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GAMBLING LEGISLATION IN NEW YORK**

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# **THE MESSAGE OF NECESSITY AND GAMBLING LEGISLATION IN NEW YORK**

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Messages of Necessity as Proscribed by  
The New York State Constitution

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Current Legal Issues in Government  
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Article III, section 14 of the Constitution of the State of New York provides for the method of passing bills within the state legislature. This provision calls for all bills to be printed and present on the desks of all members of the legislature for three calendar days prior to the bill's final passage.<sup>1</sup> There is, however, an exception allowing immediate passage of those measures that the Governor certifies "the facts which in his or her opinion necessitate an immediate vote thereon."<sup>2</sup>

When the plaintiffs in the Dalton v. Pataki matter entered suit, they alleged multiple causes of action. One of these grounds is the Governor's alleged misuse of the message of necessity exception.<sup>3</sup> The plaintiffs claim that the Governor conducted a "midnight assault on the Constitution."<sup>4</sup> Their reasoning is based upon the Governor's message of necessity stating only "these bills [*sic*] are necessary to enact certain provisions of law."<sup>5</sup> The plaintiffs' claim is that this message of necessity is insufficient because within the statement there is absolutely no citation of facts that would justify a waiver of the regulation three-day waiting period.<sup>6</sup>

Upon a face value examination of the language of the New York State Constitution, one will find that the provision in question calls for the Governor's message of necessity to cite and certify the facts that create his opinion of necessity.<sup>7</sup> This would seem to support the argument that the plaintiffs' have presented in their brief to the New York State Court of

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<sup>1</sup> The Constitution of the State of New York, Article III, §14, as amended Nov. 8, 1938, eff. Jan. 1, 1939.

<sup>2</sup> Id.

<sup>3</sup> Corneilius D. Murray, Esq., James A. Shannon, Esq., Paul A. Gomez, Esq., & Robert T. Fullem, Esq., Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment in Action No. 1. December 23, 2002, at 1.

<sup>4</sup> Id.

<sup>5</sup> Id. at 2.

<sup>6</sup> Id. at 2.

<sup>7</sup> New York State Constitution, *supra* note 1.

Appeals. However, before this argument can be accepted by the Court, an examination of the history of the Constitutional provision must be undertaken, as well as an examination of the existing precedents of law for guidance. Though this paper is not an attempt to anticipate what the Court will decide, it is an attempt to employ the legal reasoning that will guide them.

As the Constitution was amended in 1894, what was then section 15 of Article 3(now section 14) read, in pertinent part:

“No bill shall be passed or become law unless it shall have been printed and upon the desks of the members, at least three calendar legislative day prior to its final passage, unless the Governor or the acting Governor shall have certified to the necessity of its immediate passage under his hand and the seal of the state.”<sup>8</sup>

In examining the Revised Record of the 1894 Constitutional Convention, it becomes apparent that the delegates were looking to create a system that would allow some flexibility in the legislative process, in instances of exigency.<sup>9</sup>

The only amendment made to Article III, section 14 of the State Constitution came in 1938. The delegates at the Constitutional Convention expressed their concern regarding what they perceived as widespread abuse of these messages of necessity. Sen. Fearon speaking generally said:

“I think we all realize that there has been an increasing number of emergency messages issued as the years have gone by, and that the certification as to the necessity for the immediate passage of a bill has come to mean that we have a blank form in which the Governor says, in just those words, he does certify as to the necessity of the immediate passage of the legislation.”<sup>10</sup>

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<sup>8</sup> Robert C. Cummig, Owen L. Potter, and Frank B. Gilbert, ed. *The Constitution of the State of New York with Notes, References, and Annotations*, 2nd ed., at 163. .

<sup>9</sup> Revised Record of the Constitutional Convention of the State of New York, May 8, 1894-September 29, 1894. Volume II, at 471-490.

<sup>10</sup> Revised Record of the Constitutional Convention of the State of New York, April 5-August 26, 1938. Volume II, at 975.

Upon examination of the Revised Record of the 1938 Constitutional Convention, it becomes apparent that the intent of the amendment was two-fold.<sup>11</sup>

The delegates were concerned about the increasing use of messages of necessity to allow consideration of bills without a final printing being available for review by the voting legislators.<sup>12</sup> This was in response to the large numbers of such action. Sen. Fearon had been advised “that in the last session the Governor gave some 265 emergency messages during that period.”<sup>13</sup> Sen. Fearon proposed providing “that the bill in its final form ... ought to be on the desks so that the actual information contained in that bill would be available to anybody who wanted to look it.”<sup>14</sup> It was acknowledged that this provision would not fix the problem completely, but would work to adequately inform legislators just what it was they would be voting on, as well as cut down the number of bills “appearing” at the last minute.<sup>15</sup>

A secondary concern of the Constitutional Convention delegates was the abuse of messages of necessity by the Governor, as the plaintiffs argue in the present case. The amendment of 1938 created the text that is present in the current State Constitution, calling for the Governor to certify “under his hand and seal of the State, the facts which in his opinion necessitate an immediate vote thereon.”<sup>16</sup> The intent of the provision was to require that the Governor certify the facts that led to his opinion of necessity.<sup>17</sup> It was believed that this, coupled with the new requirement that the bill must be in writing and on

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<sup>11</sup> *Id.* at 975-980 & 1434-1437.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 979.

<sup>14</sup> *Id.* at 975.

<sup>15</sup> *Id.* at 976.

<sup>16</sup> New York State Constitution, *supra* note 1.

<sup>17</sup> Revised Record, *supra* note 10, at 1435.

the desks of legislators, would make the process sufficiently tedious and bothersome, so as to dissuade Governors from exercising the power, unless it was actually needed.<sup>18</sup>

All of this “intent” seems to support the argument that the plaintiffs propose; that in certifying his message of necessity to the legislature in enacting Chapter 383 of the Laws of 2001, Governor Pataki should have included the facts that led to his opinion that immediacy was vital. Many powerful lobbying groups, such as the New York Public Interest Research Group, and the New York State League of Women Voters, in fact support this.<sup>19</sup> These groups recognize the potential for abuse and call for reform. They say:

End the abuse of the messages of necessity. New York State's Constitution requires that all legislation must be available to legislators a full three days before a house can take any action. (2) This requirement can be ignored when the Governor issues a "message of necessity" which allows for immediate action on legislation. The Constitution created this loophole in order to allow lawmakers to act on issues that required immediate attention. (3) This loophole has been abused by the Governor and the legislative leaders to such an extent that many important decisions are now approved with a message of necessity. The messages are used usually in an attempt to limit public debate over important issues. The legislature should act to carefully limit the use of these messages and to prohibit their use in budget negotiations.<sup>20</sup>

While all this “novice” interpretation seems clear cut, the true interpreter here is the court. On this specific issue, the court has already spoken, and has ruled in favor of the Governor.

There are multiple cases that have been brought based upon similar grounds. In March of 1972, in Finger Lakes Racing Assn., Inc. v New York State Off-Track Pari-Mutuel Betting Commission, the New York Court of Appeals rejected this same constitutional

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<sup>18</sup> Id. at 979.

<sup>19</sup> New York State Public Interest Research Group, “Reform New York: Legislative Rules, The State of New York’s Ethics,” *NYPIRG’s Good Government Program*. Available at <http://www.nypirg.org/goodgov/reformny/legrules.html>.

<sup>20</sup> Id.

challenge.<sup>21</sup> While the Court split 4-3 on the substantive issue of law, they unanimously rejected the challenge.<sup>22</sup> In this case, the Governor's certificate included descriptions of the general purposes of the bill.<sup>23</sup> The Court held, that the Governor's message was sufficient because it met all of the Constitutional requirements. The required procedure was satisfied by: (1) the Governor expressed his opinion of needing an immediate vote and this opinion was based upon facts that satisfied him to make such an opinion; (2) those fact that he used were rational and reasonable; and (3) he filed the proper certification.<sup>24</sup> The Court said:

“It is the Governor who must express the opinion that an immediate vote is desirable. The facts on which he forms that opinion must satisfy him. The facts supporting his opinion ... are rational and reasonable. If the proposal is to be considered a certificate must be given. This on its face is a sufficient compliance with the Constitution. The Legislature could still say the time for consideration was too short. It did not say that, but accepting the Governor's certificate and considering the proposal in the time available, it passed it. Normally a court should not intervene to nullify an act of the Governor addressed to legislative action which literally and reasonably conforms with constitutional requirements.”<sup>25</sup>

It is evident that the Court is hesitant to intervene in the actions of co-equal levels of government that reside within a separate branch; particularly where the legislature has acted to approve such action.

In the Finger Lakes case, the legislators requested the certificate from the Governor, to allow for a shortened consideration period, allowing legislative passing before the impending session adjournment.<sup>26</sup> In the Dalton matter, there appears to have

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<sup>21</sup> Finger Lakes Racing Assn, Inc. v. New York State Off-Track Pari-Mutuel Betting Commission, 30 N.Y.2d 207, 282 N.E.2d 592, 331 N.Y.S.2d 625 (1972).

<sup>22</sup> Id.

<sup>23</sup> Id. at 219.

<sup>24</sup> Id. at 220.

<sup>25</sup> Id. at 219-220.

<sup>26</sup> Id. at 219.

been no such legislative request, thus making the instant matter possibly distinguishable. However, the court specifically mentioned the ability of the legislature to reject the proposed bill, and not accept the Governor's certificate. The court has pointed out, in their decisions, the legislature's ability to choose, as it could have done in the Dalton matter.<sup>27</sup>

Following the Finger Lakes decision, came the case of Norwick v. Rockefeller.<sup>28</sup> In this matter, the court was again hesitant to rule, recognizing the inherent authority of an equal, if not superior, but separate branch of government.<sup>29</sup> The Court did, however, uphold the Governor's certificate of necessity despite the lack of factual information included within it. Relying heavily upon the Finger Lakes opinion, the court focused upon two sentences: "It is the Governor who must express the opinion that an immediate vote is desirable. The facts on which he forms that opinion must satisfy him."<sup>30</sup> This court said that the Finger Lakes opinion "indicate[s] that it is the Governor alone who determines the sufficiency of the facts."<sup>31</sup> The court finds that so long as the Governor is acting in response to factual information, he does not need to state those facts; he need only to state that in his opinion there is a need for immediate consideration.<sup>32</sup> In their ruling the court says:

"Recognizing the dominant doctrine of separation of powers with concomitant adherence to judicial self-limitation and absent any expressed criterion in the State Constitution defining the phrase 'the facts', which in the Governor's opinion require his message of necessity, I hold, on the authority of *Sullivan County* [*sic*], that their sufficiency is **unassailable**"(emphasis added).<sup>33</sup>

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<sup>27</sup> Id.

<sup>28</sup> Norwick v. Rockefeller, 70 Misc.2d 923, 334 N.Y.S.2d 571 (Sup. Ct. New York County, 1972).

<sup>29</sup> Id. at 925.

<sup>30</sup> Id. at 933; citing Finger Lakes Racing Assn., *supra* note 21.

<sup>31</sup> Id. at 934.

<sup>32</sup> Id. at 931-934.

<sup>33</sup> Id. at 934. The Court, in referring to *Sullivan County* is actually referring to Finger Lakes, *supra* note 11.

The court thusly, followed the precedent created by the Finger Lakes decision.

In Joslin v. Regan, a Constitutional challenge, based on an alleged insufficient message of necessity by the Governor, was denied.<sup>34</sup> The petitioners again argued that message of necessity did not have sufficient factual support to justify immediate legislative action.<sup>35</sup> The Court relied upon the Court of Appeals in the Finger Lakes decision once again, holding that “ ‘the courts ordinarily should not intervene to nullify an act of the Governor addressed to legislative action’ which literally and reasonably conforms with the constitutional requirements.”<sup>36</sup>

In Dalton, the message in question is only one sentence, stating, “These bills [*sic*] are necessary to enact certain provisions of law.”<sup>37</sup> This statement itself is lacking any stated factual support. However, the courts have repeatedly held that those facts need not be stated in his message of necessity.<sup>38</sup> Further, based upon the aforementioned precedents, the facts serving as the basis for the Governor’s opinion need only be reasonable and rational.<sup>39</sup> The only content that is required in the message of necessity is the Governor’s opinion; that alone is sufficient and the court is hesitant to disturb that in favor of inserting their own judgment.<sup>40</sup>

In submitting this bill for the immediate consideration of the legislature, Governor Pataki was working to amend current provisions of law in an attempt to secure increased

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<sup>34</sup> Joslin v. Regan, 63 A.D.2d 466, 406 N.Y.S.2d 938 (4th Dept. 1978).

<sup>35</sup> Id. at 5-6, 406 N.Y.S.2d 940.

<sup>36</sup> Id. at 7, 406 N.Y.S.2d 940; citing Finger Lakes, *supra* note 11.

<sup>37</sup> Corneilius D. Murray, Esq., James A. Shannon, Esq., Paul A. Gomez, Esq., & Robert T. Fullem, Esq., Memorandum of Law in Support of Plaintiff’s Motion for Summary Judgment in Action No. 1. December 23, 2002, p. 2.

<sup>38</sup> Norwick v. Rockefeller, *supra* note 24.

<sup>39</sup> Finger Lakes Racing Assn., *supra* note 21, at 220.

<sup>40</sup> See Finger Lakes Racing Assn., *supra* note 21, Norwick v. Rockefeller, *supra* note 27, and Joslin v. Regan, *supra* note 33.

revenue for New York State in a post-9/11 economy.<sup>41</sup> With state revenues shrinking, any resuscitation to the state budget, as well as the state economy could be a reasonable and rational basis for the Governor's opinion of necessity. The expansion of gambling alone could pad the state coffers with portions of gaming revenues.

Further, the construction of the six casinos in the state could infuse the New York State tourism industry, one of the state's largest industries, as well as the job market. The Poughkeepsie Journal credits the legislation as "largely prompted by the state's dire need for cash."<sup>42</sup> With the state receiving a portion of the revenue from slot machines, the aftermath of September 11 being in the forefront of people's minds, and "the economy tumbling, long-running legislative opposition to casinos was tossed aside."<sup>43</sup>

If the legislators in the Assembly and the Senate believed that the Governor's message of necessity was insufficient, they could have simply voted against the measure. The opponents of the bill allege that "unelected power brokers and influence-peddlers had more say than the rank and file members of both houses, who were left in the dark and asked by their leaders to vote on the bill immediately, virtually sight unseen, without any debate and with only a few minutes to explain their vote."<sup>44</sup> Further, in *The Business Review*, Mr. Murray, attorney for the plaintiffs, alleged, "the governor and legislative leaders forced a vote on the complex bill without a valid message of necessity."<sup>45</sup> Opponents

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<sup>41</sup> "Dalton v. Pataki – Round One," *Albany Law School: Program on Racing and Wagering*, November 2002. Available at <http://www2.al.edu/glc/wagering/daltonvpataki.html>.

<sup>42</sup> Yancey Roy, "Lawyer: Catskills casinos coming soon," *The Poughkeepsie Journal*, April 23, 2003.

<sup>43</sup> *Id.*

<sup>44</sup> "Legislative Intent and New York's 1966 Lottery Amendment," *Albany Law School: Program on Racing and Wagering*, May 2002. Available at <http://www2.als.edu/glc/wagering/Legislative%20Intent%20and%20New%20York's%201966%20Lottery%20Amendment.doc>.

<sup>45</sup> *The Business Review (Albany)*, "Lawsuit challenging casinos go to trial," October 31, 2002. Available at <http://albany.bizjournals.com/albany/stories/2002/10/28/daily53.html?t=printable>.

claim the resulting legislation “was a bill ‘that mocks everything we are supposed to believe in about our republican form of government.’”<sup>46</sup>

This seems to be a slap in the face to the legislators of this state. The implication is that the legislators are not able to decipher the meaning and intention of the bill, and grasp its concepts firmly enough to make an educated decision. Regardless of any arguments otherwise, legislators always possess the option to deny passage of legislation. Our lawmakers are elected specifically to serve the function of making that choice. We have elected and instilled in our legislators the authority to chose what would best represent the views of their constituents. That being said, to turn around and challenge the approval of a bill would be the real tragedy that would mock the democratic system.

As the New York Courts have stated in the aforementioned decisions, the Governor’s message of necessity is something that is based upon his own opinion. The New York State Constitution clearly allows for such messages, based solely upon the Governor’s opinion, under whatever he may consider exigent circumstances. The assertion of an insufficient message has no basis, because in the face of the 9/11 tragedy, as well as the apparent state fiscal crisis, it would clearly be rational and reasonable for the Governor to call for legislative provisions that would help alleviate these problems.

Additionally, had the legislature felt the time for consideration of the bill was insufficient; they could simply have refused to pass the bill.<sup>47</sup> The message itself, as well as the action of the legislature, in supporting the Governor’s message was “unassailable.”<sup>48</sup>

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<sup>46</sup> “Legislative Intent and New York’s 1966 Lottery Amendment,” *supra* note 44.

<sup>47</sup> Finger Lakes, *supra* note 11.

<sup>48</sup> Norwick, *supra* note 8.

