Cuomo's plan to tilt Albany's balance of power

Andrew Cuomo. (Governor's office)

By LIZ BENJAMIN 5:20 a.m. | Feb. 23, 2015

During the halcyon days of his first four-year term, Governor Andrew Cuomo infamously pronounced during a radio interview: "I am the government."

At the time, Cuomo was referring to his sky-high poll numbers, saying that New Yorkers' approval of him personally actually indicated their broad support for the sweeping changes he had made in Albany.

Reminded by the interviewer of the Legislature's existence, Cuomo quickly qualified his Sun King-like pronouncement with the words, "on the executive side."

But the idea that this governor views the legislative branch as little more than a semi-vestigial appendage stuck.

MORE ON POLITICO

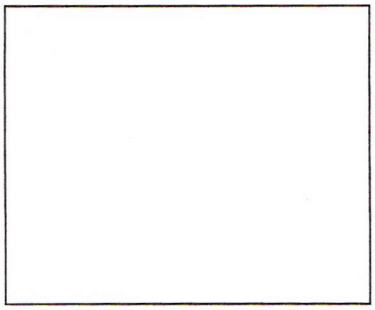
- Albany Pro: MMA clears a hurdle; a longer minimum wage runway?
- POLITICO New York Education: Success's top 20 'mistakes'
- POLITICO New York Real Estate: Barnett's Israeli investors

Though he certainly wouldn't be the first executive to feel that way, Cuomo is now taking more definitive steps to sideline the Legislature than his predecessors did, especially when it comes to budgeting.

Cuomo has constructed his 2015-16 spending plan in a manner that tests the confines of a 2004 Court of Appeals decision on the division of budget power between the executive and legislative branches.

MOST POPULAR

1 Democrats' path to possible Senate control begins on Long Island
2 Swept by the opt-out movement, a village reckons with the future
3 In Albany, de Blasio declares 'common cause' with CUNY
4 Cuomo to tap management expert to 'restructure' CUNY
5 Poll: Trump, Clinton hold wide leads in New York primaries



First in his original budget, and then in the 30-day amendments released last Friday, Cuomo placed controversial ethics and education reforms in appropriations bills, over which the Legislature is afforded very little power under the state Constitution.

In effect, Cuomo is forcing the Legislature to choose between accepting his proposals and striking down large portions of budget funding.

When it comes to appropriations bills, the Senate and Assembly can only reduce the spending the governor has proposed or eliminate it entirely. Legislators cannot change the conditions on how the governor wants that money spent. They can add spending, but the governor has the power to line-item veto those additions.

The governor is trying to "make sure the Legislature cannot sidestep reform and pass a two-way budget" and then override a gubernatorial veto as in years past, a member of the administration told me.

"We want to work with them, and we're making it as difficult as possible in order to force them to work with us," the administration member said.

Not surprisingly, lawmakers are displeased with Cuomo's tactics.

In a recent "Capital Tonight" interview, Manhattan assemblywoman Deborah Glick called Cuomo's budget strategy "inappropriate."

"I believe there's a role for the Legislature, and a role for dialogue," she said. "I don't think that people elected an emperor; we elected a governor.

"I think their putting too much into the budget, from a policy point of a view, is a negative thing for democracy."

Glick's comments were in response to Cuomo's original budget proposal, which included some policy language in appropriations bills.

With his 30-day amendments, observers said, Cuomo has gone further in testing the limits of executive budgeting than any governor in recent memory.

"(Cuomo) shoehorned into appropriations bills his top policy proposals [and] I think he's going to see how far he can go," said NYPIRG's Blair Horner said.

"It may well be that he's playing within the boundaries set by the court," Horner said. "But I would be surprised if the Legislature lets him proceed unchallenged."

But other than negotiating, which—thanks to the so-called nuclear option of post-budget deadline extenders pioneered by former governor David Paterson and broadened by Cuomo—means largely capitulating to what the governor wants, lawmakers don't have a lot of options.

In short, they can stall, sue, or try to amend the state constitution.

Each of those has significant drawbacks, and the Legislature has tried all three at various times with limited success. But legal experts and political observers alike say the time may have come to re-visit the decision commonly referred to in Albany as "Silver v. Pataki".

That's actually shorthand for two cases—Silver v. Pataki and Pataki v. the New York State Assembly—that resulted from the budget battles of 1998-99 and 2001-02, and were jointly decided by the Court of Appeals in 2004.

In the first case, the Legislature passed then-governor George Pataki's appropriation bills and then sought to amend them after the fact, not changing the amount of money that had been approved, but altering the purposes for and conditions under which that money could be spent.

The governor claimed the Legislature had acted to amend his appropriations bills in violation of the Constitution. He used his line-item veto power to strike out the provisions he considered illegal. The Legislature responded by taking Pataki to court.

It's the second case that's more germane to the current situation. In that instance, the Legislature went to court over Pataki's initial executive budget submission, saying it inappropriately contained significant changes to education and health care policy in appropriations bills.

The court was divided, with no clear majority, though five judges concurred that the governor had not exceeded in this particular instance the constitutional limits on what an appropriations bill can contain.

Writing the plurality opinion, then-judge Robert Smith, a Pataki appointee, said there is a line over which a governor might cross in exercising this power. He even offered some hypothetical examples of where that line might be, but ultimately declined to define it specifically.

"My memory of it is that we said there might be a line, and there might not, and we don't have to decide that yet, because in the case before us [the governor] wasn't going anything all that outrageous," said Smith, who reached the mandatory retirement age of 70 and stepped down from the bench at the end of last year.

Smith said he considered offering up the possibility that a governor might seek in an appropriations bill to deny funding to any county clerk who issued or refused to issue a marriage license to same-sex couples as an example of executive power run amok, but ultimately decided that was "too inflammatory."

Ironically, the Court of Appeals ruled in 2006 that denying same-sex couples the right to marry did not violate the state constitution. Smith wrote one of two majority opinions. Judge Victoria Graffeo wrote the other, which urged the Legislature to take up the issue of whether gay New Yorkers could legally wed.

Five years later, Cuomo pushed a same-sex marriage bill through both houses of the divided Legislature and signed it into law.

As for Silver v. Pataki, Smith noted that four Court of Appeals judges believed there was a clear, though indistinct, line a governor could cross into gone-too-far territory when it comes to policy language in an appropriations bill.

Two judges—chief judge Judith Kaye and Carmen Ciparick, both appointees of Mario Cuomo—dissented completely with Smith's plurality opinion, which had the support of Pataki-appointed judges Graffeo and Susan Read.

A third judge, Pataki appointee Albert Rosenblatt, wrote a concurring opinion that said the court would be shirking its duty if it "punted" and left to future cases the

determination of the bright line's location—even though that's exactly what it did. Judge George Bundy, a Cuomo appointee, concurred.

Technically speaking, that's a majority of the court.

"If another case gets up to the Court of Appeals, [the judges] are just going to have to decide whether or not what the governor has done crosses this very, very amorphous line, which means we have no idea what they're going to do," said Albany Law School professor Vincent Bonventre, a veteran Court of Appeals watcher. "All we know for sure is that Kaye's dissenting opinion is not the law, because five other judges rejected it," he said. "So, now what you're trying to do is bridge the gap between Smith and Rosenblatt."

But does the Legislature, in its scandal-scarred state, feel like risking another lawsuit—especially given the distinct possibility that it could see further erosion of its already limited budgetary powers should the judges fail to decide in its favor?

Attorney Paul Shechtman, of Zuckerman Spaeder, who successfully argued Silver v. Pataki on behalf of the then-governor, said, "Someone, some day, may test the reach of Silver v. Pataki; this is not a great test case."

One thing Smith did make clear in his opinion is the inherent danger in the judiciary becoming the final arbiter in budgeting.

Equally dangerous, he said, would be to undo the change brought about by a 1927 constitutional amendment that established executive budgeting, largely relegating the Legislature to the role of a critic whose most potent power is the ability to stall indefinitely.

But years of stalling and late budgets took a political toll on the Legislature, which has seen its standing with the public sink steadily.

And there has been a significant change in recent years that limits even the Legislature's capability of delay—Paterson's "nuclear option," in which unpalatable policy proposals are placed into extender bills, forcing the Legislature to choose between accepting the governor's ideas and shutting down the government.

The constitutionality of the nuclear option has never been litigated.

This year, Cuomo has suggested he's not interested in negotiating on one key point: whether ethics reform should indeed be part of the budget. He says he'd rather reach a stalemate and risk a government shutdown than accept a spending plan without reforms.

This sets up a battle the Legislature cannot possibly win. The public is highly unlikely to be sympathetic if lawmakers dare to hold up the budget simply because they want to protect the status quo.

And history has shown that legislative bodies, not executives, bear most of the blame in the event of a government shutdown.

"A negotiation, even with a wounded partner, would be fine," said former assemblyman Richard Brodsky, a frequent defender of the Legislature.

"That wound is largely self-inflicted—deal with it.," he said. "But an ultimatum and the use of the term is the antithesis of negotiation. That's why the system doesn't work, it never did."

Cuomo believes he's on solid legal ground when it comes to this budget. He or his top aides conferred with several Pataki v. Silver experts—including former Pataki chief counsel James McGuire and at least one other key player involved in the 2004 cases, multiple sources confirm.

Spokesmen for both the Assembly and Senate majorities said this weekend that members of their respective conferences are still trying to digest the amendments Cuomo released Friday. All options are on the table, and no one has yet ruled out the possibility of litigation.

Some veteran observers believe the Legislature's best bet in the long term for righting what he and others see is a lopsided budget power balance is a constitutional amendment. But an amendment is an arduous road to change. It requires passage by two separately elected Legislatures and subsequent approval by the voters.

Lawmakers already tried a constitutional remedy once before, putting up an amendment in 2005 known as Proposal One that would more or less restored legislative budgeting if a deal was not reached before the April 1 deadline.

Critics, even some who agreed the balance of budget power was out of whack, said this plan would provide too strong an incentive for the Legislature to ignore the executive spending plan altogether.

Voters rejected Proposal One by an almost two-to-one ratio.

Frank Mauro, executive director emeritus of the Fiscal Policy Institute and a onetime secretary of the Assembly Ways and Means Committee, argued against Proposal One, writing at the time that it would have made the state budget process "even more of a mess than it has been in many recent years."

Mauro advocated in favor of a different constitutional amendment that would have preserved the concept of executive budgeting, while also strengthening the Legislature's hand.

That amendment was given first passage by both the Senate and Assembly, and got second passage by the upper house in 2007.

The Democrat-dominated Assembly declined to follow suit after receiving assurances from then-governor Eliot Spitzer, also a Democrat, that he would discontinue the practice of putting substantive policy into appropriations bills.

The Spitzer administration stuck to this pledge, but was gone in just over a year, undone by the governor's prostitution scandal.

"And, in 2010, Governor Paterson struck upon a gambit that actually tightens the noose around the Legislature's neck" more than any previous Court of Appeals decision ever did, Mauro said.

Lawmakers may hope that second-term Cuomo is just as anxious as first-term Cuomo to show that he's getting results, and that he'll find the prospect of a shutdown just as

scary as they do. But it's a real question, this time, whether they're prepared to call his bluff.

Liz Benjamin hosts "Capital Tonight" each weeknight on the Time Warner Cable News stations across upstate New York.

MORE: ALBANY ANDREW CUOMO DAVID PATERSON ELIOT SPITZER GEORGE PATAKI LAW NEW YORK STATE ASSEMBLY NEW YORK STATE COURT OF APPEALS NEW YORK STATE SENATE ROBERT SMITH

Author: **LIZ BENJAMIN**

MORE IN ALBANY

Albany Pro: MMA clears a hurdle; a longer minimum wage runway?

MORE FROM POLITICO

MMA bill passes through Assembly

Christie says no help coming for Atlantic City without takeover

Cuomo floats tweak to minimum wage hike, but Assembly balks

New Jersey lawmakers plan hearing on Port bus terminal, Gateway

ABOUT US EVENTS ADVERTISE CONTACT PRIVACY POLICY TERMS AND CONDITIONS