GEORGE E. PATAKI, in his Official Capacity as THE GOVERNOR OF THE STATE OF NEW YORK, Plaintiff-Respondent. - against - THE NEW YORK STATE ASSEMBLY and THE NEW YORK STATE SENATE, Defendants-Appellants. -and- H. CARL McCALL, in his Official Capacity as THE COMPTROLLER OF THE STATE OF NEW YORK. Defendant.

No. 171

COURT OF APPEALS OF NEW YORK

2004 NY App. Ct. Briefs 171; 2004 NY App. Ct. Briefs LEXIS 277

November 1, 2004

Reply Brief: Appellant-Petitioner

COUNSEL: [*1] To be Argued by Stewart F Hancock Jr.

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TITLE: Reply Brief on Behalf of Defendant-Appellant New York State Senate

TEXT: PRELIMLNARY STATEMENT

In his Respondent's Brief, the Governor seems surprised, even **shocked,** that the Legislature might suggest "that he acted ultra vires." Governor's Brief, at p. 50 (emphasis in original). In 40 artfully crafted pages, he urges this Court to accept the holdings below as rather routine interpretations of the Constitution, entirely consistent with the Framers' intent - nothing to get too excited about. In his final sentence - in seemingly favoring an affirmance in the interest of "checks and balances" and preventing **either branch** from becoming a "czar" - he states:

> Any other outcome would result either in a reversion to legislative budgeting (if the Legislature could ignore the Governor's submissions) **or in an unwarranted transfer of policymaking power to the Governor** (if he could impose his will on the Legislative). **If [*2] neither branch is to be the "czar" of bndgetary matters, the carefully crafted system of checks and balances that is the genius of Article VII must be maintained.**

Id. (emphasis supplied).

This is not a debate between the executive and legislative branches over itemization or the appropriate degree of detail for the Governor's appropriation bills. The question is whether the Governor has been granted the power under Article VII to enact general, substantive legislation amending existing State laws **unilaterally, without approval or input from the Legislature.** The courts below in their holdings have granted this immense power to the Governor. They have done this by obliterating the important distinction between "appropriation" bills and "non-appropriation" bills and holding that the Governor can include any measure in an appropriation bill so long as it is related to the appropriation and that the Governor can then, under the "no-alteration" provision of Section 4, prevent the Legislature from deleting the measure or altering it in any way. n1

n1 The Governor contends, and the courts below have agreed, that under the Section 6 "anti-rider" provision **"any provision that 'relates specifically to some particular appropriation in the bill'** and is 'limited in its operation to such appropriation' may be included in an appropriation bill." *Silver II* Record at 1540 (emphasis supplied). The Governor's "anything that relates specifically to" Section 6 "anti-rider" test is even more inclusive than his "when, how or where" test under *Saxton v. Carey*, 44 NY2d 545 (1978) for an "item of appropriation" (which the lower courts have also adopted) since a measure can be included in an appropriation under the "anti-rider" provision even though it cannot qualify as an "item of appropriation" under *Saxton. See* Senate's Brief at pp. 68-69, n. 33.

[*3]

Thus, the Governor could properly preclude the Legislature from **any participation** in how State school aid should be apportioned among the school districts by simply attaching the legislation establishing the distribution formulae to the appropriation bill instead of following the customary and constitutionally required practice of putting it in an accompanying non-appropriation bill where the Legislature could revise it. n2 The Legislature's sole recourse, the courts have said, was to strike the entire $ 13.5 billion appropriation leaving the school districts without any state aid! Similarly, the Governor was empowered to effect unilateral amendments of the Public Health Law pertaining to Medicaid rates n3 and of the Education Law transferring control of the State Museum and State Library from the Education Department to the newly created "Office of Cultural Resources" n4 through the device of attaching these important measures to appropriation bills where the Legislature could only "take it or leave it" - accept the Governor's unconstitutional changes or strike the entire appropriation and, for example, shut down the State Museum and State Library.

n2 *See* Senate's Brief, at p. 16, 2nd bullet point.

[*4]

n3 *See* Senate's Brief, at p. 16, 3rd - 5th bullet points.

n4 *See* Senate's Brief, at p. 16, 6th bullet point.

To achieve their "the Governor can put in what the Legislature can't take out" application of Article VII, the lower courts have adopted two different interpretations of "items of appropriation" - one for what the Governor can put in an appropriation bill under Section 3, and another for what the Legislature cannot take out under Section 4. Thus, under these holdings, virtually any measure **qualifies** as an "item of appropriation" for proper inclusion in a Governor's Section 3 appropriation bill so long as it relates to the appropriation. But it **may not qualify** as an "item of

appropriation" for legislative revision because it is not something that can that can be "reduced," "stricken out" or "added to" under the strict "no-alteration" provision of Section 4.

Contrary to the Governor's assertions, there is no precedent for these holdings. They constitute a drastic judicial rewriting of Article VII and cause the very debacle that the Framers and sponsors of the Executive **[*5]** Budget Amendment strove so hard to avoid and assured the public would not occur- a massive transfer of the Legislature's Article III, § 1 general law-making power to the Governor. Under these holdings, despite the Governor's protestations of modesty, there is only **one** " **'czar' of budgetary matters" - the Governor.**

In the following pages, the Senate shows:

1. that the documented history of the Executive Budget Amendment is exactly the opposite of what the Governor claims;

2. that contrary to the Governor's contentions the lower courts' extraordinary interpretation of Article VII which permits the Governor to attach general legislation to his appropriation bills as "items of appropriation" which the Legislature cannot take out or change is not supported by *People v. Tremaine*, 252 NY 27 (1929) ("*Tremaine I"*), *People v. Tremaine*, 281 NY 1 (1939) ("*Tremaine IF*), *Saxton* or by any other decision;

3. that the Governor's argument that it is a "fundamental maxim of New York constitutional jurisprudence that forbids the Legislature from doing indirectly what it may not do directly" somehow supports the lower courts' application of **[*6]** Section 4 as a limitation on the Legislature's constitutional right to enact its own non-appropriation bills and its Section 5 single-purpose bills is a fallacy and should be dismissed as logically incongruous; and

4. that the Governor makes no effort to explain how the "anti-rider" provision in Section 6 could have been intended to act as a limitation on or authority for what the Governor may put in his appropriation bills when the Framers of the 1927 Executive Budget Amendment did not see fit to incorporate this provision, which the Governor **now claims** is the "sole limitation" on what he may include in his bills.

ARGUMENT

POINT I

THE GOVERNOR - IN CLAIMING TO FIND SUPPORT IN THE HISTORY OF THE EXECUTIVE BUDGET AMENDMENT FOR THE LOWER COURTS' EXTRAORDINARY INTERPRETATIONS OF ARTICLE VII - HAS PRESENTED A PORTRAYAL OF THE HISTORY WHICH IS BELIED BY THE WRITTEN RECORD.

The uncontradicted, documented history of the Executive Budget Amendment conclusively negates the very proposition for which the Governor cites it - *i.e.*, that Article VII "effects a broad and unprecedented transfer of budgetary powers that are legislative in nature from the Legislature **[*7]** to the Governor." Governor's Brief, at pp. 15-16. As the Governor portrays it, under "the legislative budget system" - the discredited system that inspired the reform of the Executive Budget Amendment - the power over budgetary matters was almost entirely in the hands of the Legislature and the **"Governor's role was quite limited."** Governor's Brief, at p. 12. Surprisingly, the Governor's authority for this claimed "limited role" is the 1915 Report of Henry L. Stimson (A290-A310), and specifically one partially quoted sentence from it. n5

n5 Report of the Committee on State Finances, Revenues and Expenditures Relative to a Budget System for the State, Document No. 32, State of New York In Convention, August 4, 1915. The Report was presented by Henry L. Stimson, the Chairman. The Governor's Brief states, quoting the Stimson Report: "The Governor's role was quite limited: he could only 'exercise[] his veto power [at the end of the legislative session] in a series of

disconnected acts.'" Governor's Brief, at p. 12.

[*8]

The Brief cites and quotes from other portions of the Stimson Report explaining some of the problems with the Legislative Budget System. But the critical points which the Stimson Report emphasizes (and the Governor's Brief fails to mention) are that under the Legislative Budget System, it was **the Governor, not the Legislature, which held "the purse strings of the state,"** (A296) (emphasis supplied) and that a principal purpose of the Executive Budget was to restore to the Legislature **"the priceless legislative function of holding the purse."** *Id*. (emphasis supplied). The following excerpts from the Stimson Report, not alluded to in the Governor's Brief, are sufficient, we believe, to show the true picture of the Legislative Budget System and the reason why the Executive Budget Reform was needed:

> Your Committee further finds that the system of permitting the Governor to veto items in appropriation bills prepared by the Legislature **has resulted in transferring to the Governor, to a large exteut, the historic function of the Legislature of holding the purse strings of the State.** The present system presents a singular, reversal of the proper relation which **[*9]** should maintain between the. Executive and Legislature.
>
> * * *
>
> In other words, our attempt to accomplish by the use of the Executive veto what elsewhere has been accomplished by the legislative rule against additions to the budget mentioned under subdivision IV above, **has very nearly resulted in an abandonment to the Executive of the priceless legislative fuuction of holding the purse.**
>
> * * *
>
> **Not only is our system an abandonment of essential legislative power,** but it is open to other grave dangers to which a proper system would not be open. Instead of presenting his budget at the beginning of the session, the Governor uses his veto power after the session is over, and can make it an instrument of punishment or reward.

A296 (emphasis supplied).

Finally, any remaining suggestion that the Framers intended "the broad and unprecedented transfer of budgetary powers"(Governor's Brief, at pp. 15-16) to the Executive must vanish in the light of the following excerpt from the Stimson Report, also not referred to by the Governor in his Brief:

> **[The Executive Budget Amendment] would add not one iota to the power that [the Governor] now possesses through [*10] the veto of items in the appropriation bills.** Whereas now that power is subject to no review and thus may be used as an instrument of reward or punishment after the legislative session is over, the proposed system would deprive him of his veto as to budget items and would thus compel him to use his influence in advance, in the open, under the fire of legislative discussion and the scrutiny of the entire State. **It would thus be the Legislature which would have the final word.**

A300 (emphasis supplied).

In sum, the recorded history of the Executive Budget Amendment shows just the opposite of what the Governor contends. The Framers did not intend "a broad and unprecedented transfer" (Governor's Brief, at p. 14) of power from the Legislature to the Governor, but a restoration of the Legislature's power over "the purse strings of the state." A296.

Indeed, to be certain that the Legislature would not be deprived of its power the Framers of the Executive Budget Amendment in 1927, in what is now Article VII, § 4, annexed a provision giving the Legislature greater control over appropriations - the power to amend the Governor's appropriation bills by **adding items of appropriation. [*11]** A310, A320, A321.

The voters who approved the Executive Budget in 1927 despite fears in some quarters that it might give too much power to the executive did so not only on the assurances in the Stimson Report, but on the unequivocal representations of the Amendment's backers, including its chief sponsor, Governor Alfred E. Smith, that the "Executive Budget **does not in the slightest degree decrease** the power of the legislature" and that it **"does not,** as it is sometimes said, **make the Governor a czar."** A 402, A393 (emphasis supplied). Henry L. Stimson, Governor Smith, the other sponsors of the Amendment and the Framers who thought they were drafting an Amendment that carefully preserved the balance of power between the two branches - to say nothing of the New York citizens who voted for the Amendment - could never have intended or expected that the Amendment would be read to give the Governor the extraordinary power **to enact general legislation amending existing laws unilaterally,** without approval or other input from the Legislature.

POINT II

THE LOWER COURTS' HOLDINGS ARE CONTRARY TO THIS COURT'S RULINGS IN *TREMAINE I* AND *TREMAINE II;* THE [*12] GOVERNOR'S EFFORT TO FIND SUPPORT IN *SAXTON* FOR THE LOWER COURTS' HOLDINGS FAILS AND HE PRODUCES NO OTHER AUTHORITY.

In his Brief, the Governor does not claim to have precedent for the lower courts' extraordinary holdings that the Governor has the power under Article VII to enact general legislation amending existing state laws by incorporating such measures in his Section 3 appropriation bills and then preventing the Legislature from altering them in any way under Section 4. The reason - there is no authority.

Instead, the Governor tries only to find support for the inclusion of "provisions authorizing the transfer and interchange of appropriated funds and those requiring the Director of the Budget to issue a certificate of approval before appropriated funds could be expended." Governor's Brief, at p. 38. For this far more modest proposition, the Governor's authority is *Saxton*, 44 NY2d 545. But *Saxton* gives him no help.

The discussions in *dictum* in *Saxton* and in Judge Breitel's dissent in *Hidley v. Rockefeller*, 28 NY2d 439, 446 (1971) - on which the Governor bases his case - pertain solely to **"intra-program** transfer of **[*13]** funds" where the Executive and the Legislature were in **"agreement as to the limitations and conditions they contain."** *Saxton*, 44 NY2d at 551 (emphasis supplied). n6 That is not what is involved in this appeal.

> n6 The Appellate Division, Third Department, in its affirmance and its approval of the **intra-departmental transfers,** noted the critical distinction, stating: "Giving the words of section 1 their ordinary meaning, **we conclude that the present appropriation bill only permits intraprogram transfers and not iuterprogram trausfers and, therefore, is not unconstitutional.** Intraprogram transfers are not only necessary but salutary for the purpose of departmental management of funds. *Saxton v. Carey*, 61 AD2d 645, 650 (3d Dep't 1978), *aff'd* 44 NY2d 545 (1978).

The "Interchange Provisions" at issue here vest authority in the Director of the Budget to make **inter-departmental** transfers or re-allocations of appropriated funds at his discretion **[*14]** without legislative approval. n7 Moreover, unlike the situation in *Saxton* where the Governor and the Legislature were **in agreement** on the degree of itemization and **the scope of the intra-departmental transfer provisions** (*Saxton,* 44 NY2d at 551), here the Legislature and the Governor are in absolute disagreement. The Legislature properly struck these provisions as unconstitutional. As measures of the very type which this Court in *Silver I* described as appropriate for inclusion in non-appropriation bills, they clearly belonged in the Governor's Section 3 **non-appropriation** bills. n8 They should not have been made part of

his **appropriation bills.** The Governor, himself, is well aware that such measures belong in his **non-appropriation bills. Indeed, in his 1998 budget submission - at issue in the *Silver II* appeal** n9- **the Governor included the same sort of transfer and sub-allocation provisions in his non-appropriation bills which he now claims were properly included in his 2001 appropriation bills.** *See, e.g.,* allocation and transfer provisions pertaining to Roswell Park Cancer Institute, quoted in the Senate's *Brief in* **[*15]** *Silver II at* p. 17.

n7 The inter-program transfer and sub-allocation provisions annexed to the appropriation for services and expenses for a medical assistance program are an example:

> Notwithstanding any inconsistent provision of law, the moneys hereby appropriated may be increased or decreased by interchange with any appropriation of the **department of health medical assistance administration program** and/or medical assistance program, and may be increased or decreased by transfer or suballocation between these appropriated amounts and appropriations of the **department of family assistance office of temporary and disability assistance and office of children and family services** with the approval of the director of the budget, who shall file such approval with the department of audit and control and copies thereof with the chairman of the senate finance committee and the chairman of the assembly ways and means committee.

R761, ln 16-27 (Vol. III).

Another example is the following provision in the appropriation for aid to localities:

> The appropriation made by chapter 55, section 1, of the laws of 2000, is hereby amended and reappropriated to read: Apiary inspection program. Notwithstanding any other provision of law, the director of the budget is hereby authorized to transfer up to $ 200.000 of this appropriation to state operations 200,000 (re. $ 200,000)

R578, ln 22-27 (Vol. III) (emphasis in original).

See also, for additional examples, descriptions of other transfer and suballocation provisions, affidavit of Carol E. Stone, P 13 (h), (i), (j), (k), (1), (m). A55-57.

[*16]

n8 *See Silver v. Pataki*, 96 NY2d 532 (2001) (*"Silver I"*) where the Court stated: "The term 'non-appropriation' is not found in the Constitution. These bills contain programmatic provisions and **commonly include sources, schedules and sub-allocations for funding provided by appropriation bills, aloug with provisions authorizing the disbursement of certain budgeted funds pursuant to subsequent legislative enactment.** *Id*. at 535, n. 1 (emphasis supplied).

n9 *See Silver v. Pataki*, 192 Misc2d 117 (Sup. Ct., N.Y. Co., 2002), *aff'd* 3 AD3d 101 (1st Dep't 2003).

Here, the Legislature's action in striking out these measures in the 2001 budget and the Governor's challenge of that action in his declaratory judgment action have put the constitutional question of what may properly be included in an appropriation bill directly before this Court. In *Saxton*, the constitutional question of what could properly be included in an appropriation bill was not before the Court. The only question decided involved the proper role of the **[*17]** Court when the Legislature and the Governor have agreed on the degree of itemization and the transfer provisions.

Even if the question before this Court involved intra-program transfers, their inclusion in the Governor's appropriation bills would still be contrary to the holdings in *Tremaine I* and *Tremaine II* In *Tremaine I*, as the Governor acknowledges (Governor's Brief, at p. 39, n. 24), this Court held that the Legislature's segregation provisions were improper since they were not additions of items of appropriations stated separately and distinctly from the original items as required by what is now Section 4. 252 NY at 49. The Court, having reached that conclusion, then stated:

> A fundamental question presents itself in this connection. If the Legislature may not add segregation provisions to a budget bill proposed by the Governor without altering the appropriation bill, **contrary to the provisions of article IV-A, section 3, it would necessarily follow that the Governor ought uot to insert such provisions in his bill. He may not insist that the Legislature accept his propositions in regard to segregations without amendment, while denying to it [*18] the power to alter them.**

Id. at 50 (emphasis supplied).

This Court in *Tremaine II*, in its narrow description of appropriation bills, stated that "appropriation bills accompanying [the budget], shall be broken down **into items sufficient to show what money is to be expended, and for what purpose,"** *Tremaine II*, 281 NY at 5 (emphasis supplied), and that **"it is the items giviug this information which is embodied in [the Governor's] appropriation bills."** *Id*. (emphasis supplied). The Court then reaffirmed the logical and entirely reasonable proposition that it had stated in *Tremaine I* (quoted above):

> When, therefore, we are told that the Legislature may not alter an appropriation bill submitted by the Governor, except to strike out or reduce items therein, **we expect the appropriation bill to contain items.**

Id. (emphasis supplied).

Saxton did not change the rule established by the holdings in *Tremaine I* and *Tremaine II* pertaining to the constitutional limits on the substantive content of Article VII, § 3 appropriation bills. It dealt solely with the appropriate degree of itemization **[*19]** required for appropriation bills and the permissibility of **intra-program** transfer provisions when the Governor and the Legislature **were in accord.** In view of this agreement, the *Saxton* Court declined "to extend the power of the robe into an arena in which it was never intended to play a role." *Id*. at 551. The Court's sole holding is stated in this sentence:

> We hold only that the degree of itemization and the extent of transfer allowable are matters which are to be determined by the Governor and the Legislature, not by judicial fiat.

Id. at 551.

Since no controversy between the Governor and the Legislature as to the constitutional limits on the content of appropriation bills was before the Court in *Saxton*, any comments on what an appropriation bill might contain must be treated as *dictum*. As *dictum*, it could not have overruled or modified the holdings in *Tremaine I* and *Tremaine II as* to the appropriate content for appropriation bills. Even if this *dictum* could be interpreted as a holding, the most that the *Saxton* opinion could be authority for would be the inclusion of **intra-program** transfer provisions in appropriation **[*20]** bills. It could not be authority for the inclusion of the sort of **inter-departmental transfer and sub-allocation provisions** involved here. Nor could *Saxton* possibly be considered authority for the lower courts' extraordinary conclusion that the Governor may include under the rubric of "items of appropriation" substantive, general legislation including, in some cases, amendments of existing laws.

POINT III

THE GOVERNOR OFFERS NO EXPLANATION FOR HOW SECTION 4, WHICH BY ITS TERMS

APPLIES ONLY TO APPROPRIATION BILLS, CAN BE APPLIED TO THE LEGISLATURE'S NON-APPROPRIATION BILLS AND TO THE LEGISLATURE'S SECTION 5 SINGLE-PURPOSE BILLS. HIS EFFORT TO APPLY THE MAXIM "WHAT CAN'T BE DONE DIRECTLY CAN'T BE DONE INDIRECTLY" RESULTS IN A LOGICAL INCONGRUITY.

The lower courts' remarkable holdings with respect to the Governor's appropriation bills - *i.e.*, that he may include measures of general legislation as "items of appropriation" which the Legislature is precluded from striking out or altering - are, as has been seen, based on the courts' application of the "no-alteration" provision in Section 4. For all the reasons stated in the Senate's Brief (at pp. 26-51), this **[*21]** one-sided and anomalous "the Governor can put it in but the Legislature can't take it out" interpretation of the Executive Budget Amendment cannot stand.

What perhaps is even more astounding are the lower courts' *ipse dixit* holdings that Section 4 - **which by its terms applies solely to the Governor's appropriation bills** n10 - can somehow be applied to prevent the Legislature from enacting its own non-appropriation bills and its single purpose Section 5 bills. The Governor in his Brief cites no authority and makes no attempt to offer a theory of interpretation of Section 4 or of any other provision in Article VII to support these holdings. Nor have the lower courts. Instead, as his sole support the Governor paraphrases the truism repeated in *People ex rel. Burby v. Howland*, 155 NY 270 (1898), and states that it is a "fundamental maxim of New York constitutional jurisprudence that forbids the Legislature from doing indirectly what it may not do directly." Governor's Brief, at p. 42. This maxim cannot be applied to uphold the application of Section 4 to prohibit the Legislature's enactment of their own non-appropriation and Section 5 single purpose bills as **[*22]** a logical analysis will show.

n10 Section 4 prescribes, in pertinent part, that the Legislature "may not alter **an appropriation bill submitted by the governor** except * * * . " (emphasis supplied). For the Court's convenience we have attached copies to this Brief of Sections 3, 4 and 6 of Article VII, tabbed accordingly by Section number.

The two cases cited by the Governor - *Burby* and *Tremaine I*- illustrate the principle and demonstrate conclusively why **it cannot constitute a rationale for applying Section 4 to prohibit the Legislature from doing what it is specifically permitted to do under Article III, § 1 and Article VII, § 5 of the Constitution.** In both *Burby* and *Tremaine I* the Constitution expressly prohibited the action which was sought to be done indirectly. In *Burby*, the office of justice of the peace was constitutionally established. 1894 Constitution Art. VI, § 17. In *Tremaine I*, the 1894 Constitution specifically prohibited a member of the Legislature from receiving **[*23]** "any civil appointment within [the] State." Art. III, § 7.

In both cases, actions were taken which were held to be efforts to evade the letter of the constitutional prohibitions by indirection - in *Burby*, reducing the criminal jurisdiction and eliminating compensation for services rendered in criminal matters by justices of the peace and thereby effectively abolishing the constitutionally established office; in *Tremaine I*, by designating the Chairmen of the Senate Finance Committee and the Assembly Ways and Means Committee for the governmental positions rather than appointing them by name.

Here, there is no constitutional provision - analogous to those in *Burby* and *Tremaine I*- prohibiting the Legislature from enacting its non-appropriation and single-purpose bills. To the contrary, these legislative actions are specifically permitted by Article III, § I and Article VII, §§ 3 and 5. What the Governor seeks to do here by invoking the maxim in *Burby* is not to evade an existing constitutional prohibition, but to impose a prohibition where none exists. It obviously does not work.

POINT IV

THE GOVERNOR DOES NOT ATTEMPT TO ANSWER THE SENATE'S ARGUMENTS [*24] ON THE "ANTI-RIDER" PROVISION IN SECTION 6 AND MAKES NO REFERENCE TO THE CRITICAL

FACT THAT THE FRAMERS OF THE EXECUTIVE BUDGET AMENDMENT OF 1927 OMITTED THIS SECTION ON WHICH THE GOVERNOR PLACES SUCH RELIANCE.

The Governor's argument on the "anti-rider" provision in Section 6 is devoted almost entirely to his contention that, under his interpretation of Section 6, virtually any provision can be included in a Governor's appropriation bill so long as it specifically relates to the appropriation. Governor's Brief, at pp. 34-40. Under his all-embracing interpretation of the "anti-rider" provision, for example, the Governor can logically contend that the general legislation amending the Education Law as it pertains to the formulae for the distribution of state aid to eligible school districts was properly part of his appropriation bill. Governor's Brief, at p. 37.

If the Governor has this expansive "anything goes in" authority under the "anti-rider" provision in Section 6, as he contends n11 and the Legislature strenuously disputes, that fact would prove more convincingly than anything else the Senate's main argument: that notwithstanding his protestations, the Governor - under Article **[*25]** VII as the lower courts have interpreted it - has, indeed, become a "czar", the very result the Framers were so determined to avoid. The Governor ignores the Senate's argument that this vast legislative power which he claims under Section 6 - to include general legislation which the Legislature is precluded from changing under Section 4 - simply could not have been what the Framers intended.

n11 The Governor contends:

> Article VII, § 6, is perhaps the most relevant part of the State Constitution when it comes to that issue. Under Article VII, § 6, **any provision that 'relates specifically to some particular appropriation in the bill' and is 'limited in its operation to such appropriation' may be included in an appropriation bill.**

Senate's Brief, at pp. 72-73, n. 43.

What is even more significant is that the Governor makes no effort to answer the following questions: (1) why, if the "anti-rider" provision were intended to have the enormous significance as the sole limitation on what the Governor **[*26]** may attach to an appropriation bill as the Governor claims, did the Framers make no reference to it in the 1927 Amendment when, for the first time, they gave the Governor power to submit appropriation bills; and (2) how, if the "anti-rider" provision had been intended to be the only limitation on the content of the Governor's appropriation bills, as the Governor contends and the lower courts have apparently held, could this sole limitation have been left out of the Constitution and the State government permitted to operate without it from 1927 until 1938? The obvious answer to both questions, which the Governor can neither dispute nor explain, is the same: the Framers gave no thought to including the "anti-rider" provision because it had no possible connection with the substance of the Amendment - appropriation bills. The "anti-rider" provision had one purpose when it was made part of the Constitution in 1894 and that remained its sole purpose in 1927 - **to prevent members of the Legislature from tacking on "riders" to the Legislature's appropriation bills.** The Framers' inclusion of it in an amendment pertaining to appropriations, a type of legislation to which it didn't apply, **[*27]** would have amounted to an absurdity.

It goes without saying that the Framers who concededly were meticulous draftsmen would have included the "anti-rider" provision if it had been thought to have any bearing on their Amendment, let alone the critical significance the Governor now attributes to it as the "sole" limitation on the content of the appropriation bills.

CONCLUSION

In the opening paragraph of Point I in his Brief, the Governor expresses this sentiment with which all New York citizens would enthusiastically agree:

> What is at stake on this appeal, as the courts below have recognized, is the very system of Executive budgeting that the **people of the State adopted to ensure that New York would have sound fiscal policy.**

Governor's Brief, at p. 12 (emphasis supplied).

But under the skewed, authoritarian system which now exists the Governor is permitted to have his way with appropriation bills without any legislative review by forcing the Legislature to choose between accepting the Governor's appropriation bills in full as submitted, including the legislation to which the Legislature objects, or rejecting the entire appropriation. This "take it or leave **[*28]** it" system under which the appropriation of State funds is left to the whim of one person - the Governor - without the analysis by the Legislature which was intended cannot produce the well-considered, "sound fiscal policy" that all agree should be achieved. We respectfully urge this Court to restore the fair, balanced and democratic process the Framers created and the citizens of the State deserve.

We respectfully submit that the Order of the Appellate Division should be reversed and the relief requested in the Senate's Main Brief be granted.

Dated: November 1, 2004

Respectfully Submitted,

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