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JUDICIAL AND EXECUTIVE FUNCTIONS OF THE LEGISLATOR IN NEW YORK

JOHN ROBERT BROOK*

I. INTRODUCTION

The Separation of Powers

"The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers."¹

OUR State Legislature is charged with the sole authority for the making of the laws; executive power is reposed solely in the Governor, and judicial power in the Judiciary. These three functions of government were designedly made to be separate and independent of each other for reasons that will be made clear.

Specifically, I will discuss the legislative branch, attempting to demonstrate that without violating the spirit of the doctrine of the separation of the powers of government, the legislative branch nevertheless exercises some executive and judicial powers.

Although a usurpation of all powers by one of the three coordinate branches of government would result in the ultimate destruction of our republic, as experience has taught us, there is nevertheless a certain sphere in each of the coordinate branches within which each of the others operates—an overlapping of powers, so to speak.

This theory of the separation of the powers of government, pursuant to which the three branches stand apart, is not of recent origin. The history, structure and destruction of the ancient and medieval republics have taught us that republics will survive, and the freedom and liberty of the individual is safe from the despotism of one-man rule, only with due recognition of the doctrine, coupled with an adequate system of checks and balances.

Historical Development of the Doctrine

The classic example of the ancient republic is Athens. There the Agora, a legislative institution, was the governing body and there was no limit upon its powers. The power of the state was supreme and any one or group who controlled a majority of the Agora would hold in his or their hands the total power of government—legislative, judicial and executive.

What happened to Athens without a separation of the powers of gov-

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1. Cardozo, Ch. J., Matter of Richardson, 247 N.Y. 401, 410, 160 N.E. 655, 657 (1928).

ernment? Chancellor Kent in his *Commentaries*, convinced that we could learn much from the history of the Athenian Republic, observed:

"From the incurable defect, among others, of . . . the want of a due and well-defined separation of the powers of government into distinct departments, that celebrated republic became violent and profligate in its career, and ended in despotism and slavery. The general assemblies of the people, without any adequate checks, assumed and exercised all the supreme powers of the state, legislative, executive, and judicial."²

The history of the Roman Republic, although it flowered but for a brief period, is a further warning that without the separation of the powers of government survival of freedom of the individual is impossible. Total power was vested in the Senate. The Consulate, advised by an elected advisory body known as the Comitia, was the ruling body, holding and wielding the total power of government. It was not a republic as we know it, but the rudimentary germs were there. Power grasping enemies of freedom, however, made a mockery of it, which finally ended in the appearance upon the scene of Julius Caesar, who snatched up the reins of government and extinguished for some time the flame of liberty.

After the French Revolution in 1789, the French made an attempt to establish a republican form of government. They created a Senate and a Chamber of Deputies to govern, but there was no attempt either to distribute power between the federal government and the governments of the provinces or to distribute it separately among legislative, executive and judicial branches. The Republic of France cannot be held up as a shining example of a democratic form of government, and were it not for a peculiar defect in French politics resulting in the creation of a great number of political parties, none of which by itself is able to control a majority of the legislative branch, this republic, too, would have long since fallen.

Although the theory of the separation of the powers of government was, as far back as the Athenian Republic, a recognized one, it was not clearly formulated and presented as a doctrine until the French critic, philosopher, and lawyer, Montesquieu, did so in his *Spirit of Laws*, which was published at Geneva in 1748.

It is interesting to note Montesquieu's argument and how clearly he presents the necessity for a recognition of the doctrine of the separation of powers. After observing the three divisions of government and the respective spheres in which they must operate, he says:

"The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

"When the legislative and executive powers are united in the same person, or in

2. I Kent, *Commentaries* 232, n. a (1826).

the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

"Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."³

With the appearance of the clearly defined doctrine of the separation of powers by Montesquieu, there quickly followed recognition by thinkers of the times. Rousseau took up the theory and expanded it.⁴ Blackstone followed, adopting the argument and expounding it in his *Commentaries*.⁵

Thus, we come down to the period when the great men of our colonial times were concerned with the preservation of the freedom and liberty of the individual. They were searching for an effective means of not only defending against the tyranny of a greedy monarch, whose acts and decrees, although depriving the Colonies of their independence, at the same time provided fuel for the flame and spirit of individual liberty and freedom, but also for the creation of an instrument that would reestablish those liberties and freedoms and would constitute forever thereafter a bulwark of defense against all attempts to destroy them. A Declaration of Independence was called for, and, drafted by Thomas Jefferson, was adopted by the Continental Congress on July 4, 1776. The declaration was one of separation, freedom and independence from the British Crown because of the "repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States."

The first step had been taken. The big job, however, lay ahead: the framing of a constitution which would provide for the creation of a system of government that would be strong enough to carry out the will of the people, preserving orderly social intercourse and protecting the

3. Montesquieu, *Spirit of Laws*, Bk. XI, c. 6 (1748).

4. Rousseau, *The Social Contract*, Bk. 2, c. VII.

5. "In all tyrannical governments, the supreme magistracy, or the right both of making and enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself." 1 Blackstone, *Commentaries* 146.

"Were it [the judicial power] joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative." Blackstone, *op. cit. supra* at 268.

people, and also providing a means by which the people would be protected from that government.

*Recognition and Adoption of the Doctrine in the Constitution
of the United States*

Immediately the theory of the division of power was adopted as the obvious device for preventing all power from becoming accumulated in one set of hands which would be nothing more than following in the footsteps of the "fallen" republics. The Constitution of the United States, the oldest federal constitution in existence, the result of the strenuous labors of the minds of the great men of that time, who were, during the course of its drafting, conscious of the dangers of centralizing all power in one federal government or one division of government, was finally adopted by a convention of delegates from the different states in May of 1777, and after ratification by the several states, became effective in 1789.

An examination of that famous document shows a healthy recognition of the doctrine of the separation of powers. It is first applied in separating, between central governments, the powers reserved to the states and to the people. We here, however, are concerned with separation of the powers of the *instruments of government*.

Man's conduct and his relationship to his fellow men are regulated by law. The formulation and promulgation of law is necessarily the first operation in a system of government. The drafters of the Constitution, therefore, first directed their attention to the creation of a legislative branch, reposing in that branch all legislative powers.

Article I, section 1, of the Constitution reads:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article II, section 1, deals with the executive power and provides:

"1. The executive Power shall be vested in a President of the United States. . . ."

Article III, section 1, of the Constitution deals with the judicial power of the central government and reads:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

It is reasonably certain that the order in which the delegation of these three separate powers appears in our Constitution is of no great moment, other than perhaps that the drafters of the Constitution commenced with

the Legislature, the division of government which makes the laws, subsequently to be enforced and interpreted by the executive and judiciary. It should be noted that the granting of these three distinct powers appears separately in the first three articles of the Constitution, and their separation, therefore, is complete, having no word connection with each other, thereby indicating a determined effort to keep them separate and apart.

The Legislature, however, constitutes that branch of the government nearest to the people—the source of all power. Its members are chosen directly by the people for the purpose of interpreting, in the form of statutory law, the wishes and the will of the people. The promulgating of statutory law is, therefore, the first and fundamental step in providing for the establishment of an ordered society.

Recognition of the Doctrine in the Constitution of the State of New York

Although the first Constitution of the State of New York was adopted on April 20, 1777, some twelve years before the ratification and final adoption of the Federal Constitution, its framers, some of whom assisted in the drafting of the Federal Constitution, recognized that the doctrine of the separation of the powers of government was the best means or device for assuring that the central government they were thereby creating would not become so all powerful as to strike at and overcome the sovereignty of the people, subjugating them to the will of a despot or a despotic group.

Since the adoption of the State Constitution there have been a number of revisions and many amendments. Although there have been seven Constitutional Conventions,⁶ these resulted in only four general revisions.⁷ Such revisions and amendments have not indicated any deviation from the recognition of the prime importance of the doctrine of the separation of the powers of government.

The State Constitution provides in Article III, section 1:

“The legislative power of this State shall be vested in the Senate and Assembly.”

The executive power is delegated by the sovereign people under Article IV, section 1:

“The executive power shall be vested in the governor, who shall hold his office for four years; . . .”

Although there is no specific delegation of the judicial power to the courts of the State, there is a recognition of the separateness of this branch of government in Article VI, section 1, which reads:

6. Constitutional Conventions were held in 1801, 1821, 1846, 1867, 1894, 1915 and 1938.

7. General revisions were accomplished only by the Conventions held in 1821, 1846, 1894 and 1938.

"The supreme court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the court of appeals as now is or hereafter may be prescribed by law not inconsistent with this article."

The unlimited delegation of legislative power to the Senate and Assembly by the Constitution constitutes the New York State Legislature a most powerful governmental body. As noted at the outset the doctrine of separation of powers is fundamental to the survival of our republican form of government. It was also stated, however, that inevitably, though separate and distinct, there could be, and in our State there is, a border sphere in each of the three separate divisions of government which overlaps upon the others.

A close examination of our State Constitution, as presently revised and amended, will disclose a number of instances wherein powers generally delegated to coordinate branches have been specifically delegated to another branch. The Governor, as the chief executive, exercises certain judicial and legislative functions; the Legislature has certain judicial and executive powers; and the judge, in the course of the administration of justice, is both a legislator and an executive.

It must be admitted that legislators are, consciously or otherwise, jealous of the exercise either by the executive or the courts of any legislative function, that is, any legislative function which has not been specifically delegated by the Legislature to either one of them as incident and necessary to the proper exercise of their own functions. There are, of course, such instances, but the author is concerned principally with the executive and judicial powers or functions of the legislator.

II. JUDICIAL POWERS EXERCISED AND JUDICIAL FUNCTIONS PERFORMED BY THE LEGISLATURE

Judge Folger reminds us:

"Though the Constitution confers upon specified courts general judicial power, there are certain powers of a judicial nature which, by the express terms of the same instrument, are given to the legislative body. . . ."⁸

There are some authorities which hold that the basic nature of the legislative process is in essence a judicial process, for very little legislation ever originates within a Legislature itself.⁹ Thus, the Massachusetts Legislature is known as "The General Court." The principal function exercised by the individual legislator in the process by which legislation becomes statutory law is that of weighing the arguments for and against

8. *People ex rel. Hatzel v. Hall*, 80 N.Y. 117, 122 (1880).

9. See, e.g., Moffat, *The Legislative Process*, 24 Cornell L.Q. 223 (1938).

a particular proposal and then rendering his decision (a judicial operation), adopting or rejecting the proposal as evidenced by his "aye" or "nay" vote. The combined "ayes" or "nays" of all of the members of the particular house constitute their "decision."

The author cannot, however, accept this view, for it is theorizing without regard to the fundamental concepts of a republican form of government and completely ignores the doctrine of the separation of powers.

I prefer to limit my consideration of this subject to those instances where the powers of one division of government are specifically delegated by the Constitution to another and those instances where one division of government has in practice usurped without specific authority, the powers of another, or has attempted so to do.

Perhaps the clearest instance of the grant of authority to the Legislature to exercise judicial power is found in Article III, section 9, of the New York Constitution, which provides that each house of the Legislature shall "be the judge of the elections, returns and qualifications of its own members." There have been numerous instances where the right of an elected member to take his seat in the Senate or Assembly of the State has been challenged. In my own experience as a member of the Judiciary Committee of the Assembly, I have participated in two such challenges.¹⁰

The proceeding is initiated by the challenger filing with the proper house a petition setting forth his reasons why the member should not be seated. In form and in fact this is similar to a complaint in a civil action. The house receiving such petition usually refers it by resolution to its Judiciary Committee, authorizing such Committee to make a thorough investigation of the issues raised by the petition and report. The function then performed by the Judiciary Committee is the actual conduct of a judicial proceeding. Witnesses for both sides are subpoenaed and called upon to testify. Documentary evidence is received, and upon the completion of such "trial," the Judiciary Committee renders its judgment in the form of a report and recommendation to the entire house, which sitting as a Committee of the Whole considers the report and recommendation and renders its verdict.

Another clear instance is found in Article VI, section 10 of the Constitution which provides for the trial of impeachments.¹¹ The State

10. On petition of Richard R. Griffith v. Jeremiah J. Ashcroft, 2d Assembly District, Oneida County, January 5, 1949. (Mr. Ashcroft was seated.) On petition of Joseph P. Brennan v. John H. Farrell, 3d Assembly District, New York County, January 4, 1956. (Mr. Farrell was seated.)

11. "The assembly shall have the power of impeachment by a vote of a majority of all the members elected thereto. The court for the trial of impeachments shall be composed of the president of the senate, the senators, or the major part of them, and the judges of the court of appeals, or the major part of them. On the trial of an impeachment against the

Assembly is granted by this article the power of impeachment by a vote of a majority of its members. The actual trial of the impeachment, however, is conducted by the Senate and a majority of the judges of the Court of Appeals. This body actually, by Constitutional provisions, is constituted a court to conduct a trial at which evidence is submitted and a verdict rendered. There have been but few instances of the exercise of this judicial power by the Legislature.

Many of the powers, judicial in nature, delegated by the Constitution to the Legislature do not contain authority to exercise a judicial function, but rather to grant authority to the courts for the enlargement of their authority or to restrict the authority, functions, or activities of the courts in the exercise of their powers. There are numerous such grants in the Constitution. The Legislature is granted the authority to provide by law that the verdict in a civil jury case may be rendered by not less than five-sixths of the jury.¹² The Legislature has exercised this power by the enactment of Chapters 120 and 613 of the Laws of 1937. In the same section of the same article of the Constitution the Legislature is granted authority to enact laws governing the form, content, manner and form of presentation of a waiver by defendant of a jury trial.

Article VI of the Constitution, dealing with the Judiciary, contains many instances of grants of powers to the Legislature over the courts. In section 1, among other things, it is granted the power to alter the judicial districts. By an amendment adopted in 1947, a tenth judicial district consisting of the Counties of Queens, Nassau and Suffolk was erected out of the Second Judicial District.

This section also grants to the Legislature the power to increase from time to time the number of justices in any judicial district. This power has been exercised upon numerous occasions.¹³ In the author's twelve years of service as a member of the New York State Assembly there has not been a single year in which legislation attempting to exercise this power has not been introduced.

The Temporary Commission on the Courts, set up in 1953 pursuant

governor or lieutenant-governor, neither the lieutenant-governor nor the temporary president of the senate shall act as a member of the court. No judicial officer shall exercise his office after articles of impeachment against him shall have been preferred to the senate, until he shall have been acquitted. Before the trial of an impeachment, the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to the evidence, and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust, or profit under this state; but the party impeached shall be liable to indictment and punishment according to law." N.Y. Const. art. VI, § 10.

12. N.Y. Const. art. I, § 2, as amended by Constitutional Convention of 1938.

13. N.Y. Laws c. 788 (1952); N.Y. Laws c. 10, § 5 (1948); N.Y. Laws c. 241, § 10 (1946); N.Y. Laws c. 617, § 3 (1944); N.Y. Laws c. 560 (1933).

to legislative enactment,¹⁴ has submitted to the Legislature its recommendation that it exercise this power by increasing the number of judges of the Supreme Court in certain judicial districts.

The Legislature has been delegated by the Constitution the authority to alter the boundaries of the judicial departments, restricting such authority, however, to the extent that this may be done only once every ten years and further providing that each department shall be bounded by the lines of judicial districts.¹⁵

Similarly the Legislature has power to remove from office judges of the Court of Appeals;¹⁶ to restrict the jurisdiction of the Court of Appeals;¹⁷ to remove from office justices of inferior courts;¹⁸ to enlarge or restrict the jurisdiction of county courts and to increase the number of county court judges;¹⁹ to authorize elections of additional judges in the Court of General Sessions;²⁰ to provide for the election of additional surrogates;²¹ to regulate or discontinue inferior local courts;²² to exercise certain supervisory power over the Court of Claims and to refer to it claims made against the State.²³

Upon the recommendation of the Temporary Commission on the Courts, the Legislature in 1955 created the Judicial Conference of the State of New York.²⁴ This body is entrusted with the power and duty of studying and making recommendations "with respect to the organization, jurisdiction, procedures and rules, and the administrative, clerical, fiscal and personnel practices of all the courts of the state," and, among other things, transferring to it all of the powers and duties of the former Judicial Council, which was abolished. By this act the Legislature exercised a further power, perhaps only quasi-judicial in nature, but nevertheless indicating a friendly trespass into the private preserve of the Judiciary.

A further instance in which the Legislature exercises a power at least quasi-judicial in nature, is when it adopts statutes regulating judicial procedures. The Legislature is vested with the power to regulate these procedures but apparently only to a limited extent.²⁵

14. N.Y. Laws c. 591 (1953).

15. N.Y. Const. art. VI, § 2.

16. N.Y. Const. art. VI, § 9.

17. N.Y. Const. art. VI, § 7.

18. N.Y. Const. art. VI, § 9.

19. N.Y. Const. art. VI, § 11.

20. N.Y. Const. art. VI, § 14.

21. N.Y. Const. art. VI, § 12.

22. N.Y. Const. art. VI, § 18.

23. N.Y. Const. art. VI, § 23.

24. N.Y. Sess. Laws 1955, c. 869, adding art. 7A to the Judiciary Law.

25. N.Y. Const. art VI, § 20 (1925). See *Riglander v. Star Co.*, 98 App. Div. 101, 105,

At present it has delegated to the twenty-six justices of the Appellate Division the power to promulgate rules of procedure as distinguished from statutory enactments. These rules are the present Rules of Civil Practice. The Temporary Commission on the Courts has presently under consideration the question of whether or not there should be further delegation by the Legislature of its power to regulate rules of procedure. This question was exhaustively treated in this publication in its Autumn 1955 edition.²⁶

Though a legislator does not look upon himself as a judge nor his duties as judicial, it must be clearly and abundantly demonstrated with this recitation of some of the instances in which the legislator exercises judicial powers, that without destroying or violating the spirit of the doctrine of the separation of powers, practicalities dictate that the Legislature must perform some judicial functions.

III. EXECUTIVE POWERS EXERCISED AND EXECUTIVE FUNCTIONS PERFORMED BY THE LEGISLATURE

The legislative branch of government may, in addition to exercising those powers strictly and inherently characteristic of its own branch, also exercise other powers, some executive in nature, that are reasonably incidental to the proper performance of its own primary function. It also has delegated by implication subordinate legislative powers to the executive. It would be impossible for the Legislature today to prescribe in the laws it enacts the manner and form in which they are to be executed or their precise manner of application. Many matters of necessity must be left to be regulated by the Executive Department. However, they cannot be considered, when exercised by the executive, to be a trespass upon the legislative power because they are all incidental and necessary to the distinct function of executing or carrying out the laws so enacted.

With the advent of government by agencies, administrative bodies or commissions during the last twenty-five years, and the exercise by those bodies of certain powers that are indisputably not only executive powers but could be generally characterized as quasi-legislative or quasi-judicial, one might contend that the doctrine of the separation of powers was be-

90 N.Y. Supp. 772, 775 (1st Dep't 1904), aff'd, 181 N.Y. 531, 73 N.E. 1131 (1905), in which the Appellate Division said: "The courts are not the puppets of the Legislature. They are an independent branch of the government, as necessary and powerful in their sphere as either of the other great divisions. And while the Legislature has the power to alter and regulate the proceedings in law and equity, it can only exercise such power in that respect as it has heretofore exercised . . ."

26. Shaw, *Procedural Reform and the Rule-Making Power in New York*, 24 *Fordham L. Rev.* 338 (1955).

ginning to be undermined and nullified. This, however, in the writer's opinion, would be an erroneous assumption, for the doctrine does not require a rigid application nor impose an inflexible definition.

In the final analysis the doctrine is safe, for the legislative branch of government has the right to stop the further exercise of power it may have granted or such power as may be exercised by these administrative agencies, bodies and commissions without specific authorization, either by the enactment of law or through its power of control over the budget.

It is a fact that most of the instances where the doctrine has been relaxed have been invariably in favor of the executive branch of government.

A most important responsibility of the Legislature is that of determining public policy. In carrying out this responsibility the Legislature must perform a sifting operation whereby there are separated the bills introduced representing the interest of an individual or small group from those large organized group demands which deal with matters of public concern. It must test public opinion on these items of wide public interest and thus formulate policy with respect thereto.

One of the most essential and effective means by which the Legislature determines or reviews matters of public policy is by exercising its power of inquiry. This power is not, however, exclusively legislative, for such power is likewise vested in both the executive and judicial branches of government.

The means by which the Legislature exercises this power of inquiry is through its various joint legislative committees, which are established by joint resolution of both houses and charged with the duty of investigating and studying particular questions of extreme public interest. There appears to be no specific constitutional delegation to the Legislature of the power of inquiry. However, section 9 of Article III of the Constitution provides: "Each house shall determine the rules of its own proceedings," and, pursuant, to this broad grant, both the Senate and the Assembly have adopted their own rules of procedure conferring upon joint legislative committees this power of inquiry.

The standing committees of either house, in connection with the consideration of legislation that has been referred to them, may and in many instances do conduct independent inquiries and investigations and hold both closed and public hearings. These committees are armed with the power to require the attendance of witnesses, to issue a commission for the examination of witnesses outside of the state,²⁷ and are also empowered with the right to issue subpoenas, to enforce obedience to a subpoena and to administer oaths to witnesses.²⁸

27. N.Y. Legislative Law, § 60.

28. N.Y. Legislative Law, § 62(a).

The duties performed by these various committees in exercising the power of inquiry are basically administrative and in that respect constitute an exercise by the Legislature of executive powers. With the ever-increasing delegation of administrative functions and duties to various boards, agencies and commissions by the executive, there has developed in recent years a corresponding delegation by the Legislature of investigating functions to joint legislative committees.

Each year the Legislature is called to pass upon resolutions either continuing presently existing joint legislative committees or creating new ones. In the 1955 session, ten new joint legislative committees were created and twenty-one existing committees were continued.

The Legislature exercises certain other functions that are executive in nature, such as considering the qualifications of the Governor's nominees for appointment to public office, conferring with the Governor thereon, and confirming or rejecting them.²⁹ The Governor has the power to grant reprieves, commutations and pardons after conviction. It is little known that in the case of a conviction for treason, he only has power to suspend the execution of the sentence until the case is reported to the Legislature at its next session, when the Legislature has the right either to pardon, commute the sentence, direct the execution of the sentence or grant a further reprieve.³⁰

Arranging and distributing administrative functions to local jurisdictions is another power executive in nature exercised by the Legislature.³¹

Perhaps the most important executive or at least quasi-executive function performed by the Legislature is in its consideration and adoption of the executive budget.

Traditionally this entire function was performed by the Legislature. The appropriation of public funds was universally assumed to be essentially and exclusively one of the legislative functions and duties. In recent years there has developed a movement for budget reform and with it numerous states, including New York, have so amended their constitutions to provide that the function and duty of initiating and preparing a budget is left to the executive.³² The authority over the preparation and adoption of the executive budget by the Legislature is now considerably

29. N.Y. Const. art. V, § 4.

30. N.Y. Const. art. IV. § 4.

31. In *People ex rel. Wood v. Draper*, 15 N.Y. 532, 545 (1857), Chief Judge Denio stated: "It follows that it belongs to the legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable, to local jurisdictions, and retaining other portions to be exercised by officers appointed by the central power, and changing the arrangement from time to time, as convenience, the efficiency of administration and the public good may seem to require."

32. N.Y. Const. art. VII, adopted by Constitutional Convention of 1938.

curtailed. The Constitution, however, requires that the Governor shall submit to the Legislature:

" . . . a budget containing a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year and all moneys and revenues estimated to be available therefor, together with an explanation of the basis of such estimates and recommendations as to proposed legislation, if any, which he may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures."³³

Bills containing the proposed appropriations are submitted with the budget and introduced directly by the Governor rather than through a member of the Legislature or one of its committees.³⁴

The Legislature may strike out or reduce items in the recommended budget and may add items of appropriation. Thus, budget bills are considered carefully by the Finance Committees of the two houses, which invariably call for a joint public hearing. Prompt action thereafter is taken by both houses. It is significant that the Legislature receives the proposed budget from the Governor on the first day of February of each year (it has been stated that adopting the budget is the most important act performed by the Legislature each year) and it is always acted upon by the Legislature before the first day of April. It is not to be presumed that such prompt action has any relation to the fact that the State's fiscal year commences on that day and there would be no funds available for the support of State government without appropriations.

The degree to which the doctrine of the separation of the powers of government is observed and the extent to which it is carried out is often directly related to the political complexion of the legislative and executive branches of government. It might well be asked what has politics to do with the separation of the powers of the three coordinate branches of government. It is well to remember that man vested with authority continues to seek greater authority. Just so does a branch of government to which has been constitutionally delegated authority seek even greater authority. This seeking of additional authority and attempting to trespass upon the powers and authority of the other branches of government is never so apparent as when there is an executive of one political party and a Legislature controlled by another. It is inherent in our party system that the party in control of the two branches of government—legislative and executive—inevitably uses that control for furthering and strengthening its political interests and fortunes.

The first executive budget under the 1927 amendment to the New York Constitution was submitted to the Legislature by the then Governor Franklin D. Roosevelt and was accompanied by bills for appropri-

33. N.Y. Const. art. VII, § 2.

34. N.Y. Const. art. VII, § 3.

ations. The Legislature promptly struck out numerous items and added or substituted therefor similar items of its own, all of which were vetoed by the Governor. This was the beginning of a controversy that developed into a show-down that could only be resolved by the courts. The maneuver employed by the Republican controlled Legislature was to condition the expenditure of certain lump sum appropriations on the approval of the Governor, the Chairmen of the Senate Finance Committee and the Assembly Ways and Means Committee. The result was that the Legislature assigned or committed to its own members control of the expenditure of appropriations amounting to approximately \$32,000,000, with all the patronage that such power necessarily carried with it. The Court of Appeals pronounced the executive to be the winner in what was then known as the Executive Budget Case.³⁵

No court test of strength is reported since this decision, but from 1929 until the election of a Republican governor in 1942, there was a constant struggle between the executive and legislative branches of our State government over the preparation and adoption of the executive budget, resulting in many legislative delays, while compromises were being worked out. The powers of the Chairmen of the two Finance Committees, particularly the Chairman of the Assembly Ways and Means Committee, were greatly enhanced. In fact, during those years two separate budgets were prepared, one by the Executive and the other by the Legislature, resulting in much duplication of effort, but always reflecting the attempt of those two branches of government to encroach upon or usurp the powers of each other, engendered and intensified by politics.

In the next twelve years during which the executive branch was under the control of a strong Republican administration and during which period there were large Republican majorities in both houses, the struggle between the executive and legislative branches of the government subsided to a great degree, for the political interests of both of these branches were identical and politics, therefore, did not make its influence felt upon the observance of the application of the doctrine of the separation of powers by these two branches.

The author's observations during that twelve year period and his personal experiences convinced him that in the circumstance where the executive and legislative branches were under the control of the same political party, the legislative branch was more willing to permit encroachment upon its sphere of separate authority by the executive than the executive was to permit any of its authority to be usurped by the Legislature. This

35. *People v. Tremaine*, 252 N.Y. 27, 168 N.E. 817 (1929), holding that the provision of the appropriations statute was unconstitutional, violating § 7 of article III of the Constitution prohibiting members of the Legislature from holding other civil offices.

circumstance, however, may not be so true where the executive powers are not exercised by a strong and independent man.

IV. CONCLUSION

Neither branch of the government will be weakened by these encroachments or attempted usurpations and the doctrine of the separation of the powers of government will not have been thereby violated, for men in government are practical men recognizing readily those situations wherein the spirit of compromise must necessarily be applied. They are aware that a theory so fundamental as the doctrine of the separation of powers to the survival of our republican form of government is not to be observed with such extreme rigidity as to make impossible the attainment of its golden objective.