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# Legislative Oversight of an Executive Budget Process: Impoundments in New York

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## Articles

### **Legislative Oversight of an Executive Budget Process: Impoundments in New York**

**Eric Lane†**

#### Author's Note

I have served since 1981 as Counsel to the New York State Senate Democrats on a partial leave of absence from Hofstra University School of Law. This experience has given me the opportunity to observe state government from a perspective few academicians enjoy and to participate in the governmental decision process at a unique level. It has been an enriching experience from which I have gained respect for the state's govern-

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Special notes of appreciation are due to Manfred Ohrenstein, the Minority Leader of the Senate, for the extraordinary opportunity he has afforded me; Alden B. Kaplan, the extremely talented Secretary to the Senate Committee on Finance, Minority, who at risk to his membership in the "budget club," guided me through the intricacies and intrigue of its processes and read the Article meticulously; Michael A. Dimmitt, Staff Director of the Senate Committee on Finance, Minority, who made some very helpful suggestions, and who, along with his staff, provided numerical support for some of the Article's propositions; Professor Burton C. Agata, my colleague at Hofstra, and Robert Kurtter, First Deputy Secretary to the Assembly Ways & Means Committee, who also read the Article and provided substantial comments; Maureen Henegan, Assistant Counsel to the Senate Minority, who commented thoughtfully on the Article's legal arguments.

mental processes and the men and women who participate in them. Overall, I share Governor Cuomo's statement that "in New York neither Republicans nor Democrats apologize for Government: we use it intelligently, reasonably, proudly."<sup>1</sup>

This of course does not mean that the governmental processes in New York are free from dispute; they are not and they should not be. This Article is about a dispute between the Executive and the Legislature. In this dispute I was an active participant. My position allowed me to present information that might not otherwise be available to an observer. However, during this dispute I was a strong advocate for the legislative position. This could have colored my presentation. I have tried to avoid this problem by reconsidering all of the events described and by reexamining all of the documents that relate to them in my academic cap. As a result of this reexamination, I have included certain "inconvenient facts"<sup>2</sup> that I was not aware of at the time of my participation. Nevertheless, I remain convinced of the appropriateness of the Legislature's action.

## I. Introduction

On April 11, 1984, Governor Mario M. Cuomo of New York signed the several appropriation bills that constituted the 1984-1985 New York State budget.<sup>3</sup> For the second consecutive year,

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1. N.Y. Times, Feb. 16, 1985, at 26, col. 4.

2. See Weber, *On Science as a Vocation*, in *SOCIOLOGY: THE CLASSIC STATEMENTS* 16, 22 (M. Truzzi ed. 1971).

3. The Governor is required by the New York State Constitution to submit each year to the legislature a budget along with bills for proposed appropriations, reappropriations, and revenues. N.Y. CONST. art. VII, §§ 2, 3. These bills are known as "budget bills." N.Y. State Fin. Law § 24 (McKinney Supp. 1984-1985). The appropriation bills submitted in this fashion are: An Act Making Appropriations for the Support of Government, State Operations Budget, ch. 50 (Jan. 17, 1984) (copy available at the Pace Law Review) [hereinafter cited as State Operations Budget]; An Act Making Appropriations for the Support of Government Legislative and Judiciary Budget, ch. 51 (Mar. 31, 1984) [hereinafter cited as Legislative and Judiciary]; An Act Making Appropriations for the Legal Requirements of the State Debt Service, ch. 52 (Apr. 11, 1984) [hereinafter cited as Debt Service]; An Act in Relation to the Aid to Localities Budget, ch. 53 (Jan. 17, 1984) (copy available at the Pace Law Review) [hereinafter cited as Aid to Localities]; An Act Making Appropriations for the Support of Government, Capital Projects, ch. 54 (Apr. 11, 1984) [hereinafter cited as Capital Projects]. The designations "State Operations," "Legislative and Judiciary," "Debt Service," "Aid to Localities," and "Capital Projects" reflect appropriation uses and in all cases but the Legislative and Judiciary, are comparable to the budget categories, fund types, or accounts within funds

the budget had been adopted by the Legislature in a timely fashion,<sup>4</sup> resulting in editorial praise from across the State.<sup>5</sup> Unique to this budget, however, was the inclusion of provisions within the State Operations and Aid to Localities bills<sup>6</sup> that explicitly mandated staffing levels for the City University of New York (CUNY),<sup>7</sup> the State University of the State of New York (SUNY),<sup>8</sup> the Office of Mental Health (OMH)<sup>9</sup> and the Office of Mental Retardation and Developmental Disabilities (OMRDD).<sup>10</sup> In addition, these staffing level provisions required that the Director of the Budget<sup>11</sup> report to the chairpersons of the respective legislative fiscal committees<sup>12</sup> on discrepancies be-

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mandated by statute. See N.Y. STATE FIN. LAW §§ 22, 70, 72 (McKinney Supp. 1984-1985). Their designation is, however, a product of executive choice and custom, not law. This is important with respect to certain arguments raised in support of the impoundments studied in this Article. See *infra* notes 157-60 and accompanying text. For a full discussion of the New York State budget process, see *infra* notes 24-84 and accompanying text.

4. According to law, the budget bills need to be enacted by April 1, the first day of the fiscal year. N.Y. STATE FIN. LAW § 3 (McKinney Supp. 1983-1984). During the prior administration of Governor Hugh L. Carey (1974-1982), disputes over the funding of medicaid abortions (1978, 1979), financial plan discrepancies (1980, 1982), and state assumption of the medicaid costs of localities (1981) delayed final passage of the budgets. This caused considerable concern in the financial community, threatening the cost and marketability of New York's debt.

5. See, e.g., N.Y. Times, Mar. 31, 1984, § 1, at 22, col. 1.

6. The State Operations and Aid to Localities bills are two of five appropriation bills that comprised the 1984-1985 budget. See *supra* note 3.

7. See Aid to Localities, *supra* note 3, at 130.

8. See State Operations, *supra* note 3, at 332.

9. See *id.* at 216.

10. See *id.* at 220. The language that mandates staffing levels for CUNY, SUNY, OMH, and OMRDD is similar. Thus the SUNY provision exemplifies each provision:

Plus an additional amount for services and expenses of various programs and state operated institutions, excluding the state university hospitals, to support 391 additional staff to achieve an overall filled positions target of 27,519. Of this number, 93 positions shall be added as of July 1, 1984, another 204 shall be added as of September 1, 1984, and another 94 as of February 1, 1985.

State Operations, *supra* note 3, at 332.

11. The Director of the Budget is a statutory position appointed by the governor. N.Y. EXEC. LAW § 180 (McKinney 1982). The Director is responsible for:

assist[ing] the governor in his duties under the constitution and laws of the state respecting the formulation of the budget and the correlating and revising of estimates and requests for appropriations of the civil departments, [and] assist[ing] the governor in his duties respecting the investigation, supervision and coordination of the expenditures and other fiscal operations of such department.

*Id.*

12. The Assembly's fiscal committee is called the Committee on Ways and Means.

tween legislative appropriations and actual staffing levels.<sup>13</sup> The inclusion of these provisions did not receive similar acclaim. Indeed, former New York Governor Hugh L. Carey suggested that the inclusion of mandatory staffing levels weakened the Governor's control over his own agencies and over the state's finances.<sup>14</sup> One commentator cautioned that "the Governor's failure to resist the Legislature's incursions in budgeting may be very damaging to the long-run health of the governorship."<sup>15</sup>

The Senate's fiscal committee is known as the Committee on Finance. Their duties are set forth in N.Y. LEGIS. LAW § 30 (McKinney 1952).

13. The mandatory reporting requirements for CUNY, SUNY, OMH, and OMRDD are similar. The SUNY provision exemplifies each provision:

Within thirty days following the enactment of this appropriation, the Chancellor of the State University and the director of the budget shall jointly submit to the chairman of the senate finance committee and the chairman of the assembly ways and means committee a plan which delineates those management steps which the State University will initiate to achieve the staffing levels . . . consistent with identified service needs. Said plan shall provide that the number of filled full-time equivalent positions at the State University, excluding the State University hospitals, during the academic period July 1 -August 31, 1984, shall be between 26,449 and 27,221; and for the academic period September 1 - January 31, 1985 between 27,151 and 27,425; and for the academic period February 1 - June 30, 1985 between 27,244 and 27,519.

No later than thirty days following the close of each of the academic periods specified above the director of the budget shall submit a report to the chairman of the senate finance committee and the chairman of the assembly ways and means committee identifying the actual number of filled full-time equivalent positions at the State University, excluding the State University hospitals, for each payroll period during such academic period. If for any payroll period during such academic period the actual number of filled full-time equivalent positions is less than the minimum number specified herein, such report shall also identify for such payroll periods (i) the magnitude of such differences, (ii) the reason for such variances, (iii) the programmatic impact of such variances, and (iv) the steps that will be taken to achieve the staffing levels specified above and compliance with the plan required above during the academic period then in progress.

The director of the budget shall provide seven days prior notification to the chairman of the senate finance committee and the chairman of the assembly ways and means committee of any proposed action which, in his judgment, could prevent the attainment of the filled position levels specified above and in the plan required by this appropriation, and the circumstances and conditions to which these actions relate. Nothing contained in his [sic] section is designed to alter the respective constitutional responsibilities and powers of the executive and legislative branches of government.

State Operations, *supra* note 3, at 332-33.

14. N.Y. Times, Mar. 31, 1984, at 26, col. 1.

15. G. Benjamin, Cuomo Communicating 17 (unpublished paper) (copy available at the Pace Law Review).

Moreover, although the budgeting process was relatively calm in regard to the appropriations themselves,<sup>16</sup> the debate over the adoption of the mandatory staffing levels was quite heated. There was concern that these provisions would limit the exercise of executive discretion.<sup>17</sup> The reason for this debate and for the ultimate inclusion of the mandatory staffing levels and reporting requirements in the budget was legislative discontent over executive impoundment<sup>18</sup> of certain appropriations for staff from the 1983-1984 budget for CUNY, SUNY, OMH, and OMRDD. Referring to these 1983-1984 impoundments, one committee chairman stated that the "Legislature fought to have these monies restored. The money was there. It just did not happen."<sup>19</sup> That "it did not happen," however, was not unusual. Rather, it reflected an executive practice at least informally condoned until this time by legislative acquiescence. As correctly stated by a spokesman for the Division of the Budget, "[the 1983-1984 impoundments are] part of what the state has done and part of what the Legislature has watched happen for years. We didn't pick on these agencies. We did what we always do."<sup>20</sup> What was unusual was the legislative response to a previously common executive practice.

One purpose of this Article is to study the 1983-1984 impoundments and the Legislature's response to them. The Article

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16. The major substantive issues were the amount of aid to public education and tax cuts. Although, the Republicans quickly passed their tax cut program in the Senate where they were in the majority, they subsequently agreed to drop this issue during negotiations with the Assembly. All parties agreed that there should be a large increase in education aid that was passed as part of the budget. See N.Y. Times, Mar. 31, 1983 at 26, col. 1.

17. See *infra* text accompanying notes 189-95.

18. Impoundment refers to the executive's withholding of appropriated funds. The term is neutral; its propriety depends on the legitimacy of the executive's claim — whether it is statutory, directly constitutional, or inherently constitutional. As Louis Fisher has written "[t]o say that 'impoundment has been used in the past' is to say nothing at all. The proper inquiry must be 'what kind of impoundment?' It comes in many shapes and colors, legitimate in one case and highly suspect in another." Fisher, *Impoundment of Funds: Uses and Abuses*, 23 BUFFALO L. REV. 141, 142 (1972) (an enlightening study of impoundments, engendered by President Nixon's 1973 claim to the inherent power to impound funds appropriated by Congress).

19. N.Y. Times, Dec. 29, 1983, at 26, col. 1 (quoting Sen. Frank Padavan, Chairman, Advisory Committee on Mental Hygiene and Addiction Control).

20. N.Y. Times, Mar. 17, 1984, at B3, col. 4 (quoting Peter Lynch, Deputy Director of the Division of the Budget). See also *infra* notes 157-60 and accompanying text.

addresses impoundments from several perspectives. From a legal perspective, it analyzes them within the framework of the constitutional and statutory provisions governing New York's budget process and argues that the impoundments violated constitutional and statutory standards and that the legislative response was appropriate. From a political perspective, it places the impoundments within the framework of the budget process and the many understandings and agreements that underlie it. This Article argues that despite past practices, these impoundments constituted an excessive aggregation of executive power and that the legislative response appropriately corrected the imbalance.

New York's budget system has for a long time served as a model for the centralized, professional system believed to be necessary to orderly budgeting and management of the large sums necessarily expended by the modern state. The growth of this system dominated by the Executive has triggered a dilatory but corresponding growth in the talent and interest of the New York Legislature for participating in this process.<sup>21</sup> The Legislature's assertion of its role is a central concern of this Article. As described by the Speaker of the Assembly, Stanley Fink,<sup>22</sup> "[t]he disputes over staffing . . . result from a maturing process in the Legislature, in which committee chairmen and their staffs are becoming increasingly expert and want to make sure the laws they passed are being implemented properly."<sup>23</sup> A further purpose of this Article is to provide a case study that might be of value to other state legislatures that experience similar problems, which are likely to be exacerbated by a growing na-

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21. See NEW YORK STATE DIVISION OF THE BUDGET, *THE EXECUTIVE BUDGET IN NEW YORK STATE: A HALF-CENTURY PERSPECTIVE* 144-48 (1981) [hereinafter cited as *THE EXECUTIVE BUDGET*]. This volume provides an excellent history of the New York State Division of the Budget. For an overall study of government budgeting, see J. BURKHEAD, *GOVERNMENT BUDGETING* (1956).

22. Assemblyman Fink, a Democrat, represents the 39th Assembly District and has served as Speaker since 1979. A special tribute must be paid to Speaker Fink. Basically, his determination to see that both houses of the legislature exercise their independent legislative responsibilities has resulted in substantial change in legislative attitudes. This is not to dismiss the significant contributions of the other leaders during this period: the temporary President of the Senate, Warren M. Anderson; the Senate Minority Leader, Manfred Ohrenstein; and the Assembly Minority Leader, Clarence D. Rappleya. I only make a point with which I am sure they would all agree.

23. N.Y. Times, Mar. 18, 1984 at E6, col. 1.

tional policy of decentralization and deregulation.

Since most state legislatures meet on a part-time basis and are composed of part-time members,<sup>24</sup> it is particularly difficult for them to assume oversight responsibilities.<sup>25</sup> Some recommendations on how to facilitate this task are also provided.

Finally, it is hoped that an exposition of the New York budget process will be of general interest to the legal community, for whom this Article is written. It is often surprising how little lawyers and law students, even those who participate in the legislative process, know about the most significant of all governmental processes — that of making and implementing a budget.

## II. The New York State Budget Process

Since 1939, the executive branch has dominated the budget in New York State.<sup>26</sup> This evolution came in response to the chaotic growth of government-funded programs and their costs in the early part of this century.<sup>27</sup>

Under the current process the Governor, through the Division of the Budget and its director,<sup>28</sup> is responsible for the preparation, presentation, implementation, and management of the budget, while the Legislature is responsible for its review, passage, and oversight.<sup>29</sup> The legislative role is basically reactive, al-

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24. The New York State Legislature meets for approximately six months a year for an average of three days a week. Although many members characterize themselves as full-time, many still retain additional part-time jobs. *See generally*, THE NEW YORK RED BOOK (87th ed. 1983-1984) (yearly publication that lists the biographies of all the members of the New York State Legislature).

For a discussion on "part-time" legislators in New York, see *The Knickerbocker News* (Albany), Dec. 5, 1984, at 1, col. 3. For a detailed study of other states, see generally THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF STATES 1984-85, at 79-141 (1984).

25. Oversight, as used in this Article, defines the responsibility of the legislature with respect to the implementation of legislation to ensure that it has been designed correctly to accomplish its purpose and that it is being administered properly by the executive.

26. *See generally* THE EXECUTIVE BUDGET, *supra* note 14; N.Y. CONST. art. VII; N.Y. STATE FIN. LAW §§ 20-53a (McKinney 1974 & Supp. 1983-1984).

27. *See generally* THE EXECUTIVE BUDGET *supra* note 21, at 1-75.

28. The Division of the Budget is charged with exercising the governor's powers under article III of the State Finance Law. N.Y. STATE FIN. LAW § 20 (McKinney 1974). For a description of the Director's duties, see *supra* note 11.

29. Students of the federal budget process will find the New York system comparatively simple. However, the constitutional roles of the legislative and executive branches

though there have been substantial fiscal and appropriation initiatives by the Legislature during the last several years.<sup>30</sup>

### A. Preparation

The budget process commences in the late summer of each year when the Division of the Budget has discussions with the various state agencies about their needs and plans for the following fiscal year.<sup>31</sup> These discussions continue through December, when the actual budget and its bills are prepared for submission to the Legislature. During this preparation period, decisions are made and strategies are developed on the revenue or expenditure initiatives that the Executive wishes to undertake in the next fiscal year. Two sets of hearings are integral parts of this preparation process. The first set, known as formal budget hearings, are required by the Constitution.<sup>32</sup> These hearings force the state agencies to defend their budget proposals before the members and staffs of the legislative fiscal committees and the Division of the Budget. The second set, known as informal hearings, are similar to the first but occur without legislative participation.

In January or February,<sup>33</sup> the Governor submits to the Leg-

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are similar in the federal and the state systems. For an excellent study of the Congress' exercise of its oversight responsibility, see A. MAASS, CONGRESS AND THE COMMON GOOD (1983). Maass characterizes the legislative process as a "Control" Function, which he defines as exercising "a check upon executive leadership, to oversee it, to criticize and influence it, and to approve, reject, or amend specific executive proposals." *Id.* at 11.

30. In 1981, for example, the legislature structured the authorization that enabled the Metropolitan Transportation Authority to raise approximately \$5 billion in capital funds. It also constructed a tax package to subsidize its operations. In addition, the legislature has been responsible for increasing the funding for state universities, private universities, and public schools, since at least 1981.

31. It can be argued that the budget process actually commences immediately after the passage of a new budget, as agency heads allocate the appropriated funds in the context of the needs of future years. According to the Constitution, the heads of each department, if requested to, must furnish the governor and legislature with estimates of their budget needs. N.Y. CONST. art. VII, § 1. These estimates serve as a basis for the discussions and hearings described in the text. This provision has significant historical importance in the development of the executive budget because it terminated the prior practice of allowing departments to deal directly with legislative committees. See THE EXECUTIVE BUDGET, *supra* note 21.

32. N.Y. CONST. art. VII, § 1. See also, N.Y. STATE LEGIS. LAW § 32 (McKinney Supp. 1984-1985).

33. Constitutionally, the budget must be submitted to the legislature by the second

islature the budget along with the required budget bills. These bills include appropriation bills for state and federal funds<sup>34</sup> and revenue bills or other legislation necessary to balance the budget.<sup>35</sup> The budget must contain all intended expenditures and estimated revenues along with any recommended legislation.<sup>36</sup> For thirty days from the date of the budget's submission, the Governor may, as of right, amend the budget and its bills.<sup>37</sup> The budget bills are subject to continuous amendment by the Legislature or by the Governor with the Legislature's consent.<sup>38</sup>

The budget is required to be balanced on submission to the Legislature but not upon passage or throughout the year.<sup>39</sup> Except for the legislative and judicial budgets, the budgets for all the governmental departments are subject to extensive executive review and alteration, prior to their approval for submission to the Legislature. This is a significant aspect of the executive

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Tuesday after the first day of the legislature (the first Wednesday after the first Monday in January, N.Y. CONST. art. XIII, § 4), but in the year following the election of a governor, it must be submitted by February 1. N.Y. CONST. art. VII, § 2.

34. Over the last several years federal funds have constituted approximately 26% of the state's revenues. In 1983-1984, the estimated revenue was \$28.516 billion. \$7.78 billion of this amount was expected from the federal government. Until 1981, those funds were dispersed by administrative direction within existing federal guidelines that were reasonably broad. In 1981, in response to a suit instituted by Senator Warren Anderson, President Pro Tem of the New York State Senate and Majority Leader, the Court of Appeals declared: "that the expenditure and payment of moneys received from the Federal Government . . . without an appropriation violated section 7 of Article VII of the New York State Constitution." *Anderson v. Regan*, 53 N.Y. 2d 356, 368, 425 N.E.2d 792, 798, 442 N.Y.S.2d 404, 410 (1981). Section 7 of article VII provides in part: "[n]o money shall ever be paid out of the state treasury or any of its funds or any of the funds under its management, except in pursuance of an appropriation by law." N.Y. CONST. art. VII, § 7.

35. N.Y. CONST. art. VII, §§ 2 & 3.

36. *Id.* § 2. By statute the budget must also contain extensive amounts of additional information, including a five year capital plan, debated information about fund types, and a five year financial plan. N.Y. STATE FIN. LAW § 22. (McKinney Supp. 1984-1985).

37. N.Y. CONST. art. VII, § 3.

38. *Id.* at §§ 3, 4.

39. N.Y. CONST. art. VII, § 2. For a discussion of this rule see *supra* notes 160-69 and accompanying text.

In his 1984-1985 budget proposals, Governor Cuomo recommended a constitutional amendment that would require the state to adopt a budget balanced according to generally accepted accounting principals (GAAP). GAAP would require the budget to be balanced on an accrual basis. N.Y. Times, Jan. 11, 1985, at B2, col. 1. At the time this Article was written, this proposal was being opposed by the legislature because it is too inflexible. *Id.*

budget process because it ensures the maintenance of fiscal integrity and program consistency and because it permits the Governor to stamp a particular theme on his budget.<sup>40</sup> The legislative and judicial budgets and their bills are prepared separately by each branch of government and are presented to the Governor who must submit them without change to the Legislature as part of his budget proposals. The Governor may, however, make recommendations about them.<sup>41</sup>

According to the New York State Constitution, the appropriations must be itemized: "[f]or the Legislature to intelligently fulfill its proper role, it is of course necessary that the budget be itemized, lest the Legislature simply be presented with a lump sum which could be spent at the discretion of the Governor."<sup>42</sup> In practice, the appropriations are better characterized as lump sums, divided by programs within agencies, and categories within programs. An appropriation for a particular program will generally not contain a listing for each of the program's staff positions or a reference to the number of positions for the program or the agency. Instead, there will be an appropriation with a general purpose, such as, "amount available for personal service."<sup>43</sup> The schedules of positions that are the bases for these appropriations are negotiated prior to arriving at the appropriation figure. These schedules represent an agreement between the Executive and Legislature.<sup>44</sup>

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40. In the view of one commentator:

The fundamental purpose of budgeting is, after all, to produce and execute a coherent and workable plan from a myriad of conflicting possibilities, and although budget directors must learn to live with uncertainty it is their function within an executive budget system to do what they can to reduce the number of unknowns, to define the limits of resources, and to establish within the administration the agenda of economically feasible alternative courses of action to reach agreed upon goals.

THE EXECUTIVE BUDGET, *supra* note 21, at 104.

Essentially there are four executive versions of an agency's budget: the Agency Budget, the Division of the Budget's version of the agency's budget, the budget negotiated between the agency and the Division, and the budget with the governor's imprimatur.

41. N.Y. CONST. art. VII, § 1.

42. *E.g.*, *Saxton v. Carey*, 44 N.Y.2d 545, 549, 378 N.E.2d 95, 98 406 N.Y.S.2d 732, 734 (1978); *People v. Tremaine*, 281 N.Y. 1, 21 N.E.2d 891 (1939).

43. *See, e.g.*, *State Operations*, *supra* note 3, at 25.

44. Agreements of this sort are significant to the impoundment dispute and are discussed in text accompanying notes 176-81.

The form of appropriation bills has been the subject of considerable debate over the last sixty years. Both the Executive and Legislature have viewed them as a vehicle for asserting more control.<sup>45</sup> Although some commentators have argued that this debate was settled in the early 1970's,<sup>46</sup> the 1984-1985 budget emphasizes the continued attractiveness of using budget language as a device for legislative control.

### B. *Legislative Review and Passage*

The New York Legislature is a bicameral body containing a Senate and an Assembly. Its constitutional officers are the Temporary President of the Senate and the Speaker of the Assembly, chosen respectively by the Senate and Assembly. Both houses are organized by party conference, through which nominations for Speaker and Temporary President are made. The nominees of the majority party will in almost all cases become the Speaker of the Assembly and the Temporary President of the Senate. During 1983 and 1984, the Republicans formed the Senate majority conference and the Democrats formed the Assembly majority conference. The minority conferences also choose their leaders who, together with the Speaker and Temporary President of the Senate, form the legislative leadership. In New York these leaders dominate the Legislature through custom, rules, and strong central staffs. A leader can generally effectuate his will as long as he understands his conference's dynamics and the limits of their indulgence. The Speaker and Temporary President select the majority members for the committees, and the minority members are chosen by the minority leaders. The legislative leaders also determine, within their budget, the amount of funding members will receive for their staff. In addition, each conference has a central staff that is controlled by the conference leader and includes a counsel's office, a program office, and a fiscal office.

Upon receipt by the Legislature, the budget and its bills are referred to each house's respective fiscal committee and each item of appropriation and revenue is reviewed.<sup>47</sup> Budget hear-

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45. See THE EXECUTIVE BUDGET, *supra* note 21, at 136-44.

46. *Id.*

47. See, e.g., N.Y. SENATE R. VI, § 6 (1983-1984), which requires both bills to be

ings are held.<sup>48</sup> Appropriate members of each house are consulted concerning the merits of various appropriations and requests for additional appropriations. Additionally, formal party conferences are held to provide and receive information. This process is of course more fluid than it sounds; it consists of hundreds of informal communications that occur among legislators, staff members, lobbyists, constituents, executive staff members, and representatives of state agencies, municipalities, and localities. The focus of these communications, however, is never on more than a small percentage of estimated revenues or intended expenditures.

The Legislature may not pass or consider any appropriation bill of its own until it has acted upon the Governor's appropriation bills.<sup>49</sup> It may either pass or reject the appropriation bills. It may also strike out or reduce an item of appropriation or add a specific item on a separate line. The Constitution provides that, other than to reduce, strike out, or add a separate item, "the legislature may not alter an appropriation bill submitted by the governor."<sup>50</sup> As a result of legislative attempts to restrict or condition the use of funds, the meaning of this constitutional provision has been subject to considerable dispute. This provision played an important role in framing the 1984-1985 legislative response to the 1983-1984 impoundments.<sup>51</sup>

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referred to the Finance Committee. The fiscal committees are the legislature's most important committees. These committees have large staffs for both the majority and minority conferences. The committees are to a large extent "staff dominated." This is a result of the complexity of the issues, the professional qualifications of the staff, and the fact that they are employed full-time in a part-time legislature.

48. See N.Y. CONST. art. VII.

49. N.Y. CONST. art. VII, § 5. An exception to this rule is upon a message of necessity from the governor. *Id.*

50. N.Y. CONST. art. VII, § 4.

51. In 1982, for example, the legislature attempted to condition the expenditure of certain appropriations for the Westway Highway Project by adding restrictive language to the budget bills. These restrictive provisions were vetoed and not overridden. During this process the Counsel to the Governor requested an opinion from the Attorney General of New York State on the constitutionality of these legislatively enacted restrictions. Letter from John G. McGoldrick, Counsel to the Governor, to Robert Abrams, Attorney General (Apr. 19, 1982) (copy available at the Pace Law Review).

The Attorney General concluded that the "Legislature by acting in the manner it chose here, did not follow procedures for action on appropriation bills required by the Constitution." Letter from Robert Abrams, Attorney General, to John McGoldrick, Counsel to the Governor (Opinion No. 82-FS May 3, 1982). To reach this conclusion he

Legislative participation in the budget process has traditionally focused on the expenditure side of the budget, while anticipated revenues have been left to the Executive. Over the last several years, however, this has changed substantially. The Legislature has realized that the power to establish revenue levels gives the executive branch a significant advantage in controlling state policy.<sup>52</sup> Consequently, the Legislature has developed staff competency in estimating revenues and a political determination to make revenue estimates part of its budget negotiations.<sup>53</sup> Al-

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opined, "our conclusion is based primarily on the specific language of Article VII, § 4 and the overall constitutional scheme for budget action. However, no New York cases dealing with the distribution of power between process are squarely on point, and the issue is not entirely free from doubt." *Id.* That doubt is the product of confusion over whether the constitutional power to "strike out or reduce," N.Y. CONST. art. VII, § 4, an item of appropriation includes the power to restructure or to limit the expenditure of an appropriation or whether this legislative act constitutes an otherwise prohibited alteration.

My own view is that the Attorney General's opinion is incorrect. The essence of the constitutional provision in question is to prohibit using the appropriation bills to effectuate policy other than that covered by the executive appropriations. Thus, in *People v. Tremaine*, 252 N.Y. 27, 168 N.E. 817 (1929), the court stated that a rider conditioning the executive's expenditure of an appropriation on the prior approval by the legislative chain of the fiscal committees was a prohibited alteration.

Most restrictive language, however, relates directly to the use of an appropriation. The Westway language, for example, conditioned its expenditure on the availability of federal funds. Another example is the frequent use of restrictive language to eliminate particular staff positions. See *New York Public Interest Research Group, Inc. v. Carey*, 55 A.D.2d 274, 390 N.Y.S.2d 236 (3d Dep't 1976), *appeal dismissed*, 41 N.Y.2d 1072, 364 N.E.2d 849, 396 N.Y.S.2d 183 (1977). This more enlightened position has been taken by the Maryland courts in *Bayne v. Secretary of State*, 283 Md. 560, 392 A.2d 67 (1978), with respect to a similar constitutional provision in which the court held:

The conditions here, however, reflect no attempt to establish policy by general legislation. The General Assembly's authority to reduce or strike out an item of appropriation necessarily includes the authority to condition or limit the use of . . . the facility for which the money is appropriated, provided the condition of limitation is directly related to the expenditure of the sum appropriated, does not, in essence, amend either substantive legislation or administrative rules adopted pursuant to legislative mandate, and is effective only during the fiscal year for which the appropriation is made.

*Id.* at 574, 392 A.2d at 74.

52. See THE EXECUTIVE BUDGET, *supra* note 21, at 145-47.

53. From an organizational perspective each of the legislative fiscal staffs have revenue units. Most of the disputes discussed, *supra* note 54, resulted from disagreements over revenue projections. The legislature clearly demonstrated its determination with respect to its own revenue projections in the 1982-1983 budget when it overrode a variety of executive vetoes, claiming that funds were available to cover the expenditures. In addition, since the legislature makes its revenue prediction three months after the executive predictions, it can often take advantage of a built-in surplus that results from the

though differences between executive and legislative revenue estimates may be small if considered as a percentage of most conservative revenue estimates, the dollar amounts are quite often substantial.<sup>54</sup> Thus, higher revenue estimates involve powerful support for increasing expenditures for favored programs, implementing new programs, or cutting taxes.<sup>55</sup>

Most of the disputes over revenues and expenditures are eventually resolved at an executive-legislative staff level in consultation with interested legislative members. The remaining disputes are turned over to the legislative leadership for resolution with the Governor. Usually these entail significant policy disputes concerning, for example, revenue bills, major changes in social policy, or significant increases in educational funding. Sometimes, however, they may involve a small item wanted by a determined legislator who has not been accommodated earlier in the process. It is this last part of the budget process that commands public attention and is generally referred to as budget negotiations. The sides in these disputes do not necessarily reflect party lines. Thus, in 1981, the Assembly passed a "Democratic" budget, supported by the Democrats in the Legislature and the Governor, but in 1982, the Legislature passed a "legislative" budget, opposed by the Governor.<sup>56</sup> Ultimately, agreements are reached and most are reduced to bills and passed.

Other agreements remain "understandings" among the various parties. These may be agreements to expend lump sum appropriations in a particular fashion or not to expend appropriations until a further agreement is reached.<sup>57</sup> The understandings also may include agreements that the cash value of a certain

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Division of the Budget's traditionally conservative quarterly projections.

54. For example, in the 1984-1985 budget, the amount in dispute was approximately \$255 million, or .7% of the state budget. In 1983-1984, it was \$50 million, or .2% of the state budget. In 1982-1983, it was \$200 million, or .7%.

55. The Republican desire for tax cuts and the Democratic desire for a dramatic increase in aid to education were both proposed in the context that available future revenues would exceed the revenues projected by the executive. *See supra* note 16.

56. In 1981, the Democrats wanted the state to assume the local share of Medicaid costs. This position was opposed by the Republicans. On May 12, the budget was passed after all parties agreed to "table" the issue for another year. In 1982, after a dispute with Governor Carey over available revenues, the legislature passed what it considered to be a balanced budget that was basically sustained after a series of vetoes and overrides.

57. *See infra* notes 176-88 and accompanying text.

item for a particular fiscal year is below the amount appropriated.<sup>58</sup> This is known as the "cash" value of an item of appropriation. These negotiated understandings are considered binding on all of the parties to the budget and their breaches, although not subject to court jurisdiction, are remedied in the legislative-executive arena. It is the perceived breach of such an agreement that resulted in the Legislature's response to the 1983-1984 impoundments.<sup>59</sup>

For the last several years, each house of the Legislature, has adopted, by resolution, a statement of legislative intent known as *The Report of the Fiscal Committees on the Executive Budget*.<sup>60</sup> Essentially, the Report sets forth the Legislature's action on each of the Governor's items of appropriation with an explanation of the action when the Committee deems necessary. The Report may include a statement of projected revenues, depending on whether there is an accord on this projection.<sup>61</sup> Although the Report is the product of the Legislature alone, the itemized expenditures from the Legislature's perspective reflect a negotiated accord between the Legislature and the executive branch. This is significant since the Report may be more specific than the budget bills themselves, and thus, may represent a limitation on executive power over and above that contained in the bills.

Just as with the understandings, failure to abide by the accords contained in the Report represents a breach of faith and is subject to political remedy. From the perspective of statutory construction, the New York State Court of Appeals has suggested that the Report is admissible when a budget bill is

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58. Capital funds for a project, for example, are often appropriated in a total project amount in one year with the knowledge that these amounts will be expended over several years. The unspent portion must be reappropriated each fiscal year.

59. See *infra* text accompanying notes 189-95.

60. The Report of the Fiscal Committees on the Executive Budget is published each year, jointly, by the legislative fiscal committees. In this Article, particular reference will be made to NEW YORK STATE LEGISLATURE, REPORT OF THE FISCAL COMMITTEES ON THE EXECUTIVE BUDGET, APRIL 1, 1983 TO MARCH 31, 1984 [hereinafter cited as REPORT OF THE FISCAL COMMITTEES 1983-1984].

61. There is no fiscal plan in the Report of the Fiscal Committees, 1983-1984, because the Senate Republicans projected revenues substantially in excess of those projected by the Assembly Democrats.

ambiguous.<sup>62</sup>

Upon passage, the bills are returned to the Governor where those requiring action are either signed or vetoed.<sup>63</sup> In New York, the Governor has a "line item veto," which permits him to strike certain appropriations while approving others.<sup>64</sup> This is a powerful executive tool because it enables the Governor to restrain a legislative majority. Thus, a legislative addition, constitutionally required to be in the form of a separate item of appropriation,<sup>65</sup> can be struck without endangering the underlying item or budget bills. This executive action may be reversed by the Legislature through a two-third majority override.<sup>66</sup>

### C. *Implementation and Management*

The Governor's responsibility to implement and manage the budget has been delegated to the Division of the Budget. This responsibility is a product of both state law and an executive management arrangement that provides the Division and the Governor the commanding control they have over the operation of state government. The statutory source of this power is section 49 of the State Finance Law,<sup>67</sup> which prohibits expenditures from any lump sum appropriations, except for the Legislature and the judiciary, without the approval of the Director of the Budget. One observer noted that, in regard to the Budget Director's power, "[t]his gives the budget office continuous control

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62. See, e.g., *New York Public Interest Research Group, Inc. v. Carey*, 55 A.D.2d 274, 390 N.Y.S.2d 236 (3d Dep't 1976), *appeal dismissed*, 41 N.Y.2d 1072, 364 N.E.2d 849, 396 N.Y.S.2d 185 (1977). The court stated:

Regardless of standing, it is apparent that the complaint is without any legal merit as was held by Special Term. . . . In the absence of some duly enacted resolution of the Legislature there is nothing which would indicate any intent by the members thereof that the Report is to be followed as a plan in reducing personnel. The recommendations of a Legislative committee do not necessarily represent the intent and purpose of the entire Legislature unless the contrary clearly appears.

*Id.* at 276, 390 N.Y.S.2d at 237.

63. Under the New York Constitution only the appropriation bills for the legislature and judiciary, and additions to the other appropriation bills need be signed by the Governor. N.Y. CONST. art. VII, § 4.

64. N.Y. CONST. art. IV, § 7.

65. N.Y. CONST. art. VII, § 4.

66. N.Y. CONST. art. IV, § 7.

67. N.Y. STATE FIN. LAW § 49 (McKinney Supp. 1984-1985).

over the rate of obligations by departments, and extends to budget execution the highly centralized pattern which characterized New York State budget preparation and submission."<sup>68</sup> There are "master" certificates and "program" certificates.<sup>69</sup> The master certificates reflect the Division's allocation of appropriated funds for *all* of an agency's programs. The program certificates reflect the Division's allocation for a specific program's appropriation of the specific items that constitute the program. No amendment to any lump sum appropriation can be made without the Division's approval.<sup>70</sup> To gain approval for the expenditure of appropriated funds, the agency must submit to the Division a spending plan detailing by agency, program, and category its intended monthly expenditures.

The amount allocated in the master certificate and total of the amounts allocated in the program certificates should equal both each other and the amount of the appropriation. Because of the Division's power to transfer appropriations among an agency's programs, however, the total amount that appears on the program certificates may not equal the amounts appropriated for each program.<sup>71</sup> The program and master certificates should also reflect any exercise of the Division's authority to reduce appropriations if they are not needed due to changes in circumstances.<sup>72</sup> Spending plans submitted by the agencies, on the other hand, need not reflect the actual amount of appropriation but rather the cash value assigned to any appropriations, based on informal agreements reached prior to the budget's passage.<sup>73</sup>

In addition to section 49, two other sections of the State Finance Law are important for an understanding of the executive's power and responsibility for implementing the budget: sec-

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68. J. BURKHEAD, *supra* note 21, at 354.

69. Certificates of Approval are required pursuant to N.Y. STATE FIN. LAW § 49 (McKinney Supp. 1984-1985). Their form is determined by the Division of the Budget.

70. *Id.*

71. The Division's power to transfer funds pursuant to the N.Y. STATE FIN. LAW § 51 (McKinney Supp. 1984-1985), is discussed below. *See infra* text accompanying notes 76-80.

72. The power to legally impound funds pursuant to the N.Y. STATE FIN. LAW § 42 (McKinney 1974), is discussed below. *See infra* text accompanying notes 78-80.

73. *See supra* notes 57-58 and accompanying text.

tion 51<sup>74</sup> and section 42.<sup>75</sup> Section 51 grants the Director of the Budget total discretion to approve the transfer of funds among items within an agency's program and limited discretion to approve a transfer between an agency's programs.<sup>76</sup> The purpose of this statute is to provide the Executive with the flexibility to respond to a variety of unforeseen circumstances.<sup>77</sup>

Section 42 permits an expenditure of less than an amount appropriated if the amount to be expended is "sufficient to accomplish in full the purposes designated by the appropriations."<sup>78</sup> The responsibility for making this determination is not stated in section 42. In practice, the Division of the Budget has served as its implementer, refusing from time to time to permit the expenditure of funds when in its judgment the appropriation's purpose could be accomplished more economically.<sup>79</sup> The authority to reduce expenditures for this purpose is an essential management tool. Unfortunately, it has also been used to rationalize a determination on the part of the Division to reduce expenditures in response to what is perceived as prospective budget deficits. Evidence of this practice is proffered by the Division's own official history:

The Division's response to the fiscal crisis beginning in 1968 was to institute an expenditure control program. This, in itself, was not unprecedented and rested on firmer statutory ground than President Richard Nixon's roughly concurrent expedition into executive "impoundment." The State Finance Law (§ 42) and the appropriation acts based upon it had long provided that appropriations were not commandments to spend but rather authorizations to be used only "as much as may be necessary" to achieve the purposes set forth in the appropriation.<sup>80</sup>

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74. N.Y. STATE FIN. LAW § 51 (McKinney Supp. 1984-1985).

75. N.Y. STATE FIN. LAW § 42 (McKinney 1974).

76. N.Y. STATE FIN. LAW § 51 (McKinney Supp. 1984-1985).

77. See THE EXECUTIVE BUDGET, *supra* note 21, at 144. This explanation refers to law in place in 1973. The law was tightened by amendment in 1981. See *supra* note 76.

78. N.Y. STATE FIN. LAW § 42 (McKinney 1974).

79. Competitive bidding on a contract, for example, can result in an actual need less than the amount appropriated.

80. THE EXECUTIVE BUDGET, *supra* note 21, at 247 n.80. This statement is misleading. Although the State Finance Law does permit, if possible, spending less for the same purpose, this was not the basis on which the control program noted was instituted. Rather it was a product of executive-legislative agreement to permit the executive discretion in the face of fiscal difficulties.

This statement suggests that executive impoundment of a lawful appropriation is justified if done to avert a fiscal crisis. From a constitutional and statutory perspective, this justification for executive impoundment has no basis in law.<sup>81</sup> Indeed, state impoundments for this reason are no different from similar federal impoundments that have been condemned as unconstitutional.<sup>82</sup> From a political perspective, however, executive impoundments in the implementation of the budget have rested on "firmer ground" in the past. This is the result of the Legislature's historical failure to exercise its oversight responsibility on a consistent basis and its reliance on the Executive's statement of the nature and appropriateness of the Executive's own actions.<sup>83</sup> In 1969, one legislative participant offered a comment that remains relevant:

All too often, state legislatures are the weak links in the American governmental process. Many state constitutions have recently been modified to strengthen the executive branch. The introduction of new budget systems and reorganization of the executive structure — to mention a few innovations — have all added to the power of the Executive. State legislatures, on the other hand, have often been sleeping giants — possessing an appropriate constitutional authority to balance that of the Executive, but not realizing in practice the full potentials of a power rightfully their own.<sup>84</sup>

Despite the authority and responsibility the Legislature possesses to oversee the implementation of the budget, in New York it has participated only in a limited reactive fashion, responding on an ad hoc basis to isolated incidents. Whether the legislative

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81. *Oneida v. Berle*, 49 N.Y.2d 515, 524, 404 N.E.2d 133, 138, 427 N.Y.S.2d 407, 412 (1980). In rejecting a similar argument, the New York Court of Appeals held that, "under the State Constitution, 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." *Id.* See *infra* notes 167-71 and accompanying text.

82. See, e.g., Fisher, *Impoundment of Funds: Uses and Abuses*, 23 BUFFALO L. REV. 141 (1974).

83. See, e.g., THE EXECUTIVE BUDGET, *supra* note 21, at 147. See also *id.* at 248 n.90.

84. ROBERTS, CONCEPTS OF LEGISLATIVE FISCAL ANALYSIS AND REVIEW, REPORT TO THE NEW YORK STATE ASSEMBLY WAYS AND MEANS COMMITTEE 2 (1969), reprinted in A. HEVESI, LEGISLATIVE POLITICS IN NEW YORK STATE at 92-93 (1975). Mr. Roberts was formerly Secretary to the Assembly Ways and Means Committee.

responses to the 1983-1984 impoundments will signify a more continuous, formal approach to correcting the imbalance of power that has existed between the legislature and the executive branches of state governments remains to be seen.

### III. The 1983-1984 New York State Budget

#### A. *Preparation, Review, and Passage*

On February 1, 1983, Governor Cuomo submitted his proposed 1983-1984 budget to the Legislature. Against the background of an executive-projected two-year revenue gap of \$1.8 billion,<sup>85</sup> the 1983-1984 proposal contained few additional expenditure initiatives. Instead, it focused on measures designed to close the gap.<sup>86</sup> The Governor stated: "[t]he simple truth is this: an immense potential gap exists between our projected revenues and expenditures. We have no alternative but to close that gap."<sup>87</sup> The Governor offered several proposals: a reduction in the state work force,<sup>88</sup> a reduction in appropriations for various state operations and local assistance programs,<sup>89</sup> and increases and adjustments in various fees and taxes.<sup>90</sup>

The legislative reaction to the Governor's proposals was unenthusiastic. While it was generally conceded that a gap ex-

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85. See STATE OF NEW YORK EXECUTIVE BUDGET FOR THE FISCAL YEAR APRIL 1, 1983 TO MARCH 31, 1984 Governor's Budget Message, M18 [hereinafter cited as MESSAGE OF THE GOVERNOR]. According to the Governor, there would be a \$579 million gap in the 1982-1983 fiscal year and a \$1.3 billion gap in the 1983-1984 fiscal year. The legislature correctly disputed the size of this gap. See NEW YORK STATE SENATE COMMITTEE ON FINANCE/MINORITY, CLOSE OF SFY 1982-1983 AND PROJECTIONS FOR SFY 1983-1984 (Mar. 10, 1983) (copy available at the Pace Law Review).

86. The Governor did call for a \$1.25 billion infrastructure bond issue, which the legislature approved and the voters ratified in November 1983. He also called for the creation of a New York Water Finance Authority and a Regional Development Bank, neither of which have received legislative approval to date. MESSAGE OF THE GOVERNOR, *supra* note 85, at M13-M15, M27-M29.

87. *Id.* at M7.

88. *Id.* at M8-M9. These proposed reductions in the state workforce became known as the Statewide Personnel Reduction Policy Program. See OFFICE OF EMPLOYEE RELATIONS, STATE OF NEW YORK, IMPLEMENTING THE STATEWIDE PERSONNEL REDUCTION PROGRAM (copy available at the Pace Law Review) [hereinafter cited as IMPLEMENTING THE PROGRAM]

89. MESSAGE OF THE GOVERNOR, *supra* note 85, at M9-M10. For a discussion of these reductions, see *infra* text accompanying notes 99-108.

90. MESSAGE OF THE GOVERNOR, *supra* note 85, at M11. For a listing of these proposed increases, see *id.* at M19.

isted which required additional taxes and some reductions in expenditures, questions were raised concerning the projected size of the gap.<sup>91</sup> Among the Democrats, particular concern was expressed over the reductions being proposed. The most controversial budget-cut was the proposed Statewide Personnel Reduction Program,<sup>92</sup> which was designed to reduce the state work force by 14,000 jobs, thereby saving \$219 million.<sup>93</sup> This proposed program had four components: early retirements, attrition, targeted reductions, and layoffs. Layoffs constituted almost fifty percent of the reductions.<sup>94</sup>

With respect to the early retirement component of this program, which offered additional time credit for an earlier retirement, the Executive projected that it would result in a reduction of 3400 employees, thereby saving approximately \$54 million.<sup>95</sup> This saving was an approximate calculation since there was no way to determine precisely the number of eligible employees who would retire.<sup>96</sup> Moreover, if the function of a particular retiree was in some way essential to the service being provided, or if large numbers of employees retired from a particular agency, various adjustments would be required that would reduce any projected savings. In this respect, the impact of early retirements on the services, such as SUNY, OMH and OMRDD,<sup>97</sup> which employed approximately thirty-eight percent of the eligible work force, was of particular concern to the Legislature.<sup>98</sup> Despite this uncertainty, it was clear by the end of the budget negotiations that the amount of savings needed from the programs to balance the budget was \$54 million. According to an

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91. See MESSAGE OF THE GOVERNOR, *supra* note 85.

92. *Id.*

93. *Id.* at M9.

94. See IMPLEMENTING THE PROGRAM, *supra* note 84, at 1-3.

95. For the anticipated number of early retirees, see *id.* at 1. For the estimated savings, see STATE OF NEW YORK, PRELIMINARY OFFICIAL STATEMENT: 1983 TAX AND REVENUE ANTICIPATION NOTES 51 (Apr. 4, 1983) [hereinafter cited as 1983 PRELIMINARY OFFICIAL STATEMENT].

96. For a discussion of the bill that passed, see *infra* 189-95 and accompanying text.

97. CUNY employees were not covered by the bill, nor were SUNY faculty members.

98. See OFFICE OF THE COMPTROLLER, REPORT ON THE RETIREMENT INCENTIVE PROGRAM FOR NEW YORK STATE EMPLOYEES 10 (Dec. 30, 1984) [hereinafter cited as COMPTROLLERS REPORT]. The total number of eligibles were 26,566 (2937 at SUNY, 4716 at OMH, and 2577 at OMRDD).

official state statement, "[t]he 1983-84 State Financial Plan assumes a saving of \$54 million resulting from one component of the workforce reduction program, the early retirement incentive program pursuant to which 3,400 State employees who would not normally have retired during fiscal 1983-84 are expected to elect early retirement."<sup>99</sup>

In addition to reductions resulting from early retirements, the proposed executive budget called for the reductions set forth in the following table.

Table I

Job Reductions as a Result of Statewide Personnel Reduction Program Proposed in the 1983-1984 Executive Budget, Excluding Early Retirement

<u>Agency</u>	<u>Attrition</u> <sup>104</sup>	<u>Layoffs</u> <sup>105</sup>	<u>Total</u>	<u>Savings</u> (millions)
CUNY <sup>100</sup>	227	554	781	\$15.8
SUNY <sup>101</sup>	630	1569	2199	\$37.1
OMH <sup>102</sup>	342	1388	1730	\$28.2
OMRDD <sup>103</sup>	96	747	843	\$12.8

The Legislature opposed these proposed personnel reductions on two grounds. First, under the leadership of the Speaker of the Assembly, members of the Legislature argued that the

99. See 1983 PRELIMINARY OFFICIAL STATEMENT, *supra* note 95, at 51.

100. STATE OF NEW YORK EXECUTIVE BUDGET FOR THE FISCAL YEAR APRIL 1, 1983 TO MARCH 31, 1984, THE OPERATING BUDGETS 355 [hereinafter cited as OPERATING BUDGETS]. The budget contemplated an additional \$5.8 million saving in the personnel service appropriation for CUNY, although not as part of the personnel reduction program. *Id.*

101. *Id.* at 236. An additional 498 jobs were scheduled for reduction under the prior years targeted operating level. *Id.*

102. *Id.* at 138. Another 709 jobs were recommended for abolition in nondirect care areas. *Id.*

103. *Id.* at 150. An additional 1,073 jobs were scheduled for reduction under an agency reorganization plan.

104. According to the IMPLEMENTING THE PROGRAM, *supra* note 84, attrition was defined as the "planned control of vacancies projected to occur as a result of normal attrition during the 1983-1984 fiscal year." *Id.* at 1. It excluded direct care staff at OMH and OMRDD and the hospitals operated by SUNY. *Id.*

105. Layoffs are defined as job abolishments with direct care staff at OMH and OMRDD, and SUNY hospitals subject only to 50% of the "ratio applied to the remainder of the work force." *Id.* at 2-3.

Personnel Reduction Program would substantially and adversely affect significant state-funded services. Second, some legislators, particularly some Senate Democrats, argued that the projected savings that would be realized by the layoff component of the Personnel Reduction Program were not substantial enough to justify the disruption these layoffs would cause affected state agencies.

In addition to the Personnel Reduction Program, the budget also contained proposals for reductions in a variety of local assistance programs. These reductions included the termination of a special municipal aid program,<sup>106</sup> a deep cut in local transportation support,<sup>107</sup> and cuts in a variety of other programs that had traditionally received strong legislative support.<sup>108</sup> In addition, the Governor's proposed increase of \$63 million in aid to public schools was generally considered to be too low.

On March 1, 1983, after the negotiations and public discussions concerning his budgetary priorities began, the Governor exercised his amendment right<sup>109</sup> by reducing the proposed savings at CUNY from \$15.8 million to \$3.7 million and at SUNY from \$37 million to \$27 million. This reduced the proposed layoffs at CUNY from five hundred fifty-four to forty-two. With respect to SUNY, the amendment was silent as to the number by which the proposed layoffs would be reduced.<sup>110</sup>

A series of negotiations occurred toward the end of March: first among the Democratic legislative leaders, then among the leaders and the Governor, and finally among the Republican legislative leaders. After these negotiations, an agreement was reached with respect to the 1983-1984 appropriations. The relevant ingredients included the restoration of the remaining \$3.7 million savings for CUNY, described in the law as "[a]dditional funds to offset saving due to reduction in force and managed

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106. MESSAGE OF THE GOVERNOR, *supra* note 85, at M21.

107. *Id.*

108. These included, for example, cuts in local aid to the arts, tourism, matching grants, education programs, the Office of the Aging. *Id.* at A23.

109. N.Y. CONST. art. VII, § 3.

110. See AMENDMENTS TO STATE OF NEW YORK EXECUTIVE BUDGET FOR THE FISCAL YEAR APRIL 1, 1983 TO MARCH 31, 1984, THE OPERATING BUDGETS 4 (copy available at the Pace Law Review).

attrition;"<sup>111</sup> the restoration of the remaining \$27.1 million to SUNY, plus an additional \$2.4 million to "restore the statewide personnel reduction lump sum and to preclude layoffs required by base position reductions";<sup>112</sup> the restoration of \$22 million for OMH "to offset savings attributable to the statewide personnel reduction policy;"<sup>113</sup> and the restoration to OMRDD of "additional" staff totaling \$18.8 million. Although the OMRDD bill language did not expressly refer to the Statewide Personnel Program or Policy, it did contain, unlike the others, specific information about the positions the appropriations were intended to restore.<sup>114</sup>

With respect to these items, the *Report of the Fiscal Committees, 1983-1984*,<sup>115</sup> adopted with the budget on March 27, 1983,<sup>116</sup> characterized the additional CUNY and SUNY funding

111. An Act in Relation to the Aid to Localities Budget, ch. 53, 1983 N.Y. Laws 662, 785.

112. An Act Making Appropriations for the Support of Government, State Operations Budget, ch. 50, 1983 N.Y. Laws 187, 491.

113. *Id.* at 382.

114. *See id.* at 399. It provided for \$7.7 million "for services and expenses related to 530 additional institutioned client care and direct care support staff." *Id.* Another \$8 million was similarly provided for additional community care patients. *Id.* at 406. An additional \$3 million was provided for additional restorations. *Id.* at 399, 406.

115. REPORT OF THE FISCAL COMMITTEES 1983-1984, *supra* note 60.

116. The resolution, which adopted the Report of the Fiscal Committee 1983-1984 as legislative intent states:

Whereas, Pursuant to Article 7 of the Constitution, the Governor submits to the Legislature a budget containing a complete plan of expenditures to be made before the close of the ensuing fiscal year; and

Whereas, Upon such submission, the Senate Finance Committee and the Assembly Ways and Means Committee begin an analysis and review of all the provisions of such budget; and

Whereas, After extensive study and deliberation, each committee makes recommendations as to the contents thereof; and

Whereas, Such recommendations are presented to the Members of the Legislature individually and collectively; and

Whereas, Each Member of the Legislature is given the opportunity to explain and indicate his opinion on the proposed expenditures; and

Whereas, After such Members make their comments and suggestions, the Senate Finance Committee and the Assembly Ways and Means Committee, representing the Members of each House, engage in negotiations designed to reach a common accord on the contents of the Executive Budget; and

Whereas, After such accord is reached, a "Report of the Fiscal Committees on the Executive Budget" is prepared, published and distributed; now, therefore, be it

Resolved, That such report shall be deemed to be a statement by the Legisla-

as increases to exempt these universities "from statewide personnel reduction policy and to stabilize the number of filled positions."<sup>117</sup> The Report added that the "funds shall be used to prevent layoffs or equivalent savings from forced attrition."<sup>118</sup> For OMH only \$18.2 million of the restored funds were expressly identified as marked for the Statewide Personnel Reduction Program, "to provide full annual funding for 620 inpatient/clinical, 175 inpatient/support and 458 outpatient staff scheduled for termination pursuant to the Statewide Personnel Reduction Policy in order to maintain current program levels."<sup>119</sup> The remaining \$3.8 million was characterized as an increase for positions "scheduled for termination" and included a listing of the specific jobs for which the appropriations were made.<sup>120</sup> The language of the Report relating to OMRDD, in contrast to the provisions in the law,<sup>121</sup> referred to the increase of funds for the "restoration" of specific staff but did not mention the Statewide Personnel Reduction Program.<sup>122</sup> With the restorations in place, the agreed upon staffing levels for the four agencies were: CUNY, 10,897; SUNY, 32,665; OMH, 37,436; and OMRDD, 27,635.

Table II sets forth these restorations. They do not correspond directly to the proposed job reductions set forth in Table I. Instead, Table II reflects the product of a negotiation process that focused on staffing levels for each of the four agencies, and not necessarily on the job reduction classification contained in Table I.

ture as to how expenditures should be made in the ensuing fiscal year; and be it further

Resolved, That such report shall be and hereby is designated as the official statement of legislative intent on the Executive Budget as submitted by the Governor and as amended by the Legislature.

Resolution of March 27, 1983, No. L 633, 1983 N.Y. LEGIS. REC. & INDEX 72.

117. REPORT OF THE FISCAL COMMITTEE 1983-1984, *supra* note 60, at 118, 137.

118. *Id.*

119. *Id.* at 77.

120. Of the remaining \$3.8 million, \$2.6 million was "to provide full annual funding for 155 staff positions scheduled to be terminated to maintain current program levels." *Id.* at 78. The remaining \$1.6 million was "to provide the full annual funding for 65 staff positions scheduled for termination at the Rockland Research Institute." *Id.* at 79.

121. *See supra* note 111.

122. REPORT OF THE FISCAL COMMITTEE 1983-1984, *supra* note 60, at 83-84. For the language of the law, see *supra*, note 114.

Table II

## Job Restorations Negotiated as Part of the 1983-1984 Budget.

<u>Agency</u>	<u>Positions Restored</u>	<u>Funding Received</u> (millions)
CUNY	269	\$3.7
SUNY	1919	29.6
OMH	1504	22.4
OMRDD	1022	18.8

The restoration of these amounts in the face of the Executive's Statewide Personnel Reduction Program was considered by the Legislature to be one of the significant accomplishments of the budget negotiations. This sentiment was aptly described by the Speaker of the Assembly in a letter to the Governor:

As you know, the Assembly's major concerns during last year's Budget negotiations dealt with the delivery of essential services to at-risk populations served by OMH and OMRDD, and the disruptive effects of hiring freezes and similar programs on the delivery of pedagogical services at SUNY and CUNY. The negotiated budget agreement that was enacted into law last March, addressed these concerns.<sup>123</sup>

Despite considerable confusion over this point, the restorations were not intended to exempt SUNY, OMH, and OMRDD from the purview of the Early Retirement Program, which was enacted into law on March 28, 1983.<sup>124</sup> Two related facts mandate this conclusion: first, the amount of savings from the negotiated Statewide Personnel Reduction Program included \$54 million for early retirements<sup>125</sup> and second, this savings could not be reasonably realized if three agencies containing together thirty-

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123. Letter from the Speaker of the New York State Assembly, Stanley Fink to the Governor of New York, Mario M. Cuomo (Jan. 10, 1984) (copy available at the Pace Law Review).

124. An Act Making Deficiency Appropriations for the Support of Government, ch. 5, 1983 N.Y. Laws 14.

125. IMPLEMENTING THE PROGRAM, *supra* note 88, at 1. If a number of employees greater than 3400 retired as a result of the early retirement program, they were to be part of the attrition program and thus subject to the restorations to the budget. See *supra* notes 94-98 and accompanying text.

eight per cent of the eligible workers were omitted.<sup>126</sup>

Equally as clear is the agreement that once SUNY, OMH, and OMRDD realized their intended savings by the early retirements of their shares of the 3400 employees,<sup>127</sup> their staffing levels were to benefit from the restorations in the appropriation bills. This interpretation of the limited applicability of the Early Retirement Program on SUNY, OMH, and OMRDD is consistent with the language of the budget bills, restorations, and the *Report of the Fiscal Committees*, all of which focused on the layoff and attrition components of the Statewide Personnel Reduction Program.<sup>128</sup>

Questions remained, however, about the impact of early retirement below 3400, on the direct care services provided by SUNY, OMH and OMRDD. One legislative view was that an agreement had been made with the Executive to fill direct care staff losses from early retirement on a one-for-one basis.<sup>129</sup> This, it was argued, was to be paid for by an appropriation in the state operations budget:

for supplementing appropriations available for personal service, other than appropriations for the legislature or the judicial branch, to all state departments and agencies in order to avert up to two thousand layoffs required by the Statewide Personnel Reduction Program which shall be replaced, in whole or in part, by savings from voluntary furloughs, attrition and the retirement incentive program, at the discretion of the governor.<sup>130</sup>

Although the language of this appropriation does not explic-

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126. See COMPTROLLERS REPORT, *supra* note 98.

127. These shares were determined by multiplying the percentage of employees eligible for early retirement, for each of the three agencies, by 3400. The shares are: 374 for SUNY, 603 for OHM, and 330 for OMRDD.

128. See *supra* text accompanying notes 115-20.

129. There is some confusion over this. My own recollection is that at a breakfast among Democratic leaders and the Governor, which I attended along with other staff members, the Director of the Budget assented to a proposal to refill those positions on a one-for-one basis. However, at several later meetings, there was considerable discussion about the impact of the early retirement program on these agencies, without reference to any refill, at least below the pro rata share of the 3400. In retrospect, I think that the agencies were to suffer early retirement losses of no greater than their share of the 3400 jobs and that any serious reduction in services would be accommodated by the \$20 million appropriation. See *infra* notes 131-33.

130. OPERATIONS BUDGETS, *supra* note 100, at 366.

itly state that reductions caused by the Early Retirement Program were to be restored by this \$20 million, it was the recollection of the Speaker, the Chairman of the Ways and Means Committee, and its staff, and several other legislative aides, who had participated in the negotiations, that the inclusion of this money in the budget was to restore at least some of the direct care positions lost due to early retirements in SUNY, OMH, and OMRDD.<sup>131</sup> In this regard the Speaker wrote:

Further, it is my clear recollection, that we in the Assembly ultimately agreed to the enactment of the \$20 million lump sum appropriation (a proposal which we had been skeptical of when it was first proposed during negotiations) when the Director of the Budget pointed out that the early retirement program was basically unmanageable and could effect the delivery of essential services to at-risk populations in unintended and undesirable ways.<sup>132</sup>

Ultimately, the affected agencies suffered reductions in direct care staffing that the Executive did not restore by using the \$20 million appropriation or otherwise.<sup>133</sup>

With respect to the remaining reduction in local assistance aid and the small increase in school aid, much of what had been reduced was restored and school aid was increased to \$143 million above the Governor's recommended increase.<sup>134</sup> Legislative

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131. For my own recollection, see *supra* note 129. The \$20 million appropriation was included in the budget "to ameliorate the unmanageable nature of the 'Early Retirement Program'" at SUNY, CUNY, OMRDD, and OMH. N.Y. ST. ASSEMBLY WAYS & MEANS COMM. REPORT, DOTTING THE I'S AND CROSSING THE T'S: RESTORING CHECKS AND BALANCES IN THE BUDGETARY PROCESS 3 (Jan. 1985) (copy available at Pace Law Review). Several staff members who participated in the meeting confirm my view. Among them is Alden B. Kaplan, Secretary to Senate Finance Committee, Minority. Mr. Kaplan stated that despite the language of the appropriation its intent was to provide a cushion against the direct care losses from the statewide personnel reduction program. Interview with Alden B. Kaplan, November 19, 1984.

132. Letter from the Speaker, *supra* note 123.

133. Approximately two million dollars of the \$20 million was expended. The remaining \$18 million remained unallocated. None of the amount expended was used for CUNY, SUNY, OMH, or OMRDD and almost none was used for direct care services. Certification of Approval, Miscellaneous — All State Departments and Agencies (Mar. 19, 1984) (Dep't Code 2171, Program A8330010) (copy available at the Pace Law Review).

134. For a full account of the restorations, see REPORT OF THE FISCAL COMMITTEES, 1983-1984 *supra* note 60.

and executive additions to the original budget totalled approximately \$393 million.<sup>135</sup>

To pay for these additional programs, the Governor and the legislative leadership agreed to take a number of actions, including: adopting the Governor's tax package with some adjustments; a slightly upward revision of anticipated revenues including those projected from the new taxes;<sup>136</sup> a re-estimation of the costs of certain expenditures;<sup>137</sup> and, finally, a reduction of the funding levels of certain programs.<sup>138</sup> Moreover, because the Executive considered that these acts would not result in sufficient revenue to compensate for the additional expenditures, it was agreed, at least among the Democrats,<sup>139</sup> that the Executive be given some limited authority to further reduce expenditures if necessary. This authority was not expressed in a statute, but remained a legislative-executive agreement. The existence, amount, and terms of this reduction authority became an element in the impoundment dispute. The Executive contended it had \$50 million of unlimited authority. The Democrats in the Legislature argued that the Executive had only \$28 million of authority, available only upon revenue deficits and the Republicans denied that the Executive had any authority at all.

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135. As proposed, the budget projected total expenditures of \$31.518 billion. BUDGET 1983-1984, *supra* note 100. As passed, projected expenditures were \$31.999 billion. Of the \$393 million restored, \$294 million was considered cash for 1983-1984 fiscal year.

136. The Governor's SFY 1983-1984 General Fund Tax Revenue Projection totalled \$18.806 billion and included a major sales tax base broadening proposal. BUDGET 1983-1984, *supra* note 100. The legislature rejected the sales tax proposal. This rejection reduced the projected tax revenue to \$18.67 billion. After the budget was passed, the executive projected that the revenue for 1983-1984 would be \$18.8 billion, which included \$80 million from a new real estate gains tax, a \$36 million upward re-estimation in revenues from personal income taxes and a \$56 million transfer from other funds. 1983 PRELIMINARY OFFICIAL STATEMENT, *supra* note 95, at B-2.

137. The proposed appropriation for general state charges, which includes among other things, fringe benefits, was \$1.408 billion. It was re-estimated at \$1.39 billion. *Id.* I also recall that the project cost of gas for the state's automobiles was reduced.

138. See generally REPORT OF THE FISCAL COMMITTEES 1983-1984, *supra* note 60.

139. In an interview with a New York Times reporter, Eugene K. Tykinski, Secretary to Senate Finance Committee, stated that he recalled no such agreements. N.Y. Times, Dec. 29, 1983 at B3, col. 5.

## B. *Implementation and Management*

On August 11, 1983, the Deputy Director of the Budget sent CUNY, SUNY, OMH, and OMRDD letters containing their Division of the Budget approved expenditure limits and personnel targets for 1983-1984.<sup>140</sup> These letters were the culmination of several months of negotiation with the affected agencies. Essentially, the limits and targets reflected adjustments of proposed agency spending plans and required the agencies to modify their spending plans to conform with the letters' terms for the issuance of certificates of approval. A letter sent to OMRDD provides an example: "[a]gency fiscal and personnel plans must be submitted to the Division of the Budget no later than August 26, 1983. The personnel plan must include a detailed layoff analysis. The freeze on hiring will be lifted upon approval of these plans."<sup>141</sup>

Most significant, each letter required that the agency personnel target be below the staffing levels anticipated by the appropriation laws and underlying agreements. Thus, with respect to the CUNY, a letter stated:

As we have noted, your personnel ceiling has been set at 10,547 positions, or 350 below the total funded in the Budget. That limit, which must be achieved by June 30, 1984, is projected to yield savings of \$2.2 million and that sum will be unallocated on the next regular certificate.<sup>142</sup>

As for the remaining agencies, the personnel target for SUNY was set at 31,665, or 1000 positions below the agreed upon staffing level;<sup>143</sup> for OMH at 36,073, or 1363 positions below the agreed upon staffing level;<sup>144</sup> and for OMRDD at 27,100, or 535 positions below the agreed upon staffing level.<sup>145</sup>

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140. Letter from Susan Tyler, Deputy Director of the Budget, to Dr. Joseph S. Murphy, Chancellor CUNY (Aug. 11, 1983); Letter from Tyler to Clifton R. Wharton, Chancellor, SUNY (Aug. 11, 1983); Letter from Tyler to Mr. William Morris, Acting Commissioner, OMH (Aug. 11, 1983); Letter from Tyler to Arthur Y. Webb, Acting Commissioner, OMRDD (Aug. 11, 1983) (copies of each letter is available in the Pace Law Review).

141. Letter from Tyler to Webb, *supra* note 140.

142. Letter from Tyler to Murphy, *supra* note 140.

143. Letter from Tyler to Wharton, *supra* note 140.

144. Letter from Tyler to Morris, *supra* note 140.

145. Letter from Tyler to Webb, *supra* note 140.

Allowing for pro rata reduction from early retirement without concern for any restoration agreement with respect to SUNY, OMRDD, and OMH,<sup>146</sup> the permissible reduction below the staffing levels agreed upon would have been 374 at SUNY, 603 at OMH, and 330 at OMRDD.<sup>147</sup> Taking these reductions into account, the Division of the Budget's target levels were below the agreed upon levels by 626 at SUNY, 760 at OMH, and 205 at OMRDD. The reductions at OMH were aggravated by the continuation of a hiring freeze, commenced in September of 1982, running through August of 1983. This hiring freeze reduced OMH's authorized staffing level to 2000 below the agreed upon figure. Tables III and IV analyze these situations.

Table III

The Differences Between the Staffing Levels Agreed to by the Legislature and the Executive's Target Staffing Levels

<u>Agency</u>	<u>Agreed to Staffing Level</u>	<u>Executive's Target Level</u>	<u>Difference</u>
CUNY	10,897	10,547	350
SUNY	32,665	31,665	1,000
OMH	37,436	36,073	1,363
OMRDD	27,635	27,100	535

Table IV

The Difference Between the Staffing Levels Agreed to by the Legislature and the Executive's Target Staffing Levels, Allowing for a Pro Rata Reduction from the Early Retirement Program

<u>Agency</u>	<u>Difference</u>	<u>Pro Rata Early Retirement</u>	<u>Difference</u>
CUNY	350	—	350
SUNY	1,000	374	626
OMH	1,363	603	760
OMRDD	535	330	205

146. See *supra* notes 111-22 and accompanying text.

147. See *supra* note 127.

### C. *The Impoundment Dispute*

Members of the Legislature first became aware of a reduced staffing level problem in May, 1983 when several legislators, concerned about complaints of reduced outpatient staffing at an OMH facility, were informed that the reductions were a result of the Statewide Personnel Reduction Program. One OMH official wrote:

Among the various personnel reduction programs which were in place, the Office of Mental Health lost a total of 2,700 employees, 1,800 to early retirement and 900 to layoffs and reduced authorization. . . . As you also know, the Office was recently authorized to hire approximately 1,100 individuals, 500 of which were to offset early retirement and 600 of which were to backfill jobs which had become vacant during normal attrition.<sup>148</sup>

In December, 1983, however, the issue began to take on institutional overtones. At that point, after receiving numerous complaints from members of the Legislature and affected interest groups and as the result of hearings by joint legislative committee,<sup>149</sup> the Speaker of the Assembly directed the Secretary of the Ways and Means Committee<sup>150</sup> to review the implementations of the budgets of SUNY, CUNY, OMH, and OMRDD. The Secretary's Report submitted to the Speaker on January 10, 1984, concluded:

1. the position reduction targets that have been established administratively for SUNY and CUNY are contrary to the budget agreement reached last March and embodied in the State Operations and Aid to Localities Budget Bills, the *Report of the Fiscal Committees* on those bills, and the intent of the parties, legislative and executive, who negotiated that agreement;

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148. Letter from John Urban, Deputy Commissioner of OMH to Barry Gershon, Analyst, Senate Finance Committee (May 31, 1983) (copy available at the Pace Law Review).

149. The joint legislative hearings were held by the Assembly Committee on Mental Health, Mental Retardation/Development Disabilities, Alcoholism and Substance Abuse of the Senate Mental Health Hygiene and Addiction Control Committee. These hearings were held on December 29, 1983, at the Manhattan Psychiatric Center, January 25, 1984, at the Bronx Psychiatric Center, and March 16, 1984, at the Rome Psychiatric Center. See generally N.Y. Times, Dec. 29, 1983, at B3, col. 5.

150. The secretaries of the Assembly Ways & Means Committee and Senate Finance Committee are statutory positions. N.Y. LEGIS. LAW § 27 (McKinney 1952).

2. the effect of the early retirement program and the continuation of the hiring freeze begun in September 1982, caused direct care staffing levels at OMH and OMR/DD to reach unacceptably low levels during the summer and fall of 1983. Refilling of these direct care positions has begun, but staffing is still well below both the staffing level agreed to in the 1983-1984 budget agreement and the lower staffing level imposed administratively in the summer of 1983.<sup>151</sup>

On the same day, the Secretary's Report was forwarded to the Governor by the Speaker with the following requests:

- (1) That the unauthorized position ceilings established for SUNY and CUNY be immediately removed and the positions filled.
- (2) That inasmuch as the unexpectedly high level of early retirements coupled with the unnecessary continuation of the hiring freeze until September 1983 caused staffing levels at OMH and OMRDD to reach disastrously low levels during the summer and fall of 1983, we insure that the rehiring process be accelerated so that the agreed upon staffing levels can be reached.<sup>152</sup>

This submission to the Governor was followed by a series of meetings between representatives of the Speaker and representatives of the Governor, over the weekend of January 14 and 15, 1984. During these meetings, the Governor's representatives denied that the Executive had violated any agreements with the Legislature, but offered to accelerate the implementation of staffing increases intended for the 1984-1985 budget. In particular, the Executive proposed to hire sixty-nine members for CUNY, ninety for SUNY, and a combination of three hundred sixty for OMH and OMRDD.<sup>153</sup>

The Legislature considered this proposal to be inadequate. It declared that the issue would be considered as part of the negotiations for the 1984-1985 budget and for deficiency appropriations in 1983-1984, which covered unforeseen expenditures. In late February, 1984, the Legislature passed a deficiency appropriation bill that was signed by the Governor on March 12,

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151. Memo on the Implementation of the 1983-1984 State Budget, from Frank Mauro to Speaker Fink (Jan. 10, 1983).

152. Letter from the Speaker, *supra* note 123.

153. N.Y. Times, Jan. 17, 1984, at B5, col. 2.

1984.<sup>154</sup> Included within this bill were appropriations for CUNY, SUNY, OMH, and OMRDD, similar in purpose to those restored in the 1983-1984 budget but which contained the specific staffing levels to which the appropriations were related.<sup>155</sup> In addition, the bill required that if the staffing levels fell below the specified numbers, the Executive had to justify the reduction. The language from the SUNY appropriation exemplifies the provision:

Additional funds are provided to restore the state-wide personnel reduction lump sum and to preclude layoffs required by base position reductions. (a) This increased funding is provided to exempt the State University from the state-wide personnel reduction policy and to stabilize the number of authorized filled positions at 32,665. These funds shall be used to preclude the need to secure savings from a reduction in staffing below such level. (b) To the extent that the number of filled positions is reduced below the level specified in subparagraph (a) above as a result of the retirement incentive program authorized by chapter 17 of the laws of 1983, the Governor or his designee shall (i) determine the number of positions vacated as the result of such program which should be refilled in order to assure the continuity and quality of pedagogical, maintenance and student support services and of such other services as the Governor or his designee determines to be appropriate, and (ii) authorize the refilling of as many of such determined number of positions as he determines to be feasible. (c) To the extent that the authorized year-end filled position level as of March first, nineteen hundred eighty-four is different from the level specified in subparagraph (a) above, the director of the budget shall submit to the legislature by March fifteenth, nineteen hundred eighty-four a report including: (i) the year-end filled position level for the state university; (ii) and explanation of the reasons why such year-end filled position level is different from that specified in subparagraph (a) above, and (iii) and evaluation of the programmatic impact that such year-end filled position level will have on the operations of the State University.<sup>156</sup>

The Executive responded to the mandatory staffing levels

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154. An Act Making Deficiency Appropriations for the Support of Government, ch. 5 (Jan. 21, 1984) (copy available at the Pace Law Review).

155. See *id.* at 26, 15, 9.

156. *Id.* at 15.

and reporting requirements on March 15, 1984, in his Report to the Legislature on Staffing Levels.<sup>157</sup> This Report concluded that the staffing levels then applicable to CUNY, OMH, and OMRDD resulted from both the impact of early retirement and management action taken to balance the financial plan.<sup>158</sup> The Report's analysis of all executive action taken for fiscal 1983 "indicates that the Executive fulfilled his responsibility to the purchasers of State notes to manage deficits while fully supporting the intent of the Legislature."<sup>159</sup>

Thus, the Executive's justification for reducing staff levels below what the Legislature appropriated centered upon the Governor's obligation to the State's lenders. The source of this power to impound funds was described in the Report to the Legislature on Staffing Levels as follows:

The Governor is required by the Constitution to submit a balanced budget to the Legislature for its consideration. Although neither the Constitution nor statute requires the Legislature to pass a balanced budget, judicial decisions focusing on short-term borrowing within a fiscal year have nevertheless established the bedrock assumption that in both its enactment and execution the budget will remain in balance. As a case in point, this determination precludes the State from undertaking such intra-fiscal year borrowing unless the financial plan resulting from the enacted budget is certified to be in balance. And, *inherent in the State's obligation to the individuals who purchase the tax and revenue anticipation notes is the responsibility of the Executive to exercise management control over the budget during the execution phase.* This responsibility is clearly set forth in the certifications provided to the noteholders testifying to both the fiscal balance of the budget and the willingness of the Executive to maintain such balance by exercising whatever management controls are available to him.

The validity of the tax and revenue anticipation notes rests in part, therefore, on the availability of management controls and on the ability of the State to maintain balance . . . .

The ability of the Executive to manage and adjust the plan

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157. REPORT TO THE LEGISLATURE ON STAFFING LEVELS AT OMH, OMRDD, SUNY, CUNY (Mar. 15, 1984) (copy available at the Pace Law Review) [hereinafter cited as REPORT TO THE LEGISLATURE].

158. *Id.* at 6.

159. *Id.*

to reflect actual experience throughout the year is therefore far from arbitrary; it is, indeed, fundamental to the Governor's constitutional responsibility to manage the day-to-day operation of government.<sup>160</sup>

This argument is flawed. Although it properly admits that there is no constitutional or statutory requirement that the Legislature must pass a balanced budget, it nevertheless appears to rest on a constitutional mandate for the Governor to *maintain* a balanced budget. This mandate was said to arise from judicial decisions relating to the issuance of state revenue and bond anticipation notes. Case law did not support this claim.

The only case reference even remotely supporting this proposition is dictum in *Wien v. State of New York*,<sup>161</sup> a case dealing with the state's authority to borrow short-term money to loan to other governmental entities. According to the court:

There is no express treatment in the Constitution governing appropriations made after the regular session and during the fiscal year at extraordinary sessions, but the implication is, and an essential one, that additional appropriations must be covered by matching revenues, or else the balanced budget of the regular session would be a device easily evaded at a later extraordinary session. A control on such evasion, however, and reinforcing the implication are the constitutional limitations on short-term borrowing.<sup>162</sup>

It is clear that neither this statement nor the case itself, authorizes the Governor to maintain a balanced budget by impounding appropriated funds. Although this passage, taken out of context, may suggest a requirement for a balanced budget,<sup>163</sup> the entire case does not support this proposition. Moreover, the proposition that the Governor has the power to impound funds to maintain a balanced budget has been expressly denied by two subsequent cases: *Wein v. Carey*<sup>164</sup> and *Oneida v. Berle*.<sup>165</sup> *Wein v. Carey*, decided one year after *Wein v. State of New York*,

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160. *Id.* at 1 (emphasis added).

161. 39 N.Y.2d 136, 347 N.E.2d 586, 383 N.Y.S.2d 225 (1976).

162. *Id.* at 141, 347 N.E.2d at 588, 383 N.Y.S.2d at 227.

163. *Id.* at 148, 347 N.E.2d at 592, 383 N.Y.S.2d at 231.

164. 41 N.Y.2d 498, 362 N.E.2d 587, 393 N.Y.S.2d 955 (1977).

165. 49 N.Y.2d 515, 404 N.E.2d 133, 427 N.Y.S.2d 407 (1980).

dealt with a taxpayer's challenge to the issuance by the state of revenue anticipation notes. The taxpayer claimed that these anticipation notes were invalid because the state budget was not balanced at the time the notes were issued. In rendering its decision the court clearly stated that there was no constitutional mandate to maintain a balanced budget:

The fact is that there may be an indefinite series of deficits honestly suffered. All that is necessary to produce the result are successive years of unpredictable shortfalls in revenues or rises in required spending beyond estimates. Depressed economic conditions can affect both sides of the balance. Catastrophies, emergencies, or, in smaller scale, significant needs may arise, which, if unanticipated, may upset the balance on one side or the other. Indeed, it is unattainable for any budget plan, perfectly and honestly balanced in advance, to remain in balance to the end of the fiscal year. There must, as a practical matter, in every year be either a deficit or a surplus. Nothing in the Wein case . . . suggests otherwise.

It is only when the estimates are dishonest that fault may be found with the budget plan or that which is done pursuant to it. It is then that the use of anticipation notes to balance the imbalanced budget plan is an unconstitutional practice.<sup>166</sup>

Any remaining doubt concerning a constitutional obligation to maintain a balanced budget and the Governor's authority to impound lawful appropriations to effect a balanced budget was dismissed in *Oneida v. Berle*.<sup>167</sup>

*Oneida* concerned the executive budget for 1976-1977. In his budget, the Governor had recommended a \$12 million appropriation for the maintenance and operation of sewage treatment plants. The Legislature amended his proposal by adding \$14 million to the program. The bill was signed by the Governor. Subsequently, the Director of the Budget impounded \$7 million of this amount, explaining by letter that "his action in this matter is one instance of a necessarily comprehensive effort to tighten State spending."<sup>168</sup> As a basis for his authority, the Director offered the "dual justification . . . that the Governor, as

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166. *Wein v. Carey*, 41 N.Y.2d at 504, 362 N.E.2d at 591, 393 N.Y.S.2d at 959.

167. 49 N.Y.2d 515, 404 N.E.2d 133, 427 N.Y.S.2d 407 (1980).

168. *Id.* at 520, 404 N.E.2d at 136, 427 N.Y.S.2d at 410.

Chief Executive Officer of the State, has an obligation to maintain a balanced budget throughout the fiscal year and, to accomplish that goal, possesses implied constitutional power to reduce duly enacted appropriations."<sup>169</sup> The court disposed of the Executive's argument simply by denying the validity of its premise: the constitutional requirement that a balanced budget be maintained. The court stated:

It is true, as respondents maintain, that opinions of this court have recognized the Governor's constitutional obligation to *propose* a balanced budget. . . . But at no time has the court suggested that, once a budget plan is enacted, revenues and expenditures must match throughout the fiscal year. At any isolated point in time in the spending year, there must, as a practical matter, be some gap between the two. Recognizing this reality, the court has but recently disclaimed any obligation on the part of the State to *maintain* a balanced budget. "[I]t is unattainable for any budget plan, perfectly and honestly balanced in advance, to remain in balance to the end of the fiscal year. There must . . . in every year be either a deficit or a surplus." . . . Thus, respondent's premise is untenable.

Given the absence of an obligation to maintain a balanced budget, the constitutional argument falters. For if the executive branch is under no duty to reduce expenditures or raise revenues in order to retain an equilibrium as the year progresses, it can hardly possess implied power unilaterally to "reduce" a lawful appropriation.<sup>170</sup>

According to the court, no other conclusion could be reached under the provisions and doctrines of the New York State Constitution:

A duly enacted statute, "once passed, cannot be changed or varied according to the whim or caprice of any officer, board or individual. It remains fixed until repealed or amended by the Legislature." . . . Simply, the laws and policies of the State are established by the lawmaking powers, not by "officers acting solely on their own ideas of sound public policy, however excellent such ideas may be." . . . Once the appropriation was approved, therefore, the Governor and his subordinates were duty

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169. *Id.* at 521, 404 N.E.2d at 136, 427 N.Y.S.2d at 410.

170. *Id.* at 521, 404 N.E.2d at 136, 427 N.Y.S.2d at 410-11 (quoting *Wein v. Carey*, 41 N.Y.2d at 504, 362 N.E.2d at 591, 393 N.Y.S.2d at 959).

bound "to take care that [it was] faithfully executed." . . .

However laudable its goals, the executive branch may not override enactments which have emerged from the lawmaking process.<sup>171</sup>

This view is entirely consistent with the many federal court cases that held federal impoundments unconstitutional.<sup>172</sup>

Since the Executive was without constitutional justification for its actions, the propriety of these actions must depend upon the existence of statutory or legislative authorization. From a statutory perspective, the appropriation bills themselves contained no authority for the impoundment of appropriations except in the first section of each bill in which reference was made to the impoundment power contained in section 42 of the Finance Law.<sup>173</sup> Since the language in each of the budget appropriation bills is identical, the following excerpt from the State Operations Bill will serve as an example: "the several amounts named in this section, or so much thereof as shall be sufficient to accomplish the purposes designated by the appropriations, are hereby appropriated and authorized to be paid . . ."<sup>174</sup> With respect to this provision and to section 42, no justification of the impoundment was ever offered.<sup>175</sup> Consequently, the validity of

171. *Id.* at 523, 404 N.E.2d at 137, 427 N.Y.S.2d at 411-12 (quoting *Schumer v. Caplin*, 241 N.Y. 346, 351, 150 N.E. 139, 140 (1925), *Picone v. Commissioner of Licenses*, 241 N.Y. 157, 162, 149 N.E. 336, 338 (1925), and N.Y. CONST. ART. IV, § 3). It has been suggested that the impoundments herein are different than those in *Oneida* because most of the items impounded here are from the "State Purposes" budget and not "Aid to Localities." There is no support for this argument. Neither the Constitution nor any statute notes such a distinction nor is there any logic to one. In fact, the categories of the appropriation bills are a product of executive choice and customs. *See supra* note 3.

172. *See, e.g.*, *United States v. Louisville*, 169 U.S. 249 (1898); *United States v. Price*, 116 U.S. 43 (1885); *Kendal v. United States ex. rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838).

173. N.Y. STATE FIN. LAW § 42 (McKinney 1974).

It was claimed in *Oneida* that the appropriation bill, which was somewhat more supportive of executive authority than the language of § 42, authorized the impoundments. The court dismissed this claim, stating "[s]uch a legislative delegation would be drastic indeed, and may not be inferred from ambiguous language." *Id.* at 564, 404 N.E.2d at 138, 427 N.Y.S.2d at 412.

174. STATE OPERATIONS BUDGET 1983, *supra* note 127. The language of § 42 differs from this language because it includes the phrase "in full" after the word "accomplish." I have unsuccessfully searched for a reason for this discrepancy but have found none. Hopefully it will be corrected in the 1985-1986 budget.

175. Since § 42 of the State Finance Law provides for lawful impoundment, the

the 1983-1984 executive impoundment had to rest on legislative-executive agreements.<sup>176</sup>

The executive branch claimed that two agreements justified the challenged impoundments. The first was the dispute in which the Executive claimed there had been an agreement for unlimited executive authority amounting to \$50 million, while the Democrats contended there had been an agreement for limited executive authority, while the Republicans denied that there had been any agreement.<sup>177</sup> The Executive maintained this position in the *Report to the Legislature*, which stated: "As the 1983-84 budget negotiations proceeded, agreement was reached on legislative changes to the Executive Budget. It was also assumed that the plan could be balanced, even though an apparent \$50 million gap remained after the agreement."<sup>178</sup>

The second agreement, which relates to a document known as a "Wein Statement," was tangentially referred to in the *Report to the Legislature* and was specifically referred to in a letter from the Director of the Budget to the Assistant Speaker of the Assembly.<sup>179</sup> The Wein Statement is a letter from each of the legislative leaders to the New York State Comptroller after passage of the budget.<sup>180</sup> It certifies that the budget is balanced on a cash basis, "assuming utilization of available funds and the adoption and maintenance of available expenditure control mechanisms by the executive."<sup>181</sup> According to the Director of the Budget's letter: "[a] general understanding existed that modest expenditure controls would be imposed to achieve that budget balance. That understanding was not informal but was written into documents [namely, the Wein Statement] jointly

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executive could have utilized this section more effectively to support its position.

176. See *supra* text accompanying notes 57-73.

177. See *supra* text accompanying notes 138-39.

178. REPORT TO THE LEGISLATURE, *supra* note 157, at 2.

179. Letter from Michael Finnerty to Assemblyman Edward Griffith (Feb. 17, 1984) (copy available at the Pace Law Review)

180. Letter from Senator Manfred Ohrenstein, Senate Minority Leader, to Edward V. Regan, State Comptroller (Apr. 14, 1983) (copy available at the Pace Law Review). This letter is known as the "Wein Statement" because its origins are in the two Wein cases. See *supra* notes 161-64. Use of the Wein Statement was discontinued as a consequence of the impoundment disputes. See *infra* text accompanying note 190.

181. *Id.*

certified, which were issued to the investment community.”<sup>182</sup>

The Legislature did not consider that either of these “agreements” were justifications for the disputed impoundments. With respect to the first agreement, the purported “\$50 million” agreement,<sup>183</sup> the Republicans did not accept even the existence of an agreement, while the Democrats did not believe that more than \$28 million of discretionary funds had been allocated, and then only to make up for a revenue deficit.<sup>184</sup> With respect to this point, not only were there no deficits, but taxes and miscellaneous receipts for the 1983-1984 year were \$54 million above the initial financial plan projections.<sup>185</sup> In addition, it was the view of the Democrats that, to the extent that this discretionary authority could be exercised, it could not be exercised against CUNY, SUNY, OMH, and OMRDD.<sup>186</sup> Basically, the legislative leaders considered the Wein Statements to be affirmations of the already existing authority of the Executive to do what it was lawfully permitted to do or what they agreed it could do. Thus, in neither case would the Wein Statements support the impoundments.

Moreover, by the time the *Report to the Legislature on Staffing Levels* was issued — three months after the Speaker’s letter to the Governor<sup>187</sup> and nine months after the Legislature first learned of the impoundment problem — the impoundment issue had become an institutional challenge to the Legislature. It was no longer possible to resolve the matter informally. The length of time that had gone by, the inadequacy of the Executive’s settlement offer, the breaches in informal agreements, and the continued insistence by the Executive that nothing was wrong, made an informal settlement impossible. Instead, the arguments in the *Report to the Legislature on Staffing Levels* served only to exacerbate existing tensions and to ensure that

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182. Letter from Michael Finnerty, *supra* note 180.

183. See *supra* text accompanying note 177.

184. See *supra* notes 138-39 & 177 and accompanying text.

185. The revenue projected in the initial financial plan was \$18.654 billion. 1983 PRELIMINARY OFFICIAL STATEMENT, *supra* note 95, at 132. The 1983 mid-year report indicated \$18.9 billion in projected revenue. STATE OF NEW YORK, BUDGET SUMMARY 4 (Oct. 1983).

186. See *supra* notes 127-32 and accompanying text.

187. See *supra* note 132.

the Speaker's earlier admonition — "we are going to dot every *i* and cross every *t*"<sup>188</sup> — would be realized.

#### D. *Legislative Response to the Impoundments*

The obvious means chosen to prevent future impoundments was to reduce the number of agreements upon which the budget was based by their components in the budget bills passed by the Legislature. Thus, the inclusion in the 1984-1985 budget of the mandatory staffing levels and reporting requirements was a natural and appropriate conclusion to the impoundment disputes. The staffing level mandate made clear the job fill levels associated with the appropriations and the reporting requirements provided a vehicle for legislative oversight of the implementation of the appropriations.<sup>189</sup> To further underscore this approach, the legislative leaders refused, after the passage of the 1984-1985 budget, to sign Wein Statements.<sup>190</sup> One legislative memorandum described some of the reasons for this posture:

[O]ne of the accomplishments of this year's budget negotiation was the inclusion of language which would make a repeat of last year's "impoundment" action indefensible if not impossible. Retaining the Wein language in question would undermine this position. . . . [I]t is our affirmative position that as a legal and policy matter the executive cannot react to fiscal difficulties at the expense of enacted programs without the participation of the legislature. Thus, we should not subscribe to language which suggests a contrary position.<sup>191</sup>

The reasons for this response are evident. From the legislative perspective, the impoundments were the result of the Executive's failure to honor a series of agreements which, in their view, served as the basis of the resolution of the budget negotiations. They included agreements concerning: (1) the staffing levels resulting from the restorations;<sup>192</sup> (2) the impact of early

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188. N.Y. Times, Jan. 18, 1984, at B2, col. 2.

189. For an example of the language, see *supra* note 10 & 13.

190. See *supra* note 179.

191. Memo to Sen. Manfred Ohrenstein from the Author (Apr. 1984) (copy available at the Pace Law Review).

192. See *supra* Table II.

retirements,<sup>193</sup> and other components of the Statewide Personnel Reduction Plan on CUNY, SUNY, OMH, and OMRDD;<sup>194</sup> (3) the use of a \$20 million appropriation;<sup>195</sup> (4) and the existence and amount of executive management authority and the condition for its use.

Despite these justifications, the legislative response was somewhat surprising, given its historical acquiescence to the Executive's domination over the budget. These responses are even more unique because they were directed by the Speaker of the Assembly, a member of the same party as the Governor. This can only be explained in the context of a growing legislative commitment to fulfill its constitutional responsibilities.

Over the last decade, members of the New York Legislature have become increasingly aware of their independent legislative responsibilities and more confident that they can fulfill them. At the same time there has been an expanding use of professional staff that has been both the product and in turn the creator of this growing legislative self-awareness. Legislative independence has been institutionalized by the selection of legislative leaders who share this vision of legislative responsibility.

The focus of this legislative effort has primarily been on lawmaking. Thus, in 1981, in the face of a crisis in the capital stock of the transportation system servicing New York City and its surrounding region, the Legislature, basically without executive participation, fashioned a \$5 billion capital renewal program.<sup>196</sup> Similar examples affecting housing<sup>197</sup> and the environment,<sup>198</sup> can be pointed to in legislation. The response to 1983-1984 impoundments, indicates that the Legislature is now willing to assume its oversight role as well as its lawmaking duties. As Frank Mauro, Secretary to the Assembly Ways and Means Committee, stated: "The Legislature is becoming more vigilant; it is exercising oversight powers more than it has before. It is an

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193. See *supra* text accompanying notes 95-98 and 123-27.

194. See *supra* text accompanying notes 100-28.

195. See *supra* text accompanying notes 131-33.

196. Transportation System Assistance and Financing Act of 1981, ch. 314, 1981 N.Y. Laws 1396.

197. The Omnibus Housing Act of 1983, ch. 403, 1983 N.Y. Laws 1777.

198. See, e.g., New York State Returnable Container Act, N.Y. ENVLT. CONSERV. LAW §§ 27-1001 to -1019 (McKinney 1984).

indication of the maturing of the institution."<sup>199</sup>

Oversight is of course a fundamental function of the Legislature. It tests the premises on which law is based, "to find out, after a law is passed what happened as a consequence."<sup>200</sup> It controls the bureaucracy's "inherent tendencies to be parochial, to aggregate powers."<sup>201</sup> The oversight function is, however, a difficult function to perform. Speaking about the United States Congress, James L. Sundquist has reported:

Oversight was neglected . . . because members found the function politically unrewarding in relation to the time and effort that were required. It was tedious work, often technical, requiring careful preparation to be done well. The Government was too big, anyway, for "continuous watchfulness" of more than a small fraction of its activities. Except in instances where the prospect of gaining headlines through exposing misconduct existed, oversight therefore had little appeal to the typical senator or representative. And even in those cases, committees might be deterred by considerations of party loyalty, if the administration and the congressional majority were of the same political persuasion, or by fear of interest groups that might be offended. Or committee members might be deterred by the cozy relations that often exist between the overseer and the overseen.<sup>202</sup>

Although the size of state government is substantially smaller than the federal government, the oversight difficulties are compounded by the part-time status of the members of state legislatures. Because of the nature of the state legislative process, there are constant diversions, which make meaningful oversight difficult. These difficulties are further exacerbated when the agency whose actions are under review is Division of the Budget, the mainstay of the "permanent" government.<sup>203</sup> Consequently, reliance on executive discretion has been the norm. Since the commencement of the executive budget process, the New York Legislature has generally acquiesced to the management initiatives of the Division of the Budget, regardless of their constitutionality. To a large extent, this acquiescence accounts

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199. N.Y. Times, Mar. 18, 1984, at E6, col. 1.

200. J. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 326 (1981).

201. See MAASS, *supra* note 15, at 8.

202. SUNDQUIST, *supra* note 201, at 327.

203. See generally *THE EXECUTIVE BUDGET*, *supra* note 21.

for the Division's aggregation of power. It explains the genuine surprise and consternation at the Legislature's determined and successful efforts to alter this relationship in the 1984-1985 budget.

#### IV. Recommendations

Whether this new relationship becomes permanent depends, as Mr. Mauro suggests, on legislative vigilance and the continued exercise of its oversight power. Although the task is difficult, it appears from the New York experience that a variety of steps may be undertaken to facilitate the process. First and foremost, with respect to vigilance, the number of informal recommendations and unenacted agreements should be reduced to a minimum. Certainly all that is known to the legislative leadership when the budget negotiations are completed should be included in law, unless there is some overriding reason not to. In New York, for example, there is no credible reason why staffing level agreements cannot, on a regular basis, become part of the law as was done in the 1984-1985 budget. Specific staffing levels should be required as a component of the budget bills the Governor submits to the Legislature. This requirement would not hamper executive flexibility because it would not encompass setting staffing level mandates in an unreasonable fashion. The Executive would still retain its power to impound appropriations under section 42 of the Finance Law and to transfer funds under section 51 of the Finance Law.

Second, particularly with respect to controversial matters, it is incumbent upon the Legislature to ensure that the budget bill's language clearly reflects the budget agreements. Too frequently this language is drafted at the last minute by exhausted budget analysts. Fiscal committees would benefit by having their own counsel whose sole responsibilities are to clarify and ensure consistency in the budget language.

The third recommendation relates to legislative intent. In a judicial setting the admission of external documents depends upon a court's determination of the existence of an internal ambiguity.<sup>204</sup> Thus, to ensure the probative value of reports such as

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204. See *supra* note 62 and accompanying text.

the *Report of the Fiscal Committees on the Executive Budget*,<sup>205</sup> beyond the political arena, significant passages from legislative reports should be included in the budget bills themselves. These suggestions are designed to clarify legislative mandates with respect to the implementation of the budget. The inclusion of these mandates in law will provide objective standards against which the Legislature can measure executive action.

Overseeing executive activities presents another problem. Although interest group complaints are valuable, they often come too late and it is hard to discern an overall picture from them. A much surer method of oversight for a part-time legislature is to require the Executive to report to the Legislature on budget implementation. To different degrees, states have focused on this methodology.<sup>206</sup> In New York, the Executive is required to provide the Legislature with quarterly financial plan updates in forms suitable for comparison with earlier submitted financial plans. The quarterly plan must contain an explanation of any major deviation from prior plans.<sup>207</sup> Moreover, the comptroller must submit monthly reports containing a "complete statement of disbursements, expenditures, receipts and revenues for the prior month and year-to-date."<sup>208</sup> This case study indicates that this is not sufficient. In the 1984-1985 budget, the Director of the Budget was required to submit, to the Legislature, implementation plans for satisfying the mandated staffing levels, regular reports concerning staffing level status with an explanation of any variance and its impact on service, and steps to eliminate the variance. In addition, the Legislature must receive advance notice of any "proposed actions which . . . could prevent the attainment of the average filled position levels . . . and the circumstance and conditions to which these actions relate."<sup>209</sup> Provisions like these should be permanent. They should be expanded to include advance notice of decisions to limit any category of spending. For example, the Executive should be required

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205. See *supra* note 60.

206. See generally YONDORF, A LEGISLATOR'S GUIDE TO BUDGET OVERSIGHT AFTER THE APPROPRIATIONS ACT HAS PASSED (1983) (report of the National Conference of State Legislators).

207. N.Y. STATE FIN. LAW § 23 (McKinney Supp. 1984-1985).

208. *Id.* § 8(9-b).

209. State Operations, *supra* note 3, at 333.

to give the Legislature advance notice of an impoundment, pursuant to section 42 of the Finance Law.<sup>210</sup> Finally, in New York the chairpersons of the fiscal committees should exercise their power under section 8(9) of the Finance Law<sup>211</sup> to require the comptroller to provide information to the Legislature in a fashion that corresponds to the form of the budget bills.

These recommendations are designed to end acquiescence to the Executive and to develop a manageable informational system for a part-time legislature. Managing information and measuring it against legislative standards requires persistence. In most instances, a part-time legislature can find this persistence by relying on full-time staffs. It is incumbent upon legislative leaders and members to ensure that the full-time staffs are aware of the legislative oversight responsibility and that they are authorized to exercise this responsibility on behalf of the Legislature. This process is beginning in New York. Recently, the Ways and Means Committee began a series of in-depth analyses of the responsibilities, resources, and overall performance capabilities of the various state agencies. The first report in the series has already been completed.<sup>212</sup> Whether it can become a fixture in the legislative-executive relationship, in New York or elsewhere, remains to be seen.

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210. N.Y. STATE FIN. LAW § 42 (McKinney 1974). For a discussion of this section, see *supra* text accompanying note 75-81.

211. N.Y. STATE FIN. LAW § 8(9) (McKinney 1974).

212. See N.Y. ST. ASSEMBLY WAYS & MEANS COMM., REPORT ON THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION: A PROGRAM AND BUDGET HISTORY (Jan. 1985).

