the state against lawsuits." *Id.* "Although the attorney general is a constitutional officer, virtually all of [her] powers and duties as the chief legal officer of the state emanate from the common law and statutes." ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 91 (Rutgers Univ. Press 1997) (1990).

Governor Jon Corzine behind closed doors to plead her case that resignation was too severe a punishment for violating the state's ethics code.[3] Governor Corzine, unfazed and facing intense political pressure, asked the Attorney General, whom he personally appointed seven months earlier,[4] to "call it quits."[5] And that is exactly what Ms. Farber did.[6]

Ms. Farber's last-minute decampment may have averted a constitutional showdown between the state's chief executive and chief law enforcement officer. Her resignation leaves unsettled questions about the scope of the New Jersey Governor's authority to remove constitutional officers. What if Ms. Farber had not bowed to Governor Corzine—if she had refused to

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3. *See* Salazar et al., *supra* note 1, at A01. The ethics code violations were found in a report issued by Special Prosecutor Richard Williams. *Id.* The report is critical of Ms. Farber for coming to the scene of a Fairview, New Jersey police traffic stop involving her boyfriend. *See id.* When Ms. Farber arrived at the scene, police officers allowed Ms. Farber's boyfriend to drive his unregistered minivan home. *Id.* In his conclusions, Judge Williams found that Ms. Farber's boyfriend "did, in fact, receive preferential treatment," and that "[b]y approving actions which allowed [her boyfriend] to drive his vehicle home, the Attorney General knowingly acted to secure a benefit for [her boyfriend] that was violative of the motor vehicle laws . . . ." OFFICE OF THE ATT'Y GEN., REPORT OF SPECIAL DEPUTY ATTORNEY GENERAL RICHARD J. WILLIAMS, CONCERNING THE MAY 26, 2006 MOTOR VEHICLE STOP OF HAMLET E. GOORE 33, 35 (2006) [hereinafter WILLIAMS REPORT].

4. The Governor of the State of New Jersey appoints the State's Attorney General. N.J. CONST. art. V, § IV, para. 3 ("The Secretary of State and the Attorney General shall be nominated and appointed by the Governor with the advice and consent of the Senate to serve during the term of office of the Governor . . . ."). Nationally, only the governors of Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming have the power to appoint their attorneys general. Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 6 (1993). Maine's Attorney General is elected by the legislature, and the Tennessee Supreme Court appoints that State's Attorney General. *Id.* In the remaining forty-three states, the Attorney General is popularly elected. *Id.*

The modern attorney general office can trace its origins to England, where the attorney general has "always been appointive, never elective, the attorney general being appointed, formally at least, and in earlier days in fact as well, by the monarch." BYRON R. ABERNATHY, SOME PERSISTING QUESTIONS CONCERNING THE CONSTITUTIONAL STATE EXECUTIVE 32 (1960). For an interesting discussion on the pros and cons of attorney general election versus appointment, see generally William N. Thompson, *Should We Elect or Appoint State Government Executives? Some New Data Concerning State Attorneys General*, 8 AM. REV. PUB. ADMIN. 17 (1974).

5. *Farber Finished*: *Attorney General Resigns Over Ethics Flap*, JERSEY J. (Jersey City, N.J.), Aug. 16, 2006, at 1. At a public press conference, however, Governor Corzine denied pressuring Ms. Farber to resign. *See* Salazar et al., *supra* note 1, at A01.

6. On August 15, 2006, at a press conference with Governor Corzine, Ms. Farber announced her intention to resign as Attorney General effective August 31, 2006. Laura Mansnerus & David W. Chen, *Corzine's Attorney General Out in Ethics Breach*, N.Y. TIMES, Aug. 16, 2006, at A1, *available at* 2006 WLNR 14153262.

resign? Would the Governor have had the authority to dismiss the Attorney General?

As is the case in other states,[7] New Jersey's Governor has broad authority to remove state officials "for cause" through a formal hearing process and with an opportunity for judicial review. The state constitution provides:

> The Governor may cause an investigation to be made of the conduct in office of any officer or employee who receives his compensation from the State of New Jersey, except a member, officer or employee of the Legislature or an officer elected by the Senate and General Assembly in joint meeting, or a judicial officer. He may require such officers or employees to submit to him a written statement or statements, under oath, of such information as he may call for relating to the conduct of their respective offices or employments. After notice, the service of charges and an opportunity to be heard at public hearing the Governor may remove any such officer or employee for cause. Such officer or employee shall have the right of judicial review, on both the law and the facts, in such manner as shall be provided by law.[8]

Whether and how this provision applies to the State Attorney General and Secretary of State—New Jersey's only two appointed constitutional offices[9]—has never been tested.[10] This Note argues and some have expressed

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7. *See, e.g.*, ARK. CONST. art. XV, § 3 ("The governor, upon the joint address of two-thirds of all the members elected to each House of the General Assembly, for good cause, may remove the Auditor, Treasurer, Secretary of State, Attorney-General, Judges of the Supreme and Circuit Courts, Chancellors and Prosecuting Attorneys."); NEB. CONST. art. IV, § 10 ("The Governor shall have power to remove, for cause and after a public hearing, any person whom he may appoint for a term except officers provided for in Article V of the Constitution . . . ."); PA. CONST. art. VI, § 7 ("All civil officers elected by the people, except the Governor, the Lieutenant Governor, members of the General Assembly and judges of the courts of record, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate.").

8. N.J. CONST. art. V, § IV, para. 5.

9. The offices are considered constitutionalized by virtue of their placement in the state constitution. *See id.* at para. 3 (amended 2005) ("The Secretary of State and the Attorney General shall be nominated and appointed by the Governor with the advice and consent of the Senate to serve during the term of office of the Governor, except the Governor may appoint the Lieutenant Governor to serve as Secretary of State without the advice and consent of the Senate.").

10. *Corzine Taps Chief Counsel as Next AG*, BUCKS COUNTY COURIER TIMES (Levittown, Pa.), Aug. 24, 2006, at C8, *available at* 2006 WLNR 14946938 ("The governor can remove the attorney general 'for cause,' but that authority has never been tested.").

the belief that the Attorney General and the Secretary of State *cannot* be removed by the Governor.[11] The opposing view—based on a four-page legal opinion issued in 2003 by the New Jersey State Office of Legislative Services ("OLS")[12]—is that "the framers intended that both the Secretary of State and the Attorney General be subject to removal for cause by the Governor."[13]

Surprisingly little has been written about the power of governors in all fifty states to remove constitutional officers, cabinet officials, and members of state boards and commissions.[14] A governor's power to remove executive branch employees is one of a chief executive's greatest powers.[15] Nevertheless, the absence of research in this area has left basic questions about the gubernatorial power of removal unanswered. What does the "for cause" constitutional provision mean and what other state constitutions have

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11. *See, e.g.*, Tom Moran, *A State of Corruption*: *Four Experts Talk About How to Deal with N.J.'s Ethically Challenged Politicians*, STAR-LEDGER (Newark, N.J.), Nov. 10, 2002, at 1, *available at* 2002 WLNR 12939464 ("'In New Jersey, the attorney general is in a very secure, powerful position, in the sense that, once confirmed, the attorney general cannot be fired by the governor or anyone else.'" (quoting former State Attorney General Robert J. Del Tufo)); Salazar et al., *supra* note 1, at A01 ("New Jersey's attorney general is appointed to a four-year term that can end only through resignation or an elaborate impeachment process.").

12. "The Office of Legislative Services is an agency of the Legislature established by law to provide professional, nonpartisan staff support services to the Legislature and its officers, members, committees and commissions." New Jersey Office of Legislative Services: An Overview, http://www.njleg.state.nj.us/legislativepub/oview.asp (last visited Mar. 5, 2008).

13. Letter from Danielle A. Brucchieri, Office of Legislative Services Deputy Counsel, to Senate Republican Office 4 (May 9, 2005) [hereinafter OLS Legal Opinion], *available at* http://njlegallib.rutgers.edu/ols/ols20050509.pdf.

14. In recent years, limited research has focused on the powers of governors generally. According to Professor Robert F. Williams, federal constitutional law has received the "lion's share of academic and judicial analysis within the category of constitutional interpretation." Robert F. Williams, *The Brennan Lecture*: *Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY. U. L. REV. 189, 190 (2002). The majority of the coverage that state constitutional law has received "has centered on rights cases, and whether state courts should interpret their constitutions to be more protective than the federal constitution." *Id.* (emphasis omitted). Writing more generally, Saikrishna Prakash has noted that "[r]emoval is an under-theorized and relatively unexamined area of constitutional law." Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1781 (2006).

15. Richard J. Connors and William J. Dunham have referred to the New Jersey Governor's powers of removal as one of the Governor's "three principal constitutional weapons." RICHARD J. CONNORS & WILLIAM J. DUNHAM, THE GOVERNMENT OF NEW JERSEY 140 (1993). Duane Lockard has recognized the removal authority as a prime example of the New Jersey Governor's "base of power." 14 DUANE LOCKARD, THE NEW JERSEY GOVERNOR: A STUDY IN POLITICAL POWER 4 (1964).

these clauses? What processes must governors in New Jersey and other states follow to remove an officeholder, and are there procedural constraints imposed on governors by the state and federal constitutions? Does the judiciary have a role in reviewing a governor's decision to remove an officeholder? The Zulima Farber scenario illustrates that the implications of these questions may have future ramifications if New Jersey is ever again faced with a recalcitrant Attorney General and a strong-willed Governor.[16] In such a circumstance, New Jersey courts would be placed in a powerful position to define the scope of the Governor's constitutional removal authority.

Part II of this Note examines the history, development, and modern scope of a chief executive's ability to remove subordinate government officials in New Jersey, in other states, and in the federal system generally. Part III studies the upper limits of the New Jersey Governor's "for cause" removal powers insofar as whether the Governor can remove the state's constitutional officers, including the Attorney General. Part IV considers the evolving meaning of the phrase "for cause," and the varying state and federal procedural requirements which may cause a governor's decision to remove a subordinate to be overturned for any number of reasons in state or federal court. Finally, Part V argues that New Jersey courts should not permit the Governor to remove the Attorney General given the constitution's text, the framer's intent, and structural policy concerns.

16. Recent history suggests a repeat of a "Zulima Farber-like" scenario is not beyond the realm of real possibility. In fact, Peter Harvey, whose term immediately preceded Ms. Farber's, was criticized for both perceived misjudgments and connection to scandal. It was alleged—though not proven—that Mr. Harvey subpoenaed a sitting state senator in an "attempt to intimidate [the senator] after the senator raised questions about an investigation into wrongdoing at the state Parole Board." Editorial, *Advancing Amid Questions*, STAR-LEDGER (Newark, N.J.), June 12, 2003, at 18, *available at* 2003 WLNR 15625966. It was also alleged that Mr. Harvey "abandoned" a criminal investigation of members of his own political party, "rais[ing] questions." *Id.*

Recorded scandals involving attorneys general date back to before the adoption of the modern state constitution. *See, e.g.*, *Van Riper Indicted as OPA Violator*, N.Y. TIMES, Feb. 16, 1945, at 25. Then-Attorney General Walter D. Van Riper was indicted by a federal grand jury as a "black marketer in gasoline." *Id.*

II. SCOPE AND HISTORY OF THE GOVERNOR'S REMOVAL POWER

A. Origins of Federal and State Executive Dismissal Authority

Since the time of this nation's founding, on both the state and federal level, there has been debate over how far a chief executive's dismissal power should extend. Central to this debate is the issue of whether the executive branch should be granted the authority to fire public officers, absent input from a legislature or the judiciary. Proponents of gubernatorial power argue that investing removal authority in the executive branch allows governors to more easily "shap[e] and direct[] executive branch policies."[17] Governors with removal authority are able to more quickly remove criminals and the unfit from office.[18] Opponents point to an "overriding demand of public policy that officers be protected in the performance of their offices during their terms."[19]

The Federal Constitution, unlike state constitutions, has long been viewed to vest dismissal authority in the chief executive. In 1789, during the very first session of the U.S. Congress, the body considered "the question of the nature of the power of the President to remove his appointees from office."[20] The "settled doctrine" at the time was that the President had

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17. Matheson, Jr., *supra* note 4, at 20. This would also lead to a more efficient state government, since removal authority avoids "deadlock in carrying out executive functions." *Id.* at 7. The underlying assumption is that powers of appointment and removal "constitute a significant aspect of [a governor's] control over state administration." John Murdoch Dawley, *The Governors' Constitutional Powers of Appointment and Removal*, 22 MINN. L. REV. 451, 451 (1938).

18. Edward G. Jennings, *Removal from Public Office in Minnesota*, 20 MINN. L. REV. 721, 723 (1936) ("[The removal power] guard[s] against . . . veering . . . in the direction of making the public service a haven of safety for the unfit when once in office, or for the confirmed bureaucrat whose mentality as well as methods have become static." (citation omitted)). The alternative model to gubernatorial removal—impeachment by the legislature—has been called "costly, dilatory and unsatisfactory," which may help to explain why "comparatively few impeachment proceedings have ever been instituted." Charles Kettleborough, *Removal of Public Officers, A Ten-Year Review*, 8 AM. POL. SCI. REV. 621, 621 (1914).

19. MICHAEL A. PANE, NEW JERSEY PRACTICE SERIES – ROCAL GOVERNMENT LAW § 12.14 (3d ed. 2002). Edward G. Jennings has noted that "[s]ecurity of tenure conditioned on satisfactory work is of importance in any adequate civil service system." Jennings, *supra* note 18, at 721. Security of tenure is important because as government becomes more complex, it becomes significantly more difficult to replace an officer with long experience, even when the officer's replacement has "superior native talent." *Id.* at 722.

20. Alonzo H. Tuttle, *Removal of Public Officers from Office for Cause*, 3 MICH. L. REV. 290, 291 (1905).

"absolute power of removal of all his appointees, without the assent of the Senate."[21]

The Supreme Court has recognized this power, repeatedly finding that the President possesses a broad and implied power of removal.[22] The President's power to remove federal officers was "first directly addressed" by the Supreme Court in 1926 when the Court—considering the constitutionality of a federal statute that blocked the President's ability to oust postmasters without the Senate's advice and consent—declared the statute "unconstitutional as a violation of the separation of powers."[23] Congress, more recently, has endeavored to "deprive" the President of his constitutional authority to remove public officers by concentrating power in independent administrative agencies, beyond the President's control.[24]

State governors have not historically been recognized to have the same inherent removal authority as the President.[25] State constitutions have

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21. *Id.*; *see also* U.S. CONST. art. II, § 3 (establishing the President's appointment and removal authority through the constitutional directive that the President "take Care that the Laws be faithfully executed"); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1035 (2006) (noting that almost all Representatives believed the Federal Constitution permitted removal of executive officers by means other than impeachment).

22. *See* Myers v. United States, 272 U.S. 52, 161 (1926) ("The power to remove inferior executive officers, like that to remove superior executive officers, in an incident of the power to appoint them, and is in its nature an executive power."); *Ex parte* Hennen, 38 U.S. 230, 253 (1839) ("The right to remove is an incident to the power of appointment.").

23. Arch T. Allen, III, *A Study in Separation of Powers*: *Executive Power in North Carolina*, 77 N.C. L. REV. 2049, 2070 (1999) (citing *Myers*, 272 U.S. at 161). The Court looked to Madison to draw support for its reasoning: "'The powers relative to offices are partly legislative and partly executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases.'" *Myers*, 272 U.S. at 128 (quoting 1 ANNALS OF CONG. 604 (Joseph Gales ed., 1789) (statement of Rep. Madison)).

24. Harvard Law School Dean Elena Kagan has observed the erosion of a "strongly unitary" executive branch, "[b]ecause Congress has deprived . . . the President of . . . plenary authority in one obvious respect - - by creating the so-called independent agencies, whose heads the President may not remove at will . . . ." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001); *see also* Wiener v. United States, 357 U.S. 349, 353 (1958) (noting the Supreme Court has drawn "a sharp line of cleavage between officials [in] the Executive establishment . . . removable by virtue of the President's constitutional powers, and . . . members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government . . . .'" (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 625-26 (1935))).

25. Professor John Murdoch Dawley acknowledged in the 1930s that "the governor of a state is not a chief executive to the same extent that the president of the United States is a chief executive." Dawley, *supra* note 17, at 476. When Dawley compared the removal powers

historically assigned "the predominant legal position . . . to the legislature."[26] This assignment of powers to the legislative branch, including the removal power by means of impeachment, was the result of historical concerns over the strength and dominance of the executive branch.[27]

Historically, the availability and scope of executive removal powers varied significantly from state to state. These varied approaches can be broadly distilled into three distinct models of removal. Under the first model, adopted chiefly by Illinois,[28] the chief executive had no removal power, with that power vested instead in a legislative body or in the judiciary. The second model—as provided in New York's first constitution[29] and judicially adopted

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of the President to those of a state's governor, he concluded such a comparison "shows conclusively [a governor's] more restricted position." *Id.*

Consistent with this "more restricted position," governors have been viewed historically as not possessing inherent removal powers like the President. *See, e.g.*, State *ex rel.* Lyon v. Rhame, 75 S.E. 881, 882 (S.C. 1912) ("The Governor, as chief executive, has no prerogative control over officers such as is held by the king of Great Britain. The power of removal from office, therefore, is not an incident of the executive office . . . ."); State *ex rel.* Thompson v. Morton, 84 S.E.2d 791, 797 (W. Va. 1954) ("No inherent power to remove from office is vested in the Governor . . . ."); *see also* Case Note, *Constitutional Law—Governor's Removal Power*, 39 YALE L.J. 1060, 1060 (1930) ("It is now well settled that the power of appointing administrative officers granted the president of the United States includes an unrestricted power to remove. But a state governor, as chief executive, has no such power of removal unless it is conferred by the state constitution or provided for by statute." (citations omitted)).

26. John M. Mathews, *The New Role of the Governor*, 6 AM. POL. SCI. REV. 216, 216 (1912). With regard to dismissal authority, in particular, state constitutions have historically been far more limiting of the chief executive's powers than the Federal Constitution. *See* John A. Fairlie, *The State Governor II*: *Administrative Powers*, 10 MICH. L. REV. 458, 461 (1912) ("The power of removal possessed by State governors is everywhere much limited, in even more marked contrast with the power of the President than is the power of appointment." (emphasis omitted)).

27. *See* Michael S. Herman, *Gubernatorial Executive Orders*, 30 RUTGERS L.J. 987, 988 (1999) ("The drafters of [early] constitutions perceived the danger of vesting such power as the British King or colonial Royal Governors had exercised in a single executive."); Mathews, *supra* note 26, at 216 ("The conflicts that had taken place between the colonial governors, appointed by the crown, and the colonial legislatures, composed of representatives of the people, had embittered the colonists against the exercise of executive authority.").

28. *See, e.g.*, Field v. People *ex rel.* McClernand, 3 Ill. (2 Scam.) 79, 83 (1839) (holding that the Illinois State Constitution does not grant the Governor the power of removal and that he could not exercise powers not expressly granted).

29. Fairlie, *supra* note 26, at 461. The original New York model called for a council of appointment, with which the governor "jointly had and exercised a power of removal co-extensive with their power of appointment . . . ." *Id.* The council of appointment scheme would later be abandoned in light of political abuse and for other reasons. *See id.*

in 1881 by Maine[30]—vested dismissal power in the Governor, but made the removal power coextensive with other branches. The third model gave the Governor considerably more leeway in this area: either allowing the Governor to remove officers he appointed for specific causes,[31] or alternatively, giving the Governor virtually blanket authority to make personnel decisions for the executive branch.[32]

B. History and Development of the New Jersey Governor's Removal Powers

Nineteenth-century New Jersey went the way of the Illinois model—preferring a weak governor to a strong one, and vesting dismissal powers in a Legislative Council in lieu of the Governor himself.[33] Illustrating the "impotence of the governor in respect to removal" under then-existing law,[34] the New Jersey Supreme Court held in 1873 that Governor Joel Parker[35] possessed no inherent removal rights[36]—not even the power to remove state

30. *In re* Opinion of Justices, 72 Me. 542, 550 (1881) ("The power of removal where the appointment is by the governor with the advice and consent of the council, is not conferred by the constitution on the governor.").

31. Nebraska has historically afforded its Governor the "power to remove any officer whom he may appoint, for incompetency, neglect of duty, or malfeasance in office." Fairlie, *supra* note 26, at 461. Another state, Maryland, allowed the Governor to remove officers appointed for a term of years "for incompetency or misconduct." *Id.*

32. At the turn of the twentieth-century, twelve states—Delaware, Iowa, Missouri, New Mexico, New York, Oregon, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming—granted their governors "extensive" authority to remove executive branch officials. Kettleborough, *supra* note 18, at 624. By statute, Minnesota's legislature granted its Governor "generally unlimited" powers of removal. *See* Jennings, *supra* note 18, at 737.

33. "As in other states, the memory of executive abuses in the colonial era led the drafters of the New Jersey Constitution of 1776 to create a very weak Office of the Governor." Herman, *supra* note 27, at 988.

34. Mathews, *supra* note 26, at 217.

35. Joel Parker was New Jersey's twentieth Governor, serving from 1863 to 1866 and 1872 to 1875. William C. Wright, *Joel Parker*, *in* THE GOVERNORS OF NEW JERSEY, 1664-1974: BIOGRAPHICAL ESSAYS 132-35 (Paul A. Stellhorn & Michael J. Birkner, eds., New Jersey Historical Commission 1982), *available at* http://www.njstatelib.org/NJ_Information/Digital_Collections/Governors_of_New_Jersey/GPARK.pdf. His official biography remembers him as "one of the Lincoln administration's most outspoken critics" during the Civil War, a supporter of states' rights, and someone who "continually spoke out against corruption in government." *Id.* at 133-34.

36. State v. Pritchard, 36 N.J.L. 101, 1873 WL 6864 (N.J. 1873). This contrasts the chief executive's inherent authority to remove officials that has been recognized in the Federal Constitution. *See supra* notes 20-24 and accompanying text. *Pritchard* addressed the limited issue of "inherent" removal rights—meaning the right to remove a subordinate in the absence of a constitutional or statutory grant of authority. *Id.* Forty-seven years after *Pritchard*, the

officials convicted of crimes involving the public trust.[37] In fact, New Jersey's first two constitutions did not vest dismissal authority in the Governor, but rather left that power exclusively to the domain of the legislature.[38] The state supreme court's holding in *Pritchard* that the Governor has no inherent right of removal is consistent with the jurisprudence of nearly every state in the nation, save Indiana.[39]

The lack of a positive grant of constitutional or statutory dismissal authority in New Jersey's earliest constitutions is reflective of a weak executive branch. Not surprisingly, "[f]or most of New Jersey's history, the real power in this state resided with the legislature."[40] Under the 1776

New Jersey Supreme Court held that the Governor, *when empowered by legislative act*, could possess a limited right of removal. *See* McCran v. Gaul, 112 A. 341, 344 (N.J. 1920).

37. *Pritchard,* 1873 WL 6864, at *6-8. The case involved police commissioners of Jersey City who were tried and convicted of conspiracy to defraud the City of public funds. *Id.* at *1. The Governor then attempted to remove them from office. *Id.* Although the state officials at issue "were impeachable for their alleged official misdeeds," Chief Justice Beasley noted, "it would have been competent for the court of impeachments to remove them from their posts." *Id.* at *11. In short, the court found that the Governor was not himself a competent court of impeachment: "I have not been able to perceive any intimation, not even the least, either in the constitution of this state, its system of laws, or legal observances, that this right of superintendency over, or power of removal from public office, except in instances of statutory specification, has been delegated to the executive head of the government." *Id.* at *7. The lack of requisite authority to support removal of executive officers is not surprising, considering the fact that "other branches prior to 1947 were reluctant to cede power to the Governor." Jack M. Sabatino, *Assertion and Self-Restraint*: *The Exercise of Governmental Powers Distributed Under the 1947 New Jersey Constitution*, 29 RUTGERS L.J. 799, 806 n.52 (1998).

38. The 1776 constitution provided that executive branch officers, including "the Attorney-General," could be "dismissed, when adjudged guilty of misbehaviour, by the [Legislative] Council, on an impeachment of the Assembly." N.J. CONST. of 1776, art. XII. The 1844 constitution authorized the Governor to fill vacancies "during the recess of the legislature," but did not specify or authorize gubernatorial removal of state officers. *See* N.J. CONST. of 1844, art. V, § 12.

39. *See* ABERNATHY, *supra* note 4, at 51 ("Hence, in seeking to define the removal power of the governor, one finds no automatic inherent or implied executive power to remove subordinates (except in Indiana), but must look for positive constitutional or statutory authorizations for the governor to remove public officials."). The Indiana Supreme Court adopted the federal model, and found that even in the absence of positive authority in that state's constitution or by legislative grant, an implied authority of the Governor to remove appointees exists. *See* Tucker v. State, 35 N.E.2d 270, 287 (Ind. 1941) ("[I]n the absence of any express limitation respecting removals, that as [the Governor's] selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.").

40. John J. Farmer, Jr., *Perspective*: *The Evolution of New Jersey's Gubernatorial Power*, 25 SETON HALL LEGIS. J. 1, 6 (2001).

constitution, for example, the Legislature appointed most county and state officials and all judges, while the Governor did not even possess the chief executive's conventional power to veto legislative acts.[41] While revisions to the constitution in 1844 strengthened the Governor's Office,[42] "[t]he Governor still had no appointment authority,"[43] and no power of removal can be located anywhere in the text of the 1844 constitution. It was not until the modern constitution, adopted in 1947, that New Jersey granted express dismissal authority to its chief executive.[44]

The language of the 1947 constitution, for the first time in the state's constitutional history, gave New Jersey's Governor clear and direct authority to remove state officers, independent of the legislature.[45] The effect of the addition of this power, coupled with other changes,[46] dramatically "strengthened the governor's authority in 'faithfully executing' the laws."[47] In fact, by almost every measure, the 1947 constitution re-shaped the office of New Jersey's Governor into one of the most powerful in the nation.[48]

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41. *See* N.J. CONST. of 1776, arts. V, XII.

42. The 1844 constitution specified that the Governor would be popularly elected as opposed to being appointed by the legislature, increased his term of office from one to three years, and granted him veto authority which could be overridden by a simple majority of legislators. *See* Farmer, *supra* note 40, at 8.

43. *Id.*

44. *See* N.J. CONST. art. V, § IV, paras. 2, 5.

45. This is not to imply that the Governor's new authority is the only means available by which to remove a state officer. The Legislature also retained removal authority under the 1947 constitution. *See id.* at art. IV, § IV, para. 3 (providing for expulsion by the Legislature). Other avenues of removal are also provided. *See, e.g.*, *id.* at art. VI, § VI, para. 4 (providing for removal of judges by the supreme court); *id.* at art. IV, § V, para. 3 (creating a vacancy when a member of the Legislature becomes a member of Congress or accepts any federal or state office or position). At least one scholar has observed that state legislatures have de facto removal powers in their arsenal as well, not explicitly mentioned in a constitution's text, but palpable nevertheless—including the power to fail to make appropriations and to abolish non-constitutional offices. *See* Dawley, *supra* note 17, at 469.

46. The Governor was given a four-year term, allowed to succeed himself for one additional term, had his veto power strengthened, was given the power of a "pocket veto," and was charged with the full power to manage executive departments. Farmer, *supra* note 40, at 9-10.

47. Jack M. Sabatino, *The Separation of Powers in New Jersey Since 1947*: *Accommodation But Not Abdication*, 185 N.J. LAW., June 1997, at 34, 35 (citation omitted).

48. *See, e.g.*, Laura Mansnerus, *Call It 'Ayatollah' or 'Caesar,' It's the Imperial Governorship*, N.Y. TIMES, July 30, 2000, § 14, at 1 ("Whatever their measure of power, scholars generally agree that among governors, New Jersey's is at the top of the list.").

With an "aim[] at pinpointing responsibility and control within the executive branch,"[49] the framers of the 1947 constitution charged the Governor with direct supervision over all principal departments and department heads.[50] Coextensive with this power of supervision, department heads, for the first time in the state's history,[51] were directed to serve "at the pleasure of the Governor during his term of office and until the appointment and qualification of their successors."[52] This clause invalidated the holding of *Pritchard*,[53] since the Governor was granted unambiguous constitutional authority to dismiss state officials at his pleasure.[54]

Three notable limitations cap the Governor's ability to exercise his "at pleasure" dismissal power granted under the 1947 constitution. First, the provision only applies to principal department heads and sub-principal department heads.[55] Second, the Attorney General and Secretary of State are specifically exempted from the provision and cannot be fired "at the pleasure of the Governor."[56] Third, New Jersey's Lieutenant Governor,[57] who the

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49. WILLIAMS, *supra* note 2, at 91. Notably, for the first time in the state's history, "[n]ot only are department heads under the governor's supervision and serve at his pleasure after being appointed by him, but they are to be individuals rather than boards or commissions unless the legislature decides otherwise." *Id.*

50. *See* N.J. CONST. art. V, § IV, para. 2 ("Each principal department shall be under the supervision of the Governor.").

51. *See supra* note 38 and accompanying text (discussing the Governor's want of removal power under New Jersey's 1776 and 1884 constitutions).

52. N.J. CONST. art. V, § IV, para. 2.

53. *Pritchard*, 36 N.J.L. 101, 1873 WL 6864 (N.J. 1873).

54. In fact, the power of executive branch dismissal authority is no longer even limited to the Governor himself. Numerous subordinate officials in the executive branch of state government serve "at the pleasure of" a cabinet or sub-cabinet official. *See, e.g.*, N.J. STAT. ANN. § 52:17A-7 (West 2006) (providing that "Deputy Attorneys-General and Assistant Attorneys-General in the Department of Law and Public Safety shall hold their offices at the pleasure of the Attorney-General and shall receive such salaries as the Attorney-General shall from time to time designate."). At least one delegate to the 1947 state constitutional convention expressed concern that giving the Governor the power to remove "at pleasure" was too broad a grant of power to give the chief executive. *See* FRANK G. SCHLOSSER, DRY REVOLUTION: DIARY OF A CONSTITUTIONAL CONVENTION 109 (1960) ("[The governor] does not need power summarily to dismiss a man without reason.").

55. The provision places "[e]ach principal department . . . under the supervision of the Governor." N.J. CONST. art. V, § IV, para. 2. For a discussion on how sub-principal department heads also fall within the ambit of the "at pleasure" provision, see *supra* note 54.

56. N.J. CONST. art. V, § IV, para. 2 ("[E]xecutives shall be nominated . . . by the Governor . . . to serve at the pleasure of the Governor . . . except as herein otherwise provided with respect to the Secretary of State and the Attorney General."). Two scholars have posited that the difference between "for cause" removal power and "at pleasure" removal power is that the individual or entity with "for cause" removal power does not act "as the final

Governor may appoint to serve as the head of a principal department,[58] may not be dismissed "at the pleasure of" the Governor from her role as Lieutenant Governor. Instead, the Lieutenant Governor may be released from her role as a principal department head,[59] if so appointed.[60]

For those officials that the "at pleasure" provision clause does not reach, such as state commissioners and board members who do not neatly fit within a principal department, the constitution invests in the Governor power to remove these officials "for cause."[61] The Governor may remove these officials only after notice, hearing, and judicial review.[62] In addition to granting the Governor the power to remove state officers and employees, the "for cause" provision also gives the Governor the power to discipline and suspend subordinates.[63] Separately, the clause grants the Governor the power

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arbitrator of whether 'cause' exists." Russ E. Boltz & Robert C. Ludolph, *Serving at the Pleasure*: *Termination of Officers and Employees of Financial Institutions*, 104 BANKING L.J. 553, 564-65 (1987). This is because, unlike "at pleasure" removals, the judiciary has a defined role in determining whether "cause" exists. *Id.*

57. New Jersey has historically not had a Lieutenant Governor. For an interesting narrative on gubernatorial succession prior to the creation of the Lieutenant Governor post, see generally Michael L. Ticktin, *Succession to the Office of Governor and Separation of Powers*: *The Unfinished Business of the 1947 Constitution*, 29 RUTGERS L.J. 1021 (1998). On November 8, 2005, New Jersey voters amended the state's constitution to create the post, with the first Lieutenant Governor to be elected in 2009. *See* Robert Schwaneberg, *No More Acting*: *We'll have a Lieutenant Governor*, STAR-LEDGER (Newark, N.J.), Nov. 9, 2005, at 18, *available at* 2005 WLNR 23825389; *Getting up to Speed on the Lieutenant Governor Question*, REC. (Bergen County, N.J.), Nov. 6, 2005, at L08, *available at* 2005 WLNR 18102717.

58. The Governor may appoint the Lieutenant Governor to serve as the head of a principal department without the advice and consent of the State Senate. *See infra* note 112. The Governor may not, however, appoint the Lieutenant Governor as Attorney General. N.J. CONST. art. V, § I, para. 10, cl. b ("The Governor shall not appoint the Lieutenant Governor to serve as Attorney General.").

59. *See* N.J. CONST. art. V, § I, para. 10, cl. b ("The Governor shall appoint the Lieutenant Governor to serve as the head of a principal department or other executive or administrative agency of State Government . . . .").

60. *See id.* § IV, para. 2 (amended 2005) ("The Governor may appoint the Lieutenant Governor to serve as the head of a principal department, without the advice and consent of the Senate, and to serve at the pleasure of the Governor during the Governor's term of office.").

61. *Id.* at para. 5.

62. *Id.*; *see also* WILLIAMS, *supra* note 2, at 92.

63. WILLIAMS, *supra* note 2, at 92 ("[T]he New Jersey Supreme Court [has] held that the governor's power to remove state officers and employees carrie[s] with it, inherently, 'the right to impose all lesser degrees of punishment.'" (quoting Russo v. Governor, 123 A.2d 482, 488 (N.J. 1956))).

to investigate state employees,[64] a power that the Governor statutorily possessed prior to the 1947 constitution's adoption.[65]

Unlike a number of other state constitutions,[66] the New Jersey Constitution does not specify what "causes" are enough to justify removal of a public officer.[67] Thus, the constitution leaves the determination of what causes merit removal to the Governor's discretion. The Governor's finding of cause, however, is subject to independent judicial review. The right of independent judicial review is guaranteed to the public officeholder by the state constitution's text.[68]

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64. *See* N.J. CONST. art. V, § IV, para. 5 ("The Governor may cause an investigation to be made of the conduct in office of any officer or employee who receives his compensation from the State of New Jersey . . . . He may require such officers or employees to submit to him a written statement or statements, under oath, of such information as he may call for relating to the conduct of their respective offices or employments."). A proposal by Delegate Jane Barus at the 1947 Convention provided express penalties for failure to comply with a governor's investigation: "Any person who shall . . . refuse to testify or to answer any questions relating to any matter under investigation . . . shall thereby become disqualified to hold any publicoffice [sic], position or employment." Jane Barus, *Proposal Introduced by Jane Barus, Delegate, to be Included in the Article on Public Officers* (1947) (proposal to the New Jersey State Constitutional Convention) (on file with author). Barus's proposal, however, was not ratified and does not appear in the modern constitution. *See generally* N.J. CONST. art. V.

65. The 1844 Constitution "grant[ed] no investigatory power to the Governor." Letter from Sidney Goldmann, Head, N.J. Archives and History Bureau, to Abram S. Freedman (May 20, 1947) (on file with author). Despite this, a 1941 legislative act provided the Governor with statutory authority to examine and investigate "any . . . officer[,]. . . department, board, bureau or commission of the State." S.B. 4, 165th Leg. (N.J. 1941). To exercise this statutory authority the Governor was granted the power to "subpoena and enforce the attendance of witnesses, to . . . examine witnesses under oath and to require the production of any books or papers deemed relevant or material." *Id.* The sponsor of the measure was State Senator Robert C. Hendrickson, who would later chair the Commission on Revision of the New Jersey Constitution which would propose broad changes to the 1844 constitution. The Act was approved March 15, 1941. 1941 N.J. Laws 34. Despite the adoption of the 1947 constitution, and the constitutionalization of the Governor's power to investigate officers of the government, *see supra* note 64, Hendrickson's 1941 Act remains codified in New Jersey's statutes. *See* N.J. STAT. ANN. § 52:15-7 (West 2006).

66. *See infra* notes 209-211 and accompanying text.

67. *Compare* N.J. CONST. art. V, § IV, para. 5 (allowing New Jersey's Governor to remove officials "for cause" without specifying particular causes), *with* FLA. CONST. art. IV, § 7, para. a (allowing Florida's Governor to exercise removal authority only in instances of "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony").

68. *See* N.J. CONST. art. V, § IV, para. 5 ("Such officer or employee shall have the right of judicial review, on both the law and the facts, in such manner as shall be provided by

Application of the provision is expressly limited to "any officer or employee who receives his compensation from the State of New Jersey."[69] There are additional, significant limitations to the Governor's ability to dismiss employees "for cause." "Cause" is not enough for the Governor to be able to remove "for cause" the following officials: (1) a "member, officer or employee of the Legislature;"[70] (2) "an officer elected by the Senate and General Assembly in joint meeting;"[71] and (3) "judicial officer[s]."[72] These named officials are expressly outside the ambit of the Governor's disciplinary and removal powers.[73] Protecting these officials avoids violating

law."). The process for seeking judicial review is delineated by statute. *See* N.J. STAT. ANN. § 52:14-17.2 (West 2006).

69. N.J. CONST. art. V, § IV, para. 5. This limitation ensures that New Jersey's Governor may not remove municipal and county officials, who do not directly receive compensation from the State. *See, e.g.*, Yurick v. State, No. A-5247-02T5, 2004 WL 1575063, at *5 (N.J. Super. Ct. App. Div. June 30, 2004) (per curiam) (holding that county prosecutors receive their compensation from the county in which they are located and that therefore the Governor's power of removal is inapplicable), *rev'd on other grounds*, 875 A.2d 898 (N.J. 2005). This contrasts with the situation in Florida, where it has been held that the governor may remove, at least temporarily, municipal officers. *See generally In re* Advisory Opinion to the Governor, 336 So. 2d 97, 98 (Fla. 1976) (holding that the Governor had authority to suspend the mayor of the city of Jacksonville under provisions relating to suspension of county officers).

70. N.J. CONST. art. V, § IV, para. 5. Both the judiciary and legislature of New Jersey have not yet defined with precision this constitutional term. The New Jersey Legislative Code of Ethics defines "'[s]tate officer or employee' in the legislative branch of the State Government" as "a salaried officer or employee, other than a member of the Senate or General Assembly . . . who spends the predominant part of his working time in the employ of the Legislature . . . ." Legislative Code of Ethics, S. Con. Res. 107, 200th Leg., 2d Sess. (N.J. 1983), *available at* http://www.njleg.state.nj.us/ethics/code_ethics.asp. The Code separately delineates elected members of the Legislature as "[s]pecial State officer[s] or employee[s]." *Id.* Presumably, then, elected members of the Legislature and legislative aides, including partisan staff as well as the nonpartisan staff of the OLS would be covered within this broad term of art. *See supra* note 12. *But see* Schabarum v. Cal. Legislature, 70 Cal. Rptr. 2d 745, 759 (Ct. App. 1998) (holding that the nonpartisan Legislative Counsel "is not a part of 'the Legislature'" for purposes of spending limitations).

71. N.J. CONST. art. V, § IV, para. 5. The New Jersey Constitution specifically provides for election in joint meetings by members of both legislative houses in two limited circumstances. The first circumstance is when there is a numerical tie in the popular election of a Governor and Lieutenant Governor. N.J. CONST. art. V, § I, para. 4. The second circumstance is for the appointment of the State Auditor. *See id.* at art. VII, § I, para. 6.

72. N.J. CONST. art. V, § IV, para. 5; *see* discussion *infra* Part III.A.1.

73. The Governor may remove these officials "for cause." Also, these officials are outside the scope of the Governor's "at pleasure" removal powers. *See* N.J. CONST. art. V, § IV, para. 2. And for good reason: separation-of-powers concerns were at the heart of the

the separation-of-powers doctrine, since it ensures the Governor will not have removal authority over members of the legislature or the judicial branch.[74] Setting these three named exceptions aside—and note that the Attorney General is not explicitly named in the clause[75]—the Governor may remove "for cause" a broad category of officials, specifically "any officer or employee who receives his compensation from the State of New Jersey."[76]

III. THE NEW JERSEY GOVERNOR'S ABILITY TO REMOVE THE ATTORNEY GENERAL

The only existing legal analysis of the Governor's ability to remove constitutional officers comes in a four-page OLS legal opinion, which concludes that the Governor *can* remove the Attorney General and Secretary of State under the state constitution's "for cause" provision.[77] When Ms. Farber's ethical woes first emerged,[78] minority-party members of New Jersey's Legislature rushed to publicly urge Governor Corzine to dismiss Ms. Farber—going so far as to distribute copies of the OLS Legal Opinion to remind Governor Corzine of his purported legal authority.[79] As a general rule, legal opinions issued by the OLS under the color of statute,[80] though non-binding, influence legislative and state government action in a

framers' decision to place these offices beyond the Governor's reach. *See* WILLIAMS, *supra* note 2, at 92.

74. WILLIAMS, *supra* note 2, at 92.

75. The Attorney General, Secretary of State, and Lieutenant Governor are not mentioned within the text of the provision. *See* N.J. CONST. art. V, § IV, para. 5.

76. *Id.*

77. *See supra* note 13 and accompanying text.

78. *See supra* note 3 (summarizing Ms. Farber's alleged ethics violation).

79. *See, e.g.*, Lisa Brennan, *Governor Has Constitutional Power to Remove AG, Says OLS Counsel*, 185 N.J. L.J. 245, 245 (2006) ("[A]mid calls for Attorney General Zulima Farber to resign . . . GOP lawmakers handed Gov. Jon Corzine a new broom to sweep the mess away. Senate Republicans dusted off a legal opinion [concluding] . . . that the state constitution . . . empowers the governor to remove . . . the Attorney General . . . .").

80. The Legislative Counsel of New Jersey's Office of Legislative Services has the duty to "furnish formal written opinions on legal matters," upon the "written request of either or both Houses of the Legislature, the presiding officer of either House, the majority or minority leader of either House, [or] a legislative committee or commission." N.J. STAT. ANN. § 52:11-61(f) (West 2006); *see also* OFFICE OF LEGISLATIVE SERVS., NEW JERSEY LEGISLATURE LEGISLATOR'S HANDBOOK 42 (2006) ("The Legislative Counsel is available to advise the members, legislative leadership, committees and commissions with respect to parliamentary procedures and legal matters affecting the Legislature . . . .").

substantive way.[81] In the past, such opinions have even been cited by New Jersey courts in published opinions.[82]

This Note argues that a more complete examination of the framer's intent reveals that the power to remove the Attorney General and Secretary of State is far from settled doctrine.[83] At the very least, until the judiciary

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81. There are concrete examples of OLS legal opinions influencing the legislative process. *See, e.g.*, Brief of Plaintiff in Support of Motion of Summary Judgment at 2, Planned Parenthood of Central New Jersey v. Verniero, 22 F. Supp. 2d 331 (D. N.J. 1998) (No. Civ.A. 97-6170(AET)), *reprinted in* 20 WOMEN'S RTS. L. REP. 111, 112 (1999) ("Governor Whitman vetoed [legislation banning partial-birth abortion in New Jersey] 'based upon advice from the Attorney General, the Office of Legislative Services, and [her] Chief Counsel that the bill in its current form is unconstitutional.'" (second alteration in original) (citation omitted)); Gary S. Gildin, *A Blessing in Disguise*: *Protecting Minority Faiths Through State Religious Freedom* Non-*Restoration Acts*, 23 HARV. J.L. & PUB. POL'Y 411, 433 n.103 (2000) ("On January 13, 1998, New Jersey legislators introduced the New Jersey Religious Freedom Act. The bill died after [the OLS] issued an opinion concluding that the Act would violate the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution." (citation omitted)).

The true impact of the OLS's opinions on the legislative process, however, is impossible to gauge because the great bulk of opinions the Office issues are confidential, unless released to the public by the legislator who requested the opinion. *See* N.J. STAT. ANN. § 52:11-70 (West 2006) ("All requests for legal assistance, information or advice and all information received by [the OLS] in connection with any request . . . shall be regarded as confidential and no information in respect thereto shall be given to the public or to any person other than the person or persons making such request or any officer [or] person duly authorized to have such information . . . ."); *see also* OFFICE OF LEGISLATIVE SERVS., *supra* note 80, at 41 ("By law, all communications between legislators and the OLS personnel are confidential. The agency will disclose to a third party neither the nature of an assignment nor the name of the legislator requesting the information or research unless so authorized by the legislator."). A collection of publicly released legal opinions—including the May 9, 2005 opinion on gubernatorial removal powers—is available online. *See* New Jersey Digital Legal Library, N.J. Legislative Counsel Opinions, http://nljegallib.rutgers.edu/ols (last visited Mar. 5, 2008).

82. *See, e.g.*, Commc'ns Workers of Am. v. Florio, 617 A.2d 223, 227 (N.J. 1992) (reprinting and summarizing portions of a 1992 legal opinion letter); Twp. of Holmdel v. N.J. Highway Auth., 905 A.2d 900, 903 (N.J. Super. Ct. App. Div. 2006) (per curiam) ("I concur with the statement contained in the legal opinion rendered by the Office of Legislative Services that 'construction of the [Reception Center] appears to be exactly the type of project that the Legislature sought to control in enacting [the 1968 Legislation].'" (alterations in original) (citation omitted)), *aff'd in part and rev'd in part*, 918 A.2d 603 (N.J. 2007).

83. It is admittedly strange that questions would exist as to which state officers the removal clause applies. Such removal provisions "are usually clear as to the officers to whom the removal power extends." Charles M. Kneier, *Some Legal Aspects of the Governor's Power to Remove Local Officers*, 17 VA. L. REV. 355, 356 (1931). Nevertheless, we can speculate that sufficient doubt existed in the minds of some state officials to prompt the request by the Senate Republican Office to draft the OLS Legal Opinion in the first place.

interprets this constitutional question,[84] the Governor's constitutional authority to fire the Attorney General is considerably more unclear than the definitiveness that the OLS Legal Opinion implies.[85]

A. Textual Arguments Using the 1947 Constitution

Although the Governor's authority to remove the Attorney General has never before been litigated,[86] there are two possible textual arguments that militate against a finding of removal authority. First, the Attorney General may argue that her office fits within an existing textual exception to the "for cause" removal clause. The second (and stronger) textual argument is that reading the "for cause" removal clause so as to authorize the gubernatorial removal of the Attorney General would lead to *absurd results*.

1. Attorney General as "Judicial Officer"

The Attorney General may argue that she cannot be removed by the Governor "for cause" because she functions as a "judicial officer" and is therefore expressly exempt from being subject to the Governor's dismissal power.[87] The gravamen of such an argument would be that many of the Attorney General's powers and responsibilities are judicial in nature—including the power to issue advisory opinions,[88] make administrative

84. An alternative remedy would be for the New Jersey State Legislature to submit to the voters of the state a constitutional amendment clarifying the application of the Governor's dismissal authority. *See generally* N.J. CONST. art. IX. This is not to suggest that amending the state constitution is an easy task. For a case study on the difficulties encountered by reformers in amending the New Jersey State Constitution, see G. Alan Tarr & Robert F. Williams, *Foreword*: *Getting From Here to There*: *Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1103-06 (2005).

85. This is not to suggest that the *Legislature* does not have unambiguous authority to remove the Attorney General. *See* N.J. CONST. art VII, § III, para. 1 ("The Governor and all other State officers, while in office and for two years thereafter, shall be liable to impeachment for misdemeanor committed during their respective continuance in office."). Impeachment, after all, has been dubbed an "effective instrument" of the Legislature. Samuel Hendel, *Separation of Powers Revisited in Light of "Watergate,"* 27 W. POL. Q. 575, 587 (1974). The problems with impeachment, however, are in the process delays and costs. *See supra* note 18.

86. *See supra* note 10 and accompanying text.

87. This argument is not considered in the May 9, 2005 OLS Legal Opinion. *See generally* OLS Legal Opinion, *supra* note 13 and accompanying text.

88. *See* Henry J. Abraham & Robert R. Benedetti, *The State Attorney General*: *A Friend of the Court?*, 117 U. PA. L. REV. 795, 798 (1969) ("In all states, the attorney general is empowered to issue advisory opinions which are customarily regarded as having the force of

determinations,[89] and provide advice and counsel on questions of law.[90] The "judicial officer" exception,[91] after all, contemplates the separation-of-powers doctrine, and ensures the Governor will not have removal authority over state officials exercising judicial functions.[92]

Consistent with this argument, other states readily categorize their Attorney General as a judicial officer.[93] The constitutions of Iowa, Mississippi, and Tennessee provide for the Attorney General in sections relating to the judiciary.[94] The Massachusetts Constitution of 1780 "appears to characterize the attorney general as a judicial officer."[95] Georgia and South Carolina mention the Attorney General in articles dealing with the executive and judiciary.[96] Virginia's 1776 constitution viewed the Commonwealth's Attorney General "'primarily as a judicial officer.'"[97]

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law unless and until tested in court."); Thomas R. Morris, *State Attorneys General as Interpreters of State Constitutions*, 17 PUBLIUS: J. FEDERALISM 133, 134 (1987) (noting the important role that attorneys general advisory opinions have in state constitutional interpretation since these opinions serve to function as "the obvious substitute whenever the state supreme court declines to issue an advisory opinion [of its own]").

89. For example, the New Jersey Health Care Accountability Act, enacted in 2002, requires the Attorney General's review of insurance carrier agreements with physicians and dentists. Patricia Kane Williams, *The Legality of Physician Price-Fixing in New Jersey*, N.J. LAW., June 2006, 56, 59-60. "When the proposed negotiations or contract terms involve fees, the New Jersey Attorney General must determine whether the carrier in question has substantial market power and whether any of the terms of the contract pose a threat . . . [to] patient care." *Id.* at 60.

90. In 1854, then-U.S. Attorney General Caleb Cushing wrote President Franklin Pierce arguing that the role of an Attorney General "is not a counsel giving advice to the Government as his client, but a public officer, *acting judicially*, under all the solemn responsibilities of conscience and of legal obligation." Office and Duties of Attorney General, 6 Op. Att'y Gen. 326, 334 (1856), *quoted in* Randolph D. Moss, *Executive Branch Legal Interpretation*: *A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1309 (2000) (emphasis added).

91. *See supra* note 72 and accompanying text (citing N.J. CONST. art. V, § IV, para. 5).

92. WILLIAMS, *supra* note 2, at 92.

93. *But see* Gershman Inv. Corp. v. Danforth, 517 S.W.2d 33, 35 (Mo. 1974) ("[The Attorney General of Missouri] has no judicial power and may not declare the law.").

94. *See* William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 494-95 (1989) ("[B]oth the elected attorney general and the elected local prosecutors are provided for in the sections of [the constitutions of Iowa, Mississippi, and Tennessee] concerning the judiciary.").

95. *Id.* at 495.

96. *Id.*

97. Michael Signer, *Constitutional Crisis in the Commonwealth*: *Resolving the Conflict between Governors and Attorneys General*, 41 U. RICH. L. REV. 43, 51 (2006) (quoting 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 663 (1974)).

Finally, the Florida Supreme Court has recognized the judicial character of the office.[98]

The judicial character of the office may also be evidenced by the functions the office performs. In many states, for example, the attorney general's advisory opinion function is "continually called upon to clarify unclear statutes and fix their meaning."[99] In this way, "the attorney general's office is continually engaged in crystallizing or molding the law and pressing it into certain channels"[100]—a function generally thought reserved to the judiciary.

But can such an argument prevail in New Jersey? The New Jersey Constitution presents three hurdles to those who argue the Attorney General is a judicial officer. First, unlike the constitutions of other states,[101] the New Jersey constitutional provision creating the post of Attorney General is physically located within article V—which addresses executive branch powers.[102] Second, the constitution textually references the Attorney General, in her role as a "principal department" head, as falling "under the supervision of the Governor."[103] Third, New Jersey courts—in interpreting the state constitution—have expressed reluctance to expand the class of applicable judicial officers to members of the executive branch. In *Bonafield v. Cahill*,[104] the Appellate Division of the New Jersey Superior Court concluded that the "for cause" exception for judicial officers "was not intended to apply to officers in the Executive Branch whatever the judicial

98. *See* State *ex rel.* Landis v. S.H. Kress & Co., 155 So. 823, 826 (Fla. 1934) ("[T]he office of Attorney General is in many respects judicial in character and he is clothed with a considerable discretion . . . .").

99. ABERNATHY, *supra* note 4, at 40.

100. *Id.*

101. *See supra* notes 94-98 and accompanying text.

102. *See* N.J. CONST. art. V, § IV, para. 3.

103. *Id.* at para. 2 ("Each principal department shall be under the supervision of the Governor."); *see id.* at para. 1 ("All executive and administrative offices . . . including the offices of Secretary of State and Attorney General, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments. . . .").

104. Bonafield v. Cahill (*Bonafield II*), 316 A.2d 705 (N.J. Super. Ct. App. Div. 1974) (per curiam). Bonafield, a judge of compensation of the Division of Workmen's Compensation, sought to restrain the Governor from removing him for engaging in the unauthorized practice of law. Bonafield v. Cahill (*Bonafield I*), 308 A.2d 386, 386 (N.J. Super. Ct. Ch. Div. 1973), *aff'd*, 316 A.2d 705. Judge Bonafield argued his status as a judicial officer placed him "beyond the reach of the Governor." *Id.* at 388.

nature of their functions."[105] Although the New Jersey Supreme Court has yet to render judgment on whether the Attorney General can be considered a judicial officer, lower courts seem to be in accord with *Bonafield*, adopting a very narrow construction of the phrase "judicial officer."[106] It seems, therefore, unlikely that an Attorney General would prevail by advancing the argument that she is exempt from the Governor's power of removal because many of her responsibilities are judicial in nature.

2. Broader Reading of Constitution Necessitated by Potential for Absurd Results

A better textual argument is that a narrow reading of the removal clause, in such a way that the clause is read to subject the Attorney General to gubernatorial removal, will lead to absurd results.[107] Drawing comparisons between the Attorney General's position and that of other state officers, specifically the Lieutenant Governor,[108] such an argument would be premised on a principle of interpretation used by the New Jersey Supreme Court in *Borawick v. Barba*.[109] The *Barba* court, which was engaged in an interpretation of the meaning of a state constitutional provision,[110] reasoned

105. *Bonafield II*, 316 A.2d at 706. The court reasoned that "[t]he essential inquiry here is whether judges in compensation are officers or employees in the Executive Branch of the State Government." *Id.* It found that Bonafield was an administrative judge in the Executive Branch and, therefore, was not a judicial officer within the meaning of the constitution. *Id.*

106. *See, e.g.*, Ravin, Sarasohn, Cook, Baumgarten, Fisch, & Rosen, P.C. v. Lowenstein Sandler, P.C., 839 A.2d 52, 57 (N.J. Super. Ct. App. Div. 2003) ("'[W]hile arbitrators exercise judicial functions, and are often considered to be quasi-judicial officers[,] arbitrators are not vested with all of the powers of a judge . . . .'" (quoting 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:77 (4th ed. 2001))); *Ex parte* Van Winkle, 70 A.2d 167, 172 (N.J. 1950) ("The terminology 'other judicial officer' does not include the judge of the Common Pleas Court.").

107. This argument is also not considered in the May 9, 2005 OLS Legal Opinion. *See generally* OLS Legal Opinion, *supra* note 13 and accompanying text. In fairness to the OLS, at the time the opinion was written, the New Jersey Constitution had not yet been amended to create the Office of the Lieutenant Governor. *See supra* note 57 (noting that the state constitution was not amended to include the post until 2005).

108. This Note refers to the Office of Lieutenant Governor throughout this text as though that office exists as of the date of this writing. The state's constitution was amended effective January 17, 2006 to prepare for the 2009 arrival of this newly created, state-wide office holder. *See supra* note 57 and accompanying text.

109. 81 A.2d 766 (N.J. 1951).

110. The *Barba* Court interpreted article VI, section 3, paragraph 2 of the New Jersey Constitution. *Id.* at 766. That section provides that, "'The Superior Court shall have original general jurisdiction throughout the State in all causes.'" *Id.* (quoting N.J. CONST. art. VI, § III,

para. 2). The plaintiff—an unmarried mother who brought suit in the state's superior court—attempted to compel the child's father "to pay to the plaintiff suitable sums of money for the care, maintenance and education of the child as well as the expenses which were incurred as a result of the pregnancy." *Id.* at 766. The superior court dismissed the action as lacking original jurisdiction because historically jurisdiction of "old bastardy acts . . . was lodged with the justices of the peace [and not the state trial court] and the proceedings were prosecuted by the overseer of the poor." *Id.* Plaintiff appealed arguing that the constitutional provision was written so broadly that "every imaginable litigation, whatever its nature, however slight its importance and regardless of its historical background, may be initiated in the Superior Court." *Id.* at 771.

The court agreed with the plaintiff that the constitutional provision textually provided for original jurisdiction by the superior court on *all* matters—including "proceedings in bastardy" that were traditionally handled by inferior courts, i.e., justices of the peace and magistrates. *See id.* If a strict textual interpretation was relied on granting the superior court original jurisdiction on all matters, however, the supreme court opined that the consequences of such an interpretation would be "absurd" and would overwhelm the state's court system:

> If this reasoning be sound, then not only bastardy cases but violations of the disorderly persons act, infractions against municipal ordinances, all of the daily grind of the magistrates' courts, become eligible for institution in the Superior Court and no matter of rule can stem the flow because the authority lies in the Constitution and is untrammeled. The Superior Court is not geared to such a practice and would not be able, physically, to assume it without a radical overturn in rules, manpower and court facilities. Because, if original jurisdiction is to be assumed in all cases, then, it seems, equipment for assuming jurisdiction must be supplied—local courtrooms, judges, clerks, dockets, practically a duplication, if not an absorption, of the entire inferior court system. The possibility of such a contingency brings a sense of shock followed by deep concern, and we believe that those sensations would be quickly shared by the bar, the bench, litigants and the taxpaying public if the suggested practice were imminent and the present inferior courts were to be paralleled by a superior court system. It is true that, literally, the words of the constitution are capable of such a meaning; but we believe that the application of familiar rules leads directly away from that construction.
>
> It is first to be observed that an interpretation which leads to an absurdity presents a *prima facie* doubt whether the interpretation is a sound exposition of the true meaning; and it can hardly be gainsaid that so great a jurisdictional up-heaval as would follow the inauguration of the suggested practice, as against the facilities in operation from time immemorial, revamped and rebuilt at the suggestion of the Constitutional Convention, for handling minor local matters in courts not of record and of what might be termed a neighborhood jurisdiction, presents a prospect so confusing, so unnecessary, so expensive and so contrary to expectation as to be absurd.

Id.

that "an interpretation which leads to an absurdity presents a *prima facie* doubt whether the interpretation is a sound exposition of the true meaning."[111]

The baseline assumption is that the framers of the post of Lieutenant Governor did not intend for a statewide, popularly-elected official to be subject to the prospect of dismissal from office at the hands of another statewide-elected official—the Governor.[112] However, if the "for cause" removal clause is read narrowly by a court and on the basis of its plain meaning, such a reading would likely lead a court to conclude that the Lieutenant Governor is subject to ouster by the Governor. The clause, after all, seems to textually apply to the Lieutenant Governor. The Lieutenant Governor is an officer of the Executive branch who draws her compensation from the State of New Jersey,[113] and is therefore subject to the clause's express terms.[114]

Additionally, the Lieutenant Governor does not fit within one of the clause's three named exceptions.[115] First, the Lieutenant Governor is not an officer or employee of the Legislature, since she has no legislative functions and her office was created within the article of the constitution that discusses executive branch powers.[116] Second, the Lieutenant Governor is not a judicial officer.[117] Finally, the Lieutenant Governor is not elected at a joint meeting of the Legislature, except in the unlikely event there is a numerical tie in the popular vote.[118]

The New Jersey Constitution does not specify that the Lieutenant Governor *cannot* be dismissed by the Governor. Other states with a

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111. *Id.*

112. In New Jersey, the Lieutenant Governor may be appointed "to serve as the head of a principal department." N.J. CONST. art. V, § IV, para. 2 (amended 2005). Of course, if such an appointment is made, the Lieutenant Governor may be dismissed as head of the principal department "at the pleasure of the Governor during the Governor's term of office." *Id.* In this circumstance, given the limitations of the clause, the Lieutenant Governor would retain her independent post as Lieutenant Governor, even though she would no longer serve as a principal department head.

113. *Id.* § I, para. 10, cl. a (amended 2005) ("The . . . Lieutenant Governor shall . . . receive for services a salary. . . .").

114. The "for cause" removal clause applies broadly to "any officer or employee who receives his compensation from the State of New Jersey." *Id.* § IV, para. 5.

115. *See supra* notes 70-74 and accompanying text. The one main exception being if there is a numerical tie in the popular vote and she is elected at a joint meeting of the Legislature. *See supra* note 71.

116. *See* N.J. CONST. art. V; *see also supra* note 70.

117. *See supra* notes 87-106 and accompanying text.

118. *See supra* note 71.

Lieutenant Governor, which have a similar clause affording the Governor removal authority over executive branch officials, use explicit language within constitutional text to specify that the Lieutenant Governor is not subject to gubernatorial removal.[119] By contrast, the New Jersey Constitution does not readily distinguish between processes of removal for elected versus appointed officials and does not textually exempt the Lieutenant Governor from the provision's reach. Because the Lieutenant Governor is not specially excepted, it follows that the Lieutenant Governor can be removed by the Governor. The Lieutenant Governor, then, finds herself in the same precarious boat as the Attorney General and the Secretary of State.

Reading the constitution to afford the Governor the unilateral power to fire a popularly-elected Lieutenant Governor is illogical and contrary to New Jersey's democratic values and traditions. To employ the New Jersey Supreme Court's language from a different context, construing the Governor's power in this way is arguably "an interpretation which leads to an absurdity."[120] It leads to absurd consequences in the sense that the Lieutenant Governor's fixed term of office, constitutional officer status, and selection through popular election should insulate her from unitary executive branch removal.

Although the Attorney General is not popularly elected, there are significant similarities between the offices of Lieutenant Governor and Attorney General: (1) both the Lieutenant Governor and the Attorney General have fixed terms of office coinciding with the Governor's term of office;[121] (2) both are constitutional officers;[122] and (3) both are subject to

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119. *See, e.g.*, PA. CONST. art. VI, § 7 ("All civil officers elected by the people, except the Governor, *the Lieutenant Governor*, members of the General Assembly and judges of the courts of record, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate." (emphasis added)).

120. Borawick v. Barba, 81 A.2d 766, 771 (N.J. 1951).

121. *See* N.J. CONST. art. V, § I, para. 4 (amended 2005) ("The Governor and Lieutenant Governor shall be elected conjointly and for concurrent terms by the legally qualified voters of this State . . . ."); *id.* § IV, para. 3 (fixing the Attorney General's term as the duration of "the term of office of the Governor").

122. The Lieutenant Governor's post was created as a result of an amendment to the state constitution by referendum. *See supra* note 57 and accompanying text. The Attorney General's office is constitutionalized by virtue of its placement in the state constitution. *See* N.J. CONST. art. V, § IV, para. 3 ("The Secretary of State and the Attorney General shall be nominated and appointed by the Governor with the advice and consent of the Senate to serve during the term of office of the Governor . . . .").

impeachment by the legislature.[123] The most significant similarity between the offices, however, is that both the Attorney General and the Lieutenant Governor are *not* textually exempted from application of the Governor's "for cause" removal power. The removal clause provides that: "The Governor may cause an investigation to be made . . . *of any officer or employee who receives his compensation from the State of New Jersey*, except a member, officer or employee of the Legislature . . . or a judicial officer."[124] A strong argument can be made that both the Lieutenant Governor *and* the Attorney General do not fit within any of the listed exceptions.[125] Therefore, if a court reads the constitutional provision as applying against the Attorney General, by analogical reasoning the same provision should also apply to the Lieutenant Governor. Such an interpretation would lead to potentially absurd consequences— a Governor finding "cause" to remove the Lieutenant Governor elected by a majority of the electorate, without any input from the legislature.

The removal of the State Attorney General is better reserved to the province of the legislature's impeachment processes for two reasons. First, as already discussed, if the "for cause" removal provision is interpreted so as to include the Attorney General, applying the same interpretational techniques could possibly mean that the state's elected Lieutenant Governor would also be subject to gubernatorial removal.[126] Second, the threat of the Governor's dismissal authority places the Attorney General, as the state's chief law enforcement officer,[127] in an untenable position when deciding to investigate the Governor or other political arms of the executive branch. The Attorney General, as "the state's chief prosecutor,"[128] can cause investigations and the filing of formal criminal charges against officials in the executive branch,

123. N.J. CONST. art VII, § III, para. 1 ("The Governor and all other State officers, while in office and for two years thereafter, shall be liable to impeachment for misdemeanor committed during their respective continuance in office.").

124. N.J. CONST. art. V, § IV, para. 5 (emphasis added).

125. *See* discussion *supra* Part III.A.1 (discussing the reasons why the Attorney General does not fit within any of the exceptions delineated in the "for cause" provision); *supra* notes 115-118 and accompanying text (discussing the reasons why the Lieutenant Governor does not fit within any of the exceptions delineated in the "for cause" provision).

126. *See supra* notes 107-119 and accompanying text.

127. *See infra* notes 128-129 and accompanying text.

128. Lawrence Aaron, Op-Ed, *Give Credit to Corzine for Early Choices*, REC. (Bergen County, N.J.), Jan. 18, 2006, at L09, *available at* 2006 WLNR 987844. The Attorney General is also "the state's chief law enforcement officer." State of New Jersey, Mission Statement of the Department of Law and Public Safety, http://www.state.nj.us/lps/aboutus.htm (last visited Mar. 5, 2008).

including the Governor.[129] As political science professor Thad Beyle has noted, an attorney general's "status may be compromised" because "there may be times when the attorney general must take action against the governor for what he or she has done or not done."[130] Interpreting the constitution so as to not vest the dismissal authority in the hands of the chief executive preserves the independence of the Attorney General's office.

Taken together, a state court should employ a *Barba* analysis to determine whether the interpretation is "a sound exposition of the true meaning [of the clause],"[131] given the absurd consequences that can result from a narrow reading of the "for cause" removal clause.

B. Framers' Intent Arguments Using the 1947 Convention Proceedings

Viewed as a whole, the record of the proceedings of the New Jersey Constitutional Convention suggests the framers did not intend the Governor's removal authority to extend to the Attorney General and Secretary of State. While establishing the plain meaning of a state constitutional provision is normally the first task a court would undertake,[132] as is the case here, "it is often difficult to establish plain meaning."[133] Even if the plain meaning of a provision is established, if such an interpretation relies on a "narrow or technical reading of language,"[134] such a reading may serve to "defeat the intent of the people."[135] Reliance on the plain text of the

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129. *See, e.g.*, John Patterson, *Attorney General Will Not Pass off Investigations Involving Governor*, DAILY HERALD (Arlington Heights, Ill.), Nov. 15, 2005, at 8, *available at* 2005 WLNR 18675182 (noting that Illinois State Attorney General Lisa Madigan was continuing two investigations of that state's governor, Rod Blagojevich, to investigate "allegations the governor traded state jobs for campaign cash").

130. Thad Beyle, *The Executive Branch*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 76-77 (G. Alan Tarr & Robert F. Williams, eds., 2006). Beyle argues that state attorneys general should be "legitimate elective position[s], chosen separately from how other elected executive branch officials are chosen." *Id.* at 77. The prospect of an elected attorney general in New Jersey has been the subject of recent debate. *See, e.g.*, Trish G. Graber, *AG's Revolving Door*: *With Possible 8 Attorneys General in 13 Years, Some Wonder if Position Should Be Elected*, EXPRESS-TIMES (Easton, Pa.), June 11, 2007 (on file with author).

131. Borawick v. Barba, 81 A.2d 766, 771 (N.J. 1951).

132. *See* Williams, *supra* note 14, at 195 ("Many courts, of course, have indicated that . . . a search for the plain meaning of a state constitutional provision is the primary task . . . .").

133. *Id.* at 195-96.

134. Zaner v. City of Brighton, 917 P.2d 280, 283 (Colo. 1996).

135. *Id.*

constitutional provision may lead to a different result in interpretation than intended by the provision's framers.

State constitutions, unlike the Federal Constitution, are products of the people by constitutional referendum. When a state constitutional provision is unclear, courts often look to discern the intent, or "voice of the people,"[136] by examining available extrinsic materials such as newspapers, ballot questions, and other materials.[137] Alternatively, courts can attempt to ascertain the "voice of the people" by investigating the records of constitutional convention proceedings.[138] Some commentators[139] and judges[140] have found

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136. According to the New Jersey Supreme Court, "It is a familiar rule of construction that where phraseology is precise and unambiguous there is no room for judicial interpretation or for resort to extrinsic materials. The language speaks for itself, and where found in our State Constitution the language is the *voice of the people*." Vreeland v. Byrne, 370 A.2d 825, 830 (N.J. 1977) (emphasis added), *quoted in* Williams, *supra* note 14, at 194 n.18.

137. State constitutional convention proceedings and the speeches and records of state constitutional convention delegates are not the first point of reference to determine the voice of the people. Because the people of a state ratify a state constitution by popular vote, the "true inquiry concerns the understanding of the meaning of [the] provision by the voters who adopted it." Williams, *supra* note 14, at 197. To ascertain the meaning of a particular provision as construed by the voters, one would likely look to "such materials as newspaper commentaries or summaries appearing on the ballot." L. Harold Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 FLA. ST. U. L. REV. 567, 569 (1978) (citation omitted).

138. Professor L. Harold Levinson has argued that the voice of the people can, alternatively, be heard by examining the intent of the framers to constitutional conventions. *See* Levinson, *supra* note 137, at 569. The connection between the intent of the people/voters, on the one hand, and the intent of the delegates, on the other, can be based on a number of theories, including the theory that "the people conveyed their concerns and instructions to the framers, who acted as agents of the people in formulating the proposals for submission back to the people." *Id.* Acceptance of such a theory links the statements of the framers at constitutional convention proceedings to the general voters of a state—making constitutional convention proceedings relevant in determining what the voice of the people intended.

139. Legal historian Stephen Gottlieb has noted that state "[c]onstitutional history is valuable whether or not one subscribes to a jurisprudence of original intent. . . . For those who reject a jurisprudence of original intent, constitutional history nevertheless helps us to preserve the lessons embodied in the drafting of the provisions at issue and to explore the consequences of the language chosen." Stephen E. Gottlieb, *Foreword*: *Symposium on State Constitutional History*: *In Search of a Usable Past*, 53 ALB. L. REV. 255, 258 (1989), *quoted in* Williams, *supra* note 14, at 205. *But see* W. F. Dodd, *The Problem of State Constitutional Construction*, 20 COLUM. L. REV. 635, 648 (1920) ("The intent of the framers is often appealed to by the courts, but plays little or no part in the decisions reached. . . . [I]ntent can ordinarily not be determined. Debates do not ordinarily indicate the actual intent of those who voted for a proposal in deliberative bodies or in popular elections . . . ."); Ann Lousin, *Constitutional Intent*: *The Illinois Supreme Court's Use of the Record in Interpreting the 1970 Constitution*, 8 J. MARSHALL J. PRAC. & PROC. 189, 191 (1974-75) (noting that "the record is seldom

significant value in this form of constitutional history, especially in the context of how a particular state constitutional provision should be interpreted.

It is especially likely that, if faced with the question of whether the "for cause" removal provision applies to the Attorney General, the New Jersey Supreme Court will examine the proceedings of the 1947 Constitutional Convention and the relevant discussions that occurred during floor debates—particularly given that court's propensity to rely on convention proceedings in the course of constitutional interpretation in other contexts. Since 1947, when the modern New Jersey Constitution was adopted, the New Jersey Supreme Court has cited to and relied on records—or an absence of records—of the 1947 Constitutional Convention on at least sixteen different occasions.[141] In *Russo v. Walsh*,[142] a case specifically implicating the "for

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perfectly clear about anything more important than the time at which the delegates recessed for lunch—and sometimes even *that* point is unclear").

140. Oregon Court of Appeals Judge Jack L. Landau has observed:

> [M]ore and more state courts are turning to history to support their decisions as to the meaning of their constitutions.
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> Most often, history is invoked in the service of ascertaining the "intentions" of the "framers" of the state constitutions. The objective is obvious. State constitutional interpretation must not reflect merely the personal predilections of those who do the interpreting. Instead, constitutional interpretation should be the product of considerations external to the judges involved. History in general, and a jurisprudence of original intent in particular . . . provides legitimacy to state constitutional interpretation.

Jack L. Landau, *A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 VAL. U. L. REV. 451, 451 (2004).

141. *See* Maressa v. N.J. Monthly, 445 A.2d 376, 392 (N.J. 1982) (finding an absence of history in convention proceedings on "a person's right to freely speak"); Passaic County Prob. Officers' Ass'n v. County of Passaic, 374 A.2d 449, 451 (N.J. 1977) (citing convention proceedings to find that "[t]he intent of the 1947 Constitutional Convention was to vest the Supreme Court with the broadest possible administrative authority" (alteration in original) (citation omitted)); Bulman v. McCrane, 312 A.2d 857, 859 (N.J. 1973) (finding through the Court's "own independent search of the 1844 and 1947 constitutional proceedings . . . no significant light as to the framers' intent in the respect under contention"); Meadowlands Reg'l Redev. Agency v. State, 304 A.2d 545, 559-60 (N.J. 1973) (Conford, J., dissenting in part) (tracing the origins of 1947 tax clause by citation to convention proceedings); N.J. Sports & Exposition Auth. v. McCrane, 292 A.2d 545, 553 (N.J. 1972) (holding that the court should not imply a constitutional requirement of the dedication of funds where convention delegates explicitly rejected such a proposal); Lullo v. Int'l Ass'n of Fire Fighters, 262 A.2d 681, 683-84 (N.J. 1970) (citing Governor Alfred E. Discroll's speech to convention delegates to interpret "the overall purpose of the delegates to the Constitutional Convention" with regard to the constitutional right of employees to organize); Booker v. Bd. of Educ., 212 A.2d 1, 15 (N.J. 1965) (quoting language from a delegate which "clearly state[s]" the "purpose" of the

cause" removal power,[143] the New Jersey Supreme Court extensively cited floor debate,[144] concluding that the framers "intended to confer upon [the Governor] the additional power of temporary suspension."[145]

In discussing the outlines of the Governor's "for cause" removal power, therefore, a constitutional interpretation analysis would be incomplete without looking beyond the text of the constitutional clause to consider the intent of the framers who shaped the clause. For the most part, the reality is that very few delegates to the 1947 Constitutional Convention gave much thought to the issue of whether the Governor could oust the Attorney General from office.[146] Indeed, it was not until August 12, 1947, two months after the convention began, that delegates began to discuss what categories of state

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constitutional provision forbidding segregation of public schools); Del. River & Bay Auth. v. Int'l Org. of Masters, Mates & Pilots, 211 A.2d 789, 792-93 (N.J. 1965) (quoting convention floor debate to emphasize distinction between public and private employees with regard to collective bargaining rights); N.Y., Susquehanna & W. R.R. Co. v. Vermeulen, 210 A.2d 214, 218 (N.J. 1965) (citing the rationales that "led to the proposal at the Constitutional Convention of 1947 against preferential treatment of a class" in tax laws); Jackman v. Bodine, 205 A.2d 713, 725 (N.J. 1964) (citing the convention proceedings to hold that the 1947 constitution is "perfectly clear" that people "can meet in convention" even though the state constitution is "silent as to constitutional conventions"); Asbury Park Press, Inc. v. Woolley, 161 A.2d 705, 715 (N.J. 1960) (citing the rejection of a proposal at the 1947 Constitutional Convention as evidence of intent); County of Bergen v. Port of N.Y. Auth., 160 A.2d 811, 816 (N.J. 1960) (using the constitutional convention proceedings to trace the origins of home rule); Wagner v. Mayor of Newark, 132 A.2d 794, 800 (N.J. 1957) (citing convention proceedings as evidence that the home rule provision was intended to "do away with the necessity of expressly granting to municipalities all of the powers needed by them"); Russo v. Walsh, 113 A.2d 516, 518-20 (N.J. 1955) (using convention proceedings to trace the origins and development of executive dismissal authority); *In re* Presentment by Camden County Grand Jury, 89 A.2d 416, 440-43 (N.J. 1952) (relying heavily on convention debate to reach the holding that the Convention "intended to have the practice theretofore existing with regard to presentments [of indictments] continued under the new Constitution"); Town of Montclair v. Stanoyevich, 79 A.2d 288, 295 (N.J. 1951) (citing "the spirit which permeated the Convention," the Court highlighted a series of statutes passed by the New Jersey Legislature in response to a call by convention delegates).

142. 113 A.2d 516.

143. *See infra* note 289 and accompanying text.

144. Between the majority opinion and dissent, the court quoted more than 450 words of floor debate from the 1947 Convention Proceedings on the issue of executive dismissal authority. *See generally Russo*, 113 A.2d 516.

145. *Id.* at 520.

146. Indeed, there was little debate on most items: "The proposals of the Committee on the Executive had come through practically without a scratch. Far-reaching changes had been made in the executive department . . . and most of them had been accepted without even a struggle." RICHARD N. BAISDEN, CHARTER FOR NEW JERSEY: THE NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, at 22 (1952).

officers the "for cause" removal power should apply against.[147] From the limited debate that did occur, it appears that two conflicting viewpoints emerged as to the removal clause's applicability against the State's chief law enforcement officer.

1. Debate Suggesting the Attorney General Can Be Removed

The OLS Legal Opinion concluded "there is *no question* [the 'for cause' removal clause] was intended to apply to both the Secretary of State and the Attorney General."[148] The Opinion based this finding on debate in the proceedings over the term "State officer or employee," and how or whether that term can be construed "to encompass county and lower-level officers, such as prosecutors, surrogates, sheriffs, and county clerks."[149] In light of the confusion, a delegate proposed changing the phrase to use clearer language—"officer or employee who receives his compensation from the State of New Jersey."[150] The delegate indicated during floor debate that he:

> submitted the amendment because, after talking to some members of the committee and some members of the Convention, they agreed with me that that was intended for the officers who were generally considered as officers of the State of New Jersey, *such as the Attorney-General*, the State Treasurer, the Secretary of State, and the Superintendent of the State Police. I, therefore, drew the amendment, describing the persons intended as persons who receive their compensation from the State of New Jersey. That, of course, would eliminate the class of persons to whom I have previously referred, and would include such persons as get their pay check from the State of New Jersey, as against the county or the municipality. I think that was the intention of the committee. I might be wrong.[151]

In response, another delegate stated that "it was definitely our intention that the Governor should have the power to investigate and to remove for

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147. The bulk of that discussion, however, seems to have squarely centered on delegates' concerns over whether and how the removal clause might apply against local and county officers, commissioners, and civil service employees. *See* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1947, at 236-41 (1947).

148. OLS Legal Opinion, *supra* note 13, at 2 (emphasis added).

149. *Id.*

150. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1947, *supra* note 147, at 236.

151. *Id.* at 237 (emphasis added).

cause what we understood as state officers. There is no intention at all that the Governor should have the power to go down and delve into the county organizations, etc."[152] This OLS Legal Opinion exclusively referenced these portions of debate—quoting no other debate—to conclude that the Governor *can* dismiss the Attorney General.[153]

2. Debate Suggesting the Attorney General Cannot Be Removed

The OLS Legal Opinion's analysis of the intent of the delegates falls far short of painting a complete portrait of the framers' intent. The Opinion relies exclusively on the brief statements of two delegates during the course of extended floor debate.[154] According to constitutional law scholar L. Harold Levinson, "[t]he intent of the framers is a useful aid in the interpretation of constitutional provisions that are not clear on their face, but only if the *collective intent* can be established. . . . A speech by an individual member is not, by itself, sufficient evidence [of collective intent]."[155] A more complete analysis of the convention proceedings is thus needed in order to assess the collective intent of the body.[156]

When a more complete examination of the record of the New Jersey Constitutional Convention is performed, new insight into the specific intent of the framers emerges. First, the record indicates a near unanimity that the Attorney General should be insulated from political actions of the Governor.[157] Second, the record reveals that at least four delegates believed that the "for cause" removal provision did not apply to the Secretary of State and Attorney General.[158]

a. Framers Intended to Insulate Attorney General

Many delegates expressed a strong desire to insulate the offices of Secretary of State and Attorney General from the Governor and the politics

152. *Id.*
153. *See* OLS Legal Opinion, *supra* note 13, at 3.
154. *See supra* notes 151-152 and accompanying text.
155. Levinson, *supra* note 137, at 570.
156. *See id.* ("The search for collective intent therefore requires an examination of the *record as a whole* and a compilation of all parts of the record dealing with the specific point being examined.").
157. *See infra* notes 176-183 and accompanying text.
158. *See infra* notes 185-194 and accompanying text.

of state government.[159] The history of the office of the Attorney General indicates near unanimity on the part of delegates to constitutionalize the office and protect it against interference on the part of other government officials.

Appointing, rather than electing,[160] the Attorney General was—at the time of the 1947 Convention—a tradition in New Jersey, as both the Attorney General and the Secretary of State were appointed to office under the 1844 constitution under the Governor's "limited power to select officers."[161] The Governor's powers of appointment were still "greatly handicapped," however.[162] Illustrative of this handicap, under the 1844 constitution, terms of office for both the Attorney General and Secretary of State were fixed at five years, while the Governor's term was fixed at three years.[163] The practical effect of the differing terms was that "governors frequently had to serve out most or all of their terms with the aid of subordinate officials who were appointed by the preceding chief executive, frequently of another political party."[164]

This and other deficiencies in the 1844 constitution prompted some to clamor for additional gubernatorial powers and the centralization of executive branch power. The 1942 Commission on Revision of the New Jersey Constitution, for example, concluded that a real problem existed with state government administration because of the weakness of the executive branch.[165] Even convention delegates noted this deficiency, opining the

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159. The OLS Legal Opinion does not contemplate the desire of delegates to insulate the Attorney General's office from the political maneuverings of the Governor. *See generally* OLS Legal Opinion, *supra* note 13; *see also supra* note 155 and accompanying text.

160. New Jersey's decision to appoint the Attorney General bucked the majority of states, and runs contrary to the approach "traced to the 1830s when states began to embrace Jacksonian democracy and principal state officers began to be elected by popular vote. The governors, who had achieved more independence from state legislatures, were compelled to share control over administration with a greater number of elected officials." Matheson, Jr., *supra* note 4, at 6.

161. BAISDEN, *supra* note 146, at 14.

162. *Id.*

163. *Compare* N.J. CONST. of 1844 art. V, § 3 (setting the term of the Governor to three years), *with* N.J. CONST. of 1844 art. VII, § 2, para. 4 (setting the term of the Attorney General to five years).

164. BAISDEN, *supra* note 146, at 14-15. Governor Charles Edison once remarked of this phenomenon: "'[Holdover appointments] are often political opponents of [the sitting governor]. Some of them count that day lost when they cannot find some way to use the powers of their offices to embarrass [the sitting governor] and bring his administration into disrepute.'" *Id.* at 15 (quoting CHARLES EDISON, SPEECHES ON THE CONSTITUTION OF NEW JERSEY 22 (1943)).

165. The Commission's report editorialized:

executive branch needed significantly more responsibility.[166] Accordingly, convention delegates endeavored "to bring the powers of the Governor into line with the popular impression of the powers of that office and to provide for a centralization of authority and power in the office of the Governor."[167] In addition, delegates recognized that tremendous growth in the size and complexity of state government required the executive branch to be refashioned so as to effectively manage "large scale government."[168]

This desire for both centralization and large-scale efficiency fermented in the form of a new chief executive dismissal authority. The 1844 constitution, after all, afforded the governor no dismissal authority, "and the officers named therein could be removed only by impeachment."[169] What power the Governor did have to remove officers and employees was premised on legislative action, but the legislature did not extend removal power in most cases.[170] By contrast, delegates to the 1947 Convention believing that "*the primary responsibility* for the conduct of the executive and administrative branches of the government resided in the Governor," granted the Governor the power "to meet and discharge the recognized responsibility by investigating the conduct of state employees and granting him the right to remove for cause shown."[171]

> The functions of modern executives in all forms of business organization contrast sharply with the office of Governor of New Jersey, who can be an executive in name only. Hampered by whimsical laws and inadequate constitutional authority, the Governor of New Jersey suffers as an executive from the multiplicity of offices, commissions, boards, bureaus, and other agencies, and from lack of authority to control his most important departments. Our greatest need, to which the revision is directed, is to strengthen the executive authority.

REPORT OF THE COMMISSION ON REVISION OF THE NEW JERSEY CONSTITUTION 919 (1942), *available at* http://lawlibrary.rutgers.edu/cgi-bin/diglib.cgi?collect=njconst&file=1942_comm&page=0001.

166. "While all three branches of the government should be improved and the responsibility more clearly defined, the greatest need has been to raise the relative position of the Executive, which under [the existing Constitution of 1844] has been the weakest of the three branches. . . ." Report of the Committee on Executive, Militia, and Civil Officers, 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1947, at 1122 (1947).

167. *Id*. After all, the existence of multiple power centers in the executive branch "serve[s] to embarrass and weaken the execution of the plan or measure, to which they relate . . . [and] counteract those qualities in the executive, which are the most necessary ingredients in its composition, vigor and expedition . . . ." THE FEDERALIST NO. 70, at 475-76 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

168. BAISDEN, *supra* note 146, at 45.

169. *Id.* at 15.

170. *Id.*

171. Russo v. Walsh, 113 A.2d 516, 518 (N.J. 1955) (emphasis added).

But did the framers really intend for the Governor to have "primary responsibility" over the conduct of the Attorney General? Delegates gave the Attorney General constitutional officer status—securing her office from legislative elimination, and perhaps gubernatorial interference. Unlike other states,[172] and the Model State Constitution of the National Municipal League,[173] in New Jersey this constitutional officer status was granted in the form of a clause in the Constitution: "The Secretary of State and the Attorney General shall be nominated and appointed by the Governor with the advice and consent of the Senate to serve during the term of office of the Governor."[174] Indeed, the Secretary of State and the Attorney General are the only two principal department heads explicitly named in the text of the 1947 constitution, and granted this unique status.[175]

According to one delegate at the convention, "We want to see the men who fill those places protected by all the powers that constitutional status will give them."[176] Another delegate argued that the Attorney General and Secretary of State should not receive interference from other parts of the state government: "My only concern is this: Those two officers shall retain their constitutional status, and their constitutional status shall in no way be impaired."[177] During debate, Ronald D. Glass, the delegate who proposed constitutionalizing the Attorney General and Secretary of State offices, pointed to the Attorney General's broad powers—and the Attorney General's role not as a subordinate to the Governor but as "an attorney for the people"—as justifying the constitutional distinction:

> The office of Attorney-General is much more significant than merely being counsel to the Legislature and to the state officers and departments. In addition to this, the Attorney-General is what the name implies, a general attorney, not for state officials only, but far more important, an attorney for the people. The Attorney-General, in many cases, is the only official who can

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172. *See, e.g.*, ABERNATHY, *supra* note 4, at 33 ("The Alaska and Hawaii Constitutions . . . fail to give the attorney general a privileged status among executive department heads.").

173. Both the 1948 and 1963 editions of the National Municipal League's Model State Constitution do not expressly provide for the creation of an Attorney General or Secretary of State or serve otherwise to constitutionalize those offices. *See generally* NAT'L MUN. LEAGUE, MODEL STATE CONSTITUTION 11, art. V, § 5.07 (6th ed. 1963); NAT'L MUN. LEAGUE, MODEL STATE CONSTITUTION WITH EXPLANATORY ARTICLES 10, art. V, § 506, para. 3 (5th ed. 1948).

174. N.J. CONST. art. V, § IV, para. 3.

175. *See generally* N.J. CONST. art V.

176. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1947, *supra* note 147, at 245.

177. *Id.* at 247.

> act on behalf of the people in declaring certain laws unconstitutional. In the past, the Attorney-General has acted as representative of the people in questioning the constitutionality of laws which are not in the best interest of all the people. If the Attorney-General does not have constitutional status, with the attendant right of exercising all of the common law privileges and constitutional powers of that office, then the same Legislature which might pass unconstitutional laws could curb his powers, vastly decreasing his effectiveness as a spokesman for the people.[178]

Delegate Robert Carey echoed this sentiment noting, "[The Attorney General does not] respond merely to the call of one man, or one department, but . . . represent[s] the necessities of every department of the State."[179] There were no dissenting views.

The views expressed during debate indicate that the delegates envisioned a role for the Attorney General that transcended interference by the Governor and the executive branch more broadly. This vision is consistent with delegate desire to frame the Attorney General's role as "attorney for the people," the Legislature, and "every department of the State"[180]—as opposed to a mere counsel to the governor. The purpose behind constitutionalizing the Attorney General—to create an office free from interference and that could dispense independent legal advice and counsel—seems contrary to the purpose behind the "for cause" removal clause, which sought to centralize "*the primary responsibility* for the conduct of the executive and administrative branches . . . in the Governor."[181]

But if the framers intended the Attorney General to be outside the reach of the Governor's dismissal authority, why would they allow the Governor to appoint her in the first place, as opposed to independently electing the office? Debate on this point is limited. At least one delegate, Robert Carey, argued that the Attorney General should be appointed by the Governor—as opposed to being popularly elected—just as judicial officers are appointed by the

178. *Id.* at 244.

179. *Id.* at 245.

180. This is a view echoed by political scientist Byron Abernathy who noted that the Secretary of State and Attorney General were given a unique status "because they were held by the constitutional convention to be 'in a different category from the heads of other departments who are not specifically named in the Constitution,' and because they 'have additional state-wide functions." ABERNATHY, *supra* note 4, at 33.

181. *See supra* note 171 and accompanying text.

Governor.[182] Carey noted in debate, "We want to see the power of appointment, *as of judicial officers*, always vested in the Governor of our State."[183] Unlike principal department heads and other executive branch officers, judicial officers, as discussed earlier,[184] though appointed by the Governor, cannot be removed by the chief executive, even "for cause."

b. The Fixed Term Controversy

A close examination of the 1947 Convention proceedings indicates that convention delegates during floor debate expressed a belief that the "for cause" removal provision was *not* applicable to the Attorney General and Secretary of State. And while an amendment to the 1947 constitution's text was proposed to make the "for cause" removal provision directly apply to the Attorney General and Secretary of State, no action was taken by delegates on this proposal.

At least one delegate detected that there might be confusion as to whether the "for cause" provision applied against the Attorney General—but the convention took no action despite the awareness of a potential problem by at least four other delegates. The clause establishing the offices of Secretary of State and Attorney General provides that both offices are to be "nominated and appointed by the Governor with the advice and consent of the Senate to serve during the term of office of the Governor,"[185] thus fixing the Attorney General's term of office.[186]

During floor debate on August 12, 1947, delegate Charles K. Barton—president of the New Jersey State Senate—argued that fixing the term of the Attorney General and Secretary of State with no express clarification as to whether the Governor can remove those offices would have the effect of frustrating application of the "for cause" removal provision:

> I'm very sorry that I had not spoken to my Passaic County confrere before [about fixing the term of the Secretary of State and the Attorney General]. His resolution not only deals with the constitutionality of the offices, but, in my opinion, [this provision] deals with another section . . . which provides

182. *See* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1947, *supra* note 147, at 245.

183. *Id.* (emphasis added).

184. *See supra* notes 69-74 and accompanying text.

185. N.J. CONST. art. V, § IV, para. 3.

186. This also resolved one of the problems attendant with the 1844 Constitution. *See supra* note 164 and accompanying text.

> for the continuance of the holding of the offices until the present terms expire. Now, this [provision] provides that they shall serve during the Governor's term of office, period. I think there should be added a clause, "except as otherwise provided in this Constitution," because these two provisions seem to me to be repugnant, as to how long they should stay there, under what conditions. It is not a question of whether they are constitutional officers or not.[187]

Barton referred to the "for cause" removal provision and the fixed term of office as clauses "repugnant" to one another. He proposed that the clause establishing the fixed terms be amended to read: "The Secretary of State and the Attorney General shall be nominated and appointed by the Governor with the advice and consent of the Senate to serve during the term of office of the Governor, *except as otherwise provided in this Constitution*."[188] Such a clause would clarify "how long they should stay there, under what conditions,"[189] as it would bring the "for cause" removal provision and the provision fixing the Attorney General's term in seeming harmony.

Perhaps sensing some ambiguity given the fixed term of the Attorney General and Secretary of State, the sponsor of the clause creating the fixed term indicated support for such an amendment.[190] A third delegate indicated awareness of "Senator Barton's concern."[191] And a fourth delegate, Van Alstyne, indicated full agreement.[192]

But Van Alstyne, citing delegate confusion, asked Barton to work out the terms of his amendment off the Convention floor:

> I would respectfully like to ask Mr. Glass and Senator Barton if they wouldn't reconsider their method of approach. It is simply this: It is difficult enough to get the exact wording tied unto the various sections and Articles, without doing it on the floor. I have no objection at all to Senator Barton's amendment to the amendment, not the slightest. In fact, I'm in favor of it, but I think it would be much clearer to the delegates, I think they would be much

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187. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1947, *supra* note 147, at 248.

188. *See id.*

189. *Id.*

190. "I would be very happy to accept that amendment to the resolution." *Id.*

191. *Id.* The full quote reads: "Mr. President, I support the amendment offered by Mr. Glass, and I'm conscious of Senator Barton's concern." *Id.*

192. "I have no objection at all to Senator Barton's amendment to the amendment, not the slightest." *Id.* at 249.

> better satisfied, if we voted now on Delegate Glass' amendment. Then, Senator Barton, I would appreciate, sir, if you would sit down with our technician, Mr. Miller, who originally transcribed this text, and then present your amendment. I think it might come out more clearly.[193]

The transcripts of the proceedings are silent, however, as to this issue ever again being addressed in convention. The amendment proposal was never again considered—whether by accident or on purpose or for some other reason we may never know.

This portion of debate has not been previously cited in legal analysis or scholarly research.[194] This debate, however, may lend support to the notion that the convention recognized some difficulty—indeed "repugnan[cy]"—in applying the "for cause" removal provision against the Attorney General. This specific concern and understanding—that the Attorney General might not be subject to "for cause" removal—was considered on the floor of the convention, but never resolved by amendment or debate.

IV. PRACTICAL APPLICATION OF THE GOVERNOR'S "FOR CAUSE" REMOVAL POWER

Setting aside the textual and intent-based interpretational arguments presented above, assume that—contrary to this Note's conclusions—the "for cause" removal provision is found to apply to the Attorney General. How, and in what form, can the Governor lawfully exercise his "for cause" authority to dismiss the Attorney General (or other subordinates, for that matter)? This Part suggests that a governor's removal of a subordinate "for cause" must satisfy both substantive and procedural requirements. Substantively, the governor must ensure that the subordinate's misconduct rises to the requisite level of "cause" necessary to effectuate a "for cause" removal. Procedurally, care needs to be paid to notice, hearing, and opportunity-to-respond requirements as required by the Federal Constitution and as delineated in the state constitutions.

Governors, in New Jersey and other states alike, may be unclear as to how far their power of "for cause" removal may extend, and the level of

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193. *Id.*

194. The OLS Legal Opinion, which provides the only legal examination of this issue, fails to mention or cite this portion of the debate. *See generally* OLS Legal Opinion, *supra* note 13.

scrutiny reviewing courts may apply.[195] Judicial reviewability of such gubernatorial actions, on a broad policy level, is built into the state system because there is a desire to protect public officers from the whims of an ambitious executive,[196] and "ensure that employees are treated fairly by their employers."[197] As a consequence, "any prosecution for removal of an official with tenure or serving for a definite term must be undertaken with great care."[198] Ergo, judicial review of a governor's dismissal of a subordinate likely will turn on the governor's degree of care and attention to procedural requirements.[199]

Although overturning a "for cause" gubernatorial dismissal is rare, one New Jersey public official—removed by the governor after a finding of "cause"—did successfully appeal his dismissal, resulting in the Governor's

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195. In Massachusetts, for example, then-Governor Mitt Romney asked the Massachusetts Supreme Judicial Court for an advisory opinion to clarify whether he had the authority to "de-designate the Chairperson of the Massachusetts Turnpike Authority for conduct consisting of mismanagement, neglect of duty, and/or fiscal irresponsibility." Answer of the Justices to the Governor, 829 N.E.2d 1111, 1113 (Mass. 2005). The request also inquired as to what standard of review the courts would apply to his decision if appealed. *Id.* The court chose to leave the matter unclear. In declining to answer the Governor's request, the court wrote: "The Governor is seeking approval from the Justices for what is essentially a basic employment decision. . . . This matter is one which, if necessary, could be brought to the court by the usual litigation process, initiated by the parties in interest." *Id.* at 1117.

196. The Utah Supreme Court expressed this notion in its 1951 decision *Taylor v. Lee*:

> The reason for throwing this cloak of protection around an office-holder is to assure to him the right . . . that he shall be removed for cause only and not for political or trifling reasons. Cases of this type usually arise as an aftermath of a fierce political battle when man's judgment is still warped by the heat of the political campaign. . . . [T]here are . . . important rights which the office holder enjoys and which can be gravely injured by an unwarranted removal. Removing for cause takes a form of punishment, it infers that the office holder has failed to perform his duties or was incompetent or unsuitable for the position to which he was appointed and directly reflects upon his official or personal qualifications. Before the good name of an office holder is clouded by removal he should be given a reasonable opportunity to present his side of the controversy, and, in addition, before his cause is finally adjudicated, he should be afforded the right of having a disinterested court determine whether the removing officer acted arbitrarily, capriciously and unreasonably.

226 P.2d 531, 538 (Utah 1951).

197. J. Edward Kellough, *Reinventing Public Personnel Management*: *Ethical Implications for Managers and Public Personnel Systems*, 28 PUB. PERS. MGMT. 655, 660 (1999).

198. PANE, *supra* note 19, § 12.14. New Jersey's Attorney General and Secretary of State have a fixed term of office, serving "during the term of office of the Governor." N.J. CONST. art. V, § IV, para. 3; *see also supra* notes 172-175 and accompanying text.

199. *See infra* note 248 and accompanying text.

decision being overturned by the judiciary.[200] A court's overturning of a Governor's dismissal of a subordinate undoubtedly serves to undermine and embarrass the chief executive. The judicial nullification of a governor's dismissal of a public officer also results in separation-of-powers problems: "judicial interference" of this nature, after all, may "detract from the stature of the courts."[201] Thus, a Governor should take great care to comply with the governing legal standards.

This requirement of great care has broader application well beyond the geographical boundaries of New Jersey. The governors of other states with similar procedural and other requirements[202] might do well to take note of the possibility that, absent certain safeguards, their dismissals may also be successfully appealed and overturned.[203] After all, most states that grant a governor "for cause" removal powers have similar state procedural requirements,[204] and all states are bound by the due process requirements of the Federal Constitution.[205]

A. Substantive Requirements: "For Cause" Constitutionally, Statutorily, and Judicially Defined

In reaching a removal decision, a governor "must first determine that the interests of the public require the removal of the public officer,"[206] and that the grounds necessary to warrant the removal of that public officer are met. The standard of removal is determined by the state constitutional provision

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200. *See* Russo v. Governor, 123 A.2d 482, 488 (N.J. 1956). New Jersey law provides: "Any officer or employee of this State, who may be removed by the Governor, pursuant to [the "for cause" removal provision], may appeal from the order of removal to the Appellate Division of the Superior Court as in the case of an appeal from a final decision of a State administrative agency in lieu of prerogative writ." N.J. STAT. ANN. § 52:14-17.2 (West 2006). The New Jersey Supreme Court reversed and remanded the Governor's dismissal of a state official in 1956. *See generally* Russo v. Governor, 123 A.2d 482 (N.J. 1956); *see also infra* notes 253-270 and accompanying text.

201. Jennings, *supra* note 18, at 724.

202. *See infra* notes 209-218 and accompanying text.

203. The Governor of Utah, for example, had his decision to remove a subordinate overturned by the Utah Supreme Court. *See* Taylor v. Lee, 226 P.2d 531, 547 (Utah 1951) ("While we are in accord with the Governor's desires to require honest and efficient operation of all state departments, we are unable to find facts in this record to sustain his conclusion that the plaintiff should be removed for cause.").

204. *See* discussion *infra* Part IV.B.1.a.

205. *See* discussion *infra* Part IV.B.2.

206. ALEXANDER J. CELLA, MASSACHUSETTS PRACTICE SERIES – RDMINISTRATIVE LAW & PRACTICE § 1004 (2006).

or statute that authorizes the removal action. Although "[t]he most frequently found cause for removal is malfeasance or misfeasance in office,"[207] modern governors have in recent years attempted to use the "for cause" removal power—successfully and unsuccessfully—for other purposes as well, including the removal of subordinates with whom they disagreed on public policy matters.[208]

Some state constitutions delineate a specific standard of removal: the constitutions of Colorado, Michigan, and Oregon set parameters on the kinds of conduct that warrant gubernatorial removal, including "neglect of duty," "incompetency," "gross immorality," and "malfeasance."[209] By contrast, New Jersey's Constitution allows executive dismissal "for cause"—without defining the term "for cause" or providing guidance on the kinds of misconduct that fall within the ambit of the provision[210]—making the

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207. Kneier, *supra* note 83, at 357.

208. *See infra* notes 228-229 and accompanying text.

209. *See* COLO. CONST. art. 4, § 6, para. 1 ("The governor . . . may remove any such officer for *incompetency*, *neglect of duty*, or *malfeasance* in office." (emphasis added)); MICH. CONST. art. V, § 10 ("[The governor] may remove or suspend from office for *gross neglect of duty* or *for corrupt conduct in office*, or for *any other misfeasance or malfeasance therein* . . . ." (emphasis added)); OR. CONST. art. VII, § 20 ("The [Governor] . . . may remove from Office a Judge of the Supreme Court, or Prosecuting Attorney . . . for *incompetency*, *[c]orruption*, *malfeasance*, or *delinquency in office*, or *other sufficient cause* . . . ." (emphasis added)).

West Virginia's Constitution also contains a clause authorizing removal for specifically delineated causes. *See* W. VA. CONST. art. VII, § 10 ("The governor shall have power to remove any officer whom he may appoint in case of *incompetency, neglect of duty, gross immorality,* or *malfeasance in office* . . . ." (emphasis added)). At the same time, however, a separate section of the state's constitution authorizes the legislature to "prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be . . . removed." W. VA. CONST. art. IV, § 8. By statute, the legislature has granted the governor power to remove appointees without requiring him to show cause. *See* W. VA. CODE ANN., § 6-6-4 (LexisNexis 2006) ("Any person who has been, or may hereafter be appointed by the Governor to any office or position of trust under the laws of this State, whether his tenure of office is fixed by law or not, may be removed by the Governor at his will and pleasure. In removing such officer, appointee, or employee, it shall not be necessary for the Governor to assign any cause for such removal."). Notwithstanding the statutory grant of power to dismiss officers without cause, even if the legislature were to repeal this statutory provision, the governor retains his article VII, section 10 "'irreducible minimum of power' to remove officers he appoints in cases of incompetency, neglect of duty, gross immorality and malfeasance." Rice v. Underwood, 517 S.E.2d 751, 758 (W. Va. 1998) (quoting State *ex rel.* Thompson v. Morton, 84 S.E.2d 791, 798 (W. Va. 1954)).

210. *Black's Law Dictionary* defines "for cause" as: "For a legal reason or ground." BLACK'S LAW DICTIONARY 673 (8th ed. 2004). But what legal reason or ground constitutes "for cause," if those reasons and grounds are neither constitutionally nor statutorily defined (for example, conviction of a crime, violation of an ethics rule, etc.)? Would not the failure to

provision "manifestly broader and more inclusive than is the definitional type in respect of the nature of the conduct which will justify removal."[211]

The use of the broad phraseology employed by New Jersey is also found in other state constitutions. The constitutions of Arkansas, Louisiana, Missouri, and Nebraska all use the phraseology "for cause" without delineating specific legal reasons and grounds that would justify a "for cause" termination.[212] Similarly vague, the constitutions of Delaware, Pennsylvania, and South Carolina direct the governor to adhere to a "reasonable cause" standard in order to remove an official.[213]

Some state constitutions are silent altogether on a governor's power to remove subordinates.[214] In these states and the District of Columbia, statutes enacted by the legislative body may give a chief executive the right to

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define the legal grounds render a statute or other enforcement mechanism unconstitutionally vague? In New Jersey, the state appellate division answered this question, finding that a statute's failure to expressly define the legal grounds that are encompassed in the phrase "for cause" did not make the statute "unconstitutionally vague." Danton v. State, 358 A.2d 207, 210 (N.J. Super. Ct. App. Div. 1976).

211. PANE, *supra* note 19, § 12.14. *But see* Tuttle, *supra* note 20, at 296 ("Most of the courts make no distinction between removal for specified cause and 'for cause,' nor does it seem to us that any difference in principle exists.").

212. *See* ARK. CONST. amend. 33, § 4 ("The Governor shall have the power to remove any member of such boards or commissions . . . *for cause only* . . . ." (emphasis added)); LA. CONST. art. X, § 43, para. D ("An appointed member of the [State Police Commission] may be removed by the governor *for cause* . . . ." (emphasis added)); MO. CONST. art. III, § 39(b), para. 1 (specifying that members of the State Lottery Commission "may be removed, *for cause* by the governor" (emphasis added)); NEB. CONST. art. IV, § 10 ("The Governor shall have power to remove, *for cause* . . . any person whom he may appoint for a term . . . ." (emphasis added)). Although more limited in scope, Oklahoma has a similar provision, allowing the Governor to remove "for cause" appointed members of the Pardon and Parole Board "only in the manner provided by law for elective officers not liable to impeachment." OKLA. CONST. art. VI, § 10.

213. *See* DEL. CONST. art. III, § 13 ("The Governor may *for any reasonable cause* remove any officer . . . upon the address of two-thirds of all the members elected to each House of the General Assembly." (emphasis added)); PA. CONST. art. VI, § 7 ("All civil officers elected by the people . . . shall be removed by the Governor *for reasonable cause* . . . on the address of two-thirds of the Senate." (emphasis added)); S.C. CONST. art. XV, § 3 ("For *any willful neglect of duty*, or *other reasonable cause*, which shall not be sufficient ground of impeachment, the Governor shall remove any . . . officer on the address of two thirds of each house of the General Assembly . . . ." (emphasis added)). The "reasonable cause" standard is left undefined in the text of these state constitutions and it appears unclear how this standard differs, in practice, from New Jersey's "for cause" standard.

214. *See, e.g.*, MASS. CONST. ch. II (failing to invest in the governor any express power of removal).

remove "for cause."[215] Such a delegation of authority from the legislature to the governor has been adjudged in both Massachusetts and Utah to comport with the constitutional separation of powers.[216] Under an alternative model, the Montana Constitution does not constitutionalize the ability of that State's governor to remove members of state boards and commissions,[217] but does constitutionalize a process whereby the state legislature is allowed to adopt a gubernatorial removal process, provided that such removal is "for cause" only.[218]

In states where specific "causes" are not delineated, and the constitution merely refers to an amorphous "for cause" requirement,[219] state courts have deferred to the governor to determine the kind of conduct that will constitute "cause"—in some circumstances refusing to hear appeals unless it can be proven that the governor acted arbitrarily, or had no facts to justify his decision. This is the case in Montana, where the Governor's finding of "cause" is only judicially reviewable when it appears "that he acted with no

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215. *See, e.g.*, D.C. CODE ANN. § 2-302.08(a)(1)(A) (LexisNexis 2005) ("[T]he Inspector General . . . shall be subject to removal only *for cause* by the Mayor . . . ." (emphasis added)); MASS. GEN. LAWS ch. 30, § 9 (2001) ("Unless some other mode of removal is provided by law, a public officer, if appointed by the governor, may at any time be removed by him *for cause* . . . ." (emphasis added)). Although the Utah State Constitution does not grant the Governor the express power to remove Public Service Commissioners "for cause," a statutory provision allows for this form of executive dismissal. *See* UTAH CODE ANN. § 54-1-1.5 (West 2004) ("Any member of the [Public Service Commission] may be removed *for cause* by the governor." (emphasis added)). It is noted, however, that this Utah statutory provision "is not equivalent to direct supervisory control." Beehive Tel. Co. v. Pub. Serv. Comm'n of Utah, 89 P.3d 131, 139 n.8 (Utah 2004).

216. *See* Levy v. Acting Governor, 761 N.E.2d 494, 500 (Mass. 2002) (accepting "the established general rule that, in the absence of express legislation prohibiting removal, public officers are subject to the authority of the Governor under [MASS. GEN. LAWS ch. 30, § 9]"); Taylor v. Lee, 226 P.2d 531, 537-38 (Utah 1951) (recognizing fact that the Utah Legislature properly granted the Governor the right to remove "for cause" members of the Commission of Finance, even in the absence of an express constitutional provision directly granting the Governor the right to remove these commissioners).

217. The Montana State Constitution provides that the Governor can remove the heads of the twenty principal departments, but contains no express constitutional authority to remove members of state boards and commissions created by law. *See* MONT. CONST. art. VI, § 8, para. 2 ("The governor shall appoint . . . all officers provided for in this constitution or by law whose appointment or election is not otherwise provided for. They shall hold office until the end of the governor's term unless sooner removed by the governor.").

218. *See* MONT. CONST. art. V, § 13, para. 1 ("[E]xecutive officers, heads of state departments, . . . and such other officers as may be provided by law are subject to impeachment . . . . Other proceedings for removal from public office *for cause* may be provided by law." (emphasis added)).

219. *See supra* note 212 and accompanying text.

facts to move his discretion, and therefore in an arbitrary and capricious manner."[220] Courts in Louisiana, New York, Texas, and Wisconsin have—since the nineteenth century—recognized that the governor's power of removal is vested within the absolute discretion of the chief executive.[221]

In recent years, however, "courts have shown an increased willingness to review a governor's determination that cause exists."[222] In *Hall v. Tirey*,[223] a case involving the removal of a member of the Oklahoma State Board of Property and Casualty Rates by that state's Governor, the Oklahoma Supreme Court found that "the Legislature intended to create an independent administrative board free of the influence that a Governor can assert" and therefore a removed member "is entitled to have the courts decide whether his removal complied with the standards established by the Legislature."[224] The Pennsylvania Supreme Court reached a similar decision in *Bowers v. Pennsylvania Labor Relations Board*,[225] holding that a member of the State Labor Relations Board who was removed by the Governor was, "at the very least, [entitled] to a determination by a tribunal independent of the influence of powerful personages, political or otherwise."[226] Finally, the Illinois Supreme Court reversed nineteenth-century precedent to broadly hold that "the adequacy of the cause cited by the Governor is judicially reviewable."[227]

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220. State *ex rel.* Matson v. O'Hern, 65 P.2d 619, 630 (Mont. 1937).

221. *See* State *ex rel.* Attorney General v. Doherty, 25 La. Ann. 119, 120 (1873) ("The grant of power to the Executive to remove an officer for a certain cause implies authority to judge of the existence of that cause. The power vested exclusively in Executive discretion can not be controlled in its exercise by any other branch of the government."); People v. Stout, 11 Abb. Pr. 17, 20 (N.Y. Sup. Ct. 1860) ("[W]here the power of removal has been conferred, for causes to be publicly assigned by those in whom the power has been vested, that the responsibility to the people, . . . would be a sufficient guard against an improper exercise of this power."); Keenan v. Perry, 24 Tex. 253, 262 (1859) ("[T]he governor had the authority, to remove the appellee from office, for the specified causes, and that his action must be deemed conclusive, as to the existence of cause, in so far as the right to the office is concerned."); Attorney General *ex rel.* Taylor v. Brown, 1 Wis. 513, 1853 WL 1737, at *4 (1853) ("So long as the power [to remove] is vested in [the Governor], it is to be by him exercised, and no other branch can control its exercise.").

222. Lunding v. Walker, 359 N.E.2d 96, 101 (Ill. 1976). *But see* Roberts v. Richardson, 109 P.3d 765, 767 (N.M. 2005) (declining "to determine whether a governor must specify the basis for a 'just cause' removal of a [State Accountancy Board] member").

223. 501 P.2d 496 (Okla. 1972).

224. *Id.* at 501.

225. 167 A.2d 480 (Pa. 1961).

226. *Id.* at 486.

227. *Lunding*, 359 N.E.2d at 102. The *Lunding* Court rejected the Illinois Supreme Court's earlier jurisprudence, which held that once the Governor determined that he had a basis to remove someone for incompetence, neglect of duty, or malfeasance, separation of

Courts in Massachusetts, New Mexico, and Rhode Island have identified boundaries whereby a governor can fail to articulate the requisite level of cause. For example, Acting Massachusetts Governor Jane Swift's 2002 attempt to remove two members of the Massachusetts Turnpike Authority "for cause" was rebuffed by the Massachusetts Supreme Judicial Court.[228] The court found that Governor Swift's decision to dismiss the two Authority members "boil[ed] down to a difference of opinion between the Governor and two members of the Authority over . . . the ability of the members to fix tolls," and that a "difference of opinion does not constitute substantial evidence . . . that warrants removal by the Governor for cause."[229] In New Mexico, Governor Gary E. Johnson was blocked from removing two members of the New Mexico Institute of Mining and Technology's Board of Regents.[230] The New Mexico Supreme Court found that "[t]he [New Mexico] Constitution limits the reasons and the manner in which a regent may be removed," and held that the Governor did not have sufficient authority to remove the regents "simply because their terms had expired."[231] Finally, a U.S. district court judge interpreted Rhode Island law to provide that "[r]emoval solely for partisan or personal reasons unrelated to capacity or fitness for office" would not satisfy a Governor's attempt to remove a member of the State's Board of Governors for Higher Education "for cause."[232]

At the same time, however, there are a number of cases upholding a governor's findings of "cause." In New Jersey, the state's supreme court held that the services of public employees may be terminated "for reasons of economy" and still meet the "for cause" requirement.[233] In 2004, the Third Circuit upheld the "for cause" removal of a Virgin Islands Assistant Attorney

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powers prohibited the courts from questioning the Governor's determination of cause. *See* Wilcox v. People *ex rel.* Lipe, 90 Ill. 186, 206 (1878) ("[T]he court will only inquire whether the officer has acted within the power, and will not attempt to substitute its own judgment or discretion for that of the officer.").

228. Levy v. Acting Governor, 767 N.E.2d 66, 77 (Mass. 2002).

229. *Id. But see* McSweeney v. Town Manager of Lexington, 401 N.E.2d 113, 116 (Mass. 1980) ("Removal 'for cause' does not require a showing of inefficiency, neglect or misconduct, and hence the cause for removal need not amount to a substantive dereliction of known duties or standards of performance . . . .").

230. Denish v. Johnson, 910 P.2d 914, 917 (N.M. 1996).

231. *Id.* at 927.

232. Vanlaarhoven v. Newman, 564 F. Supp. 145, 148 (D.R.I. 1983).

233. Barringer v. Miele, 77 A.2d 895, 897 (N.J. 1951).

General for his "failure to comply with the dress code."[234] In 1997, the South Carolina Supreme Court in *Rose v. Beasley*[235] found the Governor acted within his power when he removed the state's Director of the Department of Public Safety for a failure to "immediately furnish" requested documents.[236] In *DeCecco v. State*,[237] the Rhode Island Supreme Court focused on procedural issues and did not take issue with the Governor's "causes" which "included a list of [the officeholder's] organized-crime associations" along with a Federal Bureau of Investigation agent's report that the officeholder was purportedly "a participant in a 'gambling combine.'"[238] Finally, in Michigan, that state's supreme court found that the acceptance of illegal fees or compensation is misconduct meriting removal.[239]

B. Procedural Requirements: Hearing and Notice Safeguards in the "For Cause" Removal Process

1. State Procedural Requirements

In addition to adhering to substantive removal requirements, a governor exercising "for cause" removal authority in New Jersey—or elsewhere—must also comply with state procedural requirements outlined in the constitutional or statutory text. State procedural frameworks normally afford subordinates with, at the very least, an opportunity to learn of the governor's charges and present a case in defense of those charges.[240] These frameworks impose on governors a general duty to satisfy certain requirements before the governor may exercise the removal power. The procedural framework for executive dismissal in New Jersey is constitutionally detailed, and the

234. Bouton v. Farrelly, 122 F. App'x 562, 565 (3d Cir. 2004). The dress code required "each male professional employee to wear a coat and tie at work." *Id.* at 564. The officeholder refused, citing an "alleged physical condition which made compliance uncomfortable." *Id.* It is important to note that this removal, however, was not made directly by a governor—but, rather, by a subordinate.

235. 489 S.E.2d 625 (S.C. 1997) (per curiam).

236. *Id.* at 628. The removal was authorized under South Carolina statutory law. *Id.*; *see also* S.C. CODE ANN. § 1-3-240 (1976) (governing "Removal of officers by Governor").

237. 593 A.2d 1342 (R.I. 1991).

238. *Id.* at 1343.

239. *See* People *ex rel.* Johnson v. Coffey, 213 N.W. 460, 463 (Mich. 1927) (per curiam) ("The courts, too, frown on the taking of moneys from the public treasury unlawfully, in the guise of salary, fees, or compensation, and deal more severely with such official misconduct than with many other acts of official misbehavior, different in kind.").

240. *See infra* notes 241, 244 and accompanying text.

modern understanding of this framework has been considerably shaped by both gubernatorial action and judicial review.

Express constitutional and statutory procedural requirements related to "for cause" gubernatorial removals vary by state. The constitutions of Arkansas, Louisiana, Maine, Maryland, New York, and Wisconsin, for example, require that the governor afford the officeholder with notice or charges in advance of the dismissal action along with a hearing.[241] The constitution of Nebraska affords the officeholder only a public hearing.[242] The Michigan Constitution, while authorizing the governor to remove subordinates for certain causes, provides the subordinate with no express constitutional notice or hearing rights.[243] In other states, where the state constitution is silent on removal processes, statutory law may expressly require notice and hearing before a governor can use her executive removal authority.[244] Finally, in a small grouping of states, the governor's role in the

241. *See* ARK. CONST. amend. 33, § 4 ("The Governor shall have the power to remove any member of such boards or commissions before the expiration of his term for cause only, after notice and hearing."); LA. CONST. art. X, § 43, para. D ("An appointed member of the commission may be removed by the governor for cause after being served with written specifications of the charges against him and being afforded an opportunity for a public hearing thereon by the governor."); ME. CONST. art. IX, § 10 ("Whenever the Governor upon complaint, due notice and hearing shall find that a sheriff is not faithfully or efficiently performing any duty imposed upon him by law, the Governor may remove such sheriff from office . . . ."); MD. CONST. art. VI, § 6 ("Whenever during the recess of the Legislature charges shall be preferred to the Governor against the Comptroller . . . it shall be the duty of the Governor forthwith to notify the party so charged, and fix a day for a hearing of said charges . . . ."); N.Y. CONST. art. XIII, § 13, para. a ("The governor may remove any elective sheriff, county clerk, district attorney or register . . . but before so doing the governor shall give to such officer a copy of the charges against him or her and an opportunity of being heard in his or her defense."); WIS. CONST. art. VI, § 4, para. 4 ("The governor may remove any elected county officer mentioned in this section except a county clerk, treasurer, or surveyor, giving to the officer a copy of the charges and an opportunity of being heard.").

242. *See* NEB. CONST. art. IV, § 10 ("The Governor shall have power to remove, for cause and after a public hearing, any person whom he may appoint for a term . . . .").

243. *See generally* MICH. CONST. art. V, § 10. Michigan courts have historically recognized, however, a right to be given notice of the charges and an opportunity to present a defense. *See, e.g.*, People *ex rel.* Metevier v. Therrien, 45 N.W. 78 (Mich. 1890).

244. *See, e.g.*, ALA. CODE § 16-3-4 (LexisNexis 2001) ("The Governor may remove any appointive member of the board . . . giving to him a copy of the charges against him and, upon not less than 10 days' notice, an opportunity of being heard publicly in person or by counsel in his own defense."); ALASKA STAT. § 04.06.070 (2006) ("The governor may not remove the director [of the Alcoholic Beverage Control Board] unless the director is given a copy of the charges and afforded an opportunity to be publicly heard, in person or by counsel, in defense against the charges upon at least 10 days' notice."); CAL. GOV'T CODE § 12906 (West 2005) ("Any member of the [Fair Employment and Housing Commission] may be

removal process is limited to "suggest[ing]"[245] or "addressing"[246]— a process whereby the governor is the initiator in a subordinate's removal, but the decision to remove is placed in the hands of another branch of government. These procedural requirements, depending on whether there is a finding of a property interest, may be augmented by the Federal Constitution's Due Process Clause requirements.[247]

a. The Hearing Process in Practice

State courts have diverged over how the hearing to remove the state official should proceed, and what rules and procedures should govern the operations of the hearing. In Michigan and New Jersey, the Governor must comply with statutory procedure when endeavoring to remove a subordinate through a "for cause" removal hearing.[248]

Although most jurisdictions require that the governor adhere to delineated procedure, strict adherence to court procedural rules or the rules of evidence is not often required. In *Wilcox v. People* ex rel. *Lipe*,[249] the

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removed by the Governor . . . after being given a written statement of the charges and an opportunity to be heard thereon."); COLO. REV. STAT. § 35-57-109 (2007) ("The governor may remove [a Colorado Beef Council member] . . . . Such member shall be entitled to a public hearing, [after being served] ten days before the hearing, a copy of the charges . . . together with the notice of the time and place of the hearing.").

245. In Alabama, the State Supreme Court is to "ascertain[]" whether the attorney-general, state auditor, and other designated officials are of "unsound mind," "*upon the suggestion of the governor*." ALA. CONST. art. V, § 136 (emphasis added). In Missouri, to remove a member of the Missouri Citizens' Commission on Compensation for Elected Officials, the governor "*request[s]*" that the attorney general bring an action in circuit court because of the member's "malfeasance" or for another specified reason, the attorney general brings the action, and the circuit court decides whether the removal is warranted. MO. CONST. art. XIII, § 3, para. 4 (emphasis added).

246. In Delaware, "[t]he Governor may for any reasonable cause remove any officer upon the address of two-thirds of all the members elected to each House of the General Assembly." DEL. CONST. art. III, § 13. A similar provision exists in the South Carolina State Constitution. *See also* S.C. CONST. art. XV, § 3.

247. *See* discussion *infra* Part IV.B.2.

248. *See* Groesbeck v. Bairley, 176 N.W. 403, 405 (Mich. 1920) ("[T]he power exercised by the Governor is quasi judicial in character, it is limited in scope and must be exercised in strict compliance with the Constitution and laws bearing upon the question."); Golaine v. Cardinale, 361 A.2d 593, 597 (N.J. Super. Ct. Law Div. 1976) ("[T]he power to remove, once conferred, may only be exercised in strict compliance with the procedural and substantive provisions of the applicable statute."), *aff'd*, 395 A.2d 218 (N.J. Super. Ct. App. Div. 1978).

249. 90 Ill. 186 (1878).

Illinois Supreme Court held that the Governor "is to act in the matter, to determine, himself, . . . [with] no mode of inquiry being prescribed for him to pursue, . . . [since] it is not for the courts to dictate to him in what manner he shall proceed in the performance of his duty."[250] The Supreme Court of Minnesota sustained the Governor's removal decision despite his disregard for the application of hearsay rules.[251] Similarly, the Missouri Supreme Court found that the failure of the Governor to allow the prosecution to present its case-in-chief prior to the defendant's case-in-chief being presented, "so that the relator would have been informed [of the prosecution's case] before being put on his defense"—though normal practice in Missouri civil courts—was not a reversible error.[252]

A review of the hearing process would be incomplete without a sample of the different models that have been used, in practice, to effectuate investigations and removals. In New Jersey, there has historically been great variation among governors of the state with respect to their levels of personal involvement in the hearing and investigation process. New Jersey Governor Robert B. Meyner was the only governor in the state's history to chair a subordinate's removal proceeding—and he was also the only governor to have a "for cause" removal reversed by the New Jersey Supreme Court.[253] Meyner's deep level of involvement in the hearing process is unique, but it also sheds light on the extent to which a governor can involve himself in the day-to-day minutiae of the removal process.

In 1954, Meyner endeavored to investigate widespread corruption in the State Division of Employment Security, and appointed the administrative assistant to the Attorney General, H. Norman Schwarzkopf, to act "for and

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250. *Id.* at 205.

251. The Minnesota Supreme Court held:

> It may be that the rule against hearsay, if strictly enforced, would have excluded some of the evidence received, but, in such proceedings, the Governor is not bound to enforce the technical rules of evidence, and his decision cannot be reversed because incompetent or irrelevant evidence was received, if it is sufficiently supported by other competent and relevant evidence.

In re Mason, 181 N.W. 570, 573 (Minn. 1920).

252. Barrett *ex rel.* Bradshaw v. Hedrick, 241 S.W. 402, 411 (Mo. 1922). The court held that the statute granting the Governor the authority to remove public officers after a hearing merely required a hearing—the statute did not specify the order in which evidence was to be presented and the Governor was not, therefore, required to adhere to the rules of procedure of the Missouri state courts. *Id.* ("Without doubt that is the orderly procedure in the trial of a civil case, but the statute has not so provided in hearings of this character. The act says that the commissioner shall have an opportunity to be heard.").

253. *See generally* Russo v. Governor, 123 A.2d 482, 487, 494 (N.J. 1956) (reversing the Governor's removal decision and remanding the case to him for further consideration).

on [the governor's] behalf and in [his] name and, in so doing to exercise all rights and powers specified in that behalf" in the investigatory phases.[254] As a result of the investigation, Schwarzkopf found evidence that Assistant Chief Examiner Louis J. Russo and others in the Department of Civil Service—including former New Jersey Governor Harold Hoffman—were involved in various financial improprieties.[255]

In response to the evidence against Russo, Meyner designated a Newark, New Jersey lawyer, Augustus C. Studer, Jr., to serve as a hearing officer and to report his findings to the Governor along with his recommendations.[256] Studer noted in published accounts that he would employ "the elementary rules of fair play . . . but added that, since the hearings were executive in nature, the strict regulations of the courts were not binding."[257] He nevertheless "granted the defense the right of subpoena and cross-examination,"[258] and held the hearings in the State Assembly chamber.[259]

At the end of the formal hearing, Studer found no violation by Russo and dismissed the charges.[260] Dissatisfied with Studer's findings of no wrongdoing, the Governor personally reheard oral arguments and denied Russo's motion to dismiss—in essence directly overruling Studer's summary dismissal of the charges.[261] The Governor also "relieved [Studer] from any

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254. Meyner Exec. Order No. 2 (N.J. Mar. 18, 1954); *see also Jersey Aide Sues in Hoffman Case*, N.Y. TIMES, July 3, 1954, at 28.

255. The specific allegation levied against Russo was that he was inappropriately issued invoices for "alleged overtime work" resulting in payment to him of $1,000 a year for nearly five years. *Russo*, 123 A.2d at 484. The thrust of the investigational efforts, however, centered around the Division's Director and a former governor of the State, Harold G. Hoffman. For an interesting account on the scandals surrounding Hoffman, see Paul A. Stellhorn, *Harold G. Hoffman*, *in* THE GOVERNORS OF NEW JERSEY, 1664-1974: BIOGRAPHICAL ESSAYS 205, 209 (Paul A. Stellhorn & Michael J. Birkner, eds., New Jersey Historical Commission 1982), *available at* http://www.njstatelib.org/NJ_Information/Digital_Collections/Governors_of_New_Jersey/GHOFF.pdf.

256. *See* Meyner Exec. Order No. 9 (N.J. 1955).

257. *Regulations Set in Jersey Inquiry*, N.Y. TIMES, July 20, 1954, at 13.

258. *Id.*

259. George Cable Wright, *Kickback to Hoffman Charged at Inquiry*, N.Y. TIMES, Aug. 17, 1954, at 1.

260. Studer sent word to Governor Meyner that, "The proof fails to show that Russo acted fraudulently. It shows merely that during a portion of his tenure in office . . ., he performed certain work for the [State], for which he was paid and which payment was approved by his superiors." *Russo*, 123 A.2d at 485; *see also Meyner is Urged to Restore Russo*, N.Y. TIMES, Mar. 25, 1955, at 17 (noting Studer's recommendation that Russo "be exonerated").

261. *Russo*, 123 A.2d at 485 ("Exceptions to [Studer's] report were filed by counsel for the Governor and thereafter oral argument on those exceptions were heard by the

further duties in the case and the hearing of the balance of the proceedings . . . was conducted before the Governor personally."[262] As the self-appointed hearing officer, the Governor ruled on document production requests and requests for *subpoenas duces tecum*[263] submitted by attorneys for Russo. The bulk of the Governor's decisions were unfavorable to the defense, and substantially limited Russo's access to evidence.[264] As a result of the limited discovery, Russo's attorney advised his client not to take the stand in his own defense on the ground that the attorney

> feared that without [the information requested in the discovery phase] available . . . in advance of trial . . . not only would Russo's cross-examination by the Governor's counsel, who had all the records available to him, be unfair but that Russo also by lapse of memory might misstate the names of any fellow employees and so subject himself to civil or criminal liability.[265]

In the end, the hearing proceeded (without Russo's testimony), and "[t]he Governor's final determination was that Russo should be removed from office."[266] That determination was based, in part on a finding of "bad faith" that resulted from Russo's failure to take the stand in his own defense.[267]

Russo appealed his removal, and the New Jersey Supreme Court reversed Governor Meyner's removal action, remanding the removal action back to the Governor for further proceedings.[268] The court held that Russo "was clearly entitled [to] the same kind of discovery processes as would be available in an ordinary civil trial to prepare himself for cross-

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Governor personally. The Governor sustained the exceptions and denied the defendant's motion to dismiss.").

262. *Id.*

263. *Black's Law Dictionary* defines "*subpoenas duces tecum*" as: "A subpoena ordering the witness to appear and to bring specified documents, records, or things." BLACK'S LAW DICTIONARY, *supra* note 210, at 1467.

264. Russo made two requests: (1) for the production of records of the Department of Civil Service and other departments dealing with payments for "overtime services" made by other state employees; and (2) for *subpoenas duces tecum* to the thirteen department heads for payroll information related to employees of similar job classifications. *See Russo*, 123 A.2d at 485-86. Governor Meyner substantially limited Russo's first request, and denied the second request altogether. *Id.*

265. *Id.* at 493.

266. *Id.* at 487.

267. *See id.* at 493.

268. *See id.* at 493-94.

examination,"[269] and that the failure of Governor Meyner to allow Russo access to relevant evidence prevented the court from adjudicating the issue of whether "bad faith" existed.[270]

Although Governor William T. Cahill did not directly chair a removal proceeding like Meyner, he also took a hands-on approach to the removal process in 1973 when he removed "for cause" state official James J. Bonafield, who—according to a report issued by the State Commission of Investigation ("SCI") – engaged in "unauthorized practice of law" while serving as an administrative law judge.[271] In response to the SCI Report, Cahill promulgated a detailed Executive Order in which he outlined the procedural steps he intended to follow in order to remove Bonafield, under his constitutional removal powers.[272] First, Cahill directed the Commissioner of the Department of Labor and Industry—the head of the agency where Bonafield worked—to forward a copy of the removal charges to Bonafield.[273] Second, the Governor appointed a "hearing examiner," John J. Francis, Esq., "to conduct a public hearing based on the above charges . . . and to report to [the Governor] his findings of fact and law concerning those charges."[274] Finally, Cahill suspended Bonafield "from all his official duties pending the hearing and determination of the charges."[275] Once the charging and hearing process were complete, Cahill promulgated a second Executive Order formally removing Bonafield, noting in deciding to remove Bonafield, he had personally reviewed the hearing transcript and all the exhibits.[276] Although Bonafield petitioned to state court that Governor Cahill had no authority to remove him,[277] his appeal was ultimately rejected.[278]

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269. *Id.* at 493.

270. *See id.* The New Jersey Supreme Court noted that "the Governor could not have believed that there was an absolute lack of good faith here." *Id.* They cited as evidence of a lack of a finding of "bad faith" the fact that the Governor expressed a desire to preserve Russo's pension rights. *Id.* The court reminded the Governor that that removal was not the only course of action available to him, and that Russo could be suspended instead if bad faith was not found. *See id.*

271. Cahill Exec. Order No. 57, at 1152 (N.J. 1974).

272. *See generally* Cahill Exec. Order No. 47 (N.J. 1973).

273. *Id.* at 1136.

274. *Id.*

275. *Id.* at 1136-37.

276. Cahill Exec. Order No. 57, at 1153 (N.J. 1973) ("After my independent study and review of the transcript, exhibits, report of the special hearing officer, exceptions and briefs, I have found beyond a reasonable doubt that James J. Bonafield is guilty of the charges brought against him . . . .").

277. Bonafield v. Cahill, 308 A.2d 386, 388 (N.J. Super. Ct. Ch. Div. 1973) ("Judge Bonafield asserts that he is a judicial officer beyond the reach of the Governor."), *aff'd*, 316

Meyner's and Cahill's formal participation in the removal process differs from Governor Jon Corzine's approach to the recent investigation of former Attorney General Zulima Farber.[279] Governor Corzine took no *formal* role in the investigation and pre-removal formal processes.[280] Although Ms. Farber's case never reached the hearing phase, the investigation stages were not even conducted at the request of the Governor, but rather at the behest of the Governor's then-Chief Counsel, Stuart Rabner, who "requested the appointment of an independent person . . . for the purpose of investigating and, if warranted, prosecuting any matters arising out of [the] May 26, 2006, motor vehicle [incident]."[281] Of course, Governor Corzine, pursuant to his "for cause" removal power, could have personally ordered an investigation and the production of the documents,[282] but he apparently instead elected to delegate management of the investigation process to his Chief Counsel.[283]

b. A Governor's Power to Suspend State Officials

A survey of the procedural limitations on the governor's power to remove "for cause" is incomplete without discussion of the constraints placed on a governor's ability to temporarily suspend subordinates "for cause."[284] State constitutions, statutory provisions, and court decisions differ widely on whether a governor's "for cause" removal power also includes the authority to suspend a subordinate. The Florida and Michigan Constitutions are the only state constitutions in the nation that expressly clothe the Governor with the power to suspend subordinates for causes such as "misfeasance" and "malfeasance."[285] By contrast, the power to suspend is

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A.2d 705 (N.J. Super. Ct. App. Div. 1974); *see also supra* notes 87-106 and accompanying text.

278. *See* Bonafield v. Cahill, 316 A.2d 705 (N.J. Super. Ct. App. Div. 1974) (per curiam).

279. *See supra* note 3.

280. Unlike Governors Meyner and Cahill, Governor Corzine issued no Executive Orders on the subject of investigating Ms. Farber and his chief counsel, Stuart Rabner, was the person who actually requested the investigation. *See infra* note 281 and accompanying text.

281. WILLIAMS REPORT, *supra* note 3, at 3.

282. *See* N.J. CONST. art. V, § IV, para. 5.

283. *See supra* notes 280-281 and accompanying text.

284. Federal Due Process Clause limitations may also govern the suspension of a state subordinate, and those federal requirements may exceed state procedural protections. *See infra* notes 319-320 and accompanying text.

285. FLA. CONST. art. IV, § 7(a) ("By executive order . . . the governor may suspend from office any state officer not subject to impeachment . . . for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or

granted in a more limited way in three other state constitutions: (1) the Georgia Constitution allows for suspension only in the circumstance where the subordinate is indicted for a felony related to his office;[286] (2) the South Carolina Constitution only allows gubernatorial suspension where a state officer is accused of a crime involving misappropriation of public funds;[287] and (3) the Maryland Constitution provides only for gubernatorial suspension of military officers for "disobedience of orders" or other military offenses.[288] It appears that no other state constitutions use the term "suspend" in provisions dealing with the governor's removal authority.

In New Jersey, even though the state's constitution does not expressly grant the state's governor the power to suspend subordinates, the Supreme

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commission of a felony."); MICH. CONST. art. V, § 10 ("[The Governor] may remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein . . . .").

286. The relevant Georgia constitutional provision provides:

> If [a review commission] determines that the [criminal] indictment [of the current officeholder] relates to and adversely affects the administration of the office of the indicted public official and that the rights and interests of the public are adversely affected thereby, the Governor . . . shall suspend the public official immediately and without further action pending the final disposition of the case or until the expiration of the officer's term of office, whichever occurs first.

GA. CONST. art. II, § III, para. I, subsec. b.

287. The relevant South Carolina constitutional provision provides:

> Whenever it appears to the satisfaction of the Governor that probable cause exists to charge any officer of the State or its political subdivisions who has the custody of public or trust funds with embezzlement or the appropriation of public or trust funds to private use, then the Governor shall direct his immediate prosecution by the proper officer, and upon indictment by a grand jury or, upon the waiver of such indictment if permitted by law, the Governor shall suspend such officer and appoint one in his stead, until he shall have been acquitted. . . .
>
> Any officer of the State or its political subdivisions, except members and officers of the Legislative and Judicial Branches, who has been indicted by a grand jury for a crime involving moral turpitude or who has waived such indictment if permitted by law may be suspended by the Governor until he shall have been acquitted.

S.C. CONST. art. VI, § 8.

288. The relevant Maryland constitutional provision provides:

> The Governor may suspend or arrest any military officer of the State for disobedience of orders, or other military offense; and may remove him in pursuance of the sentence of a Court-Martial; and may remove for incompetency, or misconduct, all civil officers who received appointment from the Executive for a term of years.

MD. CONST. art. II, § 15.

Court of New Jersey has implicitly read such a power into the constitution's "for cause" removal provision.[289] Additionally, the state's appellate division has read the clause to allow other ranking officials within the executive branch to impose suspension on subordinates.[290] This holding of the New Jersey Appellate Division is consistent with the holdings of state courts in Minnesota and Missouri, which have read an implied power of suspension into similar "for cause" constitutional and statutory removal provisions.[291] By contrast, Maryland courts have found that no such power to suspend can be implied, absent express constitutional or statutory text.[292] In a more recent case, *Rose v. Beasley*,[293] the South Carolina Supreme Court voided the Governor's suspension of his Director of the Department of Public Safety, citing the fact that the Governor "has no statutory or constitutional authority

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289. Russo v. Walsh, 113 A.2d 516, 520 (N.J. 1955) ("We think the 1947 Constitution as drafted, granting express power to the Governor to remove public officers after hearing and for just cause, was intended to confer upon him the additional power of temporary suspension incidental to removal . . . ."). The state supreme court read such a power into the state constitution based on the debate at the 1947 Constitutional Convention proceedings and an earlier holding that "a statutory grant of the power to remove an employee included the power to suspend him pending hearing." *Id.* at 519.

290. *See* Grzankowski v. Heymann, 321 A.2d 262, 264 (N.J. Super. Ct. App. Div. 1974). The *Grzankowski* court held that:

> The circumstances surrounding the adoption of the constitutional provision, which lodged in the Governor the power to remove state employees, do not suggest that the ancillary power to impose lesser forms of discipline upon such employees was one intended to be exerted solely by the Governor to the exclusion of any other agency or arm of government.

Id.

291. *See, e.g.*, Martin v. Dodge County, 178 N.W. 167, 168 (Minn. 1920) ("The Governor had as incident to the power of removal implied authority to suspend the judge of probate pending the hearing."); Shartel v. Brunk, 34 S.W.2d 94, 98 (Mo. 1930) ("This court has held that the power to remove necessarily includes the minor power to suspend, and that an officer may be suspended pending the trial of charges preferred against him.").

292. In *Cull v. Wheltle*, 78 A. 820 (Md. 1910), for example, the Maryland Court of Appeals held that the power to suspend required an express statutory grant, and absent such grant the governor has no authority to suspend:

> Can it be said . . . that the Governor has the implied power to suspend without a hearing pending the proceedings for removal? There can be but one answer to that in our judgment. Possibly the Legislature can authorize it, but it has not done so, and hence we express no opinion as to that.

Id. at 824. The Maryland Attorney General advised that "[s]tiffer sanctions" by the governor, other than removal of an officeholder, "such as suspension or loss of pay or automatic legislative censure, would require statutory authorization." 62 Md. Op. Att'y Gen. 431 (1977).

293. 489 S.E.2d 625 (S.C. 1997) (per curiam).

to impose such a suspension" and finding that the Governor has no "inherent" power to suspend an officeholder.[294]

2. Federal Due Process Requirements

A governor's removal actions must also be guided by the requirements that the Federal Constitution imposes on him when dismissing a subordinate "for cause." It is accepted that "public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process."[295] The origins of this notion—that a government official has the right to a hearing with charges and notice—finds its roots in early British common law. Dating back to the early eighteenth century, British courts recognized that "a public officer has a property right in his office which cannot be taken from him except by due process of law."[296]

Modern due process protections are significant because it is possible that a state employee removed by a governor may have Federal Due Process Clause protections that exceed those protections afforded that employee by a state constitutional provision or statute.[297] Ultimately, a failure to adhere to the requirements and limitations imposed by the Fourteenth Amendment's

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294. *Id.* at 630.

295. Gilbert v. Homar, 520 U.S. 924, 928-29 (1997) (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 578 (1972)).

296. Tuttle, *supra* note 20, at 291. Tuttle, tracing the uniquely British origins of due process requirements attendant with "for cause" removals, writes:

> This doctrine was laid down first in the famous *Boggs* case where the plaintiff was removed from office without a hearing for "asking the Mayor of London to salute an indescribable portion of his anatomy." This doctrine was corrected and established by Lord Mansfield's opinion in *Rex v. Richardson*. Since then there have been numerous decisions to the same effect. Said Lord Ch. J. Cockburn in a comparatively recent case, *Queen v. Saddlers Company*: "No proposition in the law can be more clear or indisputable than that a man, liable to removal from an office for misconduct, is entitled to be heard in his own defense, and must have an opportunity of being so heard before he can be removed."

Id. (citations omitted).

297. States cannot "rely on the procedures set forth in state laws to define the nature or extent of constitutionally protected procedural due process." April Land, *Children in Poverty: In Search of State and Federal Constitutional Protections in the Wake of Welfare "Reforms,"* 2000 UTAH. L. REV. 779, 788. Procedural due process rights are "conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring) (citation omitted).

Due Process Clause,[298] as applied to a governor's dismissal authority, may lead to an ineffective removal.[299]

Recent decisions by eight federal courts of appeals have limited the kind of claims that an aggrieved officeholder can bring to challenge removal from public office.[300] Notably, the Third Circuit recently held that the Fourteenth Amendment does not grant public employees substantive due process rights.[301] This view is consistent with the views adopted by almost every other circuit.[302] Despite this trend limiting claims under the substantive prong

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298. The Fourteenth Amendment provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

299. "A public employee who is summarily deprived of a qualifying property interest in continued employment thus may challenge the termination procedures on the grounds that they violate the Due Process Clause." Daniel T. Gallagher, *Summary Suspension of Public Employee Without Pay Does Not Violate Due Process*: Gilbert v. Homar, 39 B.C. L. REV. 464, 464-65 (1998); *see also infra* notes 321-325 and accompanying text.

300. *See infra* notes 301-302.

301. A 2000 opinion authored by then-circuit judge (now Justice) Samuel Alito noted that "[the Third Circuit] has adopted an approach to substantive due process that focuses on the nature of the property interest at stake." Nicholas v. Pa. State Univ., 227 F.3d 133, 141 (3d Cir. 2000). Under this new approach, the Third Circuit limited substantive due process review "to cases involving real property ownership," and other property interests viewed as "fundamental" under the Constitution. *Id.* The court concluded that "tenured public employment [is not] a fundamental property interest entitled to substantive due process protection." *Id.* at 142.

302. *See, e.g.*, Singleton v. Cecil, 176 F.3d 419, 425-26 (8th Cir. 1999) ("[A] public employee's interest in continued employment with a governmental employer is not so 'fundamental' as to be protected by substantive due process."); Local 342, Long Island Pub. Serv. Employees v. Town Bd. of Huntington, 31 F.3d 1191, 1196 (2d Cir. 1994) ("We do not think, however, that simple, state-law contractual rights, without more, are worthy of substantive due process protection."); McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir. 1994) ("[E]mployment rights . . . are not 'fundamental' rights created by the Constitution."); Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339, 1350 (6th Cir.1992) ("[P]laintiffs' state-created right to tenured employment lacks substantive due process protection."); Huang v. Bd. of Governors of Univ. of N.C., 902 F.2d 1134, 1142 n.10 (4th Cir. 1990) (holding that a professor's interest in a position in a university department "is essentially a state law contract right, not a fundamental interest embodied in the Constitution"); Lum v. Jensen, 876 F.2d 1385, 1389 (9th Cir. 1989) (finding "no clearly established constitutional right to substantive due process protection of continued public employment" in the Ninth Circuit as of 1984); Kauth v. Hartford Ins. Co. of Ill., 852 F.2d 951, 958 (7th Cir. 1988) ("[I]n cases where the plaintiff complains that he has been unreasonably deprived of a state-created property interest . . . the plaintiff has not stated a substantive due process claim."). *But see* Newman v. Massachusetts, 884 F.2d 19, 25 (1st Cir. 1989) ("[S]chool authorities who make an arbitrary and capricious decision significantly affecting a tenured teacher's employment status are liable for a substantive due process violation.").

of the Federal Due Process Clause, public officeholders found to have a property interest in their office, can still advance claims under the Due Process Clause's procedural prong.[303]

The first step in a Federal Due Process Clause analysis is to consider whether the officeholder has a property interest in her office.[304] To determine whether a property interest exists, the court may consider: (1) the constitutional provision or statutory law creating the office and the procedure for filling vacancies in the office; and (2) the state constitutional provision defining a governor's powers of removal.[305] In performing this analysis, at least one federal district court has found that "[t]here would be no logic in requiring *cause* to remove a person from a position if there were no property interest in the position held by the office holder."[306] This view is consistent with recent case law which recognizes that, in the sphere of public officeholding, the mere presence of a "for cause" removal provision is evidence of a property interest in office.[307] Thus, where a state constitutional

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303. *See infra* note 321 and accompanying text.

304. The Supreme Court explored the basic principles behind the property interest requirement, as applied to public employees, in *Board of Regents of State Colleges v. Roth*:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

408 U.S. 564, 577 (1972).

305. *See* Ford v. Blagojevich, 282 F. Supp. 2d 898, 903 (C.D. Ill. 2003) (holding that a claim of a property interest in public office by a Commissioner of the Illinois Industrial Commission "must be examined in the context of the Illinois law defining the Commission and the procedure set forth in the statute for filling vacancies on it, as well as the Illinois constitutional provision defining the Governor's powers"). This is consistent with United States Supreme Court jurisprudence. *See Bd. of Regents of State Colls.*, 408 U.S. at 577 ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").

306. *Ford*, 282 F. Supp. 2d at 905.

307. *See, e.g.*, Whalen v. Mass. Trial Court, 397 F.3d 19, 24 (1st Cir. 2005) (holding that law providing for dismissal of public employee for "just cause" created property right in office); Brown v. Trench, 787 F.2d 167, 171 (3d Cir. 1986) (holding that county ordinance permitting only "for cause" dismissal created property interest); Schultz v. Baumgart, 738 F.2d 231, 234 (7th Cir. 1984) (holding that where statute only permits removal "for cause," a property right is created); Barnett v. Hous. Auth. of Atlanta, 707 F.2d 1571, 1582 (11th Cir. 1983) (providing that Georgia law allowing dismissal "for cause" creates property right),

provision or statute mandates that a public officeholder has a right to her job, "i.e., cannot be fired except 'for cause,'" state law creates a "'property [interest]' which cannot be taken away without procedural due process."[308]

Once a property interest in office is found to exist, the Due Process Clause applies and grants the officeholder certain limited, but important, protections.[309] The "essential requirements" of due process in the public employment context "are notice and an opportunity to respond" prior to the officeholder's dismissal.[310] The hearing, "though necessary, need not be elaborate,"[311] and the "formality and procedural requisites for the hearing can vary," with variations depending on "the importance of the interests involved and the nature of the subsequent proceedings."[312] The basic requirements of such a hearing include four essential elements: (1) "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken;" (2) "oral or written notice of the charges;" (3) "an explanation of the employer's evidence;" and (4) "an opportunity to present [the officeholder's] side of the story."[313] In conducting the hearing, the standard imposed on the State, however, is generally not very rigorous.[314]

Ultimately, however, "[d]ue process . . . is a flexible concept that varies with the particular situation."[315] Depending on the circumstances, for

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overruled by McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994); Bueno v. City of Donna, 714 F.2d 484, 492 (5th Cir. 1983) (noting that city law requiring "just cause" dismissal created property interest).

308. Leon Friedman, *Public Employment Litigation*, *in* EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS 473, 475, (ALI-ABA Course of Study, Sept. 15-17, 2005), *available in* Westlaw, SL021 ALI-ABA 473. By contrast, it has long been held that "where an appointment is during pleasure, or for a fixed period, with a discretionary power of removal, the office may be vacated, and the removal made ex parte." People *ex rel.* Jones v. Carver, 38 P. 332, 333 (Colo. Ct. App. 1894).

309. *See generally* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

310. *Id.* at 546.

311. *Id.* at 545.

312. Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

313. *Loudermill*, 470 U.S. at 546 (citations omitted). The *Loudermill* Court further noted that requiring more than these four elements would "intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.*

314. *See, e.g.*, Lemon v. Tucker, 695 F. Supp. 963, 971 (N.D. Ill. 1988) (holding that the due process requirement was satisfied even where the employee did not have access to all documents submitted to the state agency and related to the agency's investigation).

315. Zinermon v. Burch, 494 U.S. 113, 127 (1990). Courts weigh several factors to determine what procedural protections apply in a given situation:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally,

example, a post-termination—as opposed to a pre-termination hearing required in *Loudermill*[316]—may be found to satisfy the requirements of the Federal Due Process Clause.[317] Abolishing a public office altogether, without a hearing, does not deny the officeholder her federal due process protections, "as long as the abolition is not a colorable attempt to oust particular incumbents and to replace them with others."[318] Public officeholders suspended by a governor are entitled to a "prompt post-suspension" hearing,[319] even though in practice there can be a considerable delay between the act of the suspension and the hearing, depending on the circumstances surrounding the suspension.[320]

> the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

316. *See supra* note 310-313 and accompanying text.

317. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982) (finding that where "quick action" is necessary or where it would be impracticable for a state to provide a pre-deprivation hearing, a post-deprivation hearing is constitutionally adequate).

318. 16D C.J.S. *Constitutional Law* § 1904 (2005). Summarizing other cases, in an unreported Memorandum and Order, the Superior Court of the District of Columbia laid out the general requisites for abolishing a public office through legislative action:

> [S]uch legislation can survive . . . scrutiny *if* the enactment in fact makes a substantial change in the agency's identity (such as by combining it with another office as part of a genuine reorganization, or by giving it entirely new duties) and *if* the termination of the incumbent's appointment is logically related to the changes made to the office.

Cropp v. Williams, No. 03CA4569, 2003 WL 21904574, at *6 (D.C. Super. Ct. Aug. 1, 2003), *vacated as moot*, 841 A.2d 328 (D.C. 2004).

319. *See* Barry v. Barchi, 443 U.S. 55, 64 (1979) (holding that a state-licensed horse trainer could be suspended without pay on an interim basis, "pending a prompt judicial or administrative hearing that would definitely determine the issues," even though the relevant statute failed to provide for a post-suspension hearing).

320. Despite the "promptness" requirement, *see supra* note 319, courts have found that even significant time delays between the date of suspension and the date of the hearing comport with Due Process Clause standards. When a delay is challenged as a per se due process violation, the government is permitted to argue that the delay is justified:

> "In determining how long a delay is justified in affording a post-suspension hearing and decision, it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interests; and the likelihood that the interim decision may have been mistaken."

Jones v. City of Gary, 57 F.3d 1435, 1444 (7th Cir. 1995) (quoting Fed. Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 242 (1988)).

Thus, in *Homar v. Gilbert*, 63 F. Supp. 2d 559 (M.D. Pa. 1999), the plaintiff argued that a twenty-three day delay between suspension and post-suspension hearing violated his due process rights. *Id.* at 567-68. The court balanced the plaintiff's "substantial interest in his

Failure to comport with due process requirements in dismissing a subordinate "for cause," often leads to a federal cause of action.[321] For example, the subordinate could bring an ineffective removal claim against a governor under § 1983, which holds liable, in an action at law, "[e]very person who, under color of any statute [or] regulation . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ."[322] A violation of due process does not result in the invalidation of the dismissal. If a due process violation is found to exist, the general rule is that "the remedy for a denial of due process is due process."[323] In *Perry v. Sindermann*,[324] for example, the United States Supreme Court held that a professor whose contract was not renewed was entitled to a hearing, but not reinstatement.[325]

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continued uninterrupted employment," against the employer's interest in investigating misconduct following the plaintiff's arrest for a drug offense. *Id.* at 569-70. Even though the criminal charges that led to plaintiff's suspension were dropped in seven days, and the plaintiff remained suspended for sixteen days, the court found that "a 16 day delay does not rise to the level of a procedural due process violation." *Id.* at 570.

Similarly, in *Jones v. City of Gary*, 57 F.3d 1435, the Seventh Circuit Court of Appeals found no due process violation where a firefighter was suspended for six months without pay and without a post-termination hearing. The firefighter in that case failed to report to duty because of an arthritic condition and a pending appeal before a pension board. *Id.* at 1437. The court balanced the "interests of the individual firefighter," i.e., the plaintiff's "private financial interest in remaining gainfully employed," against the City's interest, i.e., the City's desire to "maintain[] a full complement of firefighters," and found that the "City's interest in having a full complement of firefighters outweighs Jones's protected property interest in his employment." *Id.* at 1441-42, 1443.

321. *See, e.g.*, Gilbert v. Homar, 520 U.S. 924, 928 (1997) (noting that respondent filed suit under 42 U.S.C. § 1983 contending that "petitioners' failure to provide him with notice and an opportunity to be heard before suspending him without pay violated due process"); Mitchell v. King, 537 F.2d 385, 386 (10th Cir. 1976) (discussing cause of action by Museum of New Mexico Board of Regents member against the governor under § 1983 to "redress alleged deprivation under color of state law of certain rights secured to him by the Constitution of the United States"); Ford v. Blagojevich, 282 F. Supp. 2d 898, 900 (C.D. Ill. 2003) ("Plaintiff Diane Ford . . . filed this law suit under 42 U.S.C. § 1983 claiming that Governor Blagojevich violated her constitutional due process rights to property in her job as a Commissioner of the Illinois Industrial Commission . . . .").

322. Civil Rights Act, 42 U.S.C. § 1983 (2006).

323. Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 933 (Tex. 1995).

324. 408 U.S. 593, 602 (1972).

325. *Id.* at 603. The Court wrote:

> [R]espondent must be given an opportunity to prove the legitimacy of his claim. . . . Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request,

V. CONCLUSIONS

New Jersey courts should hesitate to interpret the state constitution as granting the Governor the authority to remove the Attorney General "for cause." The OLS Legal Opinion, while informative, omits key constitutional convention debate and in so doing represents an incomplete analysis of the delegate intent in framing the gubernatorial "for cause" removal provision. Because the release of the Opinion predated the creation of the Office of the Lieutenant Governor—larger structural implications of the Opinion also remain unconsidered.

There are, of course, satisfying policy arguments to be made in favor of the Governor's authority to institute "for cause" removal actions against his Attorney General. The "for cause" removal provision was intended to allow for a state's chief executive to quickly and efficiently remove a criminal or someone otherwise unfit from office.[326] In theory, a "for cause" removal is a more time-efficient remedy than the alternative "costly, dilatory and unsatisfactory" impeachment process employed by the legislature.[327]

Such an analysis without more, however, is too simplistic. Although the 1947 Convention delegates, in adopting the "for cause" removal provision, did intend to vest "*the primary responsibility* for the conduct of the executive and administrative branches of the government . . . in the Governor,"[328] it is clear that they also intended to insulate the Attorney General from politics and pressure from the executive branch.[329] From a structural perspective, the

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where he could be informed of the grounds for his nonretention and challenge their sufficiency.

Id. But see Reeves v. Claiborne County Bd. of Educ., 828 F.2d 1096, 1101 (5th Cir. 1987) (noting that reinstatement is "normally an integral part of the remedy for a constitutionally impermissible employment action").

326. *See supra* note 18 and accompanying text (noting that one of the primary purposes behind the "for cause" provision is to allow the government to quickly remove criminals and the unfit from office).

327. Kettleborough, *supra* note 18, at 621. There is, however, a lack of empirical evidence that the impeachment process is substantially quicker to execute, in practice, than a "for cause" removal—especially given the substantive and procedural hearing requirements attendant with "for cause" removal process. *See* discussion *supra* Part IV (documenting both the federal and state substantive and procedural requirements necessary to avoid judicial nullification of a "for cause" removal).

328. Russo v. Walsh, 113 A.2d 516, 518 (N.J. 1955) (emphasis added).

329. *See supra* Part III.B.2.b (noting the expressed desire of New Jersey delegates to insulate the New Jersey Attorney General by constitutionalizing the office).

Attorney General should feel free to investigate, and even prosecute, political officers of the executive branch without fear of gubernatorial reprisal.[330]

"For cause" removal, in many ways, affords the governor a blank check and wide discretion to remove officials subject to the provision's ambit. Though procedural and substantive safeguards exist *in theory*[331]—governors are *in practice* afforded great latitude and deference by courts in both their removal fact-finding and decision-making. Governors' findings of cause are rarely struck down on substantive grounds.[332] Procedurally, federal and state constitutional protections provide only the most basic of safeguards to the public officeholder. In most states, for example, removal hearings need not even comply with basic evidentiary and civil trial rules,[333] and the Federal Constitution essentially requires only that the officeholder be provided "notice and an opportunity to respond."[334] To add to the already limited review mechanisms that exist, a judiciary careful not to intrude into the province of the executive branch may be reluctant to overturn a gubernatorial removal decision for fear of "detract[ing] from the stature of the courts."[335]

While such broad discretion and a low removal standard may be well suited to remove a member of a state board or commission, a higher standard should be imposed when it is desired to remove one of a state's constitutional officers. In this respect, it makes better sense to leave the removal of constitutional officers inferior to the Governor—the Lieutenant Governor, the Attorney General, and the Secretary of State—to the exclusive province of the legislature through the process of impeachment.[336]

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330. "Public employees who criticize either the specific institution with which they are associated or the government more generally are vulnerable to employment reprisals." *See* Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 YALE L.J. 376, 379 (1979) (citations omitted); *see supra* notes 127-130 and accompanying text (discussing the conflict and untenable position that results from a governor's possessing authority to remove an attorney general).

331. *See supra* note 68 and accompanying text (documenting the availability of judicial review mechanisms in New Jersey); *see generally* discussion *supra* Part IV (discussing broadly the availability of judicial review mechanisms in other states).

332. *See supra* 233-239 (collecting cases that upheld gubernatorial findings of cause for reasons ranging from failure to "immediately furnish" requested documents to "reasons of economy").

333. *See supra* notes 249-252 and accompanying text.

334. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985); *see also supra* notes 309-314 and accompanying text (reviewing the basic procedural Federal Due Process clause requirements as applied to public employment).

335. Jennings, *supra* note 18, at 724.

336. *See* N.J. CONST. art VII, § III, para. 1 ("The Governor and all other State officers, while in office and for two years thereafter, shall be liable to impeachment for misdemeanor

It is conceded that the governor's power to remove state constitutional officers may not be tested in the foreseeable future. Since the adoption of the modern New Jersey Constitution six decades ago, only six Executive Orders have been promulgated under the Governor's article V, section IV, paragraph 5 power to investigate, discipline, and remove state officials "for cause."[337] The recent broadening of forfeiture of office laws,[338] a reluctance on the part of modern governors to dismiss top appointees in light of managerial concerns,[339] and the development of a number of political strategies to "by-pass" the officeholder[340]—are all factors that may help to explain why

committed during their respective continuance in office."). The power to impeach is vested in the General Assembly and the power to remove is a function of the Senate. *Id.* at para. 2 ("The General Assembly shall have the sole power of impeachment by vote of a majority of all the members. All impeachments shall be tried by the Senate, and . . . [n]o person shall be convicted without the concurrence of two-thirds of all the members of the Senate.").

337. Data for the orders of Governors Driscoll through Whitman was obtained from Michael Herman's study of New Jersey Executive Orders which appeared in the *Rutgers Law Journal* in 1999. *See* Herman, *supra* note 27, at 991. Data for the orders of Governors Whitman through Corzine was obtained through the "info bank" on the Official Website for the State of New Jersey, Executive Orders, http://www.state.nj.us/infobank/circular/eoindex.htm (last visited Mar. 5, 2008). Only two Governors—Meyner and Cahill—have issued Executive Orders calling for investigations, discipline or removal. *See supra* notes 253-278 and accompanying text.

338. Forfeiture of office laws have existed in the New Jersey statute books since as early as 1898, when members of the State Legislature, if convicted of bribery, were "forever disqualified from holding any office of honor, trust or profit, under this state." Act for the Punishment of Crimes, ch. 235, § 1, para. 25, 1898 N.J. Laws 791. In 1913, the laws were expanded to include disqualification for crimes "touching the administration of [an] office" or involving "moral turpitude." Act of Mar. 12, 1913, ch. 74, 1913 N.J. Laws 116. The modern version of the law, approved in 1980, now disqualifies "[a] person holding any public office" upon conviction "of an offense involving dishonesty or of a crime of the third degree or above." N.J. STAT. ANN. § 2C:51-2 (West 2006). By having more public officeholders who commit crimes automatically removed from office, the Governor does not need to pursue a cumbersome removal process to remove this class of officeholders.

339. A report prepared for Governor Brendan Byrne by a gubernatorial aide identified eleven factors which "mitigat[e] against the Governor's personal management of the state government," including exercise of the direct management of subordinates. STEPHEN SCHOEMAN, GOVERNOR'S OFFICE OF PLANNING AND POLICY, THE GOVERNOR'S ROLE IN THE MANAGEMENT OF STATE GOVERNMENT 1 (1981). These factors include, "6. [the Governor] lacks the time to devote to a problem," "9. he may want to avoid the risk that involvement in a management problem might 'blow up in his face,'" and "11. resistance to his management efforts." *Id.*

340. One strategy is to "by-pass" the office of an uncooperative officeholder altogether, as opposed to removing him. On January 27, 1948, Governor Alfred E. Driscoll, who decided that he "would not seek the services of Attorney General Walter D. Van Riper," bypassed the office of the Attorney General altogether by creating the office of "special

modern governors so infrequently make use of their considerable power to remove subordinates. And as the last-minute wrangling and circumstances surrounding Ms. Farber's resignation exemplify,[341] sometimes the old-fashioned practice of arm-twisting—"resignation inducement"—is enough to force out an officeholder and avoid the specter of a protracted removal hearing.[342]

Although political scientists agree that the power to remove subordinates is one of the most important prerogatives a governor can wield,[343] this Note suggests that a governor think twice before playing his "ace in the hole" removal card. The power to remove "for cause," after all, is a limited one. In New Jersey, it remains far from settled whether the Governor possesses the constitutional authority to dismiss the Attorney General and other constitutional officers "for cause."

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counsel to the executive department in place of the Attorney General." *Bill is Offered to By-Pass Van Riper as Legal Adviser to Jersey Governor*, N.Y. TIMES, Jan. 28, 1947, at 11. The office of Counsel to the Governor is now codified in New Jersey's statutes. *See* N.J. STAT. ANN. § 52:15-8 (West 2006) ("The Governor may appoint and commission a person to be known as counsel to the Governor . . . ."). While an attorney general may have some of her functions diminished through by-pass, governors and legislatures should take great care so as to not strip the "inherent core functions" of the attorney general's office. *See, e.g.*, Jason C. Pizatella, *Separation of Powers and the Governor's Office in West Virginia*: *Advocating a More Deferential Approach to the Chief Executive from the Judiciary*, 109 W. VA. L. REV. 185, 200-01 (2006) (discussing separation of powers problems resulting from an Act of the West Virginia Legislature where the Attorney General alleged that the statute diminished his role to a point that made his office "'de facto non-existent'" (quoting State *ex rel.* McGraw v. Burton, 569 S.E.2d 99, 104 (W. Va. 2002))).

341. *See supra* note 1 (discussing the last-minute negotiations involved in Ms. Farber's departure). It is worth restating that Governor Corzine has publicly denied pressuring Ms. Farber to resign. *See* Salazar et al., *supra* note 1, at A01.

342. Some commentators have noted that federal judges and legislators may be induced to resign in light of a threat of impeachment or recall. *See, e.g.*, Paul L. McKaskle, *Of Wasted Votes and No Influence*: *An Essay on Voting Systems in the United States*, 35 HOUS. L. REV. 1119, 1192 n.305 (1998); Emily Field Van Tassel, *Resignations and Removals*: *A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PA. L. REV. 333, 336-337 (1993). This Note submits that, applying the same logic, a Governor's cabinet appointee—including the Attorney General or Secretary of State—can likely also be induced by the Governor to resign.

343. *See supra* note 15 and accompanying text.