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Breaking the Budget in New York

by E.J. McMahon

After failing to adopt a budget on time for 20 of the last 21 years, New York State legislative leaders are seeking voter approval of a constitutional amendment that they insist on characterizing as “budget reform.”

Budget *de-form* would be more like it.

If enacted, the constitutional and statutory changes represented by Proposal One on the Nov. 8 statewide ballot would mark a fundamental shift of power in the state Capitol. For the first time since the late 1920s, New York’s Legislature would have the upper hand in shaping the annual budget.

The result would be less fiscal discipline, higher spending and higher taxes – all without improving the level of efficiency, transparency or accountability in the state’s much-criticized budget process.

What are the flaws in Proposal One? What kind of changes in the budget process would really be in the best interests of taxpayers? This analysis seeks to answer those questions.

Key provisions

The potential impact of the Legislature’s proposed changes is best understood in light of the existing New York State Executive Budget law, rooted in Articles 4 and 7 of the state Constitution.

As summarized in the side-by-side comparison on Page 2, current law is designed to make the governor primarily responsible for shaping the annual state budget. When the fiscal year begins without a new budget in place – as it did from 1984 to 2004 – the temporary biweekly spending bills necessary to keep the state government functioning had to originate with the governor, giving him further negotiating leverage with the Legislature.

The Executive Budget amendments to the state Constitution were approved by New York voters in 1927 with the strong support of a bipartisan reform coalition spearheaded by then-Governor Alfred E. Smith, a Democrat frustrated by his limited ability to control and shape spending under the previous system.

Proposal One:

✓ *Would give the Legislature an enormous new incentive to delay action on the state budget until after the start of a new fiscal year.*

✓ *Would promote bigger spending increases by allowing the Legislature to ignore gubernatorial attempts to reform Medicaid and other programs.*

✓ *Would not require the Legislature to explain or disclose the impact of changes in a governor’s budget proposal.*

✓ *Would not require a balanced budget.*

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Proposed Changes in New York State Budget Process

CURRENT LAW

1. Governor's appropriations bills and supporting statutes are introduced and submitted in both the Assembly and Senate soon after the start of the session, without need of legislative sponsorship.
2. Legislators can unilaterally "strike or reduce" proposed items of appropriation, and governor is powerless to stop such changes. They can also add more spending, "provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose." The governor then has the power to veto these additions, subject to potential override by a two-thirds vote of each house of the legislature.
3. The Legislature cannot consider any other appropriation until all of the governor's bills have been "finally acted upon."
4. When new budget is not adopted before start of fiscal year, Legislature adopts temporary spending bills (usually biweekly) drafted by the Governor.
5. When new budget is not adopted before start of fiscal year, Legislature remains subject to restrictions in #2 and #3 above.
6. Legislators' salaries are withheld if budget is late and paid only after final action on governor's bills.

PROPOSAL ONE

1. Same as current law.
2. Same as current law — but only until start of new fiscal year.
3. Governor's proposed budget bills expire at end of the fiscal year in which they are introduced.
4. Contingency budget (the prior year's adopted budget, with exceptions) is effective automatically at start of new fiscal year.
5. Legislature has unrestricted ability to amend contingency budget in a single multipurpose bill, with line-item changes in adopted budget subject to governor's veto.
6. Failure to act on governor's budget is deemed "final action," so legislative pay is never interrupted.

Turning back the clock

Almost from the moment the first Executive Budget was presented by Governor Franklin D. Roosevelt in 1929, the Legislature began pushing to expand its power to modify spending bills or get around other provisions of the law. But in a series of landmark cases over the past 75 years, the courts have broadly interpreted executive budgeting power.

A December 2004 decision by the state's highest court has sharpened the Legislature's resentment of the governor's budget-making power and undoubtedly provided much of the motivation for the changes now proposed by Senate and Assembly leaders. The Court of Appeals ruling in *Silver v. Pataki*¹ strongly affirmed the state constitutional limits on the Legislature's ability to change the wording of the governor's budget bills.

Legislators have been further aggravated since 1999 by a provision withholding their pay whenever they fail to take "final action" on the governor's budget bills before the start of a new fiscal year. (To be sure, they passed this law themselves—but only under duress, as one of Governor Pataki's conditions for signing into law their last pay hike.)

The Legislature's poison pill

As shown in the right-hand column of the Page 2 summary, Proposal One would essentially slap a termination date on the governor's budget proposal. If not adopted by the start of the fiscal year (which would be moved from the current April 1 to May 1), the governor's plan would expire. In place of the current temporary bills, it would establish New York's first automatic contingency budget. This budget would essentially consist of the prior year's appropriations, with cash disbursements capped at prior year levels.

Exceptions to the disbursement cap would include welfare payments, state employee health benefit and pension costs, debt service, and "federal funds for which receipt would be jeopardized or federal law violated if subject to such disbursement limitation" – a category that could be interpreted to include all or most of the spending required under the state's massive Medicaid program.

Proponents of this change argue that the contingency budget represents an unpleasant option that no governor or legislator would want to live with for very long. But in the proposed constitutional amendment, the Legislature gave itself a huge escape clause: the power to amend the contingency budget twice, with a single "multiple appropriation bill" and a supplemental appropriation bill—neither of which would originate with the governor.

This, in itself, would mark a significant departure from the Article 7 provision requiring the Legislature to act on the governor's bills before taking up any other appropriations. But the amendment goes even further by stipulating that a contingency budget "shall constitute ... final action" on the governor's bills. Indeed, it flatly *prohibits* the Legislature from acting on the governor's bills after a new fiscal year begins.

The "final action" clause in the proposed amendment is a poison pill for any governor; if enacted, it would mean the Legislature could effectively kill the Executive Budget merely by doing nothing.

By deliberately waiting until the clock strikes midnight on the first day of the fiscal year, Senate and Assembly leaders put themselves in a position to amend the contingency budget immediately with appropriations of their own design. For all intents and purposes, the Governor would then be on the outside of the budget process looking in. He would retain the freedom to veto line items in the Legislature's contingency bill

amendments, but a united Senate and Assembly could override him, as both houses did in 2003 — leading to the largest state tax increase ever in New York.

The "final action" provision does one other thing of great importance to senators and assembly-members: it effectively repeals the law withholding legislators' pay in the absence of a new adopted budget.

The ability to kill all of a governor's proposals merely through inaction — and to get paid for it nonetheless — is an enormous new incentive for legislators to delay action on the final budget. This is precisely the problem Proposal One is supposedly designed to halt.

Spending on autopilot?

Legislators assert that two-year school aid appropriations, another key feature of their proposed budget changes, are necessary to provide more financial certainty and predictability to school districts outside New York City, most of which are required to submit their budgets to voters in early May. However, appropriating school aid two years at a time will deprive the Governor of significant negotiating leverage and is likely to result in significantly higher school aid spending.

Proposal One is so sloppily drafted that it is unclear how the second year of a school aid appropriation would be affected under a contingency budget. Indeed, it is unclear whether a biennial appropriation would actually be constitutional in New York, since the change is not actually authorized under the constitutional amendment that comprises Proposal One.

Skyrocketing Medicaid costs have been a huge factor

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Prop One will make it easier for legislators to put Medicaid and school aid spending on autopilot.

in the growth of the state budget since 1999. But just as they relentlessly push for more school aid spending, legislators in both parties strongly resist significant Medicaid reforms or cost-containment actions.

Proposal One would make it possible for either house of the Legislature to single-handedly kill Medicaid reforms sought by a governor. Moreover, the broad federal spending exception to the contingency budget limitations arguably could put all or most state Medicaid spending on permanent autopilot, beyond reach of a governor's vetoes.

Real reform

The most frequently cited problem with the state budget is that it is chronically late. But lateness is ultimately a failure of the legislative process, not the Executive Budget law. After all — as the 2003 budget battle showed — a united and sufficiently motivated Legislature can dispense with the governor's budget bills and override his vetoes in fairly short order. And 2005 saw the first on-time budget in 21 years *after* the Court of Appeals clarified limits on legislative power that were largely unquestioned before the 1980s. In fact, for the most part, late budgets since 1984 have reflected deliberate strategic choices by the Legislature.

While the proposed amendment would significantly strengthen the Legislature at the governor's expense, neither the amendment nor the statute would do anything to improve the transparency or accountability of the Legislature's current budget-making process. Key decisions would continue to be made behind closed doors, with no allowance for public scrutiny and no new mileposts for legislative action.

What would real reform look like? Here are a few basic steps:

- Provide for a contingency budget but allow no exceptions to prior year spending limits and preserve the executive's prerogatives by (a) eliminating the provision that would make a contingency budget tantamount to final action on the governor's bill, and (b) giving the governor the sole authority to propose changes to the contingency budget in order to keep within limits.
- Establish a statutory timetable requiring the Senate and Assembly to pass separate budget resolutions at least 10 weeks in advance of the fiscal year deadline, detailing their respective responses to every line item of governor's budget, followed immediately by the organization of conference committees to openly hammer out differences between the two houses before the end of the fiscal year.
- Move the start of the state fiscal year to July 1 (matching the calendar of most other states) and require budget adoption by June 15 — matching the practice in all but a handful of other states.
- Require the Legislature and the governor's bud-

get staff to issue a detailed financial plan summarizing all changes they intend to make in the Executive Budget before voting on it.

- Require that the final budget be balanced.

As noted, two-year appropriations of school aid would carve out a problematic preference for what is already the biggest single item in the state-funded budget. But there is something to be said for biennial budgeting as a general proposition. At the very least, it would cut the number of late budgets in half and may be worthy of consideration for that reason alone.

Most discussion of state budget reform has focused on the budget process without much consideration of improving results. To that end, two constitutional reforms are desperately needed.

- Cap the annual growth in state funds spending at the rate of inflation plus population growth, creating exceptions only for shifts of funding responsibility from the local to the state level.
- Put tight new limits on state debt and restrict the issuance of bonds without voter approval, and outlaw the use of public authorities as unrestricted backdoor-borrowing vehicles.

Back to the drawing board

The proposed changes to the budget process are less about "reform," real or imagined, than about opening a new front in a battle that the Legislature has been unable to win in state courts.

Indeed, in case of Prop One's defeat, the Legislature already has a back-up plan: a second amendment (S.3195/A.4630), which was passed for the first time this year. It is drawn much more narrowly than Proposal One — and, unlike Prop One, is designed specifically to right the perceived imbalance caused by the *Silver v. Pataki* ruling. If Proposal One fails, legislators will surely turn their attention to giving second passage to this measure in 2007 — just in time to negotiate a new "reform" statute with a newly elected governor.

In the meantime, given the Legislature's spending proclivities and aversion to any form of sunshine, Proposal One is a prescription for even looser fiscal practices in state government—the last thing New York needs.

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1. 4 NY3d 75

2. An implementing statute that would become effective only with passage of Proposal One (S.2) also would require the Governor to release some additional budgetary details at the beginning of the process, and would speed up by a few days the introduction of the Executive Budget. It would create a new legislatively controlled "independent budget office," on top of a half-dozen legislative and executive staff groups already involved in revenue forecasting and budget analysis. These changes are of dubious merit, would not significantly change the budget process or the results — and could, in any case, be enacted without recourse to a constitutional amendment.