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New York State Bar Association

Committee on Attorneys in Public Service

Hon. James F. Horan, ALJ Chair

Associate Dean Patricia E. Salkin, Vice Chair

2006 Annual Meeting

Tuesday, January 24, 2006
Programs 9 a.m.–5:15 p.m.
Awards Reception: 5:30 p.m.–7:30 p.m.

MORNING SESSION:
SUPREME COURT REVIEW

Program Chair
James A. Costello, New York State Court of Appeals

Speakers
Susan Herman, Centennial Professor of Law, Brooklyn Law School
Burt Neuborne, Pomerory Professor, New York University School of Law

In June 2005, the Supreme Court of the United States finished an extraordinary term, issuing significant decisions addressing the Establishment of Religion, The Takings Clause, federalism, the Federal Sentencing Guidelines and the death penalty for juveniles. The Court's docket for the October 2005 Term lists cases of great interest to public service attorneys, addressing such topics as physician-assisted suicide, abortion rights and protest, the impact in death penalty cases of claims of innocence based on new DNA evidence, and mandated on-campus interviewing by the military. Join eminent constitutional scholars Susan Herman and Burt Neuborne as we discuss the work of the Court, the potential impact of the new Chief Justice and that of the current nominee for Associate Justice.

Afternoon Session

Current Legal Issues in Governmental Reform: Judicial Elections, Public Authority, and State Government

Program Chair
Donna J. Case, U.S. District Court, Utica

Moderator
Patricia E. Salkin, Albany Law School, Albany

Speakers
John Feerick, Fordham University School of Law, New York
Fern Schair, Chair, Board of Directors, The Fund for Modern Courts, New York
Ira Millstein, Weil Gotshal & Mendes, New York
Assemblyman Richard L. Brodsky, Westchester County Chairman, Committee on Corporations, Authorities, and Commissions

Judicial elections, public authorities, and governance of the state are three areas where some say reform is needed. The method of selecting judges in New York State has a direct and significant impact on public confidence in the judiciary. Should the judicial election process be changed? Is reform needed, as Public Authorities in this State increasingly have become the focus of concerns about governmental integrity? Does New York State's legislative process need to be revised and, if so, is the State Constitution the place to effectuate such fundamental changes? Associate Dean and Professor Patricia E. Salkin will moderate three panels, composed of leading authorities on these subjects, in discussing proposed reforms in these areas of State government.

FOLLOWING OUR EDUCATIONAL PROGRAMS, please join your NYSBA friends and colleagues at the 7th Annual CAPS Awards for Excellence in Public Service Reception, New York Marriott Marquis, 37th Floor, Sky Lounge, from 5:30–7:30 p.m. The reception is free of charge and open to NYSBA members and their colleagues.

Our 2006 Award for Excellence honorees:

The Honorable Jonathan Lippman, Chief Administrative Judge, State of New York
David B. Klingaman (posthumous award) NYS Court of Claims
Office of the Staff Judge Advocate of the 42nd Infantry Division

Message from the Chair

James F. Horan

In this issue of the *Journal*, I'd like to welcome the *Journal*'s new Editor, review the reception that the Committee on Attorneys in Public Service (CAPS) sponsored in Albany in June, discuss changes in some CAPS sub-committees and announce the winners of the CAPS Award for Excellence in Public Service.

The *Journal*: To begin this month, I'd like to thank Rose Mary Bailly, from Albany Law School, for agreeing to take over as the *Journal*'s new Editor. This issue on the Office of the Governor marks the inaugural issue for Rose Mary as Editor and for the new Albany Law School student editors. The issue comes at an interesting time, as New York faces a transition in the Governor's Office, following Governor Pataki's announcement that he will not seek re-election. Rose Mary will discuss the issue in more detail in her column.

The Reception: One of the missions of CAPS is to help integrate public service attorneys into the New York State Bar Association's (NYSBA) Sections and other freestanding Committees. Such integration will help to assure that public service attorneys have influence on NYSBA's activities and positions and will provide the Sections and Committees with the benefit of the public service attorneys' expertise.

On June 8th, CAPS and the NYSBA Membership Committee hosted a reception at the Bar Center in Albany as a means to encourage public service attorneys to join NYSBA and to encourage public service attorneys who belong to NYSBA to become active in Sections and Committees. In addition to inviting public service attorneys from the Capital Region to the Reception, we also invited all the NYSBA Sections and Committees to send representatives to speak about the work of their Sections and Committees and to provide examples of the publications and programs that the Sections and Committees produce. Associate Judge Victoria Graffeo of the Court of Appeals spoke at the Reception. We were also honored to welcome Chief Judge Kaye and Associate Judges Rosenblatt, Ciparick and Read from the Court of Appeals, as well as Presiding Justice Cardona of the Appellate Division for the Third Department, former State Senator John Dunne and former NYSBA President Lorraine Power Tharp. Over 100 other persons attended and most of the NYSBA Sections and Committees were able to participate. Several Sections and Committees were enthusiastic about participating not only for the chance to recruit new members, but also for the chance to participate in an event that calls attention to the often overlooked contribution that public service attorneys make to NYSBA and to the legal profession in general. We thank Judge Graffeo for her remarks, the Membership Committee for their co-sponsorship and the Sections and Committees for their participation. Photos from the Reception appear later in this issue.

The Sub-Committees: In furtherance of our mission to increase the influence of public service attorneys within the Association, CAPS has created a sub-committee on legislative issues. In conjunction with the NYSBA Executive Committee and in compliance with positions that the NYSBA House of Delegates has established, the legislative sub-committee will develop and comment on legislation of interest to public service attorneys, with the emphasis on administrative law, public service loan forgiveness, procurement law and policy, attorney regulation, public integrity, disclosure and public finance. Spencer Fisher from the New York City Corporation Counsel's Office chairs the sub-committee.

"In addition to our missions concerning integration and increased influence, CAPS also exists to provide continuing legal education programs of interest to attorneys in the public sector, to provide resources related to practice, to serve as a network for public sector attorneys and to facilitate the contributions of public service attorneys as members and leaders of communities."

In addition to our missions concerning integration and increased influence, CAPS also exists to provide continuing legal education programs of interest to attorneys in the public sector, to provide resources related to practice, to serve as a network for public sector attorneys and to facilitate the contributions of public service attorneys as members and leaders of communities. To further our mission on continuing education, Donna Case and Jim Costello, the Education Sub-Committee chairs, are now planning the full day continuing education program for Tuesday January 24, 2006 at the NYSBA Annual Meeting. Further details on the Annual Meeting Program appear later in this issue. My colleague, Larry Storch, has just agreed to chair the tech-

nology sub-committee that overseas the CAPS Website (http://www.nysba.org/caps). We hope to be able to increase the resources available on the Website for public service attorneys and to provide opportunities through the Website for networking. Steve Casscles from the State Senate has also agreed to chair a subcommittee to help publicize the work and accomplishments of public service attorneys.

The Award: Since 2000, CAPS has presented an Award for Excellence in Public Service to recognize excellence by a member or members of the legal profession in the commitment to and the performance of public service. For the first time this year, CAPS is presenting the award to three co-recipients:

- Judge Jonathan Lippman, Chief Administrative Judge of the State of New York, for outstanding leadership in public service,
- David B. Klingaman, the late Chief Clerk of the New York Court of Claims, for a distinguished forty-year career in public and community service, and,
- the Office of the Staff Judge Advocate for the Army National Guard for the 42nd Infantry Division, currently serving in Tikrit, Iraq, for excellence and dedication to public service by a legal office or group.

We will present the award at the CAPS Reception at the NYSBA Annual Meeting at the New York Marriott Marquis on January 24th. Further details on the reception appear elsewhere in this issue.

Hon. James F. Horan, Chair of the NYSBA Committee on Attorneys in Public Service, serves as an Administrative Law Judge with the New York State Department of Health. He is a past President of the New York State Administrative Law Judges Association.

Editor's Foreward

By Rose Mary Bailly

Beginning in 1777 with the election of George Clinton, "the Father of New York," New York has had 53 governors including our current governor, George Pataki. They have come from various towns and counties across the state with various political views. Their tenures have been varied as have their records as history records such things. Some have gone on to national prominence, some have remained at home. But each of them has felt the tension between their office and the legislature—always at odds over how much power each should be allowed to wield.

Today, the Office of the Governor of New York is regarded as one of the most powerful in the nation but the tension continues. This issue of the *GLP Journal* examines the Office of the Governor and explores how that tension has played out both in the past and the present. A special thanks to our authors who one and all bring their keen insight and thoughtful analysis to this topic.

Our two introductory articles on gubernatorial power both past and present, set the stage for a deeper appreciation of the Office of the Governor itself and the current debate in New York over authority of the legislature versus the governor with respect to the budget. That debate not only serves as a current civics lesson but reminds us of the history surrounding the Office of the Governor. The role of governors in the United States over the years as described by Nelson Dometrius' article, *Governors: History and Context*, has been one involving the dynamic of power of the governor and the power of the legislature. And although Professor Dometrius suggests that the current trend is toward increasing power in the Executive Branch, the current debate between Governor Pataki's administration and the New York Legislature illustrates that at least in New York, that trend is being resisted to some degree. As Thomas Marks notes in his article, *Strong Governor States vs. Weak Governor States*, the acceptance of increased power in the Executive Branch is likewise not uniform around the country. Based on his analysis of a system of ranking gubernatorial models based on implied, inherent powers of the governor, New York is not at the top of the strong gubernatorial model but rather tied with two other states for fourth place.

Catherine Bonventre guides us through the constitutional parameters of the Office of the Governor. The undercurrent of her reflection is the ongoing concern of concentrating too much power in one individual no matter how wise, how discreet, and how personable. Robert F. Pecorella and Jeffrey M. Stonecash succinctly summarize the tension between the Office of the Governor and the Legislature alluded to earlier as *Gubernatorial Powers in New York: The Ongoing Battle.*

Not surprisingly, several authors offer various perspectives on this ongoing battle in the context of who should control New York's budget process, an issue dating back at least to the 1920s and the era of progressive reform. In his article, *Fiscal Discipline in New York State*, Joseph Zimmerman points out two ways in which the legislature can counter the governor's power over the budget: "member items" and deliberate delay, making it no surprise that New York's on-time 2006 fiscal year budget was the first since 1982. The governor's counter is the line item veto which also has been sorely tested. Both Professor Zimmerman and Robert Ward, in his article, *In Defense of Executive Budgeting*, criticize the legislative response to the Court of Appeal's recent rulings regarding the strength of the governor's budget powers. The Ward article provides details on the proposed constitutional amendment and contrasts it to the intentions of the reformers of the progressive era whose ideal was a strong governor who could assure the state's fiscal responsibility. Proposal One—the constitutional amendment addressing the role of the legislature in the budget process discussed in the Zimmerman and Ward articles, and the article by Gerald Benjamin described below—appeared on the state ballot on November 8, 2005. On Election Day Proposal One was rejected by the voters. The reasons in favor of its rejection described herein appear to have carried the day.

"[E]ach of them has felt the tension between their office and the legislature—always at odds over how much power each should be allowed to wield."

In her article *The Right to Legislate: How Has the Court of Appeals' Decision in* Pataki v. Assembly *Affected the Executive/Legislative Balance of Power?*, Janet Horn indicates that the resolution of the battle for power is not concluded. The voters' response to Proposal One, and the alternatives to it discussed in this issue would seem to add further support to that view.

Despite the uncertainty that may remain over the relative powers of the governor and the legislature, there can be little doubt of the governor's considerable influence over the agencies in the Executive Branch. Hermes Fernandez, in his article, *Gubernatorial Oversight*

of Executive Agencies, points out that the governor's powers are not without limits. The Constitution places the authority over state funds in the hands of the state comptroller, the authority to litigate on behalf of the state in the hands of the attorney general, and the authority over education in the hands of the State Board of Regents, a body elected by the majority vote of the senate and assembly sitting and voting in a joint session. Despite these limits, New York's governor has substantial power and influence over state agencies. The governor appoints heads of agencies and controls agency budgets and agendas through the secretary to the governor, counsel to the governor, the governor's appointments secretary, and the governor's staff working on the "second floor."

Judith Saidel views the power to appoint through the lens of adding democratic diversity to government at the highest levels in her article, *Exercising the Power of Appointment: An Analysis of Variation in Gubernatorial Appointments*. Professor Saidel gives us an in-depth analysis of the effect of appointments not only to reward loyal supporters and address policy agendas but also to achieve change through the appointment of diverse groups of individuals.

Norman Greene asserts that the power to appoint as it extends to the judiciary deserves special attention in his article, *The Governor's Power to Appoint Judges: New York Should Have the Best Available Appointment System.*

A glimpse at the future history of the Office of the Governor brings us to the conclusion of our issue when Dean Gerald Benjamin offers his perspective on the influence of our current governor, George Pataki, on history in his article, *George Pataki and the Institution of the Governorship in New York.*

As always, this issue was born of collaboration. Our Board of Editors was instrumental in suggesting authors and providing support. The Albany Law School student editorial staff, led by this year's Executive Editor Ryan Emery, brought their admirable skills to bear in assisting our authors through the editorial process. The staff of the New York State Bar Association, starting with Pat Wood and extending to Wendy Pike and Lyn Curtis, deserve special thanks for their admirable patience and good humor in seeing us through the printing of this issue.

I appreciate the opportunity to oversee this issue and accept the attendant responsibility for any flaws, mistakes, oversights or shortcomings in these pages. Please let me know your comments and suggestions.

Governors: History and Context

By Nelson C. Dometrius

The governorship is one of the earliest American public offices. Today, it is a state's central political office. This has not always been so. Nor is the governorship a singularity, with each state's unique history and culture adding distinctive contours to their governorship. Yet there is a common core to the office that has followed national trends.

Governors exist in a political system, an interrelated set of forces that includes other state officials, political parties, national policies, economic forces, and more. Colonial governors *were* the government. Their extensive powers included command of the armed forces, sole selector of judges and other governing officials, and granting pardons. The political system at the time was trans-oceanic and the gubernatorial office served primarily as an agent of the British crown and parliament.

The British heritage common to most colonists also included faith in legislative bodies to represent popular interests and limit the power of the crown. Hence, colonial legislatures were common, though often meeting only sporadically. As revolutionary fervor grew, legislatures became a platform for condemnations of British policy. Colonial governors, however, possessed an absolute veto over legislative actions plus the power to dissolve the body entirely—a step taken with increasing frequency as protests over British policies grew. The colonial experience amplified the belief of early Americans that executives were to be feared and legislatures trusted.

The product of this history was reflected in the Articles of Confederation, which included no chief executive. States, then the center of political authority, did incorporate the executive office, but often only in name. Many limited their governors to a single, one-year term, as often as not selected by the legislature, and spread executive power widely. The New York Constitution of 1777 was stronger than many, creating a governor selected by popular election for a three-year term, but the state treasurer was selected by the legislature and other state officials by a council. Only Massachusetts and South Carolina gave their early governors a veto. In New York, veto power was vested in a council consisting of the governor and judges of the supreme court. The tenor of the times was aptly represented by Leslie Lipson, citing a North Carolina delegate returning from that state's constitutional convention. Asked how much power the constitution would give to the state's governor, the delegate replied: "Just enough to sign the receipt for his salary."[1] In the political systems of the newly independent states, the governorship was frequently an office with "many checks and few balances."[2]

The path of the governorship since then has not been linear, but rather a cycle of surges and declines. Immediate post-revolutionary times raised problems of economic and political stability, which led, at the national level, to our current federal structure replacing the Articles of Confederation. Washington's presidential service allayed some fears about the executive office. Later Andrew Jackson broke the Virginia aristocracy's domination of the presidency and symbolized the office as a representative of the popular will. The same period saw numerous well-publicized examples of corruption by power-laden state legislatures. The sum of these forces led many states to strengthen their governorships via popular election instead of legislative selection, and enhanced gubernatorial authority. New York, for example, adopted a gubernatorial veto in 1821 with a hefty two-thirds override requirement.

"Governors exist in a political system, an interrelated set of forces that include other state officials, political parties, national policies, economic forces, and more."

The post Civil War Reconstruction era led to an imperial governorship in the defeated states. The minority of carpetbaggers and union sympathizers now controlling the South required centralized power to govern effectively. Political power was drawn to state capitals—particularly in the governorship—virtually denuding counties, towns, and even courts of authority. It was not unknown for Reconstruction governors to remove numerous local leaders as presumed Confederate sympathizers, replacing them with their own appointees. At the end of Reconstruction, the former Confederate states reacted through constitutions targeted to the evils of Reconstruction. Lengthy statutory constitutions locked in numerous policies so they could not be changed by statute. Administration at the state and

county levels was dispersed among multiple elected officials, most with limited tenure. Southern governors were but a first among equals, and frequently in name only. This gubernatorial weakening was not limited to the South, with some emerging Western states adopting elements of the Southern model.

Eastern and Midwestern states were affected by different forces, though pushing in a similar direction. The growing industrialization and urbanization of older states demanded greater government action to deal with urban needs and monopolistic industries. Yet corrupt political machines often had gained control of existing government structures. The response of reformers was to lodge new government programs under the authority of independent boards and commissions. With board members either separately elected or appointed for terms far exceeding that of any governor, state government programs became a balkanized set of fiefdoms with little coordination and often at odds with one another.[3] One agency would complete a new road only to have a second tear it up a month later to install a new sewer. The fire marshal would require a landlord to install a fire escape on a property that the building inspector required to be demolished, each imposing a penalty for non-compliance.

A fair summary of American political history is that its first 100 years emulated ancient Greece with its focus on how to govern democratically, while its second 100 years more closely followed Rome with an emphasis on how to govern well. The period from about 1890 to the late 1920s saw the rise of what is commonly termed the state reorganization movement. Scholars, led by Woodrow Wilson and supported by multiple studies emanating from the New York Bureau of Municipal Research, sought to apply "scientific principles" to the management of public programs. The problem they saw was pervasive overlap, duplication, inconsistency, and waste stemming from widely dispersed authority, which led to governments resembling multi-headed Hydra. The solution was clear, efficient administration, requiring a clear, hierarchical chain of command. Related programs should be combined into a limited number of agencies whose heads were all under the authority of the governor's coordinating hand.

The state reorganization movement had early successes, particularly in the older and more urbanized states where the problems were most severe. It then went into a period of quiescence from the 1930s to the 1950s, never disappearing, but remaining with only sporadic successes. There were two reasons for this. First was the vast expansion of the federal government required by two world wars that surrounded the Great Depression and fueled by revenues generated from the adoption of the income tax. Second, many states receded into minimalist governments largely due to state legislative malapportionment.

Most states followed the national model of upper legislative house seats representing geographical regions, typically counties. Lower legislative seats theoretically were apportioned on the basis of population, but district lines often had not been revised for 50 or more years. The population movement to the cities between the 1930s and the 1960s produced vast imbalances in representation, exemplified (in the 1960s) by Los Angeles County with one million plus residents possessing the same voting power in the California state senate as Alpine County with only 16,000 residents. Urban demands for government programs to assist with housing, transportation, and air pollution were blocked by rural-dominated state legislatures whose primary interests were low taxes, limited government, and no changes in government structures that had been created to benefit them. The majority of states, therefore, became political backwaters whose primary interests were to resist change. Governors of such states were expected to serve as good-time Charlies, innocuous individuals carrying out the office's ceremonial functions and upsetting no one.

The state reorganization movement came back with a vengeance in the 1960s and 1970s. The U.S. Supreme Court reapportionment decisions from *Baker v. Carr* produced state legislatures that responded to urban needs for more and better-funded state programs. Many of Lyndon Johnson's Great Society programs, addressing the urban demands earlier ignored by the states, were devolved back to the states from the Nixon through the current Bush administrations. Multiple elected administrative officials continued to exist, but with declining importance as newer, and large-budget, state responsibilities in such areas as health and the environment were assigned to statutorily created agencies headed by gubernatorial appointees. To effectively govern these increased activities, gubernatorial terms were expanded from the traditional two years to four, veto power was strengthened with the addition of the item veto in many states, and governors were given greater staff assistance for budget development and program management. This growing importance of the states' executive offices has attracted younger, more ambitious, and more capable individuals to the governorship who in turn continue to push for further expansion of executive authority.

The structural power of the governorship still varies, and few governors can claim to be presidents writ small when it comes to having executive authority constitutionally vested solely in their offices. Gubernatorial staffs range from as low as 9 in Nebraska to 310 in Florida. New Hampshire and Maine still restrict their governors to two-year terms, and slightly less than half

of the states continue with lieutenant governors elected separately from the governor. Occasional intra-executive squabbles also continue, such as when Governor George Bush of Texas sued his own attorney general over the distribution of funds from the successful lawsuit against tobacco companies.

"Regardless of variances in office strength, contemporary governors can lay solid claim to pre-eminence within their states, a position many did not hold in the past."

However, government by committee can function even moderately well only when government is small. The vast post World War II population move from the farm to the city seems to have changed the waxing and waning cycle of gubernatorial authority into a more linear, upward trend. The rise of television since the 1960s has also allowed many a governor to maneuver around office limitations, building informal political resources. Many Eastern and Midwestern urban states have long had strong governorships and proactive governments, but the rest of the country is now catching up. This is symbolized by those using the increased prominence of the state office to move into the national political scene. Through the 1960s, presidential contestants tended to come from such states as New York, Massachusetts, and Ohio. Since then, population and political power has moved south and west, giving rise to presidents from Georgia, Arkansas, California, and Texas. Regardless of variances in office strength, contemporary governors can lay solid claim to pre-eminence within their states, a position many did not hold in the past.

Endnotes

1. Leslie Lipson, The American Governor: From Figurehead to Leader 14 (1939).
2. Larry Sabato, Good-bye to Good-time Charlie: The American Governorship Transformed 4 (2d ed. 1983).
3. That the governor sometimes served as one member of such boards was often more a hindrance than a help consuming the governor's time with unimportant details. For example, in the early 1900s the New York governor's service on the Building Improvement Commission required devoting time to such weighty issues as plastering a toilet, building a henhouse, and deciding on the location of a piggery.

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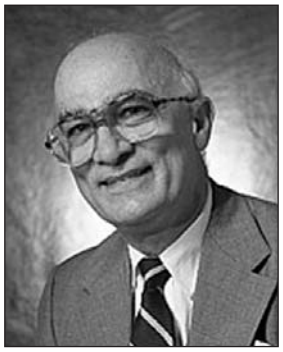
Dr. Nelson C. Dometrius is a professor of political science and past chair of the Department of Political Science at Texas Tech University. His research on state politics and the governorship has appeared in such publications as: *The American Journal of Political Science*, *American Politics Quarterly*, *The Journal of Politics*, *Oxford Companion to American Law*, *Public Administration Review*, *Social Science Quarterly*, and *State Politics and Policy Quarterly*.

Strong Governor States vs. Weak Governor States

By Thomas C. Marks, Jr.



My charge, as I understand it, is to briefly discuss strong governor models of state government as compared to weak, or at least weaker ones. One system that ranks such things appears to have West Virginia at the top (strong governor), New York tied with two other states ranked fourth, and Virginia tied with one other state, situated last.[1] I will start the discussion with West Virginia and then discuss New York and Texas.[2] What I discovered about West Virginia will inform the rest of the discussion as explained in the following paragraph.

The template I am using to measure strong governor and weaker governor systems is the scope of what might be called the governor's implied, inherent power. By this I mean the penumbra of power that surrounds or emanates from the executive power allocated to the governor by the state Constitution. Such power does not, in my hypothesis, flow from a statute, although within the bounds of separation of powers it might be limited or expanded by statute. I use the word allocated advisedly because I do not believe that, for the several states having inherent power, their constitutions can ever grant anything at the state level of government. Allocate already existing inherent power, yes; grant power, no. A.E. Dick Howard has suggested a somewhat similar approach: "The central question implicit in any clause vesting the executive power is whether it is an independent grant of power or whether it only encompasses those duties enumerated elsewhere in the document."[3] This approach or template is—for me—a mere suggestion at this point or a hypothesis if you will. It seems to work in the West Virginia situation and, to a somewhat lesser degree, in New York. In Texas, the weaker governor example, it may still work but within a much narrower range. This is because the people of Texas, as we shall see, have diluted the governor's power by making him, for many purposes, little more than first among equals, or at least near equals, in a mostly elected executive structure. Of course, this is only one measure of gubernatorial power. Other things, such as the strength of the governor's veto power, or the personality of the governor and his or her willingness to use existing power, cannot be overlooked.[4]

The West Virginia Constitution spells out the general powers of the governor in a fairly common manner: "The chief executive power shall be vested in the governor, who shall take care that the laws be faithfully executed."[5] This power, combined with the governor's role as commander in chief of the National Guard when not in federal service,[6] led to the Supreme Court of Appeals' decision in *Hatfield v. Graham*.[7] In *Hatfield*, the court opined that because of these two constitutional provisions, especially the former, executive acts of the governor were virtually unreviewable by the judiciary if they were not within the scope of some other executive officer's powers and not done in bad faith. The court did point out, however, that the governor was subject to the impeachment process.[8]

Since *Hatfield* was decided almost 100 years ago and involved unusual circumstances, its continuing precedential value is uncertain. One commentator has suggested, however, that although the case is troubling on at the least freedom of press grounds, it may provide some scope for the implied inherent or penumbra theory of gubernatorial powers.[9] Although not stated exactly as such, this view is apparently based upon the constitutional allocation to the governor of inherent executive power and the penumbra surrounding it as understood by West Virginia's highest court.

"This is because the people of Texas . . . have diluted the governor's power by making him, for many purposes, little more than first among equals . . . in a mostly elected executive structure."

Briefly stated, the *Hatfield* court had before it a case in which—avoiding where possible the complexities of common law pleading—the governor and others had been sued for damages to a newspaper (trespass on the case) caused when its plant was seized and one issue of the paper was destroyed. The governor and the other defendants moved to dismiss the complaint. Their motion rested upon an affidavit that, for pleading purposes, was admitted to be true by the plaintiff's demur. The trial court refused to accept the affidavit and moved toward trial. At that point, the governor and the others sought a writ of prohibition from the Supreme Court of Appeals. The facts spelled out in the affidavit indicated that parts of several counties were, and had been for some time, in a state of insurrection that had

produced considerable property damage and a number of deaths. The governor sent in the National Guard to restore order but that move was not met with total success. Finally, when a peaceful settlement was in the works, the plaintiff's newspaper, which had been fanning the flames of the insurrection all along, was prepared to publish an issue urging rejection of the settlement. At this point, the National Guard, on the governor's orders, arrested the officers of the newspaper, seized the printing plant, and destroyed the offending issue.

With one justice dissenting, the court granted the writ of prohibition, and held that, on these facts, the lower court lacked jurisdiction over the governor (the others were acting on his orders). As the court stated:

> It follows from the very nature and Constitution of our government, and from the character of the powers and duties with which it has clothed the chief executive, that he must determine for himself the necessity for the exercise of such power as is vested in him. There is no higher authority in the state to determine it for him. Within his constitutional duties and powers he is supreme. Like any other officer of the state he is [subject to impeachment].[10]

It can be argued that penumbra of implied inherent power that resides in the office of governor in West Virginia has, in a sense, been recognized by the federal courts as well. In *Kirker v. Moore*,[11] the governor, after consultation with the West Virginia Road Commissioner, fired a number of state employees who refused to report to work when bad weather created very hazardous conditions in certain parts of the state's highway system. The discharged employees sued and the governor moved to dismiss their complaint. In arguing against the governor's motion, the employees argued, *inter alia*, that the governor had exceeded his authority. Even though a West Virginia statute made the road commissioner "responsib[le] for employment of Commission Personnel" the district judge held that the governor's "chief executive power" under article VII, § 5 of the Constitution, together with § 18 of article VII, which "require[d] all officers of the Executive Department to keep the Governor advised of their activities," was sufficient to support the governor's actions.[12] As the court also pointed out, the commissioner served "at the will and pleasure of the Governor." This seems to suggest that in the court's view the commissioner went along with the governor's action. That being the case, as the court put it, it made no difference that the governor made the public announcement of the firings.

Thus, both state and federal courts appear to have little trouble giving sanction to a seemingly broad theory of implied inherent power flowing from a constitutional allocation of executive powers which are themselves inherent. As suggested earlier, such power does not flow from statute, although within the bounds of separation of powers it might be limited or expanded by statute. And, of course, as also suggested earlier, the personality of the governor and his or her willingness to use the power and other factors cannot be overlooked.

The pattern of implied inherent gubernatorial power identified in West Virginia seems to be generally repeated in New York, although possibly to a somewhat lesser degree. It can perhaps be argued that this is so because of the role the legislature has chosen to play. The New York Constitution provides that "[t]he executive power shall be vested in the governor."[13]

In *Johnson v. Pataki*,[14] Governor Pataki superceded a district attorney in a particular case that was challenged. The Court of Appeals began its analysis on the merits by recognizing, "that when the Governor acts by Executive Order pursuant to a valid grant of discretionary authority, his actions are largely beyond judicial review." The Court went on to opine:

> Judicial review in such cases is generally limited to determining whether the State Constitution or the Legislature has empowered the Governor to act, and does not include the manner in which the Governor chooses to discharge that authority [case citations omitted]. For abuse of lawful discretionary authority, the remedy as a rule lies with the people at the polls, or with a constitutional amendment, or with corrective legislation.[15]

In a sense, *Sacco v. Pataki*[16] can be seen as a federal court affirmation of the governor's implied inherent power in a way somewhat similar to *Kirker v. Moore* was with regard to West Virginia. In *Sacco*, the federal district court upheld Governor Pataki's executive modification of the law governing the operating corporation that ran the Jacob Javits Center. He did so "to eradicate corruption and ties to organized crime from the Javits Center."[17] The legislature had earlier refused to enact the law that Pataki wanted, so he acted instead on his executive authority. In holding that this action did not constitute a violation of separation of powers under the New York Constitution, the court referred to the "governor's broad authority to execute the [legislative act] that created the Javits Center."[18] The legislature's refusal to act could not "be interpreted as a revocation of" that "broad authority." In addition to article IV, § 1 quoted in pertinent part above, the court also relied on § 3, which "provides that the governor 'shall expedite all such measures as may be resolved upon by the legis-

lature, and shall take care that the laws are faithfully executed.'"[19]

The most telling aspect of the power of the governor in Texas is found in the structure of the executive branch. "The Executive Department of the State shall consist of a Governor, who shall be the Chief Executive Officer of the State, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Commissioner of the General Land Office, and Attorney General."[20] The Interpretive Commentary found in *Vernon's Constitution of the State of Texas Annotated* just about says it all:

> [U]nlike some states, the executive department . . . is decentralized in that there is a defusion of executive authority within the executive department itself. The governor, to be sure, is the chief executive officer, but executive authority is distributed by constitutional mandate among six other officers, all but one of which are elected by popular vote. Furthermore, they are largely independent of the governor in the exercise of their powers. *** This in effect established a plural executive, and was done to weaken the executive branch, for such an arrangement makes for a separation of powers within the executive department itself.[21]

It may be that, if I am correct in my hypothesis about a penumbra and implied inherent power, a residuum of it may exist in the Texas governor, vastly limited, of course, by the powers of the other members of the executive branch.

There are no doubt many factors to be considered in analyzing gubernatorial power. I believe the one I have principally discussed is a useful part of the mix.

Endnotes

1. Thad Beyle, Gubernatorial Power, *available at* <http://www.unc.edu/~beyle/tab7.6-SummaryPowers05.doc>. Since I wanted to pursue my own hypothesis, I did not attempt to ascertain upon what facts this ranking was based.
2. I substituted Texas for Virginia when my research did not bear out the latter's low ranking. As A.E. Dick Howard has commented, "Such are the powers of the Governor in twentieth-century Virginia that he has been ranked as one of the seven strongest state governors." A.E. Dick Howard, Commentaries on the Constitution of Virginia 589 (1970), *citing* Joseph H. Schlesinger, *The Politics of the Executive*, *in* Politics in the American States 229 (Herbert Jacob & Kenneth N. Vines eds., 1965).
3. Howard, *supra* note 2, at 587.
4. As Professor Howard has pointed out, "The prestige of the office, the Governor's easy access to the press, and other informal sources of power add to his stature." *Id.* at 589 (note omitted).
5. W. Va. Const. art. VII, § 5.
6. *Id.* art. VII, § 12 ("The governor shall be commander-in-chief of the military forces of the State (except when they shall be called into the service of the United States), and may call out the same to execute the laws, suppress insurrection and repel invasion.").
7. 81 S.E. 533 (W. Va. 1914).
8. *Id.* at 535.
9. Robert M. Bastress, The West Virginia State Constitution: A Reference Guide 190 (1995).
10. *Hatfield*, 81 S.E. at 535.
11. 308 F. Supp. 615 (S.D. W.Va. 1970), *aff'd*, 436 F.2d 423 (4th Cir.), *cert. denied*, 404 U.S. 824 (1971).
12. *Id.* at 623.
13. N.Y. Const. art. IV, § 1.
14. 91 N.Y.2d 214, 668 N.Y.S.2d 978 (1997).
15. *Id.* at 223.
16. 982 F. Supp. 231 (S.D.N.Y. 1997), *aff'd*, 278 F.3d 93 (2d Cir. 2002).
17. *Id.* at 234.
18. *Id.* at 247.
19. *Id.*
20. Tex. Const. art. 4, § 1.
21. A.J. Thomas, Jr. & Ann Van Synen Thomas, Vernon's Constitution of the State of Texas Annotated 680 (1997). The authors of the commentary point out that:

    > The framers of the Constitution of 1876 were in no mood to return to the principle of the Constitution of 1845 and vest all the executive power in the governor, for after reconstruction experiences they were determined to cut down still further on the governor's power so as not to see a future renewal of his despotic control over state administration.

    Id.

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Article IV of the State Constitution: New York's Governor and the Executive Branch

By Catherine L. Bonventre

Introduction

When New York Governor George E. Pataki took the stage at the 2004 Republican National Convention to introduce presidential incumbent George W. Bush, the wheels of the political rumor mill were already grinding out predictions of a 2008 hopeful.[1] The mill continues to grind out intimations of the governor's interest in the Oval Office.[2] Should Governor Pataki run for United States president and succeed, he will join a noteworthy list of former New York governors that have led careers in the federal government as presidents. Those that served as the chief executive of both New York and the United States are Martin Van Buren,[3] Grover Cleveland,[4] Theodore Roosevelt,[5] and Franklin D. Roosevelt.[6] Indeed, of the nine states whose governors have become president, New York has supplied the most.[7]

The governorship seems a likely place from which to launch a presidency—if one can run a state, one can run the county, no? However, the Oval Office has not been the only federal destination for New York governors. For example, Charles Evans Hughes departed his second term as New York governor to become an Associate Justice of the United States Supreme Court in 1910—a position he held for six years.[8] At the close of his tenure as Associate Justice, he ran for the presidency and failed, returned to the practice of law in New York City, served as Secretary of State under President Harding, and subsequently sat as a Judge on the Permanent Court of International Justice—all before his ultimate appointment as Chief Justice of the United States Supreme Court, where he remained until his retirement in 1941.[9] There is another, albeit less illustrious, distinction of the New York governorship. Whereas, 29 women have or are currently serving as governor in other states,[10] not one woman has been governor of New York.[11] New York has, however, had three female lieutenant governors—Mary Anne Krupsack,[12] Elizabeth McCaughey Ross,[13] and current lieutenant governor Mary O. Donohue.[14]

This article will explore the contours of the chief executive and the executive branch of New York government as set forth in Article IV of the state Constitution.

History

Since the State of New York adopted its first constitution in 1777, there have been constitutional provisions governing the executive branch of the state government.[15] In 1777, the executive power of the state was vested in the governor in Article XVII, which stated:

> And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that the supreme executive power and authority of this State shall be vested in a governor; and that statedly, once in every three years, and as often as the seat of government shall become vacant, a wise and descreet freeholder of this State shall be, by ballot, elected governor, by the freeholders of this State, qualified, as before described, to elect senators; which elections shall be always held at the times and places of choosing representatives in assembly for each respective county; and that the person who hath the greatest number of votes within the said State shall be governor thereof.[16]

Thus, wisdom, discretion and property ownership formed a portion of the necessary prerequisites to the governorship.

Some of the governor's present powers and duties were embodied in the 1777 Constitution. For example, the governor was commander-in-chief of the state military; he had the power to convene the legislature, and the power to grant pardons and reprieves except for treason and murder.[17] However, the term of office was only for three years, as opposed to the current four-year term.[18]

The "convention created as strong a governor as is found in any early state constitution."[19] Nevertheless, fear of concentrating too much power in one individual led to the adoption of the Council of Appointment and the Council of Revision in which the governor shared the appointment and veto powers with the legislature and the judiciary.[20] Both Councils were subsequently abolished by the Constitution of 1821.[21]

The Provisions of Article IV

Today, Article IV of the New York Constitution is divided into eight sections. Sections 1 and 2 concern

both the governor and the lieutenant governor and cover elections, term of office, and qualifications; §§ 3 and 4 cover powers and duties specific to the governor; §§ 5 and 6 concern only the lieutenant governor; § 7 covers the governor's responsibilities with respect to action on legislative bills; and finally § 8 concerns filing requirements.[22] This article will examine provisions from each of the eight sections, highlighting a few of those that have provided controversial fodder for the courts. The discussion will proceed by first examining the sections concerning both the governor and lieutenant governor, next reviewing the lieutenant governor's conspicuously limited responsibilities,[23] and then moving to the bulk of the discussion, which will center on the governor's powers and duties. Finally, there is a brief discussion of § 8.

§ 1 Power, Mode of Election, and Term of Office

New York government is divided into three branches—executive, legislative, and judicial. Section 1 vests the executive power of New York government in the governor.[24] It is a power analogous to that of the president's under the federal Constitution.[25] Both the governor and lieutenant governor are jointly elected for a term of four years and the New York Constitution does not impose term limits on the office.[26] This attribute has been ascribed to a number of factors that make the office of New York governor "one of the most powerful in the nation."[27] As a consequence of having no limits on re-election, some of New York's governors have served quite lengthy terms. Indeed, New York's first governor, George Clinton, was elected in 1777 and held office for 21 years.[28] Governor Pataki, New York's 53rd governor, is currently serving his third term.

Interestingly, the provision on joint election did not exist prior to 1953.[29] Before then, the governor and lieutenant governor could be elected from different political parties.[30] Because ideology clashes arising out of this scheme bore the potential to undermine a "responsible, cohesive administration," the constitution was amended by vote of the people in 1953 to provide for joint elections.[31] With respect to the method of voting for the governor and lieutenant governor, § 1 provides for "the casting by each voter of a single vote applicable to both offices . . . [with] [t]he respective persons having the highest number of votes cast jointly for them for governor and lieutenant governor respectively shall be elected."

One of the recurrent issues arising out of the state constitution is the separation of powers doctrine. Notwithstanding the lack of an express mandate in the constitution that forbids overlap between the three branches of government, the New York Court of Appeals has observed the principle on more than one occasion—such as it did in *Clark v. Cuomo*.[32] At issue in the case was an executive order released by then-Governor Mario Cuomo that established a voter registration task force and a voter registration program designed to ensure the citizens of New York had the opportunity to exercise the right to vote.[33] The chairman of the New York Republican State Committee challenged the order on the ground that "it infringe[d] upon the mandate that the Legislature 'provide by law for a system or systems of registration' [under NY Const. art II, § 6]."[34] The Court conceded that despite the implied separation of powers, it has nonetheless recognized "some overlap" between the three branches does not always violate the doctrine.[35] In that regard, the Court remarked, "'common sense and the necessities of government do not require or permit a captious, doctrinaire and inelastic classification of governmental functions.'"[36] Despite the legislature's exclusive power to enact laws, the Court remarked that the governor's executive order, although "cast in a rule-making mold" was merely "repetitive of existing legislation" and thus not wholly violative of the separation of powers doctrine.[37] The dissent, however, noted "[t]he constitutionality of an Executive Order, which operates with full force of law, is wholly contingent upon whether there exists a *specifically* conferred legislative authorization for the gubernatorial act."[38] Indeed, the dissent found there existed no legislative authority for the executive order—either express or implied.[39]

§ 2 Qualifications

Landownership is no longer a requirement for the chief executive office.[40] All that is required under § 2 to become governor or lieutenant governor is United States citizenship, the age of no less than 30 years, and a residency in New York for five years immediately preceding the election.[41] Wisdom and discretion are no longer expressly required as qualifications for the office as they were in 1777.[42] Nevertheless, the value of public officials having such attributes cannot be overemphasized.

§ 5 When Lieutenant Governor to Act as Governor

The sections of Article IV that specifically address the lieutenant governor's powers and duties are primarily concerned with succession. That is, the primary responsibility of the lieutenant governor appears to be to ensure that someone can fill in for the governor should he be unable to execute his duties. Accordingly, § 5 provides that if the governor is removed from office, dies, or resigns, the lieutenant governor becomes governor for the remainder of the term.[43] Moreover, if the governor-elect declines to serve or dies, the lieutenant governor-elect becomes governor for the full term. Or, if the governor-elect fails to take the constitutional oath of office[44] at the beginning of the term, the lieutenant governor acts as governor until the governor takes the oath.[45]

Furthermore, if the governor is impeached, absent from the state or unable to discharge the duties of

office, "the lieutenant governor *shall* act as governor until the inability shall cease."[46] Although the foregoing appears mandatory by its use of the word "shall," in practice it does not work out to be so. An article in the *The New York Sun* pointed out that there are those that view this clause as anachronistic in that it has been embodied in the constitution since 1777—long preceding all the modern means of communication and travel.[47] Thus, a spokesperson for Governor Pataki, when asked whether his Lt. Governor, Mary Donohue, was in charge while Pataki was in Europe, was quoted as having said, "Whether the governor is in Washington or any other place, he is still the Governor . . . [a]nd given the modern-day technology that exists in the 21st century, he's in contact with his senior staff on a regular basis."[48] On the other hand, the article pointed out that a former counsel to Governor Rockefeller noted that Rockefeller's lieutenant governor would occasionally sign documents when Rockefeller was out of state.[49]

With respect to removal, William Sulzer, who served from January 1–October 17, 1913, is the only New York governor to have been impeached and removed from office.[50] It seems that Governor Sulzer offended his associates in the Tammany Hall political machine by "announc[ing] plans to expose and eradicate corruption and elevate standards of official integrity" once he took office.[51] Among Sulzer's associates who took offense was Tammany boss Charles Murphy who "pressed his influence with the legislature" to have the governor impeached.[52]

§ 6 Succession

Section 6 begins by reiterating the requisite qualifications for the office of lieutenant governor, stating that they are the same as those for the governor.[53] The section then identifies the one apparent power the lieutenant governor has independent of being the governor's substitute—the lieutenant governor is president of the senate with a tie-breaking vote.[54]

It has been observed that, "the importance of [the question of succession] is underscored by the frequency with which governors of New York have resigned."[55] Accordingly, § 6 further details succession to the governorship by providing that the temporary president of the senate is next in line should both the governor and lieutenant governor, or the lieutenant governor alone, be unable to discharge their duties.[56] Next in the line of succession is the speaker of the assembly and beyond that the legislature is empowered to provide for the duty to act as governor in situations not covered in Article IV.[57]

§ 3 The Governor's Powers and Duties

As he has been since the New York Constitution of 1777, the governor is the commander-in-chief of the New York military and naval forces.[58] He has the power to convene the legislature on "extraordinary occasions" with the caveat that at such sessions, "no subject shall be acted upon, except such as the governor may recommend for consideration."[59] The governor must deliver a state of the state address to the legislature at every session "recommend[ing] such matters . . . as he . . . shall judge expedient."[60]

Section 3 reinforces the governor's executive power under § 1 by providing, "[t]he governor shall expedite all such measures as may be resolved upon by the legislature, and shall *take care that the laws are faithfully executed*."[61] To paraphrase the New York Court of Appeals, this means that while it is the legislature's duty to establish state policy, it is the governor's duty to implement those policies.[62] The governor's power to implement legislation is broad and flexible. While the New York Constitution confers upon the governor the ultimate responsibility for executing, or implementing, the laws of the state, the statutory "Executive Law" sets forth the specific details regarding how some of the governor's functions are carried out.[63]

The case of *Johnson v. Pataki*[64] illustrates the manner in which the governor can combine his constitutional power with his statutory authority to "take care that the laws are faithfully executed." There, Bronx County District Attorney Robert Johnson had a case before him in which a police officer had been shot and killed.[65] Based on the district attorney's public comments and past performance, it was feared the district attorney had a uniform policy against seeking the death penalty and that he consequently would not seek the death penalty in the case at issue.[66] Accordingly, Governor Pataki issued an executive order—pursuant to Executive Law § 63(2)—that required the attorney general to replace the district attorney in all matters related to the shooting of the police officer.[67] Executive Law § 63(2) permits the governor to supersede a district attorney and states in relevant part:

> The attorney-general shall . . . [w]henever required by the governor . . . manag[e] and conduct[] . . . criminal actions or proceedings as shall be specified in such requirement; in which case the attorney-general . . . shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform; and in any of such actions or proceedings the

> district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general[68]

The governor issued the order reasoning that the district attorney's policy of not seeking the death penalty "violated a District Attorney's statutory duty to make death penalty determinations on a case-by-case basis and opened future death sentences to challenges on proportionality grounds."[69]

On review of the district attorney's challenge to the order, the Court of Appeals examined "whether the State Constitution or the Legislature has empowered the Governor to act" and found the order to be a valid exercise of the governor's constitutional obligation "to take care that the laws are faithfully executed."[70] Following the decision in *Johnson*, Governor Pataki was quoted as saying the Court's decision was a "victory for all law-abiding New Yorkers, victims of violent crimes and for justice. The death penalty is the law throughout New York State, and no single district attorney, whether for personal, political or philosophical reasons, can ignore the law."[71] Nevertheless, inasmuch as New York's statute does not *mandate* that the district attorney seek the death penalty, the question remains whether a governor would assert his power to supersede any district attorney who chooses not to seek the death penalty in an eligible case, thus effectively eliminating the prosecutorial discretion which the legislature incorporated into the law.

§ 4 Mercy

Section 4 bestows the power of mercy upon the governor by giving him the authority to grant post-conviction reprieves, commutations, and pardons "for all offenses except treason and cases of impeachment . . . subject to such regulations as may be provided by law relative to the manner of applying for pardons."[72] The regulations governing application for clemency are set forth under the Executive Law, which codifies the governor's constitutional clemency power.[73] Under the state constitution and the Executive Law, the governor must communicate to the legislature on an annual basis, any pardons, reprieves, or commutations that he has granted.[74]

Each year, around the holidays, Governor Pataki grants clemency to one or two New York inmates, usually those convicted under the state's Rockefeller drug laws.[75] However, for the first time in New York history, Governor Pataki granted clemency to a battered woman when he commuted her sentence in 1996.[76] The woman, Charline Brundidge, was convicted of killing her husband after suffering his abuse for seven years.[77] Since then, Governor Pataki has granted clemency to one other battered woman convicted of killing her abuser.[78]

§ 7 How a Bill Becomes a Law

Section 7 sets forth the process by which a bill becomes a law.[79] The section begins with the following language, "Every bill which shall have passed the senate and assembly shall, before it becomes a law, *be presented* to the governor."[80] In a pair of related decisions construing this so-called presentment clause, the Court of Appeals held that this means that once the legislature has passed a bill, the legislature *must* present the bill to the governor—they may not decide to keep it and they may not ask for it back once they present it.[81]

In *King v. Cuomo*, the Court of Appeals called the process by which a bill becomes law "a model of civic simplicity."[82] In other words, once a bill is passed by the legislature it is presented to the governor who can act on the bill in three ways: he can approve it by signing it; he can veto it; and he can approve it by not acting on it within a constitutionally specified period. At issue in *King* was the legislature's long-standing practice of recalling bills it had sent to the governor. There, both houses of the legislature passed a bill to amend the Agriculture and Markets Law, formally sent it to the governor, and adopted a resolution the following day to request the governor return the bill.[83] The governor's office complied with the request the same day.[84] The Court observed, "when both houses have . . . finally passed a bill, and sent it to the governor, *they have exhausted their powers* upon it."[85] Commenting on the impact of the recall practice on the governor's constitutional power, the Court stated:

> The Governor has been referred to as the "controlling element" of the legislative system. . . . The recall practice unbalances the constitutional law-making equation, which expressly shifts power solely to the Executive upon passage of a bill by both houses and its transmittal to the Executive. By the ultra vires recall method, the Legislature significantly suspends and interrupts the mandated regimen and modifies the distribution of authority and the complementing roles of the two law-making Branches. It thus undermines the constitutionally proclaimed, deliberative process upon which all people are on notice and may rely. . . . The limbo status to which a passed bill is thus consigned withdraws from or allows evasion of the assigned power granted only to the Executive to approve or veto a passed bill or to allow it to go into effect after 10 days of inaction.[86]

With that, the recall practice was ended.

Then, some two years later, in *Campaign for Fiscal Equity v. Marino* ("*CFE*"),[87] the Court again addressed the meaning of the presentment clause in Article IV, § 7. There, the issue was whether the legislature had a constitutional mandate to present a bill to the governor once the bill had passed both houses. *CFE* involved a school finance bill that the legislature had passed but never presented to the governor before the close of the legislative session.[88] Consequently, CFE brought a suit seeking a declaratory judgment that the legislature's practice of withholding passed bills from the governor violated the Article IV, § 7 presentment clause.[89] The Court agreed with CFE and remarked, "[t]o hold otherwise would be to sanction a practice where one house or one or two persons, as leaders of the Legislature, could nullify the express vote and will of the People's representatives."[90] Comparing the case at bar to the Court's decision on the recall practice at issue in *King*,[91] the court observed, "[t]he practice of withholding passed bills while simultaneously conducting discussions and negotiations between the executive and legislative branches is just another method of thwarting open, regular governmental process, not unlike the unconstitutional 'recall' policy which, similarly, violated article IV, § 7."[92]

Accordingly, under § 7, when both houses of the legislature have passed a bill, the legislature must then present the bill to the governor.[93] At that point, the governor can respond by approving the bill by his signature and thus making it law or he can reject, or veto, the bill by returning it to the legislature with his objections.[94] Moreover, the governor only has 10 days (not including Sundays) within which to execute either of the foregoing, otherwise the bill becomes law as though the governor had signed it.[95] In addition, if the governor is unable to return the bill within 10 days because the legislature adjourned, the bill will not become a law without the governor's approval.[96]

A bill will become law notwithstanding the governor's veto if the legislature garners a two-thirds majority vote to override it.[97] In addition, if the bill contains one or more fiscal appropriations, the governor has the so-called line-item veto power with which he can object to one or more such items while approving the rest of the bill.[98] Thereafter, the legislature will require a two-thirds majority vote to override it.[99]

This process of checks and balances between the governor and the legislature over budget appropriations has been the source of much political conflict over the years. For example, the political strife between these two branches caused the budget to be late an astonishing 21 years in a row, until the streak was broken this very year.[100] Conflicts over the budget appropriations process have also made their way into the third branch of government, with the Court of Appeals just recently deciding key state constitutional issues concerning the governor's and legislature's respective roles in the budget making process.[101]

§ 8 One of These Things Is Not Like the Others . . .

Section 8 concerns the filing requirements for departmental rules and regulations and seems oddly placed in Article IV. Nevertheless, § 8 mandates that no rules or regulations promulgated by "any state department, board, bureau, officer, authority or commission" will be effective until they are filed with the Department of State.[102] Rules that relate to the organization or internal management of such agencies are exempted from this requirement.[103] The foregoing operates in conjunction with the Executive Law, which sets forth the necessary mechanics for implementing § 8. Under § 102 of the Executive Law, "a certified copy of every such code, rule and regulation . . . together with a citation of the statutory authority pursuant to which each such code, rule or regulation was adopted" must be filed with the secretary of state.[104] Again, rules relating strictly to the internal operational affairs of the agencies are exempted.[105]

The purpose of Article IV, § 8 is to fulfill the notice component of due process—or so said the Court of Appeals in *Jones v. Smith*, a case in which the court distinguished between rules that were operational and internal and those that were not.[106] There, the New York state corrections commissioner had suspended the disciplinary hearing regulations and issued "Temporary Regulations II."[107] The regulations were not filed because, as the commissioner argued, they were temporary and pertained only to internal operational affairs and were thus exempted from § 8 filing requirements.[108] Two inmates challenged their subsequent discipline under the temporary regulations. Observing that the "prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime," the Court stated that prisoners "may not be deprived of life, liberty, or property without due process of law."[109] Because the rules affected the inmates' "liberty" interests they could not be considered internal operational rules.[190]

Conclusion

Under the proposed New York Constitution of 1967—which was never adopted—Article IV would have been a bit more concise and better organized, containing only five sections.[111] Importantly, the driving force of the governor's power, the "take care" clause, was moved to the second line of § 1.[112] Gone from Article IV under the proposed constitution were the governor's command of the military and naval forces as well as the rule filing requirements under § 8.[113] The few powers and duties of the lieutenant-government remained few—essentially, president of the senate with

a tie-breaking vote and first in line for succession to the governorship.[114]

The drafters of the proposed constitution of 1967 had the correct idea in attempting to reorganize Article IV to render it less cumbersome. More importantly, however, *how* the individual who is the chief executive actually executes the powers authorized by the state constitution is at least as important as the authority granted itself. In that regard, perhaps it would not be such a bad idea to reincorporate the prerequisites of wisdom and discretion from the 1777 constitution to the explicit qualifications for the office of the governor.[115]

Endnotes

1. *See* Joe Mahoney, *Letting George Do It: Pataki To Introduce W - And Himself As White House Hopeful*, Daily News, Sept. 2, 2004, at 23.
2. Michael Cooper, *Pataki Wants Voice in '08 Race*, N.Y. Times, Apr. 26, 2005, at B5 (quoting the governor as having stated that he wanted to be part of the policy debate involved around the 2008 presidential election and that the governor had not ruled out whether his part in the debate would be as a candidate).
3. Served as governor from January 1–March 12, 1829. New York State, *Governors of New York*, *available at* <http://www.ny.gov/governor/nygovs/index.html> [hereinafter *Governors*]; and as president from 1837 to 1841. The White House, *The Presidents of the United States*, *available at* <http://www.whitehouse.gov/history/presidents> [hereinafter *Presidents*].
4. Served as governor from 1883–1884, *Governors*, *supra* note 3; and as president from 1885–1889 and 1893–1897, *Presidents*, *supra* note 3.
5. Served as governor from 1899–1900, *Governors*, *supra* note 3; and as president from 1901–1909, *Presidents*, *supra* note 3.
6. Served as governor from 1929–1932, *Governors*, *supra* note 3; and as president from 1933–1945, *Presidents*, *supra* note 3.
7. *See* National Governor's Association, *available at* <http://www.nga.org/>. Calculations are the author's own. Coming in at a close second behind New York is Virginia, with three former governors—Thomas Jefferson, James Monroe, and John Tyler—having become president. *Id.*
8. Samuel Hendel, *Charles Evans Hughes*, *in* The Justices of the United States Supreme Court 1789–1978 Their Lives and Major Opinions 1896 (Leon Friedman & Fred L. Israel eds., 1980).
9. *Id.* at 1901-1903.
10. National Governor's Association, *Trivia: Female Governors*, *available at* <http://www.nga.org/>.
11. Accordingly, this paper will resort to the conventional use of the male pronoun when referring generically to the governor.
12. Krupsak served from 1975 to 1978. New York State, The Red Book 32 (George A. Mitchell ed., 95th ed. 1999).
13. McCaughey Ross served from 1995 to 1998. *Id.*
14. Donohue began her term as lieutenant governor in 1999. *Id*.
15. Peter J. Galie, Ordered Liberty: A Constitutional History of New York *passim* (1996).
16. N.Y. Const. art. XVII (1777), *available at* <http://www.yale.edu/lawweb/avalon/states/ny01.htm>. The excerpt was taken from the Yale University Avalon Project website, which cited its posting of the Constitution of 1777 to 1 Journals of the Provincial Congress, Provincial Convention Committee of Safety and Council of Safety of the State of New York, 1775, 1776 1777 892-98 (1842) (Spelling in the original).
17. Galie, *supra* note 15, at 41-42.
18. *Id.*
19. *Id.* at 42.
20. *Id.* at 42-43. Presently, Article V, § 4 confers the power to appoint department heads on the governor and will therefore not be part of the following discussion of Article IV.
21. *Id.* at 78.
22. N.Y. Const. art. IV, §§ 1-8.
23. The limited role is quite plain from the face of the constitutional provisions that define the office of lieutenant governor. Note, too, the following excerpt from the New York State Senate website. "The Lieutenant Governor is the Senate's President. In this largely *ceremonial* capacity, the Lieutenant Governor presides over the Senate during the legislative session and has a rarely used casting vote to break ties in measures before the house." New York State Senate, *Branches of Government in New York State Legislative Branch*, *available at* <http://www.senate.state.ny.us/sws/aboutsenate/branches_gov.html> (emphasis added).
24. N.Y. Const. art. IV, § 1.
25. U.S. Const. art. II, § 3.
26. N.Y. Const. art. IV, § 1.
27. Sarah F. Liebschutz, *The New York Governorship*, *in* New York Politics and Government Competition and Compassion 92 (Sarah F. Liebschutz ed., 1998).
28. *Governors*, *supra* note 3.
29. Galie, *supra* note 15, at 272.
30. *Id.*
31. *Id.*
32. 66 N.Y.2d 185, 495 N.Y.S.2d 936 (1985).
33. *Id.* at 189.
34. *Id.*
35. *Id.*
36. *Id.*, quoting *People v. Tremaine*, 252 N.Y. 27, 39 (1929).
37. *Id.* at 191.
38. *Id.* at 193 (Jasen, J. dissenting) (emphasis in the original, internal citations omitted).
39. *Id.* at 194.
40. *See supra* note 16.
41. N.Y. Const. art. IV, § 2.
42. *See supra* note 16.
43. N.Y. Const. art. IV, § 5.
44. The governor's oath of office is prescribed under N.Y. Const. Art. XIII, § 1 which states in relevant part, "Members of the legislature, and all officers, executive and judicial, except such inferior officers as shall be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of _____, according to the best of my ability.'"
45. N.Y. Const. art. IV, § 5.
46. *Id.* (emphasis added).
47. William F. Hammond Jr., *Technically, Lieutenant Governor Donohue Is In Charge*, N.Y. Sun, Dec. 21, 2004, at 1.
48. *Id.*
49. *Id.*
50. *Governors*, *supra* note 3; Red Book, *supra* note 12, at 28.

51. Galie, *supra* note 15, at 189.
52. *Id.* at 190. Galie also notes that in addition to Sulzer's aspirations of integrity for the executive office, Sulzer's "tendency toward reckless, impulsive action and flamboyancy, alienated Sulzer from many party regulars, particularly Murphy." *Id.*
53. N.Y. Const. art. IV, § 6. The qualifications are "reiterated" because they specifically appear, with respect to the lieutenant governor, in § 2.
54. *Id.*
55. Galie, *supra* note 15, at 271. New York has had 6 governors resign in its history.
56. N.Y. Const. art. IV, § 6.
57. *Id.*
58. N.Y. Const. art. IV, § 3.
59. *Id.*
60. *Id.*
61. *Id.* (Emphasis added). The "take care" clause also appears in the U. S. Constitution with respect to the president. U.S. Const. art. II, § 3.
62. *Bourquin v. Cuomo*, 85 N.Y.2d 781, 784, 628 N.Y.S.2d 618, 620 (1995).
63. *See generally* N.Y. Executive Law §§ 2, *et. seq*.
64. 91 N.Y.2d 214, 668 N.Y.S.2d 978 (1997).
65. *Id.* at 221.
66. *Id.*
67. *Id.*
68. N.Y. Exec. Law § 63(2).
69. *Johnson*, 91 N.Y.2d at 221.
70. *Id.* at 223.
71. Jon R. Sorensen & Corky Siemaszko, *Gov's DA Yank In Death Case Upheld*, Daily News, Dec. 5, 1997, at 20.
72. N.Y. Const. art. IV, § 4.
73. N.Y. Exec. Law §§ 15-19.
74. N.Y. Const. art. IV, § 4; N.Y. Exec. Law § 17.
75. *See*, *e.g.*, *Reform in Small Steps; Gov. Pataki Grants Clemency to Another Inmate Convicted under the Rockefeller Drug Laws*, Times Union (Albany, NY), Dec. 30, 2003, at A8 (criticizing the lengthy sentences imposed for criminal convictions under the state's "draconian" drug laws and remarking that instead of imposing "sweeping reform" of the system, the Governor is "softening the statutes . . . one clemency at a time").
76. Raymond Hernandez, *7 Prisoners Get Clemency From Pataki*, N.Y. Times, Dec. 24, 1996, at B1.
77. *See* Winifred Yu, *Woman Who Killed Husband After A Beating Seeks Clemency*, Times Union (Albany, NY), Dec. 15, 1996, at D1.
78. *See* William Glaberson, *Pataki Grants Clemency to 4 in Prison*, N.Y. Times, Dec. 25, 2002, at B1.
79. N.Y. Const. art. IV, § 7.
80. *Id.* (emphasis added).
81. *King v. Cuomo*, 81 N.Y.2d 247, 597 N.Y.S.2d 918 (1993); *Campaign for Fiscal Equity v. Marino*, 87 N.Y.2d 235, 638 N.Y.S.2d 591 (1995).
82. *King*, 81 N.Y.2d at 252.
83. *Id.* at 250.
84. *Id.*
85. *Id.* at 252, quoting *People v. Devlin*, 33 N.Y. 269 (1865) (emphasis in the original *King* decision).
86. *Id.* at 254.
87. 87 N.Y.2d 235, 638 N.Y.S.2d 591 (1995).
88. *Id.* at 237.
89. *Id.*
90. *Id.* at 238–39.
91. 81 N.Y.2d 247.
92. *CFE*, 87 N.Y.2d at 239.
93. N.Y. Const. art. IV, § 7. The governor has 10 days to act on the legislation after it has been presented to him. If he fails to act, the bill will become law, unless the legislature has previously adjourned. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* On an interesting note, Article IV, § 7 does not mandate when the governor must announce to the public his decisions on legislative bills. In that regard, Governor Pataki has been criticized for delaying the disclosure of such action to strategically control his publicity in the media. *See* William F. Hammond Jr., *Pataki Delays Disclosure On 75 Pieces Of Legislation, Leaving Them In Limbo*, N.Y. Sun, Nov. 9, 2004, at 3.
97. N.Y. Const. art. IV, § 7.
98. *Id.*
99. *Id.*
100. James M. Odato, *State Passes Timely Budget*, Times Union (Albany, NY), April 1, 2005, at A1.
101. *See Pataki v. New York State Assembly*, 4 N.Y.3d 75, 791 N.Y.S.2d 458 (2004). A more detailed discussion of the implications of this case, and the budget making process in general, are beyond the scope of this article.
102. N.Y. Const. art. IV, § 8.
103. *Id.*
104. N.Y. Exec. Law § 102(1)(b).
105. *Id.*
106. 64 N.Y.2d 1003, 489 N.Y.S.2d 50 (1985).
107. *Id.* at 1005.
108. *Id.*
109. *Id.*
110. *Id.* (quotation marks in the original).
111. *See* Anthony J. Travia, *Text, Abstract and Highlights of Proposed Constitution of the State of New York to be Submitted to the Electors of the State on November 7, 1967.*
112. *Id.* at 9.
113. *Id.* at 9.
114. *Id.* at 10.
115. For a discussion of the 1777 constitution setting forth the requirement for a "wise and discreet freeholder," *see supra* text accompanying note 16.

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Gubernatorial Powers in New York: The Ongoing Battle

By Robert F. Pecorella and Jeffrey M. Stonecash

Robert F. Pecorella

Public policy in New York results from the interactions of one of the nation's most professionalized state legislatures with one of its most institutionally powerful chief executives. Analyses of legislative capacity uniformly suggest that professional legislatures share the following characteristics: they meet in regular annual sessions of at least several months duration, thereby affording members the time to consider policy proposals; they provide ample clerical and professional staff support, thereby providing the members with critical information and communication tools; and they pay a reasonable salary, thereby allowing members to serve as full-time legislators.[1] The New York State Legislature ranks at—or near—the top on each of these measures.[2]

Likewise, the governor of New York occupies an institutionally powerful office. In the literature, a "strong executive" is defined as one possessing appointment, veto and budget powers.[3] Appointment authority over the heads of the state agencies allows the executive to place commissioners loyal to his/her programs throughout the executive branch; veto power permits direct executive involvement in the legislative formulation of public policy; and an executive budget system allows the governor to establish the basic policy agenda for any fiscal year. The governor of New York has substantial appointment powers; exercises a veto that can only be overridden by a two-thirds vote of the legislature; and has full executive budget authority.

While both of these branches are now viewed as strong institutions, their relationship has been through several phases, with each institution enjoying eras of dominance over the other. At the beginning of the last century the legislature dominated the governor. This was a legacy of the fear of strong executives tracing back to the beginning of the nation. The New York State Constitution in the late 1800s reflected this legacy and significantly limited the power of the governor. The governor had little control over state agencies, being unable to appoint or remove most agency heads. Agencies did not have to submit written reports to the governor.[4] There was no unified budget for the state, and the governor was not responsible for the execution of the budget. Budgets for each agency were submitted directly by the agency to the legislature, and negotiations over budgets took place between the legislature and the agency.[5] Governors were peripheral to the negotiations, and their primary influence came through the power to veto an agreement. The governor could not and did not present a legislative program. As state government grew during the late 1800s and early 1900s,[6] the legislature created more new and independent organizations, and by the 1910s there were, by some counts, 187 state boards, commissions, departments and agencies.[7] The logic was that executive power could be contained by dispersing authority within the executive branch.[8] This weak gubernatorial power made the legislature relatively powerful.

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"The governor of New York has substantial appointment powers; exercises a veto that can only be overridden by a two-thirds vote of the legislature; and has full executive budget authority."

This dominance of the legislature lasted until the late 1920s. During the 1920s then-Governor Al Smith undertook a successful effort to pass several constitutional amendments granting the governor more power.[9] In 1925, state agencies were consolidated. In 1927, the governor was made the head of all agencies, and empowered to develop and present an executive budget. The governor was also made responsible for overseeing the implementation of the budget and given more authority over agency decisions. In the early 1930s, the term of the governor was extended from two to four years, making the governor someone the legislature had to deal with during the budget process.

While the office of the governor became relatively more powerful in the budget process beginning in the 1920s, the legislature lagged for many years in its development. From the 1930s through most of the 1960s the legislature remained an institution with limited resources and few long-serving members. The legislature had no office building until 1975. Its staff began to

grow only in the late 1960s and was able to significantly expand only when the legislative office building opened in 1975. Since the 1960s more and more legislators have chosen to remain in office for lengthy careers.[10] The combination of more staff and more careerist legislators resulted in the legislative leaders having more capacity to review and critique gubernatorial proposals and to offer their own proposals.

"By definition, the 'executive budget' system creates an institutional process where the governor is the "'creator' and the legislature the 'critic' of fiscal policy. In no other area of public policy is the legislature so restricted in dealing with gubernatorial proposals and in no other area is the governor so empowered in responding to legislative initiatives as with the budget."

This gradual development of legislative capacity set the stage for the gubernatorial–legislative conflicts of the last two decades. As both of these powerful branches of government engage in the process of making public policy, institutional conflict, exacerbated by partisan divisions, is inevitable. At times, such conflict requires judicial intervention to clarify legislative and executive authority in a particular policy area. New York's executive budget system is a case in point. Adopted in 1927 and incorporated as article VII of the 1938 state constitution, the executive budget system in New York requires that the governor submit to the legislature by a certain date "a bill or bills containing all the proposed appropriations . . . included in the budget"[11] and that except to "strike out or reduce items therein," the legislature *may not alter* the appropriation bills.[12] Furthermore, any increase in or addition to the governor's spending plans that the legislature enacts must be listed singularly and are subject to the governor's line-item veto.[13]

By definition, the "executive budget" system creates an institutional process where the governor is the "creator" and the legislature the "critic" of fiscal policy. In no other area of public policy is the legislature so restricted in dealing with gubernatorial proposals and in no other area is the governor so empowered in responding to legislative initiatives as with the budget. In the nearly eight decades since its inception, New York's budget process has been the subject of several judicial clarifications. To date the rule of judicial intervention in this area seems clear: when the court considers a matter political, the governor's powers are enhanced; when the court intervenes, i.e., it deems the matter justiciable, the legislature's powers are augmented.

Two cases in the early 1980s stand as clear examples of affirmative action by the court resulting in an increase in legislative influence over the budget. In 1980, the New York State Court of Appeals disallowed the practice of impounding funds by the executive once they have been appropriated by the legislature.[14] One year later, the court ruled that federal grants-in-aid provided to New York must be allocated through the normal appropriation process and cannot be parceled out through executive fiat.[15]

In 2004, however, the Court of Appeals issued two rulings strongly affirming executive authority on the budget system.[16] In the more sweeping ruling of the two, *Pataki v. N.Y.S. Assembly*, the court ruled that the extensive amount of detail specifying how funds were to be allocated included by the governor in the 2001 appropriation bills did not violate § 6 of article VII.[17] This state constitutional provision states that: "[n]o provision shall be embraced in any appropriation bill submitted by the governor . . . unless it relates specifically to some particular appropriation in the bill." Moreover, the Court also ruled that the legislature was prohibited by the *no alteration clause* from changing any of the program details included in the bills.[18]

In issuing its ruling, the Court concluded that the matters in question should be resolved in the political arena. Whatever the merits of the majority's conclusions, and they were challenged by a spirited dissent,[19] their effect was to increase the governor's already substantial *institutional* influence over fiscal policy which, as a practical matter, has the effect of augmenting the executive's strategic political position in dealing with the legislature on the budget.

Prior to the rulings referenced above, the politics around the executive budget process predictably reflected institutional arrangements favoring the governor. The governor would often "lowball" appropriations to programs important to legislators—e.g., state education aid and health care—in the realization that, bereft of any institutional authority to increase spending outside of the line-item veto, legislators would be forced to negotiate increases in their favored programs by ceding to the governor's budget wishes in other areas. Moreover, in recent years, Governor Pataki's disengagement posture has seemingly changed the locus of responsibility for late budgets from the executive to the legislature and thereby increased political pressure on legislators to accede to his budget wishes.[20]

In the wake of the aforementioned rulings, the governor's strategic position has been enhanced. By ceding broad-based authority to the governor to incorporate

policy detail into the appropriation bills while strictly interpreting the no-alteration restrictions on the legislature, the Court has provided the executive with new strategic weapons in its institutional budget contest with the legislature. In the words of Chief Judge Judith Kaye's dissent: "Given the substantive law amendments now accepted by my Colleagues as items of appropriation, it is hard to imagine, for the future, what could not be cast as an item of appropriation subject to the no-alteration rule."[21] And, if the legislature's main response, as the Court asserts, is to simply reject or delay appropriation bills, it is "hard to imagine" the extent of the strategic advantage handed the governor by a majority more willing to acknowledge a potential problem than to establish any viable remedy for it.[22]

Indeed, in the political climate surrounding budget politics in Albany, legislative delay in a political environment where all the forces of "reform" speak about increased efficiency, e.g., on-time budgets, is not a viable political option at all.

Endnotes

1. For a review of this literature, see Christopher Mooney, *Measuring U.S. State Legislative Professionalism: An Evaluation of Five Indices,* 26 State & Local Gov't Rev. 70 (1994).
2. *See* Keith E. Hamm & Gary F. Moncrief, *Legislative Politics in the States, in Politics in the American States* 157-93 (Virginia Gray & Russell L. Hanson eds., 8th ed. 2004).
3. *See* Thad Beyle, *Governors*, *in Politics in the American States* 212-13 T. 7-5 (Virginia Gray & Russell L. Hanson eds., 8th ed. 2004).
4. James T. Crown, The Development of Democratic Government in the State of New York Through the Growth of the Power of the Executive Since 1920 53-54 (1955) (unpublished dissertation, Department of Government, New York University).
5. NYS Div. of the Budget, The Executive Budget in New York State: A Half-Century Perspective 12-13 (1981).
6. *See generally* Don C. Sowers, The Financial History of New York State from 1789–1912 (1914); John A. Fairlie, The Centralization of Administration in New York State (1918). *See also* NYS Div. of the Budget, supra note 5, at 4-6.
7. Crown, *supra* note 4, at 55.
8. NYS Div. of the Budget, *supra* note 5, at 8.
9. Jeffrey M. Stonecash et al., *Politics, Al Smith, and Increasing the Power of the New York Governor's Office*, N.Y. Hist. 149-79 (Spring 2004).
10. Jeffrey M. Stonecash, *The Rise of the Legislature, in New York Politics and Government* 80-92 (Sarah F. Liebschutz ed., 1998); Jeffrey M. Stonecash & Amy Widestrom, *The Legislature, Parties, and Resolving Conflict, in Governing New York State* (Robert F. Pecorella & Jeffrey M. Stonecash eds., forthcoming 5th ed. 2005).
11. N.Y. Const. art. VII, § 3.
12. *Id.* art. VII, § 4.
13. *Id.*
14. *Oneida v. Berle,* 49 N.Y.2d 515, 427 N.Y.S.2d 407 (1980). It is useful to note that this decision mitigated the governor's responsibility to "maintain" a balanced budget throughout the fiscal year. *See also* Robert P. Kerker, State Government Finance, in The New York State Constitution: A Briefing Book 157-75 (Gerald Benjamin ed., 1994).
15. *Anderson v. Regan*, 53 N.Y.2d 356, 442 N.Y.S.2d 404 (1981).
16. *Pataki v. New York State Assembly*, 4 N.Y.3d 75, 791 N.Y.S.2d 458 (2004). The case consolidated two cases, *Silver v. Pataki* and *Pataki v. New York State Assembly*. Both cases concerned budget appropriations disputes between Governor Pataki and the New York State Assembly in 1998 and 2001, respectively. In *Silver*, the Court concluded that the legislature, by altering parts of the "non-appropriation bills" submitted by the governor along with the 1998 appropriation bills had violated the non-alteration restriction of § 4 in article VII. *Id.* at 91. Non-appropriation bills accompany appropriation bills and typically supply schedules and sub-allocation for funding programs.
17. *Id.* at 97-99. It is worth noting that the appropriation bills included an extensive rewrite of the funding formulas by which the state distributes education aid to school districts, thereby overriding existing legislation.
18. *Id.* at 88-89, 91-92.
19. Chief Judge Judith Kaye issued a starkly worded dissent in the cases that concludes: "The executive budgeting scheme set forth in our Constitution is not the system my Colleagues sanction today." *Id.* at 122.
20. *See* Edward Schneier & John Brian Murtaugh, *New York Politics: A Tale of Two States* 304-06 (2001) (providing an analysis of the governor's involvement in recent years' budget processes).
21. *Pataki*, 4 N.Y.3d at 105.
22. *Id.* at 105. The majority opinion makes it clear that Judge Kaye's concerns are not unwarranted and that their decision is certainly "susceptible to abuse" in future budget cycles. *Id.* at 93.

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Fiscal Discipline in New York State

By Joseph F. Zimmerman

The fiscal committees of the state legislature historically prepared the state budget with very limited roles played by the governor and the state comptroller.[1] Taxpayers had no protection—other than a gubernatorial veto of appropriation bills that potentially could shut down the government—against reckless or unjustified legislative appropriations until 1874, when voters ratified a proposed state constitutional amendment granting the governor authority to veto items in appropriation bills.[2]

Reformers recognized the inadequacy of the legislative budget system in providing fiscal discipline and sought its replacement in the 1890s. Governor Charles Evans Hughes of New York in 1909 highlighted the need for "some permanent method of comparative examination of departmental budgets and proposals for appropriations in advance of the legislative session, so that the Legislature may be aided by preliminary investigation and report in determining, with just proportion, the amounts that can properly be allowed."[3] Nevertheless, the system was not replaced until 1929 by the executive budget system designed to allow the governor, with the professional assistance of the Division of the Budget, to establish the forthcoming fiscal year's agenda by presenting a balanced budget to be considered by the legislature. It also would foster a cooperative relationship between the governor and the legislature's fiscal committees by directing the governor to furnish them with copies of the budget requests of departments and agencies and authorizing committee members to attend the hearings on the requests held by the governor.[4]

The amendment also stipulates, "[n]either house of the legislature shall consider any other bill making an appropriation until all the appropriation bills submitted by the governor shall have been finally acted on by both houses, except on message from the governor certifying to the necessity of the immediate passage of such a bill."[5] The legislature may strike out or reduce items in the governor's appropriations bills, but may add appropriation items only if they are "stated separately and distinctly from the original items of the bill and refer each to a single object or purpose" and hence are subject to the item veto.[6]

The First Attack on the System

Governor Franklin D. Roosevelt, a Democrat, presented to the legislature the first executive budget containing several lump-sum appropriations and authorizing the governor to segregate items for the executive departments in the process of reorganization because their expenses could not be estimated precisely. The Republican legislative leaders introduced—and the legislature enacted—a bill stipulating that the chairmen of the fiscal committees would share authority with the governor in allocating the lump-sum appropriations. The governor challenged the provision, but the Appellate Division of the Supreme Court upheld the validity of the provision in 1929.[7] The Court of Appeals, however, in the same year reversed this decision and opined making the committee chairmen coordinate with the governor in the segregation of lump-sum items violated § 7 of article III of the state Constitution prohibiting members of the legislature from holding any other civil office.[8]

The Second Attack

The Republican-controlled 1939 state legislature amended Democrat Governor Herbert H. Lehman's budget bills by striking out nearly every item and substituting a lump-sum appropriation for each department, division, and bureau. In effect, a legislative budget was substituted for the executive budget. The Court of Appeals in 1939 opined that "[w]here . . . a whole appropriation has been stricken out, including the items of which it is made, . . . the words of the Constitution have not been followed and such appropriation is illegal."[9]

Subsequent Developments

The court in 1980 rendered a most important decision relative to the governor's budgetary execution powers by ruling "the executive possesses no express or inherent power based upon its view of sound fiscal policy to impound funds which have been appropriated by the Legislature."[10] Prior to this decision, governors generally had impounded items of appropriated funds instead of using the item veto to disallow specific items of appropriation.[11]

The legislature continued to resent the prohibitions and restrictions placed upon its appropriation powers by the constitutional executive budget amendment. Legislative leaders' bargaining with governors in the

late 1980s resulted in the development of "member items" which critics label "pork." Lump-sum appropriations bills are enacted with the governor and each house is authorized to spend a prescribed portion of the funds. Individual legislators, as determined by the leader of each house, are allowed to review applications from non-profit organizations for grants and designate the recipients of grants within their respective constituency, thereby enhancing legislators' re-election prospects. These items total $200 million for fiscal year 2006 and include $85 million for each house and $30 million for the governor.[12]

A second approach employed by the legislature to increase its power over appropriations involves deliberate delay in enacting appropriation bills while the two legislative leaders continue negotiations with the governor. Substantial delays have occurred prior to enactment of the major annual budget bills. Short-term budget bills have been enacted to keep the state financed after the March 31st end of the state fiscal year. All annual budget bills, except those pertaining to matters under negotiation and the court-ordered increased appropriations for the New York City school system, were enacted prior to the start of fiscal year 2006, the first time since 1982.

The New York State Bankers Association challenged enactment of an audit fee added as a legislative amendment to the governor's fiscal 1991 state operations budget bill. The New York Supreme Court, Cayuga County, in 1991 granted summary judgment to the plaintiffs and the Appellate Division of the Supreme Court affirmed the decision in 1992.[13] The Court of Appeals in 1993 affirmed the lower court ruling by noting § 4 of article VII of the state Constitution "constitutes a limited grant of authority from the People to the Legislature to alter the budget proposed by the Governor, but only in specific instances" involving striking out or reducing items.[14] This decision was an unusual one in that both the governor and the legislature favored levying the fee. No constitutional question would have arisen had the legislature enacted a separate bill levying the fee and submitted it to the governor for his signature.

Continuing gubernatorial-legislative budgetary disputes led to the more frequent exercise of the item veto. In 2003, the legislature overrode Republican Governor George E. Pataki's 119 vetoes of items in legislative budget bills, thereby restoring $1.3 billion in authorized spending. The governor in 2004 rendered 195 item vetoes, disallowing $1.8 billion in increased spending and borrowing.[15]

Two suits were filed relative to the item veto power of the governor. Assembly Speaker Sheldon Silver in 1998 challenged Governor Pataki's use of the item veto to disallow non-appropriation language added to his appropriation bills. The speaker argued the constitutional no-alteration clause was not violated because the legislature had approved the budget bills and subsequently amended them by changing only the language and not the amounts. The governor in 2001 filed suit against the Assembly challenging the action of the legislature in enacting budget bills that altered items in the governor's budget bills containing formulas for spending Medicaid and school aid appropriations, and seeking to enjoin the state comptroller from authorizing payments.

The Court of Appeals consolidated the two suits and in December 2004, by a 5-to-2 vote, held that the legislature violated the state Constitution by altering appropriations bills designed to implement the governor's fiscal 1999 and fiscal 2001 executive budgets.[16] The majority opinion in *Silver v. Pataki* noted "the theory that the Legislature can rewrite the text of the Governor's appropriation bills is inconsistent with the basic idea of executive budgeting."[17]

The Court reflected upon its ambivalent role in resolving gubernatorial-legislative budgetary disputes by writing: "Today we do not reject, but we also do not endorse, the Governor's argument that no judicial remedy is available (where the anti-rider clause does not apply) for gubernatorial misuse of appropriation bills."[18] The Court added that judicial resolution of gubernatorial-legislative budget disputes is arguably worse than either executive or legislative budgeting.[19]

Chief Judge Judith Kaye wrote a strong dissent: "Thus, the Constitution authorizes the use of the line-item veto only to strike items from appropriation bills . . . as a check on government *spending*. There is simply no authority for [the] exercise of the line-item veto against provisions contained in nonappropriation bills, as occurred in 1998."[20]

Proposed Constitutional Amendment

The state legislature approved for the first time a proposed constitutional budget amendment in May 2004, and approved the amendment again in January 2005, that: (1) directs the governor to submit the executive budget by January 15th (February 1st for a new governor); (2) reduces from thirty to twenty-one days the period during which the governor may amend budget bills; (3) changes the start of the fiscal year to May 1st to facilitate a more accurate forecast of anticipated revenues during the forthcoming year; and (4) provides for an annual contingency budget in the event the governor's budget bills are not enacted by this date. The governor lacks constitutional authority to veto a resolution proposing a constitutional amendment, but vetoed on May 3, 2005, a bill (S.2) designed to implement the constitutional amendment if ratified by the voters.[21]

Implementation of the proposed amendment could result in a return to the thoroughly discredited legislative budget system as the constitutional no-alteration rule applicable to the governor's budget bills would be eliminated and the governor no longer would be responsible for ensuring fiscal prudence in terms of a balanced budget. The legislature purposely could delay enactment of budget bills until May 1st, thereby triggering a contingency budget, which would be little more than an emergency one, deemed to be final legislative action on the governor's budget bills. Section 5(2) of the proposed amendment stipulates: "The contingency budget, *except as otherwise provided by* statute, shall provide the same appropriations and reappropriations as enacted for the immediately preceding fiscal year . . ." and remain in effect until altered by a multiple appropriation bill. This provision would authorize the legislature to disregard the governor's budget bills by drafting and enacting its own comprehensive appropriation bill which no doubt would provide for significantly increased spending and borrowing that could adversely affect the state's credit rating, result possibly in higher taxes, and injure the business climate of the state.

There are three conspicuous absences in the proposed amendment: There is no (1) requirement that the legislative budget must be balanced in terms of expenditures and anticipated revenues; (2) authorization for the state comptroller to provide binding estimates of revenues in the event the governor and the two houses disagree on the total amount; and (3) provision for emergency appropriations, even with a message of necessity issued by the governor, during the time period the contingency budget is in effect.

There is little evidence that a majority of the members of the legislature, each representing an individual constituency, are protective of taxpayers against excessive spending and borrowing. The annual budget proposed by the assembly provides for the most spending. The senate typically favors slightly less spending and the governor, whose constituency is the state, is the most frugal in terms of his proposed total spending due in part to his constitutional obligation to present a balanced budget to the legislature.[22]

In sum, the proposed constitutional amendment is a Trojan horse, disguised as a budget process reform proposal, possessing the potential to return the state to the legislative budget system. If the voters ratify the proposed amendment, taxpayers will have to rely upon the governor's extensive employment of the item veto for protection. Unfortunately, the item veto offers inadequate protection to taxpayers as reflected in the legislature overriding all of the governor's 119 item vetoes in 2003.[23]

Endnotes

1. Arthur E. Buck, Public Budgeting 476-77 n. 1 (1929).
2. N.Y. Const. of 1846, art. IV, § 9 (amended 1874). Currently, the section number is 7 as the Constitutional Convention of 1938 renumbered the section and voters ratified the change.
3. Public Papers of Charles Evans Hughes: Governor, 1909 78-79 (1910).
4. N.Y. Const. art. VII, §§ 1-2. *See also* NYS Div. of the Budget, The Executive Budget in New York State: A Half-Century Perspective (1981).
5. N.Y. Const. art. VII, § 5.
6. N.Y. Const. art. VII, § 4.
7. *People v. Tremaine*, 226 A.D. 331, 340, 235 N.Y.S. 555, 567 (3d Dep't 1929).
8. *People v. Tremaine*, 252 N.Y. 27, 45 (1929).
9. *People v. Tremaine*, 281 N.Y. 1, 8 (1939).
10. *County of Oneida v. Berle*, 49 N.Y.2d 515, 524, 427 N.Y.S.2d 407, 412 (1980).
11. *See generally* Frank W. Prescott & Joseph F. Zimmerman, 1-2 The Politics of the Veto of Legislation in New York State (1980).
12. James M. Odato, *State Leaders Have $1B to Dole Out*, Times Union (Albany, NY), Apr. 14, 2005, at B3.
13. *N.Y. State Bankers Ass'n v. Wetzler*, 151 Misc.2d 684, 687-688, 573 N.Y.S.2d 816, 819 (N.Y. Sup. Ct., Cayuga Co. 1991), *aff'd*, 184 A.D.2d 1077, 586 N.Y.S.2d 779 (4th Dep't 1992).
14. *N.Y. State Bankers Ass'n v. Wetzler*, 81 N.Y.2d 98, 104, 595 N.Y.S.2d 936, 939 (1993).
15. James M. Odato, *Pataki Vetoes Budget Items*, Times Union (Albany, NY), Aug. 21, 2004, at A1.
16. *Pataki v. New York State Assembly*, 4 N.Y.3d 75, 791 N.Y.S.2d 458 (2004).
17. *Pataki*, 4 N.Y.3d at 89.
18. *Id*. at 97. Section 6 of Article VII of the state Constitution forbids the addition of riders to appropriation bills.
19. *Id.*
20. *Id.* at 121.
21. Erin Duggan, *Budget Reform Vote Sought*, Times Union (Albany, NY), May 4, 2005, at B3.
22. N.Y. Const. art. VII, § 2. *See also Wein v. State*, 39 N.Y.2d 136, 141, 383 N.Y.S.2d 225, 227 (1976) (stating that the "Governor must present a balanced budget.").
23. James M. Odato, *Lawmakers Override Pataki Actions Create a 'Historic' Budget*, Times Union (Albany, NY), May. 16, 2003, at A1.

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In Defense of Executive Budgeting

By Robert B. Ward

For more than a century, progressive government reformers in America have argued that a powerful chief executive makes state governments more accountable and responsive. In the Empire State, a coalition of early 20th-century reformers, including Al Smith, Charles Evans Hughes and Franklin Delano Roosevelt, gave New Yorkers a constitutional framework that allows voters to hold governors accountable, particularly with regard to the state's budget policies.

In November 2005, New York State voters were asked to reverse a key reform of the Progressive era. A proposed constitutional amendment placed on the ballot by the legislature would shift significant budgetary authority from the executive to the legislative branch. This article will trace the history of New York's executive budget system, argue that voters should reject the proposed amendment, and offer alternative reforms that would truly improve the state budget process.

Under article VII of the state Constitution, key sections of which were adopted by the people in 1927, the governor submits an executive budget to the legislature at the start of each year.[1] The Constitution grants the governor the power to include "proposed legislation" related to the use of appropriated funds. As the state Court of Appeals ruled in December 2004, the legislature has no power to change such legislative language in the governor's budget bills.[2]

Moreover, as Peter Galie has written, "[t]he executive budget system is a major source of the governor's power, promoting integration of and control over the executive branch."[3] The current system also gives the chief executive power to shape broader spending policies, in areas such as education and Medicaid.

The Progressive-era reformers created a powerful executive office for good reason. In the late 1800s and early 1900s, state governments around the country took on major new responsibilities. They assumed the cost of, and authority over, services that had been mostly local in nature, such as care for the mentally ill. States also created entirely new governmental programs—such as regulation of labor relations—in response to dramatic changes in society and the economy.

Legislatures, which had run state governments since before the nation's founding, were poorly equipped to manage larger and more activist governments. They were also seen as susceptible to political horsetrading and irresponsible spending. In New York and across the country, reformers came to a consensus that putting more power in the hands of governors would improve the quality of government.

Among the first to suggest a major change in New York's budget system was Charles Evans Hughes, one of the most respected American leaders of his era. Governor Hughes and other reformers complained that legislators, in developing the budget for the state, were always more concerned about their individual districts than the statewide picture. As Chief Judge Judith Kaye wrote in 2004, "Legislative budgeting produced wasteful pork barrel spending without any responsible assessment of relative budget priorities."[4]

At the state's 1915 Constitutional Convention, Republican reformers Elihu Root and Henry Stimson joined then-Assembly Speaker Al Smith, a Democrat, in supporting an executive budgeting system similar to today's. The convention's proposal failed narrowly to win voter approval.

Once elected governor, Smith became the most powerful advocate of government reform along the lines of the 1915 proposals. His efforts paid off in 1927 when voters approved today's article VII by a margin of nearly 3-to-1. Hughes played key roles in developing the specifics of the budget amendment, as well as voter support. (Smith and Hughes also led other successful efforts to strengthen the chief executive, such as consolidating most agencies under the governor.)

As has been the case recently, when the executive budget amendment took effect in 1929 the legislature was unhappy with the governor's assumption of significant budget-making authority. Legislative leaders immediately challenged the chief executive—by then, FDR. The legislature wrote into one of the budget bills a provision that the fiscal committee chairmen would participate with the governor in allocating certain lump-sum appropriations. Roosevelt vetoed the legislature's action as an intrusion into his authority, ultimately took the case to court and won, in *People v. Tremaine*.[5] Thus, with bipartisan leadership, adoption of a strong executive budget system was complete.

Almost 75 years to the day after its *People v. Tremaine* decision, the Court of Appeals returned to the issue of budget powers in December 2004. In two cases decided jointly, *Pataki v. Assembly*, and *Silver v. Pataki*, the high Court confirmed and strengthened earlier rulings on the governor's budget powers.[6]

The joint decision rejected the legislature's claim that it had the power to rewrite text—statutory language—in executive budget appropriation bills. Nor, said the Court, may the legislature pass subsequent legislation that would have the effect of revising provisions in a governor's appropriation bills.[7]

"The amendment provides that, if the legislature has not acted on the governor's budget bills by the start of the fiscal year, those bills become moot."

Legislative leaders and others, including Chief Judge Kaye, argue that last December's ruling gives the governor virtually unchecked power to rewrite the state's statute books as part of budget legislation. Assembly Speaker Sheldon Silver said of the ruling: "The ability of the people of this state, as represented by the Legislature, to fight for public education, health care, effective economic development policies and lower property taxes has been significantly weakened."[8] Partly in response to the two court rulings, the Senate and Assembly gave second passage this year to the proposed amendment that voters will consider in November.

The amendment and implementing legislation include some provisions that are widely considered unobjectionable. For instance, they require more detailed financial reporting, and change the start of the state's fiscal year from April 1 to May 1. But, more importantly, the amendment repeals one of the basic achievements of the Progressive-era reformers: the power of the chief elected executive to shape the budget debate, restrain unaffordable spending, and ensure that the budget process gives preference to real priorities, rather than parochial desires.

The amendment provides that, if the legislature has not acted on the governor's budget bills by the start of the fiscal year, those bills become moot. The legislature then is empowered to draft its own appropriation bills, becoming the "constructor" of the budget, as the Court of Appeals described the role currently assigned to the governor. Regressing to an era when the legislature spoke in terms of "appropriations," and not "a budget," the amendment contains no requirement that lawmakers add up their total spending and compare the figure to expected revenues.

The legislature's amendment is not what Al Smith considered reform. "The very essence of the budgetary plan," he wrote, was "to prevent legislative juggling with the appropriation bills."[9]

Smith, Hughes and FDR all believed strongly in an activist government. Together, they enacted vast expansions of public services in areas, such as education, care for the poor and mentally disabled, parks and transportation. Contrary to arguments from today's legislative leaders, all three saw a strong executive office as essential to good government services. As FDR wrote, "It is safe to say that if it were not for the consolidation of state departments and for the executive budget, the great improvements to which the state of New York is committed could not be carried out economically or within a reasonable time, if indeed they could be undertaken at all."[10]

It's no insult to legislators to observe that the nature of the institution makes it virtually impossible for Senate and Assembly members to put the overall fiscal health of the state above parochial concerns. Each spring, a typical legislator hears thousands of requests for more spending—and few, if any, demands for a balanced budget. Governors, however, do have to worry about fiscal responsibility. Without it, they might be thrown out of office.

That is why both Governor Pataki and the leading Democratic contender for the 2006 gubernatorial nomination, Attorney General Eliot Spitzer, oppose the amendment. As the attorney general said recently, "[T]he history of the budget process in the state suggests there is greater fiscal prudency, fiscal discipline and greater accountability when you have an executive who is solely responsible for leading the budget process."[11]

Given the nature of the executive and legislative institutions, it is almost always governors, not legislators, who respond to major new priorities. Thomas Dewey created the State University system and initiated development of the thruway; Hugh Carey tackled the state and New York City fiscal crises; and George Pataki cut taxes and improved the business climate to strengthen the state's lagging economy.

By contrast, the seeming inevitability of legislative response to powerful interest groups may be seen in this year's long list of bills that provide special, enriched pension benefits to various classes of public employees. As Manhattan Institute scholar E.J. McMahon has shown, during the 2005 session, both houses passed at least 46 bills increasing pension benefits for favored groups of employees. The legislation, with total costs of more than $100 million, came as both the state

(Continued on page 32)

Committee on Attorneys in Public Service Spring Reception for Government Attorneys

One of the goals of the Committee on Attorneys in Public Service is to encourage more government attorney involvement in the New York State Bar Association, so that the work of the NYSBA is enhanced by their valuable perspectives and expertise. In keeping with this goal, the committee sponsored a Spring 2005 Reception for Government Attorneys on June 8th at the State Bar Center in Albany.

The event provided an enjoyable opportunity for government attorneys to join friends and colleagues as they learned about the resources and rewarding opportunities for involvement in NYSBA sections and committees. Attorneys, judges and law students from the Capital Region enjoyed an informal reception on a beautiful spring-time day, where they were able to speak with representatives from sections and committees. One special highlight of the reception were personal remarks from Court of Appeals Judge Victoria Graffeo.

Judge Graffeo shared her past experiences as a public sector attorney

Three judges of the Court of Appeals, including Chief Judge Judith Kaye, attended the June reception

NYSBA Past President Lorraine Power Tharp greets former Albany County DA Sol Greenberg

Marge McCoy, Jim Horan, Peter Loomis and Pat Wood

Former Senator John R. Dunne with Court of Appeals Associate Judges Carmen Beauchamp Ciparick and Victoria A. Graffeo

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and local governments were already straining to pay for benefit increases enacted just a few years earlier.[12]

Such parochial favors, of course, are exactly the sort of thing Governors Hughes, Smith and Roosevelt hoped to minimize. The proposed constitutional amendment, though, would lead to more such legislation—and less attention to real priorities.

"New York's taxes are already the highest in the nation, by far."

That means even higher spending, and thus higher taxes. New York's taxes are already the highest in the nation, by far. Our economy suffers as a result: We lag behind other states in creating jobs, and hundreds of thousands of New Yorkers have moved elsewhere in recent years, searching for greater opportunity.

If the proposed amendment is not the reform we need, what would be?

We need to force action on New York State's real problems of too much spending, and failure to promote long-term budget balance. This year's budget, for instance, raises spending at twice the rate of inflation and creates a gap of some $2.9 billion in the coming year. Even in New York, that's real money.

Specific steps could include requiring the legislature to adopt a balanced budget (the governor is already required to propose one). Multi-year fiscal planning should go further. If the legislature wants to insist on taking back some budgetary authority from the governor, any such move should only occur with an ironclad, constitutional limit on spending and tax increases.

Al Smith, Charles Evans Hughes and Franklin Delano Roosevelt were among the finest leaders ever elected in New York—or any other state. Let's not consign one of their greatest accomplishments to the dust bin of history.

Endnotes

1. N.Y. Const. art. 7, § 2.
2. *Pataki v. New York State Assembly*, 4 N.Y.3d 75, 90-91, 791 N.Y.S.2d 458, 466 (2004).
3. Peter J. Galie, The New York State Constitution: A Reference Guide 165 (1991).
4. *Pataki*, 4 N.Y.3d at 106.
5. *People v. Tremaine*, 281 N.Y. 1, 4 (1939).
6. *Pataki*, 4 N.Y.3d at 91, 99.
7. *Id.*
8. Press Release, Assembly Speaker Sheldon Silver, Assembly Speaker Sheldon Silver Statement on the Court of Appeals Decision (Dec. 16, 2004), *available at* <http://assembly.state.ny.us/Press/20041216/>.
9. NYS Div. of the Budget, The Executive Budget in New York State: A Half-Century Perspective 31 (1981).
10. *Id.* at 42.
11. Marc Humbert, *Spitzer Faults Legislature in Budget Process*, Associated Press, July 12, 2005, *available at* <http://1010wins.com/topstories/local_story_ 193125316.html> (quoting Attorney General Eliot Spitzer).
12. E.J. McMahon, *Legislators Still Aim to Sweeten Public Pensions*, Manhattan Institute Center for Civic Innovation, *available at* <http://www.nyfiscalwatch.com/html/fwm_2005-07.html>.

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Editor's Note: The proposed reform was defeated by New Yorkers in the November 8 statewide election.

The Right to Legislate: How Has the Court of Appeals' Decision in *Pataki v. Assembly* Affected the Executive/Legislative Balance of Power?

By Janet L. Horn

In light of the New York State Court of Appeals' December 2004 decision in the consolidated cases of *Pataki v. New York State Assembly, et al.* and *Silver, et al. v. Pataki*,[1] the central question is whether a New York governor can implement substantive law and policy decisions via the budget and appropriations process in contravention of the constitutional mandate that "[t]he legislative power of this state shall be vested in the senate and assembly."[2] A careful reading of the plurality and concurring opinions reveals that the governor has not been granted unfettered power to implement the substantive law and policy decisions that have traditionally and constitutionally been the prerogative of the legislature. However, it appears that considerable uncertainty still exists concerning the relative powers of the executive and legislative branches, which may result in conflict for years to come.

". . . the governor has not been granted unfettered power to implement the substantive law and policy decisions that have traditionally and constitutionally been the prerogative of the legislature."

The Plurality Opinion

On December 16, 2004, the New York Court of Appeals, in a plurality opinion, affirmed the decisions of the First and Third Appellate Judicial Departments regarding the governor's role in the budget and appropriations process. The Court held that the governor may include measures in appropriation bills that are not strictly dollar amounts with a short description of the proposed appropriation as long as the measures are "true fiscal measures, designed to allocate the State's resources in the way the Governor thinks most productive and efficient" and do not "appear[] to be a device for achieving collateral ends under the guise of budgeting."[3] The plurality opinion found that none of the appropriations in the governor's 2001 proposed appropriation bills had violated this standard.[4] The plurality further held that the legislature may not modify the governor's proposed appropriations by modifying the terms and conditions of such appropriations in the nonappropriation bills[5] and, therefore, affirmed the lower court decisions holding that the fifty-five provisions that the legislature had attached to the 1998 nonappropriation bills were invalid.[6]

Silver v. Pataki

First, the plurality opinion addressed *Silver v. Pataki*, a case involving the 1998 budget dispute, sparked by the governor's use of the line-item veto against fifty-five provisions in nonappropriation budget bills.[7] In *Silver v. Pataki*, the legislature had argued that it could alter the conditions attached to—but not the dollar amounts of—the governor's appropriations by including such language in nonappropriation budget bills after the legislature had passed the governor's appropriation bills.[8] The governor countered that the provisions that the legislature included in the nonappropriation budget bills were unconstitutional and therefore void *ab initio*.[9] Both the Supreme Court and the Appellate Division agreed with the governor and held that the legislation in dispute was invalid and declined to reach the propriety of the governor's use of the line-item veto.[10]

The plurality opinion rejected the legislature's arguments on the grounds that article VII, § 4 of the New York State Constitution, the "no-alteration" clause, would be rendered ineffectual and would result in a system of legislative rather than executive budgeting if the legislature could simply amend the governor's appropriation bills "out of existence" by modifying the language describing the governor's appropriations.[11] The Court thus held that if the legislature disagrees with the governor's proposed appropriations, the no-alteration clause permits it to strike out or reduce the appropriations or refuse to act on the governor's appropriations to compel him to negotiate. However, the legislature cannot substitute its own spending proposals for that of the governor by modifying the language attached to an appropriation via subsequently enacted nonappropriation budget bills.[12] Because the Court determined that the fifty-five provisions added by the legislature were invalid under the no-alteration clause, it declined to address the constitutionality of the governor's use of the line-item veto.[13]

Pataki v. New York State Assembly

In *Pataki v. New York State Assembly*, the governor included numerous provisions in his 2001 proposed appropriation bills that the legislature viewed as unconstitutional.[14] For example, for the first time, the governor included a complex formula comprising seventeen pages of provisions and conditions regarding his proposed $8.3 billion public school aid appropriation when such a complex formula had previously been included in nonappropriation budget legislation.[15] Viewing such provisions as unconstitutional, the legislature (1) deleted entire items of appropriation; (2) removed the offensive language from some of the appropriations; and (3) then enacted thirty-seven single purpose appropriation bills for the same dollar amounts and purposes as the deleted appropriations but with different terms and conditions attached.[16] It also purported to modify the language of some of the appropriations via the nonappropriation budget bills as it did in 1998.[17]

Although he signed all of the appropriation and nonappropriation budget bills into law, the governor immediately commenced an action seeking a declaration that, except for striking entire items of appropriation, all of the legislature's actions with respect to the 2001 budget were unconstitutional.[18] The legislature counterclaimed that it had acted properly because it was the governor who had included unconstitutional provisions in his proposed appropriations.[19] The Supreme Court and the Appellate Division both ruled in favor of the governor.[20]

In affirming the decisions of the lower courts, the plurality opinion interpreted the no-alteration clause to preclude the legislature from passing single-purpose appropriation bills for purposes already covered by the governor's proposed appropriations.[21] Further, the Court found the no-alteration clause permits the governor to include provisions in his appropriation bills affecting policy decisions as long as such provisions are not "essentially nonfiscal or nonbudgetary legislation."[22] The plurality addressed what might constitute such nonfiscal or nonbudgetary legislation only in the context of the unlikely scenarios discussed during oral argument, such as whether the governor could use the appropriations process (a) effectively to raise the mandatory retirement age for firefighters by making age a condition of fire departments' appropriations; (b) to render the Scaffold Law (Labor Law § 240) inapplicable to state construction projects; or (c) to override certain provisions of the Penal Law for workers engaged in certain state-financed activity.[23]

In rejecting the legislature's arguments, the plurality focused upon the governor's school funding proposal, which included a complex funding formula comprising seventeen pages.[24] First, the plurality rejected the legislature's contention that the length and complexity of the funding formula rendered it unconstitutional, holding that a formula is not unconstitutional merely because it is complex and that there could have been no objection had the bill applied the formula itself and appropriated a dollar amount to each school district directly.[25] Second, the plurality refused to adopt a "narrow historical test" of what constitutes an appropriation and rejected the legislature's argument that the school funding appropriation was unconstitutional because the details of school funding historically had been addressed in nonappropriation budget bills.[26] Finally, the plurality held that ordinary legislation enacted by the legislature could be superseded by an appropriation bill—with a two-year lifespan—because to hold otherwise would "limit the Governor's flexibility in making future budgetary choices" and "would seriously endanger the whole structure of executive budgeting."[27] The plurality thus held that neither the governor's school funding appropriation, nor any of his other appropriations, raised constitutional concerns about nonbudgetary legislation being incorporated into the governor's appropriation bills to shield them from legislative review by the no-alteration clause.[28]

Ramifications of the Plurality Opinion

Exactly what this might mean in practice for the future of gubernatorial/legislative relations was not clearly explained. The plurality opinion primarily addressed only the bills at issue in the 1998 and 2001 budget processes with only cursory reference to potential situations in which the governor might be deemed to have invaded the legislature's domain by proposing nonfiscal and nonbudgetary legislation. Thus, in reaching a decision as to only the matters actually addressed in the appropriation bills at issue and tangentially touching upon a few far-flung unlikely scenarios, the plurality provided little guidance regarding the vast amount of legislation in the gray area between strict appropriation bills and those that directly supersede existing substantive law.

The Concurrence

Although he concurred in the result reached by the majority, Judge Rosenblatt expressly wrote a separate concurring opinion, joined by Justice George Bundy Smith, because he did not "find the plurality writing [] fully satisfying" and was "unwilling to subscribe to its every premise."[29] Judge Rosenblatt's concurrence seeks to supply some much-needed guidance missing from the majority opinion, and attempts to elaborate upon and clarify the roles of the governor and the legislature in the budget and legislative processes in order "to preserve the separation of powers, a concept that goes back to our first State Constitution in 1777."[30] Judge Rosenblatt's concurrence, recognizing that the constitution vests "[t]he legislative power of this state . . . in the sen-

ate and assembly,"[31] attempts to address the fact that "the legislative branch—and not the Executive—is the primary lawmaking body."[32]

To begin, Judge Rosenblatt reaffirms his belief that the legislature retains the paramount role in crafting substantive legislation, emphasizing that,"anything that is more than incidentally legislative should not appear in an appropriation bill, as it impermissibly trenches on the Legislature's role."[33] He then enumerates a multi-factor test to determine whether the governor has impermissibly encroached upon the legislature's role: "The factors we consider in deciding whether an appropriation is impermissibly legislative include the effect on substantive law, the durational impact of the provision, and the history and custom of the budgetary process."[34]

Explaining each of these factors in detail, Judge Rosenblatt attempts to supply the guidance omitted from the plurality opinion. With respect to effect on substantive law, Judge Rosenblatt focuses upon whether the appropriation "actively alters or impairs the State's statutes and decisional law," noting that "[a] particular 'red flag' would be nonpecuniary conditions attached to appropriations."[35] Whether an appropriation's potential lifespan is greater than the two-year lifespan of the budget cycle is also a potential cause for concern as it may then "usurp[] the legislative function."[36]

In addition, Judge Rosenblatt emphasizes the role of history and custom in determining the constitutionality of the governor's proposed appropriations. The more appropriation legislation deviates from the past practices of prior executives the more suspect it becomes, i.e., it "strays from the familiar line-item format" by "exceed[ing] a simple identification of a sum of money along with a brief statement of purpose and recipient."[37] Although the specificity of the appropriation is within the governor's province, "when the specifics transform an appropriation into proposals for programs, they poach on powers reserved for the Legislature."[38] In addition, appropriation legislation may run afoul of the constitution the more its provisions affect the structure and organization of government as "[t]he executive budget amendment contemplates funding—but not organizing or reorganizing—state programs, agencies and departments through the Governor's appropriation bills."[39]

Impact on Legislative/Gubernatorial Relations

As the plurality opinion garnered only three unqualified votes of the seven-member court, whether it can be followed as authoritative precedent is in question. Moreover, even if followed, the plurality opinion still does not assist the executive and legislative branches in resolving issues regarding proposed appropriations that fall in the gray area between clearly fiscal measures and substantive policy measures. Although Judge Rosenblatt sought to supply this additional guidance, he "readily concede[s] that this or any other test is necessarily imperfect," but that "it is better than no test at all."[40] While admittedly imperfect, whether Judge Rosenblatt's test is better than no test at all can be determined only if it accomplishes its stated function of preserving the separation of powers between the executive and legislative branches. As illustrated below, the concurrence may not supply the level of guidance and clarity necessary to accomplish its goal.

Legislation That Is Clearly Within the Legislature's Domain

The only aspect of the plurality opinion that the concurrence successfully clarifies is the legislature's prerogative to determine the structure and organization of state government. As the plurality and the concurrence agree, the legislature is responsible for creating state departments and agencies and such departments and agencies cannot be created or realigned by the governor via the appropriations process.[41] The only reason that the Court upheld the governor's appropriation regarding a new agency in which to relocate the State Library and State Museum was because the appropriation did not purport to create the new agency, but merely sought to fund it if the legislature approved the agency's creation in a nonappropriation bill.[42] Judge Rosenblatt declared that, "[h]ad the Governor simply decreed this sort of reorganization in an appropriation bill, I would hold the action unconstitutional."[43]

Applying Justice Rosenblatt's multi-factor test, it is easy to see why responsibility for creating and realigning state departments and agencies lies with the legislature as a fundamental policy decision. Not only would such legislation restructure the state government, but it would also far outlive the life of any two-year appropriation. With the exception of special commissions designed to investigate particular situations, departments and agencies are not time limited by their very nature, but are expected to become a part of the infrastructure of the state for years, if not decades, to come.

The governor can propose funding for such agencies or departments, but must leave the critical policy choice about their creation or realignment to the wisdom of the legislature. Thus, although the governor may try to coerce the legislature into funding the departments or agencies that he seeks to create, the legislature still retains the final say over the creation and realignment of state departments and agencies.

Considerable Uncertainty Still Exists

Although Judge Rosenblatt seeks to provide guidance for both the executive and legislative branches in

drafting appropriation and nonappropriation legislation, the test that he has enumerated may still not resolve all of the uncertainty surrounding the budget and appropriations process. For example, Judge Rosenblatt admonishes against an appropriation that "actively alters or impairs the State's statutes and decisional law," noting that "[a] particular 'red flag' would be nonpecuniary conditions attached to appropriations."[44] Exactly what he means by "nonpecuniary conditions" is not completely clear, however. For example, Judge Rosenblatt could be referring to any appropriation that in some way modifies an existing statute on the books, such as a new education funding formula that modifies the one codified in the Education Law. Such an interpretation, however, directly contradicts Judge Rosenblatt's decision that the governor can alter the statutory education funding formula via the appropriations process. Without adequately defining exactly what might constitute a nonpecuniary condition, the concurrence fails to assist the executive and legislative branches in determining whether the governor has impermissibly included nonpecuniary conditions in his proposed appropriations.

Judge Rosenblatt also asserts that a specific program proposal in the guise of an appropriation also treads on legislative authority.[45] Once again, the concurrence fails to define exactly what constitutes a specific proposal for a program. For example, is the governor precluded from proposing the types of programs that the state university system may offer in conjunction with an appropriation to fund the state university system?

Judge Rosenblatt's concern over appropriations that do not comport with the traditional history and custom of past appropriations is also unlikely to provide considerable guidance as the physical appearance of appropriation bills—including the very bills that Judge Rosenblatt upheld as constitutional—in no way resembles that of appropriation bills of prior eras. Relying upon the 2001 appropriation bills for guidance means accepting that appropriations may be tens of pages long; a far cry from the simple dollar amount and short description provided in the 1920s and 1930s appropriation bills when the executive budget was implemented.

Judge Rosenblatt's test also contends that budget provisions that "cast shadows beyond the two-year budget cycle . . . look more like nonbudget legislation."[46] Other than the creation of state departments and agencies which, by their very nature, may become a permanent fixture of state government, all other appropriations—even for long-term projects—must be reappropriated during the next fiscal cycle. Thus, conditions attached to such appropriations, even if they affect substantive legislation, can be modified with each succeeding budget cycle. Under this standard, almost no provision would "cast a shadow" beyond the current budget cycle.

"Without a workable standard, future budget and appropriations processes may continue to be hotly contested and may, as occurred in 1998 and 2001, result in protracted litigation over the parameters of executive and legislative power."

Conclusion

This article sought to address how the Court of Appeals' decision in *Pataki v. Assembly* impacted the power of the legislature and its role in the budget and appropriations process. As explained above, the Court did not grant the governor unfettered power over substantive law and policy decisions—historically and constitutionally the legislature's domain. The Court did not, however, in either the plurality or concurring opinions, enunciate a workable standard for determining when the governor has encroached upon the legislature's lawmaking prerogative via the budget and appropriations process. Without a workable standard, future budget and appropriations processes may continue to be hotly contested and may, as occurred in 1998 and 2001, result in protracted litigation over the parameters of executive and legislative power.

Endnotes

1. 4 N.Y.3d 75, 791 N.Y.S.2d 458 (2004).
2. N.Y. Const. art. III, § 1.
3. *Pataki*, 4 N.Y.3d at 97.
4. *Id.* at 99.
5. Although part of the budget process for years, the term "nonappropriation budget bill" is not defined in the New York State Constitution or the New York statutes. In a 2001 decision regarding Speaker Silver's standing to sue in *Silver v. Pataki*, the Court of Appeals enunciated a description of what constitutes a nonappropriation budget bill. It described such bills, also known as proposed legislation, as bills containing "programmatic provisions and commonly include sources, schedules and sub-allocations for funding provided by appropriation bills, along with provisions authorizing the disbursement of certain budgeted funds pursuant to subsequent legislative enactment." *Silver v. Pataki*, 96 N.Y.2d 532, 535 n.1, 730 N.Y.S.2d 482, 484 n.1 (2001).
6. *Pataki*, 4 N.Y.3d at 91.
7. *Id.* at 85-86.
8. *Id.* at 89.
9. *Id.* at 86.
10. *Id.*

11. *Id.* (reiterating that the no-alteration clause explicitly permits the legislature to strike out or to reduce the amount of an appropriation but not to amend the language of the appropriation while leaving the dollar amount untouched).
12. *Id.* at 90.
13. *Id.* at 91.
14. *Id.* at 86.
15. *Id.* at 86-87. The governor also purported to use the appropriation bills to move the State Museum and State Library to a newly created department of his own choosing in contravention of an existing statute and to revise the method, previously established in the Public Health Care Law, of computing Medicaid rates payable to residential health care facilities. *Id.* at 87.
16. *Id.* at 87.
17. *Id.*
18. *Id.*
19. *Id.* at 87-88.
20. *Id.* at 88.
21. *Id.* at 91-94.
22. *Id.* at 94.
23. *Id.* at 93 (finding that such proposals "seem[] to go beyond the legitimate purpose of an appropriation bill").
24. *Id.* at 86-87.
25. *Id.* at 97-98.
26. *Id.* at 98.
27. *Id.* at 98.
28. *Id.* at 99 (describing how the governor's proposal to fund, but not to establish, a new agency in which to transfer responsibility for the State Library and State Museum did not encroach upon the legislature's domain).
29. *Id.* at 100.
30. *Id.*
31. N.Y. Const. art. III, § 1; *see also Pataki*, 4 N.Y.3d at 100.
32. *Pataki*, 4 N.Y.3d at 100.
33. *Id.* at 101.
34. *Id.*
35. *Id.* at 102.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 103.
41. *See id.* at 99, 102-03.
42. *See id.* at 99.
43. *Id.* at 103.
44. *Id.* at 102.
45. *Id.*
46. *Id.*

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Gubernatorial Oversight of Executive Agencies

By Hermes Fernandez

New York governors wield considerable executive power, and, arguably, under recent Court of Appeals decisions, significant legislative power. This article will survey what powers the governor does and does not have, and how governors control the executive agencies as they utilize those powers.

The state Constitution provides that "[t]he executive power shall be vested in the governor."[1] That simple declarative statement seems very complete, giving the governor plenary executive powers. The state Constitution goes on, however, to further explicate what those executive powers are. "The governor shall be commander-in-chief of the military and naval forces of the state . . . The governor . . . shall take care that the laws are faithfully executed."[2]

Having granted the governor those broad powers, the state Constitution then limits those powers by placing certain executive powers with other state officials. The state Constitution carves out three principal executive powers and assigns them elsewhere—to two officials elected directly by the people, and one body elected by the legislature.

The state Constitution places authority over state funds with the state comptroller. The comptroller is required "to audit all vouchers before payment and all official accounts . . . audit the accrual and collection of all revenues and receipts . . . [and] to prescribe such methods of accounting as are necessary."[3] In addition, the state Constitution provides that "the payment of any money of the state . . . except upon audit by the comptroller, shall be void."[4] By statute, the comptroller is required to approve all state contracts over $15,000.[5] The comptroller also is the sole trustee of the state and local pension funds,[6] funds that are now in the range of $120 billion. This includes the authority to set contribution rates for state and local governments,[7] an authority that has a considerable impact upon the operations of those governments. Those are significant executive powers held not by the governor, but by the comptroller.

The attorney general also possesses significant executive authority. The attorney general heads the Department of Law, and generally holds the authority to litigate on behalf of the state.[8] This authority includes the authority to defend state agencies from suit, and the authority, sometimes in consultation with state agencies and sometimes on its own, to commence actions to enforce compliance with state laws.[9] The attorney general also has significant substantive authority in certain areas, such as over the state's not-for-profit corporations and charities, and real estate offerings.[10]

Perhaps the greatest carve-out from the governor's executive authority is the authority over education. That authority is placed in the hands of the State Board of Regents,[11] a body not appointed by the governor, but elected by the majority vote of the Senate and Assembly, uniquely sitting and voting in joint session.[12] The State Board of Regents selects the Commissioner of Education, and that commissioner serves not at the pleasure of the governor, but of the Regents Board.[13] Given the state Constitution's requirement "for the maintenance and support of a system of free common schools,"[14] the tens of billions of dollars spent annually, the public's focus on and expectations regarding educational matters, this is a significant carve-out. The governor's authority over public education is limited primarily to budgetary matters, as the governor submits a proposed education budget to the legislature. Governors can, and do, propose legislation regarding education, but actual oversight remains with the Board of Regents.[15] Otherwise, on educational matters, the governor is restricted to the bully pulpit.

Even with these carve-outs, New York governors have vast powers. Virtually all other state agencies report directly to the governor. The governor appoints agency heads, most with the advice and consent of the state Senate.[16] The governor also controls agency budgets and agendas. Moreover, the governor may "examine and investigate the management and affairs of any department, board, bureau or commission of the state."[17]

In addition, New York State government utilizes public authorities, public benefit corporations, commissions, task forces, and some not-for-profit corporations.[18] In many of these entities, the governor either controls or has a large say in appointments.[19]

Besides these authorities, the governor has a number of other mechanisms to control state government. Some are statutory, and some have arisen through custom and experience. Primarily, the governor does so through the assistance of what is known as "the Second Floor." The governor maintains his office on the second floor of the State Capitol, and the governor's closest

staff members are housed there as well. In addition, the governor wields authority through the State Division of the Budget, a short walk down the stairs, located on the Capitol's first floor.

There are two statutory staff positions within the Executive Chamber[20] that report directly to the governor: the secretary to the governor and the counsel to the governor.[21] The secretary functions as the governor's chief of staff. Although not in statute, in function the secretary oversees the development of policy. On an annual basis, the secretary oversees the development of the governor's State of the State Message. This message, which is delivered annually to the legislature, convened in joint session, serves as a blueprint for the governor's priorities during the year. In it, the governor announces his legislative and budget priorities, and actions that he will take through the exercise of his executive authorities. Although not a statutory office, the governor has also appointed a director of state operations, responsible for overseeing the day-to-day operations of the state agencies. The secretary and the director of state operations are aided by a number of subordinates, with titles such as assistant secretary or program associate. Each of these individuals works as the governor's liaison with state agencies, working not only on the State of the State Message, but also dealing—usually at a frenetic pace—with the myriad of significant issues that develop on a daily basis. In theory, the secretary to the governor is more concerned with policy, and the director of state operations with operations. In practice, there is a substantial overlap between policy and operations, and, thus, an overlap in duties.

The liaison duties of the assistant secretaries and other program staff are important tools of gubernatorial control. The state agencies report their significant initiatives and problems to the program staff. The program staff brief and advise the governor on the most important of these matters. The program staff also communicates the governor's priorities to the agencies and oversees agency actions to ensure that they are in accord with the governor's policies.

The counsel to the governor acts as the governor's personal lawyer.[22] The counsel is aided by a staff of assistants, who interact with the governor's program and budget staffs, and the state agencies. The counsel advises the governor on matters of law; reviews all legislation enacted by the legislature, advising the governor whether to sign or veto those enactments; prepares the bills that are a part of the governor's legislative program; reviews the legislative proposals that are prepared by the executive agencies, either allowing or denying permission for those bills to be submitted to the legislature; prepares executives orders for the governor;[23] advises the governor on clemency applications; and coordinates and advises the governor on judicial appointments.

Perhaps the most important role that the governor's counsel's office plays, in gubernatorial control of state agencies, is the review and development of legislation.[24] Whether the proposal before it is for legislation from a state agency (known as departmental bills), or a bill pending before the governor after legislative enactment, the counsel's office solicits opinions from all state agencies that may have an interest in the legislation. This process ensures that various interests and perspectives are taken into account, allowing the best informed advice for delivery to the governor. The process also acts as a check on state agencies, as the governor, being informed of the interests and perspectives of various state agencies on the matter pending before him, is better able to determine what interests deserve priority, what agency positions merit reconsideration, or what agency positions may not be in conformance with his objectives.

Most agency heads hold statutory powers. Typically, these powers include the authority to administer their respective agencies, the power to fill positions, the power to issue rules and regulations, and often, the power to license within their regulatory area. By statute, then, these are legislative delegations of authority to commissioners or boards, not to the governor. For the governor to be effective, he needs the power to control appointees. With the statutory delegation of authority with commissioners, the governor's appointments secretary, another second floor office, plays a key role. This office is not responsible for the governor's schedule, but is responsible for the filling of positions subject to gubernatorial appointment. This is a critical position. For any governor to accomplish his or her goals, the governor must appoint capable individuals who share the governor's beliefs, and are committed to the implementation of the governor's policies.

There are numerous positions subject to gubernatorial appointment. These include commissioners, executive deputy commissioners, deputy commissioners and associate commissioners, counsels, public authority members, board members, task force members, advisory commission members, and others too numerous to list. In fact, virtually every position within the executive branch not subject to appointment through the civil service system is at the discretion of the governor. In certain circumstances, there are some limits on that appointment authority. The Commissioner of Health, for example, must be a physician.[25] Members of the Board of Elections must be split between Republicans and Democrats.[26] There is a similar requirement for the three members of the State Racing and Wagering Board.[27] Commissioner-level appointments must be confirmed by the state Senate. That is not, true, however, for subordinate appointments, such as deputy commissioners. Technically, a commissioner or agency head makes subsidiary appointments within the agency.[28] In

practice, the higher the position, the more likely the commissioner will be appointing an individual at the direction of the governor's appointments office. The only check on those appointments is public exposure or a protective commissioner. A commissioner may resist appointing a particular individual referred by the appointments office, but a commissioner can only resist so much, since commissioners serve at the pleasure of the governor. Even civil service positions may be, at least temporarily, subject to gubernatorial appointment. Through a process known as "provisional appointments," positions that are otherwise subject to civil service appointment are filled without reference to a civil service list.[29] Much to the chagrin of the public employee unions, some of these provisional appointments continue for years.

Besides the power to hire, the governor also holds the power to fire. Virtually every commissioner and subsidiary appointment serves at the sufferance of the governor. Some appointees, principally board and commission members, serve for terms.[30] In those circumstances, a governor's authority may continue beyond his or her term. Conversely, upon entering office, a governor may hold less sway over commission or board members who do not expect reappointment from the newly elected governor.

The Division of the Budget is a powerful lever in the governor's control of the Executive Branch.[31] The governor must submit his proposed Executive Budget to the legislature by mid-January of each year, or by February 1st in years following a gubernatorial election year.[32] That submission is the culmination of months of work that begins practically as soon as the previous year's budget is enacted. Each state agency prepares its own budget request, which the respective agency then submits to the Division of the Budget.[33] Those agency budgets are submitted to the Budget Division by October.[34] Over the next four months, the governor's budget is crafted as revenue estimates are made, priorities are set, and budget language is prepared. This is an arduous process that runs hand in hand with the preparation of the governor's State of the State Message. The director of the Division of the Budget is charged with estimating revenues, pricing program costs, and ensuring that the governor's budget proposal is balanced. During budget preparation, the governor's program staff and agency representatives work diligently to push their priorities, in the hope that their proposals will make their way into the budget. As policy issues are resolved at the staff level, items are included or rejected. Larger issues make their way to the governor, for his decision.

Once a budget is negotiated with the legislature, the Budget Division oversees implementation by the state agencies. Many appropriations, in fact, are written with a requirement that the budget director explicitly approve the expenditure. In this way, the governor is able to ensure that state agency spending remains within budgetary limits, and that the agencies spend their funds in ways acceptable to him. The governor also uses the Budget Division to control state spending in other ways. When state revenues have dipped, both Governors Pataki and Cuomo have directed state agencies to reduce their spending by certain percentages. These directives have been enforced by the Division of the Budget. At times, state agencies have been called upon to draft budget proposals reducing their spending by certain percentages, and to submit their draft budget cuts to the budget director. For most years of the Pataki administration, either a hard or soft hiring freeze has been in effect,[35] requiring state agencies to receive the budget director's approval before adding or filling a position.

Governor Pataki also has created a position that has played a critical role in the implementation of his goals. The Governor's Office of Regulatory Reform was created by Executive Order and charged with reviewing the state's extensive rules and regulations, with an eye towards elimination of unnecessary regulation.[36] As the administration has continued in office, the Office of Regulatory Reform's focus has turned to review of new regulatory proposals. Today, all regulatory proposals must be submitted to, and approved by, the Office of Regulatory Reform before the state agency may submit the proposed regulation to the State Register for publication.

In a state with over 18 million residents, and a state budget of over $100 billion, the governor requires substantial institutional controls in order to manage state government. Ultimately, though, the direction of state government is set by the governor himself. It is the governor's intellect and vigor that shapes the course of government. It is the governor that sets the priorities. It is the governor that sets the tone. State government wants to be led. State government takes its lead from the governor, from his initiatives, his public statements, and his pronouncements. Whatever the institutional levers of government, they mean little without gubernatorial leadership. This is true whether the governor immerses himself in the minutiae of government or sets a broad agenda. If the governor is vigorous, state government will be vigorous. If the governor is languid, state government will be languid.

I close with a story that I believe to be true, but cannot confirm, told to me by a past counsel to the governor. Many years ago, then-Governor Rockefeller proposed a takeover of all state Medicaid costs. Then (as today) state Medicaid costs were shared by the state and county (and New York City) governments. The governor's proposal was met with widespread opposi-

tion in the legislature because the governor also proposed that the state collect all sales tax revenues. At the time, sales tax revenues were rising more quickly than Medicaid expenditures, so local governments saw the proposal as a net financial loss. The governor hosted a leaders' meeting at the governor's mansion, where the legislative leaders voiced their strong opposition to the proposal due to the impact upon local government. When the meeting concluded, Governor Rockefeller turned to his closest advisors and asked why he had not been informed previously of the basis for the legislative leaders' opposition. In reply, one of the governor's advisors is reported to have said: "Governor, you know that your policy is that we are not to advise you of facts that are contrary to your proposals." When the governor plots a course, the ship of state must follow.

Endnotes

1. N.Y. Const. art. IV, § 1.
2. N.Y. Const. art. IV, § 3.
3. N.Y. Const. art. V, § 1.
4. *Id.*
5. N.Y. State Finance Law § 112(2)(a).
6. N.Y. Retirement & Social Security Law §§ 11(a), 13(b).
7. *Id.* §§ 17, et seq.
8. N.Y. Const. art. V, § 4; N.Y. Executive Law § 63.
9. *See, e.g.*, N.Y. Exec. Law § 63.
10. *See* N.Y. Exec. Law §§ 175, 177; *see also* Office of NYS Attorney General Eliot Spitzer, Real Estate, *available at* <http://www.oag.state.ny.us/realestate/realestate.html>.
11. N.Y. Const. art. V, § 4.
12. N.Y. Education Law § 202(1).
13. N.Y. Const. art. V, § 4.
14. *Id.* art. XI, § 1.
15. The governor does have indirect authority over the State University of New York. SUNY is controlled by a Board of Trustees. The trustees are appointed by the governor. SUNY is also authorized to approve and review the operation of a limited number of charter schools.
16. "Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards and commissions, excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law." N.Y. Const. art. V, § 4.
17. N.Y. Exec. Law § 6.
18. The use of the term "agencies" throughout the remainder of this article is also intended to cover public authorities, public corporations, and other entities that report to the governor.
19. *See, e.g.*, Press Release, Office of the Governor, Governor Announces Appointment of Niagara Greenway Commission (May 30, 2005), *available at* <http://www.ny.gov/governor/press/05/may30_05-2.htm>.
20. The Executive Chamber is the Office of the Governor. N.Y. Exec. Law § 2.
21. N.Y. Exec. Law § 4.
22. N.Y. Exec. Law § 4.
23. Executive Orders are written directives of the governor. They do not have the force of law, but agencies under the governor's control are required to follow the governor's directives.
24. The governor holds the constitutional authority to propose legislation, N.Y. Const. art. IV, § 4, and to approve or veto legislation. *Id*. art. IV, § 7.
25. N.Y. Public Health Law § 203 (PHL). Notably, the Commissioner of Health is one of the few agency heads appointed for a term. The Commissioner of Health "shall hold office until the end of the term of the governor by whom he was appointed and until his successor is appointed and has qualified." PHL § 204(1). This may explain why New York's health commissioners have traditionally been more independent than other commissioners.
26. N.Y. Election Law § 3-100(1).
27. "If not more than two of the members shall belong to the same political party." N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 101(2). There is a way around every rule. One current member of the Racing and Wagering Commission was a Republican who changed her registration to Democrat immediately before her appointment by Governor Pataki.
28. *See*, *e.g.*, N.Y. Mental Hygiene Law § 7.19(a).
29. N.Y. Civil Service Law § 65(1).
30. Members of the Racing and Wagering Board, for example, hold office for six-year terms. N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 101(3). State Election Board members hold two-year terms. N.Y. Elec. Law § 3-100(1).
31. In fact, the governor wields significant legislative power through the budget. The governor prepares and submits an executive budget to the legislature. The legislature must either accept or reject the governor's budget proposal before it may adopt its own budget proposal. N.Y. Const. art. VII, §§ 4, 5. A recent decision of the Court of Appeals has greatly restricted the power of the legislature to alter the governor's budget proposal. *See Pataki v. N.Y. State Assembly*, 4 N.Y.3d 75, 791 N.Y.S.2d 458 (2004). The Court of Appeals granted the governor a wide berth with regard to what the governor may include in the budget, allowing the governor to alter substantive law through the budget. *Id.* In addition, the legislature may not take up any bill that involves the expenditure of funds until it has acted upon the governor's budget proposal. N.Y. Const. art. VII, § 5. Arguably, the governor now has greater legislative authority than the state legislature in budgetary matters.
32. N.Y. Const. art. VII, § 2.
33. *Id.* art. VII, § 1.
34. In a legislative intrusion to the governor's executive authority, the budget director is required to provide the Assembly and Senate with a synopsis of the agency budget requests. N.Y. State Fin. Law § 22(1-a).
35. *See* Exec. Order No. 1 (1995), *reprinted in* N.Y. Comp. Codes R. & Regs. tit. 9, § 5.1 (2005).
36. Exec. Order No. 20 (1995), *reprinted in* N.Y. Comp. Codes R. & Regs. tit. 9, § 5.20 (2005).

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Exercising the Power of Appointment: An Analysis of Variation in Gubernatorial Appointments

By Judith R. Saidel, Tamika R. Black and Xiaolei Chen

Judith R. Saidel

For many decades, scholars interested in executive leadership and comparative state politics have recognized that gubernatorial performance is a function of the simultaneous interaction of many factors.[1] These include: legally based institutional features of the office of the governor; ascribed characteristics, political acumen and standing of incumbent governors; and state-level variables, such as region, political culture, and the distribution of party control between the executive and legislative branches of government.

Most studies have focused on gubernatorial power in relation to the legislature or administrative agencies. Researchers have examined the relative importance of formal and informal power; differences among the states in the influence of governors versus legislators over state agencies; the importance of state characteristics in explaining the performance of governors; and the combination of factors that differentiate outstanding governors from others. A fascinating and ongoing methodological debate in the research literature centers on how to measure gubernatorial power.

Among the competing conclusions from this now rather long-lived stream of studies, one observation is not contended—the importance of the governor's appointment power. As a prominent scholar argued almost forty years ago, "The power of appointment is a much coveted prerogative in any system of government."[2]

The power to appoint is widely recognized as a key means to exert influence over the administrative branch of government. It is an "administrative control mechanism"[3] at the disposal of governors to place individuals with congruent policy priorities and orientations at the helm of hierarchically structured public bureaucracies. Of course, the appointment power has long functioned as a way to reward past loyalty and inspire future support. In the current period of leaner state government workforces, appointees can also carry organizational efficiency portfolios.

Less widely acknowledged is another crucial purpose of the appointment power—its importance as a means by which governors can realize the democratic ideal of representativeness. The inclusion of women and minorities in high-level state leadership positions is a "critical means of strengthening democracy, helping to legitimize government among disenfranchised groups, promoting equity, enabling government to serve as a model employer for private and nonprofit firms, and advancing and testing theories of representative bureaucracy."[4]

In addition to serving the goals of policy consistency, patronage, and efficiency, top-ranking executive branch staff and agency appointments also indicate whether governors value democratic inclusion at the highest levels of executive branch political power. As governors interpret and wield the administrative power available to them, do they include the appointment of underrepresented groups to executive branch leadership positions among the priorities they set as elected officials?

Focus of Study

Gubernatorial appointment power is the focus of this article's investigation. In particular, this study explores a question about the exercise of the appointment power: What explains variation among governors in the appointment of women—who still hold only 33.4% of total state-level policy leadership posts[5]—to top-ranking executive branch positions?

Drawing on the research literature and a recent empirical study conducted at the Center for Women in Government & Civil Society, University at Albany,[6] this article uses individual-level variables, an institutional-level variable, and a state-level variable to explain differences among the 50 governors in the percentage of women appointed to head state governmental agencies.

Methodology

Original data on policy leaders appointed by current governors were collected from the states via a mailed survey and follow-up phone calls, as needed, between May and October 2004. For the purpose of the study reported here, only data on the heads of departments, agencies, offices, boards, commissions, and authorities are utilized (in the original study, gender, race, and ethnicity data were also collected on top advisors with policy influencing responsibilities in governors' offices). Only persons appointed by current governors are included in the research.

In order to explain which governors were more likely to appoint a higher percentage of women agency leaders, a regression equation was constructed with the dependent and independent variables defined in Table 1.

Table 1: Study Variables

Dependent Variable	• Percentage of Female Department Heads
Independent Variables	• Appointment Power (an index of legally based institutional power)
	• Personal Power (an index of a governor's individual political standing)
	• Power (an interaction term that combines appointment power and personal power)
	• Party (a governor's political party affiliation)
	• Percentage of female legislators

Dependent Variable

The dependent variable—percentage of female department heads—is calculated by comparing the number of women appointees at the helm of state agencies against the total number of agency heads in a given state. Data on gubernatorial appointees were collected between May and October 2004.

Independent Variables

The definition and measurement of gubernatorial powers has been regularly updated since the early 1980s by political scientist Thad Beyle. To achieve analytic consistency throughout this article, Beyle's 2004 data is utilized.[7]

The independent variable—appointment power—is an index based on the extent of a governor's autonomy in making appointments in six major functional areas: corrections; K-12 education; health; highways/transportation; public utilities regulation; and welfare. The six individual office scores are totaled and then averaged in order to calculate the state score:

5 = governor appoints, no other approval needed;

4 = governor appoints, a board, council or legislature approves;

3 = someone else appoints, governor approves or shares appointment;

2 = someone else appoints, governor and others approve;

1 = someone else appoints, no approval or confirmation needed.[8]

A governor's personal power is an index score that equals the average of the scores for four personal power components: governor's electoral mandate; governor's previous political positions; governor's tenure potential; and gubernatorial job performance rating in public opinion polls. In those states without a governor's job performance rating, the average is based on the three remaining components.[9]

The interaction term—power—measures how the interactions between a governor's appointment power and his or her personal powers affect the gubernatorial appointment of women to department head positions. It is created by multiplying a governor's appointment index score and his or her corresponding personal powers index score. A power rating is included in the equation because of the likelihood that the combined effect of formal and informal power will add explanatory power to the model beyond that contributed by each component of the interaction term by itself.

The independent variable—party—is a dummy variable that measures the impact of a governor's party affiliation on his or her likelihood to appoint female department heads. It takes the value of 1 if the governor is a member of the Democratic Party and zero otherwise. Again, to maintain analytical consistency in this article, changes in gubernatorial offices after October 2004 were not included.

The percentage of female legislators measures the effect that the gender composition in a state legislature might have on a governor's decision to appoint female department heads. It is calculated by comparing the number of female state legislators in a given state against the total number of state legislators in that state.[10] This variable is included as a proxy for a phenomenon labeled here as "state receptivity" to women's political leadership, i.e., the openness of a state's political culture to women's leadership as measured by the degree to which women are functioning in political leadership positions.[11] As operationalized in this study, the idea is that states in which voters elect higher percentages of women as legislative leaders may well be states with political cultures more open to women's leadership in other governmental arenas. One manifestation of state receptivity to female political leadership will be a higher percentage of women appointed by governors to executive leadership posts.

Findings

The regression analysis reported in Table 2 indicates that four of the five independent variables contribute significantly to explaining variation in the appointment by governors of women to top executive branch leadership positions.

Table 2 Multiple Regression Model Predicting Percentage of Female Department Heads Appointed by Governors, 2004

Independent variables	Regression coefficients (Robust standard errors)	Significance (t-value)
Governor's appointive power index	.279*** (.091)	3.06
Governor's personal powers index	.225*** (.069)	3.24
Power	-.073*** (.023)	-3.19
Female legislators in state government	.449** (.197)	2.28
Party affiliation of governor	.031 (.028)	1.11
Intercept	-.693 (.284)	-2.44
R-squared	.211	
N	50	
Degree of freedom	44	

** $p < .05$.

*** $p < .005$.

Consistent with earlier research, gubernatorial performance in this arena of action is a function of multiple factors, including: formal appointment power ($p < .005$); informal political power ($p < .005$); the interaction between the two kinds of power ($p < .005$); and, interestingly, the percentage of female state legislators ($p < .05$).

The positive and significant coefficients for appointment power (.279) and personal power (.225) indicate that the more institutional power and political power a governor has, the more likely he or she is to appoint women to executive leadership posts. In addition to the interactive effect, each variable has an independent effect on gubernatorial appointment practices. Expressed in statistical terms, the equation indicates that, holding all else constant, a one-unit increase in a governor's appointment power will independently contribute to a 28% increase in the percentage of female department heads. A one-unit increase in a governor's personal political power will independently contribute to a 23% increase in the percentage of female department heads.

More puzzling, however, is the finding that, when the two kinds of power act together, governors are slightly less likely to appoint more women [$b = -.07$, $p < .005$]. One possible explanation for this finding may be that when governors are strong in both institutional and informal power, they have the greatest degree of autonomy in making appointments, and are therefore less likely to face political backlash if they appoint few or no individuals from underrepresented groups.[12]

The assumption underlying this interpretation is that governors are less likely to appoint women and minorities without substantial external pressure. This may well be a faulty assumption although the slow and uneven progress of women into executive leadership positions suggests that such an assumption may be valid. It should also be noted that the regression coefficient in question [$b = -.07$], although significant, is quite

small, so the effect on gubernatorial appointments that we are analyzing in this instance is quite modest.

In the model described here, the independent variable—percentage of female legislators—is included as a proxy for state receptivity to women's political leadership, and is the strongest predictor [$b = .449$; $p < .05$] of higher percentages of female agency heads appointed by governors. This important finding suggests that to understand variation in governors' appointments practices, one must look for answers not only to the office of the governor and the incumbent's personal political power, but also more broadly to the political culture of the individual states.

The final independent variable—party affiliation of the governor—is not significant in differentiating between governors' appointment practices.

The model explains 21% of the variation in gubernatorial appointments patterns, an acceptable level of explanation in the social sciences, but one that still leaves a great deal of the phenomenon unexplained by the variables included in the equation. Other predictors for which data are not currently available might include: the degree of external interest and advocacy group pressure exerted on governors during and immediately after gubernatorial elections to appoint more women; and the number of women active in gubernatorial campaigns and as major campaign contributors.

Conclusion

Findings from this empirical investigation confirm that, with respect to the power of appointment, a number of factors work together to explain which governors are likely to more fully realize the democratic ideal of representativeness in the increasingly powerful leadership cohort of executive branch appointees. To understand variation between governors in the appointment of women, we must examine: the legally based appointment power that inheres in the office of the governor; the personal power of incumbent governors; the interaction between formal and informal power; and differences in state receptivity to women's political leadership.

These conclusions about the exercise of the power to appoint confirm findings about the nature of formal and informal power contained in earlier studies of gubernatorial performance more generally. At the same time, the conclusions significantly broaden understanding of executive leadership in state government by focusing on an element of discretionary gubernatorial action that is part of the appointment power. The study also suggests that the contextual variable—state receptivity to women's political leadership—is an important predictor of gubernatorial performance in this area.

Future efforts to understand differences among governors in how they interpret and wield the administrative power available to them should take into account this broader set of influences. Activists pressing for the inclusion of more women and minorities in positions of political leadership may also want to strategize about the difficult challenge of accelerating change in the states' political cultures, especially in the receptivity of different states to diversity among their political leaders.

Endnotes

1. *See, e.g.*, Deil S. Wright, *Executive Leadership in State Administration*, 11 Midwest J. Pol. Sci. 1 (1967); Joseph A. Schlesinger, *The Politics of the Executive, in Politics in the American States* (Herbert Jacob & Kenneth N. Vines eds., 1971); E. Lee Bernick, *Gubernatorial Tools: Formal vs. Informal*, 41 J. Pol. 656 (1979); Nelson C. Dometrius, *Measuring Gubernatorial Power*, 41 J. Pol. 589 (1979); Lee Sigelman & Roland Smith, *Personal, Office and State Characteristics as Predictors of Gubernatorial Performance*, 43 J. Pol. 169 (1981); Nelson C. Dometrius, *Changing Gubernatorial Power: The Measure vs. Reality*, 40 W. Pol. Q. 319 (1987); Norma M. Riccucci & Judith R. Saidel, *The Demographics of Gubernatorial Appointees: Toward an Explanation of Variation*, 29 Pol. Stud. J. 11 (2001).
2. Wright, *supra* note 1, at 14.
3. Dometrius, *Measuring Gubernatorial Power*, *supra* note 1, at 597.
4. Riccucci & Saidel, *supra* note 1, at 11.
5. Judith R. Saidel, *Democracy Unrealized: The Underrepresentation of People of Color as Appointed Policy Leaders in State Governments* 5, 8 (Center for Women in Government & Civil Society, University at Albany 2005).
6. *See generally id.*
7. More information on gubernatorial powers *available at* <http://www.unc.edu/~beyle/>.
8. Thad Beyle, *Governor's Institutional Powers*, 2004, *available at* <http://www.unc.edu/~beyle/tab7.5-InstPowers04.doc>.
9. Thad Beyle, *The Personal Powers of the Governors, 2004, available at* <http://www.unc.edu/~beyle/tab7.4-PersPowers04.doc>.
10. Data on the number and gender of state legislators in 2004 are collected by the Center for American Women and Politics, *available at* <http://www.cawp.rutgers.edu/Facts2.html>.
11. Other variables introduced into earlier regression equations with weaker explanatory powers include: region and political culture. Both were correlated with the percentage of female legislators at the .5 level. Robert S. Erikson et al., Statehouse Democracy (1993).
12. I am grateful to my colleague, R. Karl Rethemeyer, for suggesting this possibility.

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The Governor's Power to Appoint Judges: New York Should Have the Best Available Appointment System

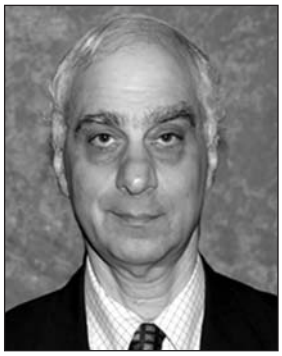
By Norman L. Greene

— "I made my decisions [to appoint judges] without respect to political affiliation, political disposition, or even possible judicial decisions. I considered competence as a lawyer, as a thinker, as a communicator. I considered collegiality, integrity, and experience."[1]

— "Despite having no experience on the bench, [] the top lawyer [for Gov. Ernie Fletcher] was chosen yesterday as one of three finalists for [an interim vacancy for] a Kentucky Supreme Court seat, along with two longtime judges. . . . Fletcher appointed three new members of the nominating commission [to choose the finalists] in the last two weeks."[2]

— "Gov. Ernie Fletcher named [his] General Counsel John Roach yesterday to fill a Kentucky Supreme Court vacancy, choosing the youngest of three candidates [38 years old] and the only one with no experience as a judge."[3]

Introduction



This article considers the governor's power to appoint New York state court judges, specifically, Appellate Division justices,[4] Court of Claims judges,[5] and interim Supreme Court justices and other interim judges.[6] It recommends that the current appointing procedures be replaced by a system based on independent judicial nominating commissions for each court in order to, among other things, limit the influence of politics on appointments, foster judicial independence, and maximize the pool of well-qualified and diverse candidates for the judiciary.[7] The governor's near unilateral power to appoint fails to comport with modern notions of the most appropriate form of judicial selection by appointment.

The commissions would differ from the screening panels established by the governor's executive order concerning the governor's appointment of judicial nominees.[8] With a judicial nominating commission, unlike a screening committee, the governor would be required to select from a limited number of nominees proposed by the nominating commission. The manner in which Appellate Division justices are selected should also be changed. The constitutional requirement that Appellate Division justices be selected only from Supreme Court justices should be eliminated to permit selection from a larger pool of qualified applicants. The Appellate Division should have a better and more inclusive judicial selection process.

The focus will be on the *procedure* for judicial selection rather than the outcome of the selection process. It is not about whether any governor of the State of New York has been appointing good or bad judges. The debate over whether a particular judicial appointment is good or bad requires careful analysis, not broad pronouncements, including a definition of what makes a good judge and empirical analysis of whether the judge meets that definition. Nor is it about whether the various screening panels used by the governor to assist him in the selection process are distinguished or working hard to find and recommend excellent judicial candidates and reject unqualified ones.[9] Finally, it is not about whether the judicial selection process in place for the Appellate Division has "worked well" by selecting good judges.

No response will be made to comments that procedural reform may be hard, take time, require a constitutional amendment, and the like.[10] Similarly disregarded are dismissive or cynical comments to the effect that any appointive system is "political" so long as the appointing authority is "political" or that "everything is political."[11] To accept such comments would discourage reform efforts on the assumption that nothing can be done to take the patronage out of judicial selection or that it would take too long to do so.[12] Rather than accept that paralyzing approach, this article will investigate the problem and consider alternatives.

The Court of Appeals—A Brief Comparison

The 1977 amendment of the New York State Constitution brought appointive selection through a commission-based nominating process to New York state courts, but only to the New York Court of Appeals. The plan, which is constitutionally mandated, set up an appointment system where the governor selects the judges but only from a limited pool of nominees identified by the nominating commission. The governor must pick from the nominees and cannot seek additional

ones.[13] Although a system in which the governor appoints judges was not new to New York in 1977, the constitutional, commission-based system was new. Indeed, the governor had long appointed judges in New York for the Appellate Divisions, the Court of Claims, and for various other courts. In certain circumstances, Senate confirmation was required for judicial appointments; however, no nominating commission existed to limit the governor's choices.

The Appellate Division

The governor's power to select Appellate Division justices provides him with the power to appoint members to what are often the courts of last resort in the State.[14] The Appellate Division judicial selection process should therefore be at least as good as that for the highest court, namely the Court of Appeals. But there are major differences, with the governor exercising far greater authority over the selection of Appellate Division justices.[15]

The Appellate Division is often the only appellate court available to litigants since no appeal to the Court of Appeals may be possible.[16] An order of the Appellate Division, unless it meets the limited circumstances available for an appeal as of right,[17] is appealable to the Court of Appeals only by leave of the Appellate Division or by the Court of Appeals.[18] A grant of leave is discretionary, with standards for granting it being vague at best, resulting in leave being infrequently granted.[19] Moreover, the Appellate Division has greater powers of review than the Court of Appeals. Among other things, the Appellate Division is permitted to review the facts as well as the law and base its decision on the interests of justice.[20] Determinations based on these grounds are generally not reviewable by the Court of Appeals and therefore are final. The Court of Appeals has powers of review limited to questions of law, with few exceptions.[21] An appeal beyond the Appellate Division may also involve expenses that the litigants may not wish to incur.

The importance of the Appellate Division warrants the best possible judicial selection system. But the Appellate Division justices are not so selected.[22] First, no judicial nominating commission limits the governor's power to select Appellate Division justices. These nominating commission plans principally developed in the 20th century, after the creation of the Appellate Division in the 19th century.[23] Although the governor has voluntarily established screening panels for the selection of these justices, unlike judicial nominating commissions, these panels do not constitutionally limit the governor's power to select Appellate Division justices.[24] The governor's power of selection should be restricted by a nominating commission that does establish a limit. The nominating commissions should be designed so that the governor selects no members, but if that is not possible, he should select as few as possible in order to maximize the independence of the process.[25]

Second, the requirement of being an elected Supreme Court justice for selection as an Appellate Division justice should be eliminated. Regardless of the past rationale for this provision and its 19th-century origin,[26] it is now self-evident that the restriction of eligibles to Supreme Court justices potentially deprives New York state of excellent appellate judicial candidates, such as those in private practice, government attorneys (prosecutors, defense attorneys, municipal attorneys, etc.), professors at law schools, or experienced judges serving on courts other than the Supreme Court. Indeed, in "one party" counties, this restriction disadvantages qualified members of the party out-of-power since they would never be elected to the Supreme Court, and they would therefore not be eligible for the Appellate Division.

No such restriction applies to federal appellate courts, since the president is not limited to appointing federal district court judges to those courts;[27] nor does it apply even to judges on the New York Court of Appeals. The Association of the Bar of the City of New York[28] and the New York State Bar Association[29] have recognized that the pool of candidates eligible for appointment to the Appellate Division should be expanded. As an Association of the Bar report has stated:

> The present system, by limiting the field of potential appellate division justices to elected justices of the Supreme Court, excludes thousands of highly qualified New York attorneys from consideration, as well as hundreds of highly qualified judges who sit in trial level courts other than the Supreme Court. If the pool of eligible candidates included experienced attorneys and a broader range of trial court judges, the Appellate Division bench would better reflect the full breadth of talent, experience and diversity of New York's bench and Bar.[30]

Even were a limitation to elected Supreme Court justices viewed as a check on quality by establishing an experience requirement, it is unclear whether serving on the Supreme Court should be a threshold requirement; the value of other experience should be credited as well. The use of an independent nominating commission to limit the governor's choices could also help to ensure quality.[31]

Passage of a court merger plan, which would make many new Supreme Court justices, would ameliorate the problem by increasing the pool of judges eligible for selection. However, it would not provide as wide a

selection as removing the Supreme Court eligibility requirement entirely.[32]

Third, the limitation to Supreme Court justices may have a negative effect on diversity, particularly in areas where minority Supreme Court justices are few. That has been noted to be the case in upstate areas. According to one commentator, an "examination of the statewide elected judiciary reveals an astonishing lack of judges of color" and that "[o]utside New York City, it seems well nigh impossible for a person of color to be elected to the bench in New York State."[33]

Other reasons warrant ending the restriction on the source of Appellate Division justices to elected Supreme Court justices. Specifically, the selection process of Supreme Court justices themselves has been questioned.[34] Supreme Court nominees are typically nominated by judicial nominating conventions controlled by political leadership. Sometimes they are cross-endorsed and run unopposed, essentially appointed by political leaders, and are often unknown to the public.[35] Without taking a position on the quality of those who have been politically successful, the intentions or abilities of those involved in administering the system, or the reforms or other variations in place in any particular county, the process reportedly provides insufficient assurance that only the best will be selected as Supreme Court justices.[36] This further supports opening up the process to judges beyond the Supreme Court and to other qualified attorneys.

Finally, the governor's power to appoint presiding justices of the Appellate Division should be limited by a judicial nominating commission. Such appointments are indeed important. Among other things, the four presiding justices of the Appellate Division, along with the Chief Judge, constitute the Administrative Board of the Courts and therefore enjoy significant powers.[37] Their selection should also be subject to a judicial nominating commission in order to improve the quality of the process.

The Court of Claims and Interim Supreme Court Vacancies

The governor's power to appoint extends to Court of Claims judges and interim Supreme Court vacancies. Once again, the system fails to comport with model methods of appointments, to the extent that it lacks an independent judicial nominating commission. But beyond that, one can observe several other possible implications of the appointing power.

For example, the power to appoint interim Supreme Court justices may be used to extend the terms of other judges substantially beyond their 70-year-old retirement ages. This may be done by appointing such judges to interim Supreme Court judgeships near their retirement age where they may be certified for an additional six years, until they are 76.[38] This may be a valuable method to extend the judicial service of various judges and may be a factor to weigh in making appointments. However, whether that is the most appropriate use of the appointment power is less clear.[39] Independent judicial nominating commissions free of the governor's control—other than the governor's power to select judges from nominees—would be a useful check and balance on this process.[40]

"New York's system of judicial appointments has prevented to some extent the types of problems that afflict states where judges are entirely elected, including contentious and expensive election campaigns."

Interim Supreme Court positions may also be used to give an "incumbent advantage" to judges in areas where Supreme Court elections are contested. The judge with an interim appointment may seek to appeal to the voters as an experienced judge. In "one party" areas, that may make no difference. There the dominant party's candidate would win regardless whether the other party fielded an "interim incumbent candidate." An interim Republican would lose in an all-Democratic county, and an interim Democrat would lose in an all-Republican county. Some have questioned whether this electoral advantage is appropriate and whether such judges should be able to run as incumbents or, in more extreme cases, run at all after an interim appointment.[41] If such judges could not run at all, few attorneys might wish to interrupt their practices or give up other careers to accept the interim position. Denying the right to run as an *incumbent* is less of a problem, since the judge is not denied access to the ballot. But it does disregard reality: the interim judge does have judicial experience, although brief, and some judicial record on which to run.

Conclusion

New York's system of judicial appointments has prevented to some extent the types of problems that afflict states where judges are entirely elected, including contentious and expensive election campaigns.[42] Imagine contested races for the Appellate Division, for example, like those when the Court of Appeals was elected in the 1970s or those which occur in other states, such as Ohio, Illinois or West Virginia. The systems set up in New York for the governor to appoint judges could be better designed, however. The governor's direct appointment power, even with the use of screening

committees, does not comport with modern thinking on how an appropriate appointment process should function.[43] The governor's power should instead be circumscribed by independent, properly designed judicial nominating commissions which limit his selections to those approved by the commissions.[44] The use of screening panels selected by the governor, which pass on the qualifications of judicial aspirants, is not a satisfactory substitute for independent judicial nominating commissions.[45] In addition, the selection process for Appellate Division justices should be changed to render eligible a wider pool of potentially qualified candidates, without limitation to elected Supreme Court justices. Both changes would be a substantial step toward reform of the judicial appointment process in New York.

Endnotes

1. Mario M. Cuomo, *Some Thoughts on Judicial Independence*, 72 N.Y.U. L. Rev. 298, 304 (1997) (commenting on his selection of judges as governor). In his article, Governor Cuomo criticized the practice of selecting judges on the basis that, "they march in philosophical or political lockstep with the elected leadership of that moment" because it "reduces the chance of finding the best judicial talent available, simply because it excludes those who may exhibit far superior judicial talent but happen to belong to the wrong party or philosophical school." *Id.* at 305. Furthermore, he stated that it was inappropriate to "use ideology or political or social philosophy as a standard of selecting judges" because it overlooked the fact that "[j]udges are supposed to approach each case with an open mind as to how the law applies to the particular facts and circumstances placed before them in a particular record." *Id.* at 306. Governor Cuomo's declared goals of a judiciary deciding impartially and on the law along with selecting from the best available talent are standard and unobjectionable. Whether any governor in practice has met this goal in all circumstances—whether in New York or elsewhere—is beyond the scope of this article.
2. Elisabeth J. Beardsley, *Fletcher Aide up for Court Seat, Two Judges also Are Nominated*, The Courier-Journal (Louisville, KY), May 17, 2005, at 1b.
3. Tom Loftus, *Fletcher Picks Justice, General Counsel to Join High Court*, The Courier-Journal (Louisville, KY), June 11, 2005, at 1a. The quotations beginning this article imply two different models for judicial selection—one based on a concept of judicial merit and another which may involve merit as well but resonates with a strong sense of cronyism. The damage done by apparent cronyism cannot be belied by polite statements made about the alleged insider and favorable comparisons to the insider—e.g., all the excellent judges who had no prior judicial experience or who started as high court judges under 40 years old, the insider's distinguished judicial clerkship and high law school grades, and his admirable judicial philosophy, if that is the case. First, polite phrases are to be expected since attorneys are likely to be reluctant to alienate the insider turned justice. Second, although welcome, the correlation between academic success and judicial excellence is unclear. Third, the mere selection itself of the insider—even if qualified—damages the process and image of the judiciary. *See* The Task Force on Judicial Selection of the Association of the Bar of the City of New York, *Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York*, 58 Rec. Ass'n B. City of N.Y. 376, 402 (2003) [hereinafter "Ass'n Recommendations"] (stating that "the appointing authority must ensure that he or she does not appoint only those who are known to be very close to the appointing authority even if such persons are qualified. Such a process would lead to widespread cynicism about the role of the screening committee and the whole notion of merit selection."). This damage may include the deterrent effect on would-be applicants who decide not to apply or apply only to withdraw their names after the favored candidate emerges, perhaps to avoid putting the appointing authority in a difficult or embarrassing position. Because the federal system is beyond the scope of this article, no comment is made or intended to be made on federal judicial selection, including the United States Supreme Court nomination of White House Counsel Harriet E. Miers by President George W. Bush to replace Justice Sandra Day O'Connor.
4. N.Y. Const. art. 6, § 4. Governor appoints all of the Appellate Division justices, including the presiding justices; no Senate confirmation is required. *Id*.
5. *Id.* art. 6, § 9. Governor appoints all Court of Claims judges with the advice and consent of the Senate. *Id*.
6. The governor's right to fill interim vacancies for Supreme, County, Surrogate's, and Family Courts outside New York City appears in article 6, § 21 of the N.Y. Constitution. The advice and consent of the Senate is required only if the Senate is in session. *Id.* art. 6, § 21, cl. a.
7. Many distinguished organizations support such a process, including national organizations such as the American Judicature Society and the American Bar Association, and New York organizations such as the New York State Bar Association, the Association of the Bar of the City of New York and the New York County Lawyers' Association. *See, e.g.*, American Bar Ass'n, Justice in Jeopardy: Report of the American Bar Association Commission on the 21st-Century Judiciary (2003) [hereinafter "Justice in Jeopardy"], *available at* <http://www.abanet.org/barserv/library/n/judiciary_and_the_courts/4543.pdf>; Report of Action Unit #4 of the New York State Bar Ass'n, A Model Plan for Implementing the New York State Bar Association's Principles for Selecting Judges (1993) [hereinafter "1993 Report of Action Unit No. 4"] (the New York State Bar's recommendation) and its predecessor report entitled, Report of Action Unit No. 4 (Court Reorganization) to the House of Delegates on Trial Court Merger and Judicial Selection (1979); Ass'n Recommendations, *supra* note 3, at 376 (Association of the Bar of the City of New York's recommendation); The American Judicature Soc'y, The American Judicature Society's Model Merit Selection Plan in Theory and in Practice (2000), *available at* <http://www.ajs.org/js/ms_schematic.pdf>, *and* Merit Selection: The Best Way to Choose the Best Judges, *available at* <http://www.ajs.org/ js/ms_descrip.pdf>; The New York County Lawyers' Ass'n, *About NYCLA* , *available at* <http://www.nycla.org/index.cfm?page=About_NYCLA> (statement as to the New York County Lawyers' Association's support for merit selection of judges). Recommending a process based on a judicial nomination commission model does not preclude advocating the need to reform that process. *See generally* Norman L. Greene, *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 Albany L. Rev. 597 (2005). The reformed process would likewise involve a judicial nomination commission as well as various safeguards to improve its functioning.
8. *See* Exec. Order No. 10 (1995), *reprinted as amended in* N.Y. Comp. Codes R. & Regs. tit. 9, § 5.10 (2005). Executive Order 10 requires the governor only to select persons found "highly qualified" by the screening panel. This does not restrict the governor's selection of any particular persons, however, as would be true if there was a nominating commission instead of a screening panel.
9. Screening panels obviously may serve a beneficial function in weeding out the unqualified applicants without putting the appointing authority in a position of having to reject unqualified applicants personally.

10. Whether any changes proposed should be accomplished through specific constitutional changes or as part of a constitutional convention is beyond the scope of this article.

11. Although that proposition may not be subject to empirical proof or disproof, if accepted, it might lead to the conclusion that the only significant variable in a judicial selection system is who the appointing authority is. The goal, however, is to attempt to develop a system whose benefits are not merely dependent on the particular appointing authority. For example, in an ideal system, a governor would not necessarily appoint members of his own party, although that perhaps is expecting too much. *But see* Cuomo, *supra* note 1, at 304-05. Democratic Governor Cuomo took pride in his appointment of several Republicans to the New York Court of Appeals. *Id*.

12. *See* Quintin Johnstone, *New York State Courts, Their Structure, Administrative and Reform Possibilities,* 43 N.Y.L. Sch. L. Rev. 915, 972 (1999-2000) (arguing that "[p]atronage benefits to those with power over the selection and retention process [of judges] is a major reason for the present system.").

13. This article acknowledges that not every judicial nominating commission is a good one and that the process can be abused. *See*, *e.g.*, Justice in Jeopardy, *supra* note 7, at 53 (noting that some "commission-based, judicial evaluation programs" may be "unduly influenced by the appointing authority."). The judicial nominating commission for the New York Court of Appeals has been described as overly controlled by the governor, leading to the selection of insiders or those otherwise close to the governor, arbitrary and secretive. *See* John Caher, *Fine Results, But a Flawed Process*, 3 N.Y. St. B.A. Gov't L. & Pol'y J. 25 (2001). With four of the twelve members selected by the governor, the very structure of the commission makes it a dubious guard against cronyism. In the case of gubernatorial appointments to vacancies in Kentucky, the judicial nominating commission has four out of its seven members selected by the governor. *See* K.Y. Const., §118(2). This leaves the impression that the governor has substantial control over the outcome—specifically, who the commission approves, leaving the situation ripe for cronyism.

    Nominating commissions need not be like that. Reforms have been proposed to safeguard such commissions against abuse, including removing the governor's power to select the commissioners, preventing him from attempting to influence the commissioners (whether or not he selects them), making the commission's work reviewable, subjecting the commissioners to an appropriate code of conduct, and ensuring that diversity is considered. *See generally* Norman L. Greene, *Perspectives on Judicial Selection*, 56 Mercer L. Rev. 949 (2005). Although the focus has been on restricting the control of the governor over the appointment process, certain other influences inside or outside the commission could negatively affect the system, including improper conduct by judicial nominating commissioners. A code of conduct for commissioners should address such matters.

14. John Caher et al., *Appellate Panels See Their Influence Rise: Tribunals Take on Role of Court of Last Resort*, 225 N.Y.L.J. 71 (2001) (stating that the Appellate Division is "essentially assuming the role of court of last resort in the vast majority of appeals" and quoting James M. McGuire, former counsel to the governor and now justice, Appellate Division, First Department, as stating that "the overwhelming majority of the cases in our court system are finally resolved by the Appellate Divisions."). *See also* Remarks on the Centennial of the Appellate Division, Third Department, *available at* <http://www.courts.state.ny.us/history/elecbook/3d_dept_hist/pg9.htm> (discussing a rendition of the Court of Appeals as a certiorari court, which "has enhanced the Appellate Division['s] role as the court of final review in the vast majority of cases in the New York State court system.").

15. Appellate Division justices serve five years or until their Supreme Court terms expire, whichever comes first. N.Y. Const. art. 6, § 4, cl. c. The Constitution refers to the designation rather than the appointment or selection of Appellate Division justices. *Id.*

16. *See* Caher et al., *supra* note 14.

17. *See* N.Y. CPLR 5601. For example, one basis for an appeal to the Court of Appeals as of right would be an appeal from an order finally determining the action, where there is a dissent by two Appellate Division justices on a question of law in favor of party taking the appeal. *Id.* 5601(a).

18. N.Y. Const. art. 6, § 3.

19. *See generally* Caher et al., *supra* note 14.

20. *Id*.

21. N.Y. Const. art. 6, § 3.

22. *See* Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. Mich. J.L. Reform 791, 818 (2004). S*ee also* Justice in Jeopardy, *supra* note 7, at 70 (recommending a commission-based appointment system).

23. *See* Daniel Becker & Malia Reddick, Judicial Selection Reform: Examples from Six States 20 (2003), *available at* <http://www.ajs.org/js/jsreform.pdf>; Charles Z. Lincoln, 3 The Constitutional History of New York 335 (1906). In the 1890s, the Appellate Division replaced the General Term, undoubtedly a reform that was intended to improve the administration of the New York courts at the time. *Id.* The General Term was a branch of the Supreme Court which had previously exercised appellate jurisdiction. *Id.* at 354. Since 1870, the governor had the statutory rather than constitutional power to designate General Term members. *Id.* When the Appellate Division was created, the governor's power of designation appears to have been continued for that court, but it was grounded in the constitution.

24. Screening panels are established by Exec. Order No. 10, *supra* note 8. "In general, the problem with screening commissions is that the appointing official has the power to keep asking for more names until candidates of choice are recommended even though they may not be the most qualified." The League of Women Voters of New York State, The Judicial Maze: The Court System in New York State 67 (1990). Such appointive selection has been "misleadingly cited as evidence that [commission-based] merit selection of judges is just as political as election" when political selections are made. *Id.* "[A] nominating process, in which the executive must choose from among a small number of the best candidates, is preferable to a screening process, which allows the executive to choose from a potentially unlimited number of candidates." *Becoming A Judge: Report On The Failings Of Judicial Elections In New York State*, *in* Government Ethics Reform for the 1990s 297 (John Feerick & Bruce Green eds., 1991). *See also* Ass'n Recommendations, *supra* note 3, at 382 (stating that "[u]nlike the judicial nomination commission, the screening committee does not narrow the field of qualified candidates."); Zeidman, *supra* note 22, at 836 (advocating the creation of a judicial nomination commission structure, in which the governor is only allowed to appoint judicial candidates from the commission's approved list).

25. *See* Greene, *supra* note 13, at 962-64 (citing sources that argue that the judicial appointing authority should not have substantial control over a judicial nomination commission). The governor could, of course, attempt to exert influence on the commission to report out certain nominees even if he did not select judicial nominating commissioners. Certain precautions may be taken in designing a judicial selection plan in order to avoid this. *See id.* at 964.

26. The longevity of such a provision is not necessarily indicative of its present merit. Provisions of such a nature may also have been in part the result of politics in the late 19th century or the product of a rationale no longer operative. *See* Johnstone, *supra* note 12, at 972 (arguing that much of the present system of "selection and retention of judges" has been the "result of past political compromises."). An official court website states that the

Appellate Division was conceived as part of the Supreme Court, implicitly suggesting that restricting Appellate Division justices to elected Supreme Court justices was natural. *See* New York State Supreme Court, Appellate Division, First Department, Pre-1896, *available at* <http://www.courts. state.ny.us/courts/ad1/centennial/pre1896.shtml#top> (stating that "[t]ranscripts of the debate at the [1894 New York Constitutional] convention indicate that the judiciary committee from the outset considered the Appellate Division to be one level of the Supreme Court, divided into four departments.").

In any event, this provision developed in years in which New York had a different appellate structure, where, among other things, access to the Court of Appeals was not as difficult as it is today, and the Appellate Division was not so often final. To say that the provision is appropriate because the Appellate Division is technically related to the Supreme Court is beside the point. The Appellate Division functions as an independent intermediate appellate court, and in many cases, as noted before, it is the court of last resort.

27. In a recent example, United States Court of Appeals for the Second Circuit Judge Richard C. Wesley became a judge of that court directly from the New York Court of Appeals. He had no federal district court experience.

28. A Report of the Council on Judicial Administration of the Association of the Bar of the City of New York, *The Chief Judge's Court Restructuring Plan, with Certain Modifications, Should be Adopted,* 52 Rec. Ass'n B. City of N.Y. 930 (1997) [hereinafter "Restructuring Plan"], *available at* <http://www.abcny.org/Publications/reports/show_html.php?rid=46&searchterm=appellate%20division#judicialselection>. *See also* A Report of the Council on Judicial Administration of the Association of the Bar of the City of New York, *Report on Eligibility for Appointment to the Appellate Division* 4, 8 (1997) (recommending "significantly expanding the pool of eligible candidates to the Appellate Division," and commenting on legislative proposals to increase the pool).

29. The New York State Bar Association has issued a report establishing a model plan which eliminates the restriction that candidates for the Appellate Division must be Supreme Court justices. *See* 1993 Report of Action Unit No. 4, *supra* note 7, at 19.

30. Restructuring Plan, *supra* note 28.

31. Supreme Court experience arguably may be relevant to the extent that it involves experience with the types of cases which may come before the Appellate Division. But the Constitution does not specify how long a justice must have served on the Supreme Court to be eligible for the Appellate Division, whether a month or 10 years. Thus, for example, the requirement prefers an elected Supreme Court justice, regardless of experience, over a long-serving Civil Court judge, even one with substantial experience as an acting Supreme Court justice.

Nor does the experience requirement address the absence of a like requirement for other appellate courts. This article does not presume to equate all appellate courts and overlook their differences, including how busy they are, in the scope of their appellate review, and in the number of interlocutory appeals which are permitted to be heard. But it is unclear why any such differences translate into a need to have an Appellate Division bench limited to an identified pool of eligible trial court candidates.

32. The Association of the Bar in its report has supported expansion of the list of eligibles for the Appellate Division by a court merger plan, which, in effect, would increase the number of Supreme Court justices. However, the report added that if a "merit selection" plan was instituted for selection of Appellate Division justices (specifically, a judicial nominating commission-based plan), it might recommend making eligible all attorneys with at least 10 years experience. *See* Restructuring Plan, supra note 28. *See also* A Report of the Council on Judicial Administration of the Association of the Bar of the City of New York, *Report on Eligibility for Appointment to the Appellate Division, supra* note 28. Chief Judge Judith S. Kaye has likewise stressed this benefit of increasing the number of persons eligible for the Appellate Division in testifying in favor of court merger. Judith S. Kaye, Testimony Before Joint Legislative Hearing on Court Restructuring, Oct. 7, 1997, *available at* <http://www.courts.state.ny.us/press/old_keep/cjtestim.shtml> ("An additional benefit of trial court consolidation would be enlarging the pool of judges eligible for designation to the Appellate Division and Appellate Terms. This will create new opportunities for a number of talented jurists to rise through the ranks of the system—especially women, minorities and judges with backgrounds in family and other areas of the law.").

33. Zeidman, *supra* note 22, at 836. Of course, the lack of diversity in certain departments would not preclude a governor from moving Supreme Court justices from one Appellate Division Department to another—such as from a downstate Department to an upstate Department—to increase diversity. *See also* William C. Thompson, *Poor Record on Naming Minorities to the Bench*, 231 N.Y. L.J. 2. (2005) (Letter to the Editor). The writer, a former Justice of the Appellate Division, Second Department, objects to the lack of minority appointments to the Appellate Division and the Court of Claims and transfers of upstate justices to the downstate Appellate Division Departments at additional costs to the taxpayers. *Id.* Unmentioned in the letter is that one of the transferred judges downstate was an African-American, Sandra L. Townes, who has since been confirmed for the United States District Court for the Eastern District of New York. The more straightforward way to proceed, however, would be to eliminate the requirement that Appellate Division justices must be selected solely from the pool of elected Supreme Court justices.

Unless a particular Department lacked qualified elected Supreme Court justices or there is some other compelling reason (perhaps the need to achieve diversity), it is unclear what non-political purpose is served by having judges selected to sit as Appellate Division justices outside the Department in which they sit as Supreme Court justices. An accelerated although not novel movement of Supreme Court justices from one Department to sit as justices in another Department, has already occurred in recent years and has raised some concerns. *See* Caher et al., *supra* note 14 (stating that "[a]lthough Governor Pataki has appointed upstate judges to downstate panels far more than did his recent predecessors, the practice is both constitutionally sanctioned and historically commonplace. In fact, according to Catherine O'Hagan Wolfe, clerk of the First Department, fully 20 percent of the judges who have served on that court in its 105-year existence have come from upstate districts."). Judges do not serve in representative capacities; however, some benefit may be achieved by having judges sit in their own geographical area, to the extent familiarity or sensitivity to local issues may be important. Furthermore, expense vouchers submitted by out-of-Department appointees in the late 1990s and early 2000s showed that such justices were seeking and collecting reimbursement from the State of New York for expenses such as meals, lodging, airline charges, taxis and other items, according to department records viewed by the author. Those records show that in 2000 and 2001 alone, New York taxpayers paid nearly $39,000 to lodge one out-of-Department appointee in the First Department—plus nearly $4,400 for travel expenses. An out-of-Department appointee in the Second Department billed the state nearly $34,000 in one year for travel expenses, lodging, and the like. Whether the system should be reformed to regulate such transfers is beyond the scope of this article.

34 *See* Commission to Promote Public Confidence in Judicial Elections: Report to Chief Judge Judith S. Kaye 5 (2004), *available at* <http://law.fordham.edu/commission/judicialelections/images/jud-freport.pdf> [hereinafter "Feerick Commission Report"]; Ass'n Recommendations, *supra* note 3, at 388-91; Zeidman, *supra* note 22, at 800-01.

35. Ass'n Recommendations, *supra* note 3, at 382-83. *See also* Fred LeBrun, *Judging Politics at its Worst*, Times Union (Albany, NY),

Sept. 27, 2005, at B1 (arguing that "[t]he only ones who really suffer for this sort of tidy, prepackaged [cross-endorsement] arrangement are the voters, who are denied any real choices when it comes to picking a judge."); Daniel Wise & Andrew Harris, *Major Parties Cross-Endorse Judge Lippman*, 234 N.Y. L.J. 1 (2005) (discussing a recent political arrangement pairing Democrat and Republican for two new Supreme Court seats in the Ninth District).

36. *Becoming A Judge: Report On The Failings Of Judicial Elections In New York State*, *supra* note 24, at 281-82 (stating that there is "no assurance that political leaders will endorse the most qualified candidates, even from among those who have been politically active.").

37. *See, e.g.*, N.Y. Judiciary Law § 213 (function of administrative board).

38. The New York State Constitution does not restrict by its terms the certification procedure for justices beyond the age of 70 to elected Supreme Court justices; therefore, it would appear that interim appointed Supreme Court justices are eligible for certification. *See* N.Y. Const. art. 6, § 25, cl. b.

39. An argument could be made that the 70-year-old retirement age requirement, given the improved health conditions since it went into effect, is too low and deprives the state of the services of well qualified judges too early. If so, that might be addressed directly through a separate reform increasing the retirement age or allowing Court of Claims judges to be certified for additional years beyond 70.

40. *See* Greene, *supra* note 13, at 962-64.

41. Arkansas has restricted the ability of appointed judges to run as incumbents for certain judicial office while holding such office. *See* Ark. Code Ann. § 16-13-104. For a discussion of the Arkansas legislative bill prior to passage, *see* Rob Moritz, *Bill on Judicial Elections Approved*, Arkansas News Bureau, March 19, 2005, *available at* <http://www.arkansasnews.com/archive/2005/03/19/News/318955.html>.

42. *See, e.g.*, Justice in Jeopardy, *supra* note 7, at 18-30.

43. These efforts at reform have included the establishment in 1977 of an appointive selection plan for the selection of Court of Appeals judges only and the recent establishment of the Commission to Promote Public Confidence in Judicial Elections. *See* Feerick Commission Report, *supra* note 34, at 17-19. Neither the reform nor the Feerick Commission dealt with direct appointments by the governor.

44. *See, e.g.*, Justice in Jeopardy, *supra* note 7, at 51 (recommending judicial nominating commissions). *See also supra* note 13 (suggesting proper designs of judicial nominating commissions).

45. *See* James L. Huffman, *Politics and Judicial Independence: A Proposal for Reform of Judicial Selection in Oregon*, 39 Willamette L. J. 1428, 1429 (2003) (stating that "[w]hile they may appoint bipartisan selection committees to recommend candidates for judicial office, and they may insist upon high professional qualifications, no governor who hopes to maintain the coalitions necessary to advance a policy agenda will ignore the politics of those appointed to judicial vacancies.").

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George Pataki and the Institution of the Governorship in New York

By Gerald Benjamin

Some governors are remembered for creating great, lasting institutions: Nelson Rockefeller built the modern State University. Others are honored for crisis leadership: Hugh Carey brought the state and New York City back from the fiscal brink in the mid-1970's. Still others are known for their transformative effect on governance itself: this was Al Smith's great legacy.

When George Pataki, a Republican, announced that he would not seek a fourth term as governor of New York, he took credit for achieving "more opportunity and less welfare; safer streets and less crime; more jobs and lower taxes; higher education standards, record school aid and the STAR program [property tax relief for school tax payers]; more open space, cleaner air and cleaner water." Additionally, the governor cited his record of leadership in the wake of the September 11, 2001, terrorist attack on the United States in New York City and during the following economic and fiscal crisis**,** "[t]he likes of which," he said, "had not been seen since the Great Depression." "Together," the governor further summarized, "we have changed the fundamental direction of this state to one that empowers the individual, and not the government."[1]

Assessments of Pataki's legacy by others, however, questioned its fundamental quality. The governor's environmental achievements—especially his preservation of almost a million acres of additional open space in the state—were almost universally acclaimed. Many also credited him for important improvements in New York's business climate. But conservatives complained of Pataki's failure to consistently adhere to his initial small-government, tax-cutting policies or to their social agenda. Additionally, those on the Right were unforgiving about his failure to rein in debt or undo rent control in New York City.[2] Meanwhile, for those to his Left, the governor was no real champion, no matter how much some traditionally Democratic constituencies may have benefited from his pragmatic, reelection-driven decisions to bolster hospital worker salaries or raise the minimum wage.[3]

For many, changes during the Pataki governorship in key policy areas were more the result of national decisions (e.g., welfare reform), or steps taken at the local level (e.g., crime reduction) than of state-level leadership. With regard to crisis management, Mayor Rudolph Giuliani—not the governor—emerged as the great national hero for rallying New York City in the wake of the attack on September 11.[4] Finally, government reformers found few of their goals realized, or even seriously addressed, in the Pataki years.

New York has two million more registered Democrats than Republicans, and yet George Pataki was elected governor three times (a substantial achievement in itself). Especially for a Republican chief executive in a heavily Democratic state like New York, the pragmatic decisions required to assure reelectability almost inevitably result in disappointments for core ideological and party constituencies. Record-embellishing credit claiming is integral to politics, and becomes an especially compelling temptation for departing elected leaders seeking to assure their place in history. At the same time, attacks on the outgoing governor's record will inevitably be one aspect of the campaign to choose a successor—even if he or she is not in the race. All these factors complicate any effort to quickly assess an outgoing governor's fundamental impact.[5]

Moreover, the books are not yet closed on the Pataki governorship. The perspective of time is needed to separate the lasting from the ephemeral. Nevertheless, it may not be too soon to begin to assess one important element of the Pataki legacy: the governor's impact on the institution of the governorship itself.

The contemporary New York governorship was designed at the Progressive-Republican-dominated 1915 constitutional convention, and later realized through the persistent efforts of New York's greatest 20th-century governor, Democrat Alfred E. Smith (with considerable help from Charles Evans Hughes and others).[6] Constitutional changes championed by Smith brought New York state the executive budget system, the four-year term for governor, and a modern structure for state government, with most department heads appointed by and accountable to the chief executive.

A recent comparative study reconsidered six dimensions of state constitutional design and political circumstance that have traditionally defined political scientists' understanding of state governors' formal powers: the number of statewide elected officials; the presence or absence of unified party control of the executive and legislative branches; the chief executive's tenure potential; and the strength of the governor's appointing, veto and budgetary powers.[7] This analysis

continued to rank the New York governorship as one of the three strongest in formal powers in the nation.[8] In addition to Smith's reforms, New York's constitution gives the governor both a strong veto and item veto. However, unlike most states, there is still no term limitation in New York for the state's chief executive. Only the persistent divided partisan control of the New York state Legislature kept the Empire state governorship from ranking above all others in the most recently published version of the "Governors Institutional Powers Index."[9]

Most state governors take the powers of their office as they find them. Their priority is almost always policy change, not institutional change—and the quicker the better. Because terms are fixed and reelection is—although possible—not assured, governors have little incentive to focus on the long term.[10] Reelection, and the additional time to lead that it provides, is seen as conditional on rapid, visible achievements for which credit may be claimed.

Structural change in state government sometimes results in electoral issues; term limitation is the best recent example. But governors most often shape the governorship not by directly seeking to alter their own powers in the system, or the powers of others, but by redefining them in their use. This article looks at both formal proposals for structural change advanced by George Pataki and his use of the powers of one of the strongest governorships in the nation as he dealt with the state Legislature and other statewide elected officials in New York. It is clear that formal proposals for change, none of which were adopted, were made with less regard for empowering the gubernatorial institution than for meeting the governor's more immediate political needs or policy objectives. In several areas, George Pataki pressed the powers of his office to the hilt. The paradox of his governorship is that by the vigorous use of his formal powers, Governor Pataki may have helped usher in a diminished office for his successors.

The Governor and Statewide Elected Officials

Gubernatorial power is affected by the number of statewide elected officials in at least two ways. The first is administrative. Departments headed by elected officials might otherwise be under the direction of a gubernatorial appointee. Elected officials at the head of state departments are far more likely to be critical of a governor's decisions and policy initiatives in areas of common or overlapping responsibility, and to act independently of him or her in running their departments. The second is political. Election statewide gives others a base for potential electoral challenge to the sitting governor, whether in a primary or a general election.

The number of statewide elected officers in American states ranges widely. There are eight in California and Florida, but only one in New Jersey. New York, with four—the governor, lieutenant governor, attorney general, and comptroller—falls at the low end of the range. There was no serious consideration of altering the number of statewide elected officials during the Pataki governorship, though this matter did come under discussion in a neighboring state.[11] Governor Pataki did suggest term limitation for all statewide offices, including his own.[12]

New York's lieutenant governor, though independently nominated, is not independently elected.[13] The role of the lieutenant governor is therefore contingent on his or her relationship with the governor. After a number of early gaffes, George Pataki's first lieutenant governor, Betsy McCaughey Ross—a person of little political experience who was recruited to the candidacy to balance the statewide GOP ticket—was systematically marginalized by the governor. Her experience was similar to that of Alfred DelBello in the Mario Cuomo administration. Ross ultimately unsuccessfully sought the Democratic nomination to run against Pataki in 1998.[14] Pataki's second lieutenant governor, Mary O. Donohue, a former prosecutor and New York State Supreme Court Judge, did not play as central a role in the Pataki administration as Malcolm Wilson did for Nelson Rockefeller or Stan Lundine in the later Cuomo years.

Even when they are of the same party, tensions arising from policy differences between the attorney general and governor are not uncommon in New York.[15] Nevertheless, relations were cordial between George Pataki and Dennis Vacco, the Republican attorney general during the governor's first term. Eliot Spitzer, Vacco's Democratic successor, extended the reach of his office and established a national reputation through aggressive prosecution of financial abuses on Wall Street and in the insurance industry.[16] At the same, Spitzer's positive working relationship with Governor Pataki earned him criticism from co-partisans, particularly his decision to represent the state in the Campaign for Fiscal Equity lawsuit seeking greater school funding for New York City.[17]

The state comptroller's constitutional responsibilities as state auditor inevitably bring him into difference with the state's chief executive. New York comptrollers have regularly been vigorous critics of governors' budgetary, financial management and borrowing practices. New Yorker's modern predisposition to choose a comptroller from the party opposite the governor's reinforces the likelihood of visible clashes between the two offices.[18] Conditions for inter-institutional conflict reach their peak if the comptroller chooses to challenge the governor for the state's top office, as was the case for Democrat H. Carl McCall in 2002. Comptroller Alan G.

Hevesi continued the practice of vigorous oversight of executive branch practices, most notably in his critique of the use of public authorities in New York.[19] At no time during the Pataki years, however, did the political or governmental clashes between the governor and comptroller, or their offices, result in serious efforts to redefine the allocation of powers between them.

Discussion has arisen from time to time about the number and powers of New York's statewide elected officials. For example, there have been suggestions on the one hand that the attorney general should be made a gubernatorial appointee, and on the other that the constitutional basis of his or her powers should be bolstered. Additionally, the role of the comptroller as the sole custodian of state retirement funds has been questioned.[20] These ideas might have received serious consideration during the Pataki years if, as discussed below, a constitutional convention were called in New York in 1997.

Appointing Power

Especially in his first term, there was considerable reorganization of state government at Governor Pataki's initiative. A number of small state agencies were abolished; economic development activities were centralized in a single department; the work of public authorities engaged in construction was concentrated in the Dormitory Authority; the Office of Equalization and Assessment, reflecting a change in focus, became part of the Office of Real Property Tax Services; and the functions of the Department of Social Services were dispersed among the existing departments of Labor and Health and the newly created Departments of Children and Family Services and Temporary and Disability Assistance.[21] Both immediately and over time, new agencies were created to reflect new initiatives in the areas of regulatory reform, homeland security and the prevention of domestic violence.[22] These changes notwithstanding, Governor Pataki's use of his appointing power to staff executive branch leadership was unchallenged; he had little difficulty in achieving ratification of appointments to key positions by the Republican-controlled Senate.

The governor's most serious effort to extend his appointing power was an early proposal to abolish the State Board of Regents, the board that appoints the commissioner and heads the state Department of Education.[23] This change, and the transference of appointing authority to a gubernatorial appointee, would have given the governor far more power over "standard setting and oversight of very nearly all organized educational activity within the state, both public and nonpublic, from preschool through graduate and professional education, and including libraries, museums, public radio and television, and historical societies."[24] The Board of Regents, entrenched in the state Constitution, is appointed by the Legislature in joint session, with each member voting individually. Absent a constitutional convention, the state Constitution may be changed only by action of the Legislature. The Democrats' margin in the 150-member Assembly far exceeds that of the Republicans' in the 62-member Senate (since 2002), assuring that Regents' selection is dominated by the Democratic Assembly. This partisan reality made the governor's proposal dead on arrival.

Partisan Context

The Republican Party has consistently controlled the New York State Senate since 1965, while the state Assembly has consistently been Democratic since 1975. Control of the state Legislature has thus been continuously divided between the two major parties for thirty-one years, the current record for a state legislature in the United States.[25] This divided control has assured that no recent New York governor of either party has enjoyed the formal condition required for the maximization of gubernatorial power: a majority in both houses of the Legislature by his or her party.

Decennial redistricting in New York is done by action of the Legislature. Divided partisan control arises from, and is perpetuated by, a bipartisan gerrymander. Historically, Senate Republicans draw districts for their house, Assembly Democrats for theirs, and each accept the other's results. Governor Pataki, a Republican, like Democratic Governors Carey and Cuomo before him, signed the legislation effecting this agreement. In fact, Pataki had a greater incentive to support the results of this gerrymander than his Democratic predecessors. The number of Republican-enrolled voters in New York is far smaller than that of Democrats, and consequently persistent Republican control of the Senate is far more dependent upon the gerrymander than is Democratic control of the Assembly.

By most measures the institutional strength of the Republican Party declined during the Pataki years. In 1996, there were nine counties outside New York City in which enrolled Democrats outnumbered Republicans; in 2005 there were twelve. Between 1996 and 2005 the Democratic enrollment edge over the Republicans statewide grew from 1.7 to 2.4 million voters. In 1994, one U.S. senator and 14 Congress members from New York state were Republican. By 2005, both U.S. senators from New York were Democrats and the number of Republican congressmen had declined to 9. Lastly, in 1994 there were 56 Republican Assembly members of 150 and 35 Republican senators (of 61). In 2005, the GOP had 46 Assembly members and 35 senators (of 62).

Executive Budgeting

The budget process adopted in New York in 1927 moved responsibility for fiscal policy making to the

chief executive from the Legislature, its classic location in the American separation of powers system. In the newly defined, constitutionally based system, the governor proposed the budget and introduced the bills to implement it. The Legislature could reduce, but not increase, his or her proposed spending and had to act finally on the executive's initiatives before it could separately advance its own.[26] These were then subject to the item veto.

Failure to adopt a timely budget through this process was a defining dimension of New York state government for the last quarter century. A complex interaction of political and institutional developments led to this dysfunction. Fundamental was the effort of the two houses of an increasingly professional full-time legislature to reassert itself in fiscal policy making. Predictably, inter-institutional tensions with the executive arose.

Early in the implementation of executive budgeting, the political branches litigated in the state high courts to define the meaning of the new constitutional amendment. Ultimately, the executive prevailed.[27] There was intermittent border warfare in later years, and occasional lawsuits define institutional powers in budgeting on the margins. But, in recent years, generally both the legislative houses and the executive avoided litigation, each preferring the leeway that a less defined situation gave them than the constraints that might arise from an adverse court decision.[28]

Silver v. Pataki and *Pataki v. New York State Assembly* arose as a result of budgetary conflicts in 1998 and 2001. One set of issues concerned the substantive and qualifying language the governor could include in appropriation bills and whether the Legislature could change or add to this language. Another set of issues centered on whether the Legislature could reject appropriation bills and then pass identical appropriations with different qualifying language. A plurality decision of the Court of Appeals, the state's highest court, confirmed the extensive constitutional powers of the governor and limits on the Legislature in budgeting.[29]

This court decision convinced the Democratic Assembly and the Republican Senate that they could not gain the role in budgeting that they believed they should exercise within the framework of the current constitution. Therefore, under the guise of addressing the public's concern over persistently late budgets, they devised an amendment to article VII, as well as legislation that seriously diminished the governor's budgetary power. The legislation was subsequently passed over the governor's veto. The amendment proposal, which under the New York Constitution is not subject to gubernatorial review, passed two successively elected Legislatures and was placed on the ballot for a vote in November 2005. At the time of this writing, the vote on this amendment was pending.

By pressing his formal budgeting powers to their limits, Governor Pataki generated a backlash that risked substantially diminishing executive power in the state. Even if the proposed amendment fails, another taking a different approach but still focused on reining in the governor's constitutional powers in budgeting is in the wings; it received first passage in 2005. Clearly a new balance of powers between the political branches in budgeting is a major (bipartisan) institutional goal for both houses of the New York state Legislature as a result of the experience of the Pataki governorship.

Veto and Item Veto: Legislative Overrides

The nuances of the executive veto are not easily caught in statistics, yet the numbers do tell a story. On average, both Governors Cuomo and Pataki vetoed the same number of bills during each year of their governorships. However, about 20 percent fewer bills were passed in each year of the Pataki governorship than that of Mario Cuomo, and about 20 percent more of the bills that reached the governor's desk annually were vetoed.[30] George Pataki, like Cuomo, used the veto most extensively in years when the legislators faced reelection and did so less frequently in gubernatorial election years.[31]

In formal terms, of course, the veto is the not the last but the next-to-last step in the intricate dance of law-making; overrides by two-thirds majorities elected to both houses are possible. But all governors would like to convince others that the political reality is different, that when they use their veto the dance is truly over. Avoiding overrides strengthens the executive's hand. For example, his successful use of the item veto in 1998 made the item veto threat an important weapon for Governor Pataki in budget negotiations in following years. In contrast, because support from only one-third plus one of the members in one of two legislative houses is needed by a governor to protect a veto, being overridden is a very real and quite visible show of weakness.

There were no gubernatorial vetoes overridden in New York between 1872 and 1976. The only example of overrides of item vetoes during this period occurred in 1917, before creation of the executive budget process.[32] Governor Hugh Carey was overridden in both his use of the veto in 1976 and the item veto in 1980 and 1982.[33] Instructed by his observation of the effects of this experience on the Carey governorship, Governor Mario Cuomo sought to avoid overrides. He was successful, most notably with regard to the death penalty legislation he vetoed annually, but also with his item vetoes (1991).

Governor Pataki, like Governor Carey, was overridden in both his use of the veto and item veto. The first override came during the second year of Pataki's first term. The legislators, facing reelection and under pressure from unions, passed—over the governor's veto—a bill shifting the locus of pay arbitration for New York City police and firefighters from the city Office for Collective Bargaining to the state Public Employee Relations Board.[34] In May 2003, the Legislature overrode 119 of the governor's item vetoes, a major bill on financial aid for New York City, and a bill to authorize to delay statewide voting on school district budgets.[35] Richard Brodsky, a long-time Democratic Assemblyman and tenacious political adversary from the governor's home county, described these events as "an institutional revolt against an imperial governorship."[36]

The merits of the Assembly's attempt to limit the reach of the item veto power after its use by Governor Pataki in 1998 were not ruled upon by the Court of Appeals in *Pataki v. New York State Assembly*.[37] But, as with budgeting, it is clear that by pushing the veto and item veto powers to their limits the governor generated a backlash, and may have made these less decisive tools for his successors.

Two-Term Limit For Governor

Governors are regarded as most powerful when they do not have to deal with lame duck status; that is, when their potential for continued service is unlimited. The gubernatorial institution therefore would have been diminished by George Pataki's proposed two-term limit for the state's chief executive. George Pataki, when advocating for the two-term limit for governor during his first year in office, said: "[c]hange, fresh ideas and new perspectives, are all essential attributes to a thriving democracy."[38] Three years later, he reinforced this point in his autobiography: "I believe term limits are vital to the long-range health of this nation at any level of government."[39]

Adopting terms limits, for the governorship or any other state offices, may be done only by changing the state constitution. As earlier noted, a constitutional amendment in New York requires passage by two separately elected Legislatures and approval at popular referendum. The governor in New York has no formal role in the constitutional change process. Term limits were anathema to the Legislature, and had no chance of passage by it.

There is, however, another path to state constitutional change. The New York Constitution mandates that every twenty years New York voters be asked whether they wish to hold a constitutional convention. Most recently, this question was scheduled for 1997, during Governor Pataki's first term. If the electorate chose to hold a convention, the Legislature could have been bypassed and term limits and other major structural changes in state government that the governor said he favored—such as lawmaking by popular initiative and referendum—might have been considered and proposed for adoption. Pataki received, but did not act upon, the report of the bipartisan commission that Governor Cuomo appointed to prepare for a potential constitutional convention. He appointed no similar commission of his own. Though Pataki endorsed a constitutional convention as the vote on the question approached, he made little effort to convince voters that it was a good idea. The convention question was overwhelmingly defeated at the polls. With this loss, any chance that the governor's term limits idea would be adopted was also lost. And, of course, when Pataki sought a third term, his credibility as an advocate of a two-term limit for governor disappeared.

Institutions Come Second

Whether his intent was political or purely policy driven, the structural changes to the state governorship that Governor George Pataki proposed were clearly advanced without apparent regard for their consequences to the governorship as an institution.[40] As explained above, term limits would have diminished the office. Extending the governor's appointing authority to the headship of the state education department would have enhanced it. Neither initiative was strongly pursued; neither was successful. Pataki had no realistic prospect of overcoming Democratic control of the state Assembly and therefore made no effort to do so. Furthermore, despite the fact that he was reelected twice, his party's strength in the state diminished during his tenure. Pataki failed to give any substantial support to a constitutional convention where serious structural change in state government might have been achieved. Moreover, by pushing his budgetary and item veto powers to their limits, Governor Pataki triggered a backlash that is likely to diminish the gubernatorial powers for those who will serve after him. While other New York governors are remembered for creating vast infrastructures, resolving budget crises, or expanding the powers of the office, George Pataki may well be remembered for his failure to protect the future of the office of the governor as an institution.

Endnotes

1. Press Release, Office of the Governor, Governor Pataki—The Nation's Longest Serving Governor—Announces Decision Not to Seek a Fourth Term (July 27, 2005), *available at* <http://www.ny.gov/ governor/press/05/july27_05.htm >.
2. John J. Miller, *The GOP's Pataki Problem: What to Do with the Governor of New York? Not Much, Probably.*, National Review, Feb. 28, 2005, at 30-34. *See also* Steven Malaga, *New York's Republican Crack-Up*, 11 City J. 54, 54-61 (2001); Thomas W. Carroll, *Governor Pataki's Failure*, 10 City J. 60, 60-67 (2000).
3. Jack Newfield, *Plenty of Nothing in New York*, The Nation, Nov. 11, 2002, at 18-20.

4. Michael Cooper, *The Shadow of His Predecessor Dominates the Pataki Legacy*, N.Y. Times, July 28, 2005, at B1.

5. Such an assessment is further complicated because Governor Pataki ceased publication of the Public Papers of the Governor. He is the first modern New York governor whose papers have not been published more-or-less contemporaneously with his service.

6. *See generally* Thomas Schick, The New York State Constitutional Convention of 1915 and the Modern State Governor (1978). *See also* Peter J. Galie, Ordered Liberty: A Constitutional History of New York 192-96 (1996).

7. Thad Beyle, *The Governors*, *in* Politics in the American States: a Comparative Analysis 212-13, T. 7-5 (Virginia Gray & Russell L. Hanson eds., 8th ed. 2004).

8. *Id.* Beyle gave New York a mean total score on his Governor's Institutional Powers Index of 24.5. The others ranked with New York were Illinois and Utah. *Id.*

9 *Id. See also* Gerald Benjamin, *Reform in New York: The Budget, the Legislature and the Governance Process*, 67 Albany L. Rev. 1021, 1051-57 (2004) (discussing the divided partisan control in New York State and its consequences).

10. All American governors now serve four-year terms except those of Vermont and New Hampshire. The governor of Virginia is limited to one four-year term.

11. Both New Jersey and Connecticut experienced vacancies in their governorships during George Pataki's third term in New York due to resignation of sitting governors as the result of scandal. In July 2004 Republican Governor John G. Rowland of Connecticut was succeeded by his Republican Lieutenant Governor, Jodi Rell, who became governor. When Democratic Governor James J. McGreevey of New Jersey resigned in November 2004, he was succeeded by the Republican Senate President, Richard J. Cody, who served as acting governor while retaining his legislative post. In this context, there was reconsideration of the need for a lieutenant governor in New Jersey, which would adhere to the separation of powers and assure succession by a person of the governor's party who would serve as governor, not acting governor.

12. *See infra* note 38 and the associated text below for a discussion of term limits for governor in this paper.

13. In New York state, voters cast one ballot for both the governor and lieutenant governor.

14. Gerald Benjamin & Robert C. Lawton, *New York's Governorship: Back to the Future?*, *in* Governing New York State 133 (Jeffrey Stonecash ed., 4th ed. 2001); Robert B. Ward, New York State Government: What It Does, How It Works 28-29 (2002).

15. *See* Gerald Benjamin, The Governor and the Attorney General in New York (1986).

16. Daniel Gross, Eliot *Spitzer: How New York's Attorney General Became the Most Powerful Man on Wall Street*, Slate, October 21, 2004, *available at* <http://slate.msn.com/id/2108509>.

17. Wayne Barrett, *Spitzer's Spiel: A.G. Backpedals on Schools, Dodges MTA Case*, Village Voice, July 23 –29, 2003, *available at* <http://www.villagevoice.com/news/0330,barrett,45700,5.html>.

18. Gerald Benjamin, *Comptroller*, *in* Encyclopedia of New York State 380 (Peter Eisenstadt & Laura-Eve Moss eds., 2005).

19. Press Release, Office of the New York State Comptroller, Hevesi, Spitzer, Silver, Brodsky Issue Sweeping Public Authority Reform Proposal (Feb. 17, 2004), *available at* <http://nysosc3.osc.state.ny.us/press/releases/feb05/021705b.htm>.

20. Gerald Benjamin, *Structures of State Government*, and Burton C. Agata, *Criminal Justice*, *in* The New York State Constitution: A Briefing Book 105, 201 (Gerald Benjamin ed., 1994). Though the state comptroller's role as sole custodian of pension funds is statutory, it is nonetheless likely to be the subject in any debate on constitutional change.

21. Benjamin & Lawton, *supra* note 14, at 126.

22. *Functional Distribution of State Agencies in the Executive Branch*, published in connection with the Executive Budget, 1994-1995 and 2005-2006 (reflecting the different conceptions of state government in the Cuomo and Pataki administrations).

23. Sam Roberts, *The Task Before Pataki: Goals and Hurdles*, N.Y. Times, Jan. 5, 1995, at B6. On the arguments, *see* Robert D. Stone, *Education*, *in* The New York State Constitution: A Briefing Book 192 (Gerald Benjamin ed., 1994).

24. Stone, *supra* note 23, at 181.

25. *See* Benjamin, *supra* note 9, at 1051-55.

26. N.Y. Const. art. VII, § 4.

27. *See People v. Tremaine*, 252 N.Y. 27 (1929); *People v. Tremaine*, 281 N.Y. 1 (1939). *See also* NYS Div. of the Budget, The Executive Budget in New York State: A Half-Century Perspective 47-52, 62-66 (1981).

28. Interestingly, the most important decision for limiting the power of the legislature to change the executive budget in the 1990s arose from a suit initiated not by the Legislature or the governor but by a private party. *New York State Bankers Ass'n v. Wetzler*, 81 N.Y.2d 98, 595 N.Y.S.2d 936 (1993).

29. *See Pataki v. New York State Assembly*, 4 N.Y.3d 75, 791 N.Y.S.2d 458 (2004).

30. *See* Table I.

31. *See* Table II.

32. *See* Frank W. Prescott & Joseph F. Zimmerman, The Politics of the Veto of Legislation in New York State (1980); Robert H. Connery & Gerald Benjamin, Rockefeller of New York: Executive Power in the Statehouse 98-99 (1979); Gerald Benjamin, *The Carey Governorship*, *in* Making Experience Count: Managing Modern New York in the Carey Era 248 (Gerald Benjamin & T. Norman Hurd eds., 1985); Benjamin, *supra* note 9, at 1024.

33. Benjamin, *The Carey Governorship*, *supra* note 32, at 247-48.

34. James Dao, *Albany Overrides a Veto by Pataki on Pay for Police*, N.Y. Times, Feb. 13, 1996, at A1.

35. James C. McKinley, *Pataki Vetoes Aid Package, Urging His Proposals Instead*, N.Y. Times, May 16, 2003, at B6; Al Baker, *Legislature Overrides Veto of $1.79 Billion City Aid Package*, N.Y. Times, May 20, 2003, at B5.

36. Baker, *supra* note 35.

37. 4 N.Y.3d at 86.

38. Press Release, Office of the Governor, Governor Pataki Proposes Term Limits and Initiative and Referendum (June 13, 1995), *available at* <http://www.ny.gov/governor/press/older_years/reform.htm >.

39. George Pataki with Daniel Paisner, Pataki: An Autobiography 118 (1998).

40. One proposal not discussed here, adoption of Initiative and Referendum for New York, would have generally diminished the powers of all elective offices. *See supra* note 38.

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Table I—Bills Passed by the State Legislature and Vetoed by Governors Cuomo and Pataki, 1983-2004

Governor Cuomo				Governor Pataki			
Year	Passed	Vetoed	% Vetoed	Year	Passed	Vetoed	% Vetoed
1983	1113	94	8.4	1995	778	84	10.8
1984	1131	113	11.3	1996	829	100	12.1
1985	1018	84	8.2	1997	756	69	9.1
1986	1054	115	10.9	1998	694	38	5.2
1987	937	77	8.2	1999	731	72	9.8
1988	855	61	7.1	2000	710	101	14.2
1989	808	29	3.6	2001	641	64	10
1990	974	22	2.3	2002	753	55	7.3
1991	831	82	9.9	2003	766	69	9
1992	971	113	11.6	2004	878	123	14
1993	925	94	11.4				
1994	784	46	5.9				
Mean	942	77.5	8.2		754	77.5	10.15

Source: New York State Redbook 84-85 (2005)

Table II—Mean % of Bills Vetoed by Governors Cuomo and Pataki by Year of Term, 1994-2004

Year	Cuomo %	Pataki %
1	8.83	9.87
2	9.57	13.44
3	7.73	9.55
4	6.37	6.25

Source: Calculated by the Author From Data in Table I

Note: Year 3 and 4 mean for Pataki is for two years.

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