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Cover Page Footnote

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A LEGAL HISTORY OF EXPENSE BUDGETING IN NEW YORK CITY

Archibald F. Robertson, Jr.* and Lucian A. Vecchio**

I. Introduction†

An examination of the history of budget-making in the City of

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† The various Charters of the City of New York will be cited in abbreviated form using the popular name of the particular Charter. The full citation for each Charter is provided below.

Charter	Citation
1830 Charter	Law of April 7, 1830, ch. 122, [1830] N.Y. Laws 125.
1849 Charter	Law of April 2, 1849, ch. 187, [1849] N.Y. Laws 278.
1853 Charter	Law of April 12, 1853, ch. 217, [1853] N.Y. Laws 410.
1857 Charter	Law of April 14, 1857, ch. 446, [1857] N.Y. Laws 874.
1870 Charter	Law of April 5, 1870, ch. 232, [1870] N.Y. Laws 520.
1873 Charter	Law of April 30, 1873, ch. 335, [1873] N.Y. Laws 484.
The Greater New York Charter	Law of May 4, 1897, ch. 378, [1897] N.Y. Laws 649.
Charter Amendatory Act of 1901	Law of April 22, 1901, ch. 466, [1901] N.Y. Laws 1184.
1938 Charter	Law of Dec. 30, 1937, ch. 929, [1937] N.Y. Laws 1 (Extraordinary Sess.).
1963 Charter	NEW YORK, N.Y., CITY CHARTER (1972) (When discussing amendments to the 1963 Charter, approved by referendum of Nov. 4, 1975, the citation will be as follows: 1963 Charter, <i>as amended</i> , (1975). The effective date of such amendments is, generally, Jan. 1, 1977. <i>Id.</i> § 1152a.).

All of the Charters prior to The Greater New York Charter were amendments to Law of April 9, 1813, 2 Rev. Laws ch. LXXXVI, at 342 (1813), which was an attempt to codify the

New York¹ will show that the City has never operated from a sound, comprehensive budget system.

That does not mean that the City has proceeded irresponsibly, or without regulation. Statutes to control the budget have existed in New York City since at least the beginning of the nation itself.² And, most commendably, those very first statutes show a proper concern by the City for the needs of all its citizens.³

The difficulty has been, rather, the lack of a comprehensively drafted body of law to handle, as an integrated whole, all aspects of City budgeting. Consequently, it has always been possible to defeat, at least to some extent, some budgetary controls. This problem still exists today.

The purpose of this Article, then, is to examine in detail the history of the budget process in order to determine the extent to which the enacting of a budget by the City legislature is, in effect, illusory, and, in so doing, to assemble in one place the current legal

scattered laws relating to the City of New York. A. MACMAHON, *THE STATUTORY SOURCES OF NEW YORK CITY GOVERNMENT* 4-6 (1923). Codification was not attempted again until the Consolidation Act of 1882, ch. 410, [1882] N.Y. Laws 1.

Technically speaking prior to 1882, only the 1857, 1870, and 1873 Charters were Charters in the "true" sense. MACMAHON, *supra* at 7. However, all of the Charters mentioned were "substantively" complete and, therefore, they have commonly been called "Charters."

1. For a general description of New York City's budget-making procedure see CITY OF NEW YORK, BUREAU OF MUNICIPAL INVESTIGATION AND STATISTICS, DEPARTMENT OF FINANCE, *BUDGET PROCEDURE FOR THE CITY OF NEW YORK* (1915) [hereinafter cited as 1915 BUDGET PROCEDURE]. The authors are indebted to Mr. Karl Schneider, student, Fordham University School of Law, for uncovering this and many other arcane sources cited in this Article.

2. See, e.g., Law of April 26, 1784, ch. 43, [1777-84] N.Y. Laws 669.

3. E.g., *id.* provided in pertinent part:

That the mayor, recorder and aldermen of the city and county of New York for the time being, or the major part of them, whereof the mayor or recorder to be one, be and hereby are fully empowered and authorized, to order . . . the raising a sum . . . by a tax on the estates, real and personal of all and every the freeholders and inhabitants within the city and county of New York to be applied to the support and maintenance of the poor of and to the repairing and maintaining the public roads within the said city and county

And it is hereby further enacted, That it shall be lawful for the said mayor recorder and aldermen . . . to determine what proportion of the monies to be raised by virtue of this act for the roads, and the poor shall be applied to the separate [sic] use of the poor

The budget request of the Common Council to the State Legislature to defray the contingencies of the City for 1786 totalled just over £10308, of which £4800 was for the Poor House. 1 MINUTES OF THE COMMON COUNCIL OF THE CITY OF NEW YORK, 1784-1831, item 386 at 198 (1917).

materials relating to the appropriations side⁴ of the New York City expense budget.⁵

II. Early History

A. Statutes and Cases

Prior to 1830, the City of New York had no budget system whatsoever in advance of expenditure; the City casually incurred debt as the need to make expenditures arose, then collected the money necessary to pay the bills as they fell due.⁶ This nonmanagement caused the City Convention of 1829⁷ to incorporate the following provision in the 1830 Charter:⁸

Annual and occasional appropriations shall be made by proper ordinances of the common council, for every branch and object of city expenditure; nor shall any money be drawn from the city treasury, except the same shall have been previously appropriated to the purpose for which it is drawn.

Pursuant to this Charter requirement, the Common Council, which consisted of a Board of Aldermen and a Board of Assistant Aldermen,⁹ passed a rudimentary budget ordinance.¹⁰ Under this ordinance, the heads of the city agencies were required to furnish the Comptroller "a detailed statement . . . of the sum which will be required for each distinct object of expenditure."¹¹ The Comptroller was then to present to the Common Council in December of

4. The "appropriations side" refers only to budgeted expenditures, not to revenue-raising which is a separate subject outside the scope of this Article.

5. New York City's annual capital requirements are financed exclusively through borrowing, but the annual debt service charges (interest plus principal amortization) are part of each annual expense budget. The capital budget is outside the scope of this Article.

6. See 1915 BUDGET PROCEDURE, *supra* note 1, at 3. Beginning in 1830 the Comptroller prepared the City's budget; before that time the Treasurer performed the same task. T. SMITH, GUIDE TO THE MUNICIPAL GOVERNMENT OF THE CITY OF NEW YORK 68 (10th ed. 1973) [hereinafter cited as N.Y.C. GUIDE TO MUNICIPAL GOVERNMENT].

7. 1915 BUDGET PROCEDURE, *supra* note 1, at 3.

8. 1830 Charter § 18. The 1849 amendments to the 1830 Charter virtually repeated this section. See 1849 Charter § 7 which provided:

No money shall be drawn from the city treasury except the same shall have been previously appropriated to the purpose for which it is drawn; and all appropriations shall be based upon specific and detailed statements in writing of the several heads of departments through the comptroller.

9. 1830 Charter § 1.

10. NEW YORK, N.Y., REV. LAWS & ORDINANCES ch. VII, §§ 2-6 (1934).

11. *Id.* § 3.

each year a general City budget for the next year, together with an estimate of miscellaneous revenues, and of the additional amount needed to balance the budget.¹² This "balancing amount" was the amount that needed to be raised by levying taxation—which became known as the "tax levy" funding of the City's budget.¹³ During this period the City's tax levy rate in support of its budget was itself fixed annually by special act of the State Legislature.¹⁴

One observation should be made: from this first rudimentary ordinance, the City legislature began a history of never being directly in charge of the budget. In fact, the budget has always been managed by an executive oligarchy—a few executives whose expertise with (and subsequent mystification of)¹⁵ the budget process enabled them to acquire an unchecked control over discretionary expenditure decisions. The City legislature, by its own actions or by those of the State, has been precluded from any meaningful input concerning the budget, functioning instead as a rubber stamp for the proposals of the particular executive group managing the budget.¹⁶

Beginning in 1851,¹⁷ the State Legislature incorporated, in the annual statute establishing the City's tax levy rate for annual appropriations, the items for which the tax levy was imposed¹⁸ and, in 1853, began limiting the use of such tax levy income to those particular items only, thereby preventing transfers of budget appropriations.¹⁹ This was still a lump-sum budget as opposed to a line-by-line budget, but certain general categories were established for spending which the City could not circumvent.²⁰

12. *Id.*

13. *See, e.g., Cox v. Mayor of New York*, 103 N.Y. 519, 525, 9 N.E. 48, 51 (1886).

14. *Id. See, e.g., Law of March 23, 1850, ch. 84, [1850] N.Y. Laws 123; Law of April 26, 1784, ch. 43, [1777-84] N.Y. Laws 669.*

15. *See note 102 infra.*

16. F. SHAW, *THE HISTORY OF THE NEW YORK CITY LEGISLATURE 18-19* (1954) [hereinafter cited as *HISTORY OF THE N.Y.C. LEGISLATURE*]. Section seven of the 1849 Charter had attempted a measure of budget control.

17. 1915 BUDGET PROCEDURE 4.

18. Law of June 20, 1851, ch. 258, § 1, [1851] N.Y. Laws 482.

19. Law of April 15, 1853, ch. 232, § 2 [1853] N.Y. Laws 522. The 1853 Charter dealt with the budget in a minor way. Section four of the 1853 Charter provided:

Every act, resolution or ordinance, appropriating money or involving the expenditure of money not rendered imperative under the provisions of any state law, shall originate in the board of councilmen; but the board of aldermen may propose or concur with amendments, as in other cases.

20. Section two of the 1853 Charter provided:

However, the provision in the 1830 Charter for "occasional appropriations"²¹ was construed in practice to mean that additional appropriations might be made for *any* purpose.²² Therefore, the balance and control attempted in 1853 by the tax levy rule²³ was undone, and the City was required to borrow in order to support "budget modifications"²⁴ made under the "occasional appropriations" clause. It was not until 1856 that this practice of making such "occasional appropriations" beyond that authorized by the tax levy income was stopped.²⁵

In 1856, the State Legislature began making substantial changes in the New York City budget submitted by the Common Council.²⁶ In fact, from 1856 to 1870 the State Legislature increasingly limited the City's discretionary powers concerning budget appropriations until it had absorbed virtually all of the City's discretionary budget power.²⁷ This was a reaction, in large measure, to the corruption and irresponsibility prevalent in the downstate municipal governments.²⁸

No portion of the said respective sums, hereinbefore [§ 1] named, shall be expended or applied to any other purposes or objects than said objects and purposes respectively for which the board of supervisors of said city and county of New-York are hereinbefore empowered to raise the same as aforesaid.

During this period the budget appropriations were made in lump sum form and thus required reappropriation by the Common Council for payment to specific payees. Both processes are referred to by the word "appropriation." The State Legislature's usage of the term usually refers to an allocation's general purpose and to the authorization to raise the necessary funds by taxation; the Common Council's usage refers to the designation of the State-authorized allocations for specific payees or contractors.

21. 1830 Charter § 18.

22. See 1915 BUDGET PROCEDURE, *supra* note 1, at 3-4.

23. See, e.g., Law of April 3, 1855, ch. 141, § 1, [1855] N.Y. Laws 221.

24. See text accompanying notes 149-64 *infra*.

25. See 1915 BUDGET PROCEDURE, *supra* note 1, at 4.

26. Compare Law of April 7, 1849, ch. 276, § 1, [1849] N.Y. Laws 402 with Law of April 12, 1856, ch. 176, § 1, [1856] N.Y. Laws 271.

27. Compare Law of April 7, 1849, ch. 276, § 1, [1849] N.Y. Laws 402 with Law of April 12, 1856, ch. 176, § 1, [1856] N.Y. Laws 271 and Law of April 26, 1870, ch. 383, [1870] N.Y. Laws 881 (repealed 1881). The budget provided in the Law of April 26, 1870 was eleven pages in length whereas the budgets in the Laws of April 7, 1849 and April 12, 1856 were only one and three pages in length, respectively.

During this period two additional charters were enacted—that of 1857 and that of 1870. Both dealt with budgeting in a minor manner 1857 Charter § 31; 1870 Charter §§ 18, 101.

28. "With the bestowal of the first trolley franchise in 1851 the Board of Aldermen embarked on a career of spoliation. The body in which 'Boss' Tweed served his apprenticeship

But, in 1867,²⁹ action had been taken which would ultimately cause the State to relinquish its ever-tightening direct control over the details of the City budget.³⁰ In that year, section 10 of the State appropriation statute for New York City established what was, in effect, an embryonic budget board whose function it was to screen the estimate-requests which would go to the Common Council.³¹ The board consisted of the Mayor, the Comptroller, and the chief officer of the agency concerned.³² After the board passed its recommendation on to the Common Council, the Council was required to act on the estimate; or, in any event, the Mayor was then to send it on to the State Legislature within three weeks.³³ This overlapping policy had the effect of gradually distancing the State Legislature from the details of the City budget.³⁴

Finally, in 1871, the State appropriations statute for New York

the following year was known as the 'Forty Thieves.' It was said that an enterprising alderman could make his fortune in a single term; few were backward in this pursuit of pelf." HISTORY OF THE N.Y.C. LEGISLATURE, *supra* note 16, at 4.

29. Cf. Act of April 25, 1864, ch. 403, § 60 [1864] N.Y. Laws 930 (repealed 1881) which established a "Board of Estimate and Apportionment" to apportion certain costs of the Metropolitan Police District consisting of the counties of New York, Kings, Westchester, and Richmond, and the towns of Newtown, Flushing, and Jamaica in Queens County. The Metropolitan Police District was established by Law of April 15, 1857, ch. 569, [1857] N.Y. Laws 200.

N.Y.C. GUIDE TO MUNICIPAL GOVERNMENT, *supra* note 6, at 29 traces the origin of the Board of Estimate and Apportionment to the 1853 Charter. Section sixteen of the 1853 Charter provided in pertinent part:

All ordinary appropriations made for the support and government of the alms-house department shall, before the same are finally made, be submitted by the governors of the alms-house to a board of commissioners, consisting of the mayor, recorder, comptroller, the president of the board of aldermen, and the president of the board of councilmen.

30. Law of April 23, 1867, ch. 586, [1867] N.Y. Laws 1596 (repealed in part 1881).

31. *Id.* § 10 provided:

Hereafter all estimates for the anticipated annual expenditures of all boards and departments of the government of the city of New York shall be made by the chief officers of every such board and department, in connection with the mayor and comptroller of said city [of New York] and submitted to the common council of said city, at the first meeting thereof in January of each year; and said estimates, whether acted upon or not by said common council, shall be presented by the said mayor to the legislature of this State within three weeks from the time of being so submitted to the said common council, and said estimates shall be taken to be the sole official estimates of such boards and departments for such annual expenditures of the year when so presented.

32. *Id.*

33. *Id.*

34. See Law of April 19, 1871, ch. 583, § 3, [1871] N.Y. Laws 1269.

City empowered the Board of Supervisors³⁵ (for New York County) directly to establish the tax levy rate necessary to finance New York City's "budget," *i.e.*, the total of all the estimates as finally determined by the newly-created "board of apportionment,"³⁶ the only limitation being an aggregate limit of two per cent of the total valuation of taxable property or \$25 million, whichever was less.³⁷

This procedure (and with it the Board of "Estimate and Apportionment")³⁸ was made permanent in 1873, when the State Legislature adopted a Charter for the City of New York, section 112 of

35. Board of Supervisors refers to the governing body of a county, in this instance New York County *qua* county, established by Law of Nov. 1, 1683, ch. 4, [1664-1719] N.Y. Colonial Laws 121. The Board of Supervisors starts, as a governing body, with the "Commissioners . . . thatt shall bee appointed in every City, Towne and County within this Province ffor the Superviseing the publique affairs & charge of each respective City Towne & County aforesaid." *Id.* ch. 9. The creation of the modern twelve-member Board of Supervisors was by Law of April 15, 1857, ch. 590 [1857] N.Y. Laws 285, *as amended*, Law of April 17, 1858, ch. 321, [1858] N.Y. Laws 515, and was abolished by Law of April 30, 1874, ch. 304, §§ 1, 3, [1874] N.Y. Laws 360. E. DURAND, *THE FINANCES OF NEW YORK CITY* 77-78 [hereinafter cited as N.Y.C. FINANCES].

36. Law of April 19, 1871, ch. 583, § 3, [1871] N.Y. Laws 1269 provided in part:

The mayor of the city of New York, the comptroller of the city of New York, the commissioner of public works, the president of the department of public parks, shall meet as a board of apportionment, and after fixing the . . . [taxes] to be raised . . . and after setting apart so much of said sum to be raised by tax . . . under this act as may be necessary for the payment of the interest on bonds and stocks of said city and county, . . . and for the payment of so much of the principal of said bonds and stocks as may become due and payable from taxation within . . . [1871], and also so much as may be necessary to pay the proportion of the State tax to be paid by the city and county of New York in . . . [1871], shall apportion the remainder thereof among and set apart to the various departments and purposes of the city and county governments by the concurring voters of all the members of said board present. . . .

37. *Id.* § 1. This legislation became known as "the two per cent act." *See, e.g.*, *Quinn v. Mayor of the City of New York*, 63 Barb. 595, 601-02 (N.Y. Sup. Ct.), *aff'd*, 53 N.Y. 627 (1873). This requirement was eliminated by Law of June 13, 1873, ch. 758, § 1, [1873] N.Y. Laws 1127 and no limit imposed until 1884 when the N.Y. CONST. art. VIII (1846) was amended by adding section eleven which limited the indebtedness of any city of over 100,000 to not exceeding ten percent of the assessed value of real estate subject to taxation and restored the two percent limitation which was continued in the N.Y. CONST. art. 8, § 10(b) (1938) as to any city of 125,000 or more, until amended in 1964, by N.Y. CONST. art. 8, § 10(f), raising the limitation to two and one-half percent for the City of New York.

38. 1873 Charter § 112 which provided in pertinent part: "The mayor, comptroller, president of the board of aldermen, and the president of the department of taxes and assessments, shall constitute a board of estimate and apportionment. . . ."

which provided the procedure for the adoption of a City budget.³⁹ Henceforth, appropriations were to be determined as follows: the gross amount of the proposed budget appropriations would be fixed by unanimous vote of the Board of Estimate and Apportionment, and the detailed amounts fixed by majority vote.⁴⁰ The proposed budget appropriations, together with explanations in detail for each estimate, would then be submitted to the Common Council,⁴¹ whose only control over the proposals would be the power to make an objection.⁴² And at that, the objections were only advisory and not at all binding upon the Board.⁴³ The Board was required merely to publish in the *City Record*⁴⁴ its reasons for rejecting such objections.⁴⁵ Having heard and dispatched the Council's objections, the Board was then free to approve and adopt the final budget in gross by unanimous vote.⁴⁶

39. *Id.* After establishing the Board of Estimate and Apportionment, this Act provided that:

[Such board] shall, annually . . . make a provisional estimate of the amounts required to pay the expenses of conducting the public business of the city and county of New York, in each department and branch thereof, for the then next ensuing financial year.

Id.

This Act, after providing for certain mandatory charges against the budget, and interest and principal due on municipal bonds for the next year, and the State tax for the next year further provided:

Such provisional estimate shall be prepared in such detail as to the aggregate sum allowed to each department and bureau as the said board of apportionment shall deem advisable. For the purpose of making said provisional estimate, the heads of departments shall, at least thirty days before the said provisional estimate is required to be made as herein provided, send to the board of apportionment an estimate in writing, herein called a departmental estimate, of the amount of expenditure, specifying in detail the objects thereof, required in their respective departments, including a statement of each of the salaries of their officers, clerks, employees and subordinates. The same statement as to salaries and expenditure shall be made by all other officers, persons and boards having power to fix or authorize them.

Id.

40. *Id.*

41. Section two of this Act provided for a bicameral City Legislature consisting of the "Board of Aldermen" and the "Assistant Aldermen." The latter body was abolished on January 1, 1875. *Id.* § 2. The surviving "house" continued with the legal name of "Common Council" until it was changed to the "Board of Aldermen" in the New York Consolidation Act of 1882, ch. 410, § 29, [1882] N.Y. Laws 7. *But see* note 48 *infra*.

42. 1873 Charter § 112.

43. *Id.*

44. The *City Record*, printed regularly since 1872, is the official newspaper of New York City. N.Y.C. GUIDE TO MUNICIPAL GOVERNMENT, *supra* note 6, at 145.

45. 1873 Charter § 112.

46. *Id.* The Law of June 14, 1873, ch. 779, § 2, [1873] N.Y. Laws 1186 (repealed 1881)

Also, the State Legislature, in 1873, omitted the "two per cent" limit,⁴⁷ and the Board of Supervisors was now fully empowered (more precisely, required) to establish the tax levy rate necessary to finance the budget.⁴⁸ This provision was the cause of a challenge to the (State) constitutionality of the Act in *Townsend v. Mayor*,⁴⁹ a taxpayer suit.

The court, in an indefensible decision,⁵⁰ found the statute consti-

provided for a no-financial-ceiling revision by the Board of Estimate and Apportionment of the New York City budgets for 1871 and 1872 which were authorized by Law of April 19, 1871, ch. 583, § 2, [1871] N.Y. Laws 1269 (repealed 1873), for funds spent prior to July 1, 1873. This provision was enforced in *People ex rel. McGowan v. Havemeyer*, 1 Hun 61 (N.Y. Sup. Ct. 1874) thereby compelling budget finality for the New York City budgets for 1871 and 1872 as of the commencement of July 1, 1873.

47. See note 37 *supra*.

48. Section 112 of the 1873 Charter provided in pertinent part:

The aggregate amount so estimated shall be certified by the comptroller to the supervisors of the county of New York; and it shall be the duty of said supervisors and they are hereby empowered and directed annually to cause to be raised, according to law, and collected by tax upon the estates, real and personal, subject to taxation within the city and county of New York, the said amounts so estimated and certified as aforesaid.

See also Law of June 14, 1873, ch. 779, § 2, [1873] N.Y. Laws 1186 (repealed 1881). In 1874, New York County was merged into the City of New York and the powers and duties of the Board of Supervisors were conferred upon the Board of Aldermen. Law of April 30, 1874, ch. 304, §§ 1, 3, [1874] N.Y. Laws 360.

49. 16 Hun 362 (N.Y. Sup. Ct. 1878), *aff'd*, 77 N.Y. 542 (1879).

50. In *Townsend*, the supreme court at general term adopted the poorly-reasoned opinion of special term which held the statute not violative of the State Constitution. The issue was, the court said, "whether the Legislature had the power to create a board of estimate and apportionment, for the purpose of ascertaining the amounts which should be raised by the board of supervisors for the expenses of the city and county of New York." 16 Hun at 363. The court relied on *Town of Guilford v. Board of Supervisors*, 13 N.Y. 143, 145-46 (1855) in deeming taxation a legislative power, and concluded that "[t]he Legislature, therefore, had the power to provide that the board of estimate and apportionment shall determine the amount which should be raised for municipal purposes" 16 Hun at 364.

To further make authoritative its reliance upon *Guilford*, the court detailed the facts presented in that case and concluded that "[t]he analogy . . . seems to be entirely perfect" 16 Hun at 367. Nothing could have been more grossly inaccurate.

In *Guilford*, the former commissioners of highways had exhausted all possible legal remedies in an attempt to obtain reimbursement from the Town of Guilford for services performed by them on its behalf. Having no legal remedy, they managed to procure an act by the Legislature which would provide equitable relief. The act required the court to appoint three commissioners to determine the amount due to the petitioners, and compelled the Board of Supervisors to levy the amount so determined and pay it over to the petitioners. The town brought suit to have the act declared unconstitutional. The court found, *inter alia*, that the

tutional: it held the Legislature could, in effect, made a de facto delegation of its taxing power—heretofore an exclusively legislative function—to a local budget-managing executive group (the Board of Estimate and Apportionment).⁵¹ Thus, the executive oligarchy was established as a legitimate institution, sui generis to municipal jurisprudence;⁵² the executive budget-managing group is the only

transfer to the court-appointed commissioners of, in effect, a tax-determining (and therefore legislative) power was not violative of the State Constitution. 13 N.Y. at 148-49. The court in *Townsend* reasoned that the court-appointed commissioners in *Guilford* were analogous to the Board of Estimate and Apportionment and, on that basis, the Board's powers were constitutional. 16 Hun at 367-68. This reasoning is preposterous. *Guilford* dealt with an act which was in the nature of a private bill for equitable relief, being sui generis and thereby outside the general law. Furthermore, *People ex rel. Hopkins v. Board of Supervisors*, 52 N.Y. 556 (1873), which should have been controlling, was erroneously distinguished in *Townsend* as inapposite. 16 Hun at 368.

The *Hopkins* court held that a statute (Law of May 15, 1872, ch. 734, § 1, [1872] N.Y. Laws 1780) imposing a "[t]ax of three and a half mills per dollar, or so much thereof as may be necessary" was sufficiently vague so as to leave to the discretion of administrative officers of the State the determination of exactly how much should be taxed, thereby delegating de facto taxing authority, a legislative function, to members of the executive department, another Department of State. 52 N.Y. at 567. The court held that this delegation was unconstitutional. *Id.* at 570.

It was stated in *Townsend* that *Hopkins* did "not decide that the Legislature cannot delegate the power to levy a local tax for a local purpose." 16 Hun at 368. On that basis, the *Townsend* Court distinguished *Hopkins*. *Id.* While this statement may be correct, it is nonetheless unresponsive, in that the legal issue is not whether the Legislature can delegate a legislative power to a local government, but whether the Legislature can delegate a legislative power to an executive group—regardless of whether the group is state or local. The court, in *Townsend*, finessed the problem of the de facto delegation of legislative power to an executive group, a delegation clearly violative of article eight of the State Constitution as determined in *Hopkins*. See 52 N.Y. at 567-68.

It should be noted that *Guilford* was overruled in 1875 by the adoption of two amendments to the N.Y. CONST. art. 8 (1846). One amendment provided "[T]he Legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor." *Id.* § 28. The other amendment provided: "[n]o county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual association, or corporation . . ." *Id.* § 10; see *Mahon v. Board of Educ.*, 171 N.Y. 263, 266, 63 N.E. 1107, 1109 (1902).

51. 16 Hun at 364. Note that Charter Amendatory Act of 1901 § 383 provides that the appointee of a borough president member of the Board of Estimate and Apportionment may properly sit as a Board member in his appointing senior's absence. *Richmond Ry. v. Gilchrist*, 225 App. Div. 371, 233 N.Y.S. 184 (1st Dep't 1929).

52. One commentator has observed that "[i]n no other city, except the few which have followed the example of the metropolis, does a small board of executive officers have the final appropriating power." N.Y.C. FINANCES, *supra* note 35, at 278.

Charles A. Beard noted that a striking feature of budgeting in New York City was:

the transference of budget making in the first instance from the nominal authority,

governmental institution legitimately empowered to perform functions relating to its purpose (*i.e.*, taxing) which are normally performed by another branch of government: in a phrase, the budget-managing group became legitimized in its existence uniquely outside the system of checks and balances.⁵³

Budgeting proceeded generally in the fashion established in 1873 until the adoption of The Greater New York City Charter, in 1897, when certain notable changes in budgeting technique were made. Now, the Board of Estimate and Apportionment⁵⁴ would be empowered by § 237 of the Charter to "transfer any appropriation" within the same fiscal year which a particular agency head found to be in excess of the agency's needs for that year "to such other purposes or objects for which the appropriations in such year are insufficient, or such as may require the same."⁵⁵ The procedure for such a transfer, known as a budget modification,⁵⁶ required the particular agency head to make a modification request to the Board of Estimate and Apportionment.⁵⁷ The Board would refer the request to an examining bureau: generally, if the request involved appropriations for personnel (personal service appropriations) the referral would be to the Bureau of Standards; if the request involved appropria-

the board of estimate and apportionment, to a committee of the board, and from this "main committee" to a subcommittee, composed not of members of the board, but of their personal representatives, employes of the city, more or less expert in the infinite details of the budget. We may say that the greater part of the New York City budget is determined by necessity and that the details of that part are settled by adjustments made by the staff agencies of the board of estimate and apportionment, the subcommittee of that board, and the heads of departments. The little that is left for adjustment after the subcommittee has completed its work is determined by the main committee of the board. The board itself, which theoretically makes the budget, as a formal organization merely delivers eulogies over a *fait accompli*.

Beard, *Prefatory Note* to A. LAHEE, *THE NEW YORK CITY BUDGET* vi (1917). Even the vote on the budget may be by a member-appointed deputy. See *Richmond Ry. v. Gilchrist*, 225 App. Div. 371, 233 N.Y.S. 184 (1st Dep't 1929). Such delegation is presently authorized by 1963 Charter §§ 7, 23.c., 82.1., 94.b.

53. "[T]he real influence of the council in the appropriations has been infinitesimal." N.Y.C. FINANCES, *supra* note 35, at 255.

54. In 1893 the "counsel to the corporation" was added to the Board of Estimate and Apportionment. Law of March 9, 1893, ch. 106, § 1, [1893] N.Y. Laws 207. The position was continued as a member under The Greater New York Charter § 226. For the remaining four members of the Board, see note 38 *supra*.

55. The Greater New York Charter § 237.

56. The concept of "budget modification" is crucial to budget administration. See notes 149-64 *infra* and accompanying text.

57. 1915 BUDGET PROCEDURE, *supra* note 1, at 13.

tions for nonpersonal items (other than personal services) the referral then would be to the Bureau of Contract Supervision.⁵⁸ Guided by the examining bureau's report, the Board would approve or deny the modification.⁵⁹

The Charter also firmly established the line-by-line schedule, albeit only as to personal services, as a requirement in budget-making.⁶⁰ This was thought to be a major advance in budget control.⁶¹ However, as later discussion will show, the value of the line-by-line device is that of audit check control, rather than the more desirable budgetary "consequences" control.⁶²

The Charter also gave the Mayor the power to veto, on a per item basis,⁶³ any reduction made by the new "Municipal Assembly,"⁶⁴ whose only control over the budget was the power to reduce some appropriations.⁶⁵ The veto was in practice irreversible: the Muni-

58. *Id.*

59. *Id.* See also Beard, *supra* note 52, at v, which notes that three organs of the Board of Estimate and Apportionment, the Bureau of Contract Supervision, the Bureau of Personal Service, and the Committee on Education were "really budget-making bureaus." As such they were precursors of the City's Bureau of the Budget.

60. Section 226 of The Greater New York Charter provided:

In order to enable said board [Board of Estimate and Apportionment] to make such budget, the heads of departments . . . shall . . . send to the board of estimate and apportionment an estimate in writing . . . specifying in detail the objects thereof, required in their respective departments

61. Beard, *supra* note 52, at iii, observed:

It is no disparagement of other American cities to say that New York has taken the leadership in budget reform during the last ten years. Perhaps most students of municipal government would concede without question the proposition that no other city has come so near to the ideal both as regards the form of the budget and the process of making it. . . .

62. It has been observed:

[T]he form of the New York City budget classification by object shows that the nature of central control is primarily of an accounting or auditing character. . . . Inasmuch as such "control" could not be based upon complete information, however, it would not be an intelligent control. . . . The New York City budget is primarily—and so long as the functional grouping remains subordinate to the object classification will remain—an instrument for voucher control.

LAHEE, *supra* note 52, at 92-93.

63. The Greater New York Charter § 226.

64. Section seventeen of The Greater New York Charter provided:

The legislative power . . . shall be vested in . . . the council and board of aldermen to be together styled "The Municipal Assembly of The City of New York."

65. Section 226 of The Greater New York Charter provided:

pal Assembly needed a five-sixths vote to override the veto.⁶⁶

This Charter, though, still did not supply the kind of audit check control over the budget that was wanted. So, in 1901, the Charter was amended⁶⁷ to enable the Board of Estimate and Apportionment⁶⁸ to set the "terms and conditions"⁶⁹ under which the City's expense budget was to be executed. The effect of this provision was to make the Board the budget "overseer," and thereby empowered to monitor the administration of the expense budget. From 1901 to 1924, included among the detailed "terms and conditions" governing the execution of each year's budget were provisions detailing the conditions upon which the Board would make modifications⁷⁰ based, of course, upon the reports of the examining bureaus mentioned above.⁷¹

As a consequence of the enabling provision of the 1901 Amendment, the Board immediately began promulgating administrative fiat (*i.e.*, "terms and conditions") which seems to have been expanded to the fullest extent by 1946.⁷² This rule-making power gave

The municipal assembly, by a majority vote by all the members elected thereto [not a majority of those present and voting], may reduce the said several amounts fixed by the board of estimate and apportionment, except [mandatory appropriations] . . . but the municipal assembly may not increase such amounts nor insert any new items.

66. *Id.*

67. Charter Amendatory Act of 1901. This Act was the product of a State Charter Revision Commission appointed in 1900 by Governor Theodore Roosevelt pursuant to Law of April 16, 1900, ch. 465, [1900] N.Y. Laws 1140.

68. The Board of Estimate and Apportionment, under section 226 of the Charter Amendatory Act of 1901 consisted of the Mayor, Comptroller, President of the Board of Aldermen, and Presidents of the Boroughs of Manhattan, Brooklyn, Bronx, Queens, and Richmond. For earlier compositions of the various boards of estimate, see notes 36, 38 *supra*.

69. Section 226 of the Charter Amendatory Act of 1901 provided:

Such budget shall be prepared in such detail as to the titles of appropriations, the terms and conditions, not inconsistent with law, under which the same may be expended, the aggregate sum and the items thereof allowed to each department, bureau, office, board or commission, as the said board of estimate and apportionment shall deem advisable.

70. See text accompanying note 58 *supra*. The "terms and conditions" of the budget of 1924 provided for: (1) no modification of salary and wage codes except for appropriations of departments involved in the establishment of a central motor repair shop; (2) the filling of vacancies in municipal employment; (3) the rates at which vacancies in municipal employment were to be filled; (4) payroll administration; and (5) audit and inventory of OTPS items. [1924] BUDGET OF THE CITY OF NEW YORK.

71. See text accompanying note 58 *supra*.

72. See *Terms and Conditions* [1946-47] BUDGET OF THE CITY OF NEW YORK. The "terms and conditions" of the 1963-64 budget provided:

The units of appropriation as finally adopted for the fiscal year July 1, 1963, to June 30, 1964, shall be administered under the appropriate provisions of the New York City

the Board the opportunity to exercise much control over the administration of the budget. As a result, various court actions were brought to determine whether the Board was exceeding this statutory authority and invading the province of the Legislature.⁷³

The 1901 Charter Amendment gave the Board of Estimate almost complete de facto power over the budget⁷⁴ in order to achieve the kind of audit check control that the State Legislature desired. This worked an even greater exclusion of the City legislature from the business of the budget. For example, the Board-votes themselves were heavily those of executive officials.⁷⁵ In addition, after the Board of Estimate and Apportionment had considered the budget, it was submitted to the now "Board of Aldermen,"⁷⁶ whose power was only to reduce some items (*e.g.*, allocations "fixed by law" could not be reduced by the Board of Aldermen).⁷⁷ The influence of the

Charter and the Administrative Code.

Terms and Conditions, [1963-64] BUDGET OF THE CITY OF NEW YORK. In 1937, the Administrative Code of the City of New York was enacted. Law of December 30, 1937, ch. 929, [1939] N.Y. Laws 1 (Extraordinary Session). The Administrative Code contains none of the "terms and conditions," evidently because the Board of Estimate did not wish to inhibit its power under section 123 of the 1938 Charter to set the "terms and conditions" "under which the budget . . . shall be administered."

The present equivalent of the "terms and conditions" is now contained in mayoral executive orders. *See, e.g.*, New York, N.Y. Exec. Order No. 20 (Aug. 1, 1974).

73. The proper context of these "terms and conditions" has been delineated in the following cases: *Rushford v. LaGuardia*, 280 N.Y. 217, 20 N.E.2d 547 (1939) (the Board of Estimate could, in the "terms and conditions," require a vacancy filling certificate from the Director of the Budget and the Board could also delegate to the Director the power to fill a position at a salary below that specified on the budget line involved); *People ex rel. Plancon v. Prendergast*, 219 N.Y. 252, 114 N.E. 433 (1916) ("terms and conditions" may require the obtaining of a filling certificate from the Board of Estimate and Apportionment before a City position may be filled); *Natilson v. Hodson*, 264 App. Div. 384, 35 N.Y.S.2d 537 (1st Dep't 1942), *aff'd*, 289 N.Y. 842, 47 N.E.2d 442 (1943) ("terms and conditions" may not properly be used to forbid employees from moonlighting).

74. The Charter Amendatory Act of 1901, was amended by Law of April 25, 1917, ch. 258, § 1, [1917] N.Y. Laws 939 to provide that the Board of Estimate and Apportionment shall "prepare for public discussion a printed tentative budget" and ten days later a "budget proposed for adoption," which "may not thereafter be increased in any item or contain any new item. . . ."

75. Although all eight members of the Board of Estimate and Apportionment were subject to general election—three city-wide (the Mayor, President of the Board of Aldermen, and Comptroller) and five to borough-wide elections (the President of each Borough)—only one, the President of the Board of Aldermen, could, with any political accuracy, be described as a legislator. Charter Amendatory Act of 1901, § 18 (President of the Board), § 94 (Mayor), § 226 (membership), § 382 (Borough Presidents). The voting was weighted. *Id.* § 26.

76. Charter Amendatory Act of 1901 § 17.

77. *Id.* § 226.

Board of Aldermen continued to be limited in that the Mayor could veto a Board of Aldermen reduction and the Board of Aldermen needed a three-fourths vote to override the veto.⁷⁸ In fact, although several attempts were made, the Board never once mustered the necessary three-fourths vote.⁷⁹

B. Early Gimmickry—Unofficial Budget Modifications

From the beginning of formal budgeting, its management has become increasingly the province of a few experts.⁸⁰ This has been the natural consequence of several interrelated factors: the inherently technical nature of large-organization bookkeeping;⁸¹ the State's reasonable fear that fraud and mismanagement might occur without extensive audit check systems, with significant control over those systems vested in a few officials who could be held directly accountable therefor; and the tendency of those in control to seek more control.

78. *Id.*

79. HISTORY OF THE N.Y.C. LEGISLATURE, *supra* note 16, at 19. The role of the Board of Aldermen in budget-making was pitifully small. *Id.* at 21. An alderman who had objected to the Board's role stated:

The participation of the Board of Aldermen of this city in the making of the annual budget is very much in the nature of a farce, and not even an amusing farce. . . . It would be impossible to find anywhere else in the world a representative body nominally vested with legislative authority on behalf of more than five millions of people, which, in the first place has so little power over the public purse strings, or which, in the second place, shows so little disposition to use the limited power that it has. . . . Even within the narrow limits prescribed by the charter, the Board of Aldermen could exercise a certain beneficial influence on the city government, if its members were less inclined to save trouble for themselves by leaving all responsibility to the men higher up.

Id., quoting IV PROCEEDINGS OF BOARD OF ALDERMEN 641-42 (1918).

80. It has been observed:

[The budget director] can and does make himself comparatively inaccessible to his critics and holds himself aloof from those who court him. In this practice, he is aided considerably by the close-knit character of his small staff, hand-picked by transfer from other agencies or hand-raised within the Bureau [of the Budget] by advancement from clerical ranks.

W. SAYRE & H. KAUFMAN, GOVERNING NEW YORK CITY 369 (1960) [hereinafter cited as GOVERNING N.Y.C.].

It is interesting to note that the present Mayor of the City of New York, Abraham D. Beame, was Assistant Budget Director from 1946-52, Budget Director from 1952-60, Comptroller of the City from 1961-65, and 1969-73. CITIZENS UNION, VOTERS DIRECTORY 13 (1973).

81. For an amusing discussion in the federal context, see A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS 8-9 (1964) [hereinafter cited as POLITICS OF THE BUDGETARY PROCESS].

This last point is demonstrated by the continuing attempts of the budget managers⁸² to control the salaries of all officials who appear

82. In this context "budget managers" refers to those persons who were empowered to set salaries. This power was regulated by the following statutes from 1861 to 1963.

(1) Law of April 17, 1861, ch. 293, § 5 [1861] N.Y. Laws 671 provided:

No expenditure for salaries of officers in . . . [New York] city shall be made exceeding the total amount herein provided for the same, nor shall the common council of said city, during the ensuing year, increase or diminish the number or compensation of the several offices of the city government as now established by law, ordinance or resolution. . . .

(2) Law of April 25, 1867, ch. 806, § 2 [1867] N.Y. Laws 1996-97 provided:

[A]nd the board of supervisors of the county of New York are hereby prohibited from creating any new office or department or increasing the salaries of those now in office or their successors, except as provided by acts passed by the legislature of eighteen hundred and sixty-seven.

(3) 1870 Charter, § 111 provided:

[T]he salaries of all officers provided for by this act . . . shall be prescribed by ordinance or resolution to be passed by the common council. . . .

(4) Law of April 19, 1871, ch. 583, § 3 [1871] N.Y. Laws 1270 empowered the Board of Apportionment to "regulate all salaries of officers and employees of the city and county government."

(5) 1873 Charter §§ 97, 112 empowered the Board of Estimate and Apportionment to set salaries "of all officers whose offices may be [lawfully] created by the common council."

(6) The Consolidation Act of 1882, ch. 410, §§ 97, 189, 202 [1882] N.Y. Laws 26, continued this arrangement.

(7) The Greater New York City Charter § 56 provided:

The municipal assembly shall have power, upon the recommendation of the board of estimate and apportionment, to fix the salary of any [city or county] officer or person whose compensation is paid out of the city treasury. . . .

See also *id.* §§ 233, 1571, 1583.

(8) Law of April 6, 1900, ch. 298, § 3 [1900] N.Y. Laws 638 provided that the wages of municipal day laborers "shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work . . . is performed. . . ." This method of setting wages was upheld against constitutional attack for indefiniteness in *Campbell v. City of New York*, 244 N.Y. 317, 155 N.E. 628 (1927). This provision is now set forth in N.Y. LABOR LAW §§ 220 (3), (5)(e) (McKINNEY 1965).

(9) Charter Amendatory Act of 1901 § 56 provided:

It shall be the duty of the board of aldermen upon the recommendation of the board of estimate and apportionment, to fix the salary of every officer or person whose compensation is paid out of the city treasury other than day laborers, and teachers. . . .

For the same effect as to county officers, see *id.* § 1583. Section 1091 empowered the Board of Education to fix the salaries "of all members of the supervisory and the teaching staff." Section 1089 empowered the Board of Education to fix the salaries of examiners.

(10) 1938 Charter § 67 provided:

The power is vested in, and it shall be the duty of the board of estimate, except as otherwise provided in this charter or by statute, to fix the salary of every officer or person whose compensation is paid from the city treasury, other than day laborers.

(11) 1963 Charter § 813 provides:

in the City's budget—whether state or local officials. As a result of these attempts, various cases were brought to determine the extent of the budget managers' powers over salaries. These cases held: that the salaries of State officials were mandatory, therefore the City (*i.e.*, budget managers) could exercise no control;⁸³ that the salaries

The personnel director [of the City of New York] shall have the following powers and duties. . . :

i. To develop and submit to the mayor standard rules governing . . . career, salary and wage plans providing for the creation, abolition and modification of positions and grades and fixing salaries of persons paid from the city treasury, subject to the provisions of this charter, the civil service law and other applicable statutes. . . .

The submission to the Mayor is, in reality, a submission to the Bureau of the Budget, which is the dominant partner in the salary fixing process.

Inclusion of a line in the budget at a given salary does not fix the salary at that rate (the "terms and conditions" of the budget permit the Budget Director to set a lower salary for non-mandatory salaries in the vacancy-filling or appointment certificate). *See* *McGovern v. Patterson*, 273 App. Div. 35, 75 N.Y.S.2d 492 (1st Dep't 1947), *aff'd*, 298 N.Y. 530, 80 N.E.2d 667 (1948); *Lyons v. City of New York*, 82 App. Div. 306, 81 N.Y.S. 1079 (1st Dept), *aff'd*, 176 N.Y. 609, 68 N.E. 1119 (1903); cases cited in note 73 *supra*.

Obviously, when a specific statute provides for fixing the salary for a given office or job, that statute governs. *See, e.g.*, *Tomlinson v. City of New York*, 50 Misc. 2d 977, 271 N.Y.S.2d 1019 (Civ. Ct. 1966).

83. *See, e.g.*, *Cox v. Mayor of New York*, 103 N.Y. 519, 9 N.E. 48 (1886); *Taylor v. Mayor of New York*, 67 N.Y. 87 (1876); *Dixon v. City of New York*, 31 Misc. 102, 63 N.Y.S. 794 (Sup. Ct. 1900); *Landon v. Mayor of New York*, 7 Jones & Spencer 467 (N.Y. Super. Ct. 1875); *Quinn v. Mayor of City of New York*, 63 Barb. 595 (N.Y. Sup. Ct. 1872), *aff'd*, 53 N.Y. 627 (1873).

New York City has continued to try to exercise discretion over nondiscretionary (State mandated) appropriations. *See, e.g.*, *Wingate v. McGoldrick*, 279 N.Y. 246, 18 N.E.2d 143 (1938) (mandatory appropriations for employees of the Surrogate's Courts of Kings and Queens counties); *In re McAneny*, 232 N.Y. 377, 134 N.E. 187 (1922) (mandatory City appropriation for the transit commission); *O'Loughlin v. Prendergast*, 219 N.Y. 377, 114 N.E. 860 (1916); *Wilmerding v. O'Dwyer*, 272 App. Div. 35, 69 N.Y.S.2d 90 (1st Dep't), *rev'd*, 297 N.Y. 664, 76 N.E.2d 325 (1947) (mandatory appropriation to finance subway deficit caused by wage increase for subway employees even if appropriation is financed by borrowing); *The Brooklyn Citizen v. City of New York*, 258 App. Div. 657, 17 N.Y.S.2d 765 (2d Dep't 1940) (mandatory appropriation for payment of legally required newspaper notices); *People ex rel. Eidt v. Hylan*, 199 App. Div. 965, 191 N.Y.S. 945 (1st Dep't), *aff'd*, 232 N.Y. 602, 134 N.E. 589 (1922) (mandatory pension system appropriations by City); *People ex rel. Cropsey v. Hylan*, 199 App. Div. 218, 191 N.Y.S. 195 (1st Dep't 1921), *aff'd*, 232 N.Y. 601, 134 N.E. 588 (1922) (appropriation for officers in the Supreme Court Kings County); *Henderson v. LaGuardia*, 182 Misc. 1071, 48 N.Y.S.2d 918 (Sup. Ct.), *aff'd*, 268 App. Div. 892, 51 N.Y.S.2d 87 (1st Dep't 1944), *aff'd*, 294 N.Y. 728, 61 N.E.2d 456 (1945) (mandatory appropriation for salaries of employees of Bronx County Surrogate's Court); *Shevlin v. LaGuardia*, 166 Misc. 473, 2 N.Y.S.2d 597 (Sup. Ct.), *modified*, 254 App. Div. 922, 5 N.Y.S.2d 556 (3d Dep't), *aff'd*, 279 N.Y. 649, 18 N.E.2d 43 (1938) (mandatory appropriation for court attendants in the Supreme Court and Appellate Division, First Department); *Bronx Parkway Comm. v. Hylan*, 119 Misc.

of offices created by the City were discretionary, that is, the City could adjust such salaries as it saw fit;⁸⁴ and that the State Legislature may convert a county (*i.e.*, "State") office to a City office, in which case the salary by inference was then controllable by the City.⁸⁵

Other attempts to increase control over expenditures resulted in the use of an assortment of gimmicks which rendered actual budget control illusory to some extent.

For example, in 1860, the carryover of certain appropriations to succeeding fiscal years was permitted by the State Legislature,⁸⁶ with the Common Council given the discretionary power to transfer, within the current budget, excess appropriations to areas of defi-

785, 198 N.Y.S. 271 (Sup. Ct. 1922), *aff'd*, 206 App. Div. 688, 200 N.Y.S. 915 (1st Dep't), *aff'd*, 236 N.Y. 593, 142 N.E. 297 (1923) (mandatory city appropriation for the Bronx parkway commission). *See also* Tobin v. LaGuardia, 276 N.Y. 34, 11 N.E.2d 340 (1937), *enforcing* Law of May 2, 1893, ch. 518, [1893] N.Y. Laws 1113 (the Board of Estimate and Apportionment must appropriate annually a sum not exceeding \$8,000 to the trustees of the Seventh regiment armory building); *People ex rel. Kehoe v. Leo*, 233 N.Y. 173, 135 N.E. 234 (1922) (the World War I "G.I. Bill" prevented abolition of jobs simply by omission of a particular job's budget line from the budget schedules); *Poucher v. LaGuardia*, 240 App. Div. 271, 269 N.Y.S. 582 (1st Dep't 1934) (a state mandated appropriation for the teachers' retirement system which was to be "sufficient for its obligations" made the amount to be appropriated by the Board of Estimate and Apportionment discretionary). *But see* *People ex rel. Daly v. York*, 66 App. Div. 453, 73 N.Y.S. 331 (1st Dep't 1901), *aff'd*, 171 N.Y. 627, 63 N.E. 1120 (1902) (mandamus will not lie for an omitted mandatory appropriation).

84. *McCarthy v. LaGuardia*, 172 Misc. 260, 14 N.Y.S.2d 943 (Sup. Ct. 1939), *aff'd* 259 App. Div. 710, 19 N.Y.S.2d 148 (1st Dep't 1940), *aff'd*, 283 N.Y. 701, 28 N.E.2d 715 (1940); *Brinck v. Mayor of New York*, 16 Hun 340 (N.Y. Sup. Ct. 1878) (involving the action of the Board of Estimate and Apportionment in striking from the budget the entire sum requested by the metropolitan police district's state police courts for janitors' salaries); *Dolan v. Mayor of New York*, 6 Hun 506 (N.Y. Sup. Ct.), *aff'd*, 67 N.Y. 609 (1876) (involving the clerk of the grand juries of the Courts of Oyer and Terminer and General Sessions in New York County); *Broschart v. City of New York*, 166 Misc. 515, 3 N.Y.S.2d 18 (City Ct.), *aff'd*, 255 App. Div. 776, 7 N.Y.S.2d 646 (1st Dep't 1938) (involving officers in the office of the sheriff of Bronx County); *Reilly v. Mayor of New York*, 10 N.Y.S. 847 (Sup. Ct. 1890) (involving a subpoena server in the District Attorney's office).

85. *People ex rel. Taylor v. Dunlap*, 66 N.Y. 162 (1876) (involving the office of commissioner of juries). *See also* *Haggerty v. City of New York*, 267 N.Y. 252, 196 N.E. 45 (1935). *Abrams v. LaGuardia*, 174 Misc. 421, 21 N.Y.S.2d 891, *aff'd*, 262 App. Div. 724, 28 N.Y.S.2d 711 (1st Dep't 1941), *aff'd*, 287 N.Y. 717, 39 N.E.2d 933 (1942); *Gresser v. O'Brien*, 146 Misc. 909, 263 N.Y.S. 68 (Sup. Ct. 1933), *aff'd*, 263 N.Y. 622, 189 N.E. 727 (1934). Non-mandatory appropriations are discretionary, and the courts may not order that such an appropriation even be requested. *Modugno v. Baumgartner*, 11 Misc. 2d 1022, 173 N.Y.S.2d 729 (Sup. Ct. 1958) (appropriation for a mosquito control program in the Department of Health).

86. Law of April 17, 1860, ch. 509, § 4, [1860] N.Y. Laws 1017 provided for carrying forward appropriations for street cleaning, construction, and maintenance for a period of up to five years.

ciency.⁸⁷ "Out of this grew the abuse of over-appropriating for proper purposes, and afterward transferring to the more questionable objects",⁸⁸ that is, the popular appropriations would be over-budgeted, and then brought forward to the succeeding year, when they would be transferred to other, less popular, appropriations. The State Legislature tried to eliminate this gimmick by forbidding such transfers, in 1864.⁸⁹ But, the problem arose again with the Law of May 1, 1874,⁹⁰ which authorized the transfer of appropriations to "such other purposes or objects for which the appropriations are insufficient, or such as may require the same."⁹¹ Hoping to take outrageous advantage of this section, the Board of Estimate and Apportionment adopted by majority vote a resolution which attempted to transfer past unexpended balances forward across several years to finance an appropriation which was not even budgeted.⁹² A taxpayer brought suit to prevent this, and the court, in *Bird v. Mayor*,⁹³ held that the Board could not carry past unexpended balances forward to fund a defeated appropriation in the current budget except from the year immediately prior to the current budget year, and that, by unanimous vote only.⁹⁴ This decision eliminated the possibility of gross abuse but still allowed the same kind of gimmick in use prior to the 1864 statute.⁹⁵ The use of

87. *Id.* See note 150 *infra*.

88. 1915 BUDGET PROCEDURE, *supra* note 1, at 4.

89. Law of April 25; 1864, ch. 405, § 2, [1864] N.Y. Laws 945 provided:

And it shall not be lawful for any amount authorized by this act, or of any amount that may hereafter be authorized to be raised by tax for any specific object or purpose for the use of the city, or of the county of New York, to be transferred and appropriated to any other object or purpose than that contemplated and authorized by law.

90. Ch. 308, [1874] N.Y. Laws 362, *re-enacted in* Consolidation Act of 1882, ch. 410, § 207, [1882] N.Y. Laws 56. Although not considered as such, The Consolidation Act of 1882 "was in a very real sense a charter. . . . In point of conclusiveness . . . it was more truly a charter than those which had gone before or those which were to follow. Neither the Greater New York Charter of 1897 nor the Amendatory Act of 1901 repealed it." A. MACMAHON, THE STATUTORY SOURCES OF NEW YORK CITY GOVERNMENT 9-10 (1923) (footnote omitted).

91. Law of May 1, 1874, ch. 308, § 2, [1874] N.Y. Laws 363 authorized carrying forward any "surplus or balance remaining unexpended of any appropriation then existing at the end of the current fiscal year. . . ."

92. *Bird v. Mayor of New York*, 33 Hun 396, 397-98 (N.Y. Sup. Ct. 1884). This resulted in a transfer to the general fund in 1884 of \$2,678,002. N.Y.C. FINANCES, *supra* note 35, at 269.

93. 33 Hun 396 (N.Y. Sup. Ct. 1884).

94. *Id.* at 398.

95. See note 89 *supra*.

this gimmick certainly was not lessened by the decision in *People ex rel. Andrews v. Fitch*⁹⁶ which held that a recent statute exempted the Public Works Department and the Police Department⁹⁷ from the restrictions set forth in *Bird v. Mayor*.⁹⁸

Those responsible for budget management were not the only officials who wanted control over expenditures. Executives with authority to hire and/or spend would invariably try to increase such authority.

Agency heads, for example, increased their expenditure power by manipulation of the judgment fund.⁹⁹ This was done by making contracts (albeit not precisely according to statute)¹⁰⁰ for items for which there were no appropriations, or at least insufficient appropriations; typically, the City would be sued on the contract and default. Then, the judgment would be paid out of the judgment fund which was empowered to borrow in order to pay judgment creditors.¹⁰¹

96. 9 App. Div. 439, 41 N.Y.S. 349 (1st Dep't 1896), *aff'd* 151 N.Y. 673, 46 N.E. 1150 (1897).

97. Law of March 23, 1893, ch. 186, § 1, [1893] N.Y. Laws 314, *amending* Consolidation Act of 1882, ch. 410, § 207, [1882] N.Y. Laws 56 which provided: "Nothing in this act contained shall in any wise apply to the department of public works or the police department of the city of New York."

98. 33 Hun 396 (N.Y. Sup. Ct. 1884).

99. 1915 BUDGET PROCEDURE, *supra* note 1, at 4.

100. See notes 102, 103 *infra*.

101. It was not possible to work the judgment fund gimmick completely within the bounds of the law. It can reasonably be inferred, for example, by reading section seven of the 1849 Charter (no money paid without an appropriation) *in pari materia* with section 23 thereof (contract-letting to conform to ordinances of the Common Council) that the Common Council was permitted to approve only contracts for which there existed sufficient appropriations. Sections eight, twelve, and fifteen of the 1853 Charter provided further details concerning the contract procedure. These charters were reinforced by the Ordinances of the Mayor, Aldermen & Commonalty of the City of New York, ch. VIII, § 35 (Valentine ed. 1859). Therefore, any contract for which there was not a sufficient appropriation (as in the usual judgment fund gimmick) would be void, the *ultra vires* act of the Common Council being analyzed as a violation of the statutory requirements for contracting. See notes 102, 103 *infra*.

The New York City Budget Appropriation Act for 1859, ch. 489, § 4, [1859] N.Y. Laws 1123 provided for expenditure of funds only in accordance with appropriations, and then, in section five, provided that whenever the Comptroller shall have "reason to believe that any judgments . . . against the . . . city . . . shall have been obtained by collusion, or founded in fraud, he . . . [shall] take all proper and necessary means to open and reverse [such judgments] and to employ counsel for such purpose. Nevertheless, the New York City Budget Appropriation Act for 1863, ch. 227, § 7, [1863] N.Y. Laws 412 permitted borrowing to pay for judgments for which there was no (sufficient) appropriation.

Unlawful contracts were further dealt with in the Common Council Compensation Act, ch. 533, § 2, [1865] N.Y. Laws 945 which made it a misdemeanor to "vote for any contract in

The courts tried to limit this abuse by rigorously applying the principles of contract law as it related to municipal corporations, consistently holding that no valid contract would be found where an agreement was made in violation of any statutory requirement for contracting with a municipal corporation and, therefore, recovery would not be permitted,¹⁰² not even in *quantum meruit* for work completed.¹⁰³

violation of law, or any appropriation unauthorized by law, or in excess of the amount authorized by law, or for any illegal or injurious disposition of corporate property, rights or franchises”

The New York City Budget Appropriation Act of 1866, ch. 876, § 10, [1866] N.Y. Laws, 2070-71 sought further to prevent illegal contracts by providing that the City “shall not be liable upon any contract made . . . for any object or purpose which is not expressly authorized by this act” This was renewed specifically in the New York City Budget Appropriation Act of 1867, ch. 586, § 5, [1867] N.Y. Laws 1605.

The New York City Budget Appropriation Act of 1868, ch. 853, § 7, [1868] N.Y. Laws 2022 renewed the anti-collusion provision of the 1859 Budget Appropriation Act, ch. 489, § 4, [1859] N.Y. Laws 1123. But, in a triumph for Boss Tweed, see N.Y.C. FINANCES, *supra* note 35, at 122, section seven was amended to authorize the Comptroller “in order to save expense of litigation and interest arising on said claim, to adjust the same, and when adjusted, to duly provide for its payment.” The New York County Appropriation Act of 1868, ch. 854, § 2, [1868] N.Y. Laws 2032 provided that no “judgment against the county of New York shall be valid unless the claim on which the action is brought has been presented to the board of supervisors . . . and passed on by them, or they have unreasonably refused or omitted to take action on the same.” To the same effect, see the New York City Budget Appropriation Act of 1869, ch. 876, § 14, [1869] N.Y. Laws 2134.

The judgment fund payor (*i.e.*, Comptroller) could have, we think, rightfully refused to pay the judgment-claim, since it was based, *ab initio*, on a void contract. But in practice, the payor apparently would look only to the judgment itself: having been properly issued by a court of competent jurisdiction, the judgment-claim would be paid without question, despite the statutory provisions cited above.

The Legislature, then, in attempting to eliminate the judgment fund abuse should have focused on the invariable irregularity of the underlying contract involved. As such, a sound remedy would have been to require the courts to determine the validity of the contract, not allowing the City to suffer a default judgment without such determination. This remedy would have eliminated the fund abuses entirely. Instead, the Law of May 4, 1866, ch. 876, § 10, [1866] N.Y. Laws 2070-71, legitimated some of the *ultra vires* contracts, by providing that at the time of presentation of the judgment-claim, there should be no payment “beyond the amount appropriated” to such contract. Today, this could be viewed as an equal protection of the laws problem, inasmuch as it sets arbitrary and capricious standards for validating *ultra vires* contracts.

102. *Appleby v. Mayor of New York*, 15 How. Pr. 428 (N.Y. Sup. Ct. 1858) (enforcing the lowest bidder provision).

103. See, *e.g.*, *Donovan v. City of New York*, 33 N.Y. 291 (1865), *enforcing* 1857 Charter § 22 which prohibited payment against an appropriation “after the amount authorized to be raised by tax for that specific purpose, shall have been expended.” *McSpedon v. Mayor*, 20 How. Pr. 395 (N.Y. Super. Ct. 1861) (enforcing the requirement of full disclosure of all work

Judgment fund abuses continued, however,¹⁰⁴ so in 1866 the State Legislature sought to eliminate them by statute, providing that "no judgment in actions upon contract shall be entered by default or otherwise, in any court, against said corporation, except upon proof in open court, that the amount sought to be recovered in said judgment still remains unexpended in the City treasury to the credit of the appropriations to the specific object or purpose upon which the claim sued for is founded."¹⁰⁵ The statute was challenged in *Tribune Association v. Mayor*.¹⁰⁶ The court held that the statute caused no impairment of the plaintiff's contract, because the statute "does not apply to the debt, but to the remedy,"¹⁰⁷ and was, therefore, constitutional.

The statute, having thus withstood the acid test of legal theory, and having become thereby established as the controlling law, was to prove ineffective: the law, unfortunately, was widely ignored.¹⁰⁸

data in the notice inviting bids).

Contracting in violation of contract requirements, has been a continuing problem. See, e.g., *McDonald v. Mayor of New York*, 68 N.Y. 23 (1876); *T.A. Clarke Co. v. Board of Educ.*, 156 App. Div. 842, 142 N.Y.S. 166 (1st Dep't 1913); *Williams v. City of New York*, 118 App. Div. 756, 104 N.Y.S. 14 (1st Dep't 1907), *aff'd*, 192 N.Y. 541, 84 N.E. 1123 (1908); cf. *Lowe v. City of New York*, 240 App. Div. 484, 270 N.Y.S. 216 (2d Dep't 1934) (concerning real property acquisition).

The City Council may, absent an appropriation, contract for services in connection with its organization and procedure for stenographic services for investigation proceedings as to the qualification and election of some of its members. *Chambers v. City of New York*, 286 N.Y. 308, 36 N.E.2d 313 (1941); *accord Smith v. City of New York*, 289 N.Y. 517, 47 N.E.2d 35 (1943); *Barry v. City of New York*, 175 Misc. 712, 25 N.Y.S.2d 27 (Sup. Ct. 1941). 1963 Charter § 124.f. presently deals with this problem.

The rigor of the contract rules was greatly ameliorated by the Law of July 17, 1907, ch. 601, [1907] N.Y. Laws 1397 adding § 246 to The Greater New York Charter which provided:

The board of estimate and apportionment may, in its discretion, inquire into, hear and determine any claim against the City of New York which has been certified to said board in writing by the comptroller as an illegal or invalid claim against the city, but which, notwithstanding, in his judgment it is equitable and proper for the city to pay in whole or in part, and if upon such inquiry the board by an unanimous vote determines that the city has received a benefit and is justly and equitably obligated to pay such claim and that the interests of the city will be best subserved by the payment or compromise thereof

104. 1915 BUDGET PROCEDURE, *supra* note 1, at 4.

105. Law of May 4, 1866, ch. 876, § 10, [1866] N.Y. Laws 2070.

106. 48 Barb. 240 (N.Y. Sup. Ct. 1867).

107. *Id.* at 243.

108. 1915 BUDGET PROCEDURE, *supra* note 1, at 4.

III. Modern Budgeting

As previously noted, the technique of line-by-line scheduling was first formally required in the 1873 Charter,¹⁰⁹ although at that time it was not fully utilized as a budgeting device.¹¹⁰ Over the years, it was increasingly relied upon and, by 1908, was widely used in City budgeting.¹¹¹

A major reason for this increased use was its popularity with budget managers. This may seem surprising, but line-scheduling actually enhanced their control over the budget, because it served as an ironic cloaking device: the more it exposed, the less it revealed.¹¹² Budgeters, realizing that with thousands of line-entries

109. See note 39 *supra*.

110. 1915 BUDGET PROCEDURE, *supra* note 1, at 6.

111. *Id.* at 6-7.

112. An amusing illustration of such cloaking is found in E. COSTIKYAN & M. LEHMAN, RESTRUCTURING THE GOVERNMENT OF NEW YORK CITY 60 (1972), which, though describing an event occurring over fifty years later than the events described at this point in the text, is by no means anachronistic:

The executive budget is a formidable—perhaps the most formidable—instrument of governmental power. It can be used, and has been used, by mayors to provide political rewards and to administer political punishment. It can be used, and has been used, to thwart policies that have apparently been approved. And whether in its simple line-item form, arrayed as a performance budget, or in its more fashionable Program-Planning-Budget Systems (PPBS) format, the document is rarely visible in all of its particulars. It is possible to hide money in it in most ingenious ways. A clever budget examiner may do so in such a manner that not even the mayor, whoever he may be, will know exactly where certain funds are. Middle-level budget examiners are able to modify, or even kill, programs that represent high policy decision. A New York Times article [Tolchin, *The Budget Mystique*, May 24, 1972, at 36, col. 2] described certain aspects of the budget process as follows:

I've been here for almost two years, and I'm just learning where they hide the money,' Alan Claxton, an assistant budget director, commented recently. "It's all coded" The found money and lost jobs are all part of a budget process that is understood by only a handful of officials. . . . The scope of the proposed budget—\$9.5 billion to be given 87 city agencies that employ 400,000 people—almost guarantees that detailed comprehension is beyond the grasp of almost everyone else, including high officials in the Budget Bureau. . . .

One commentator has noted:

On the surface, the expense budget seems to be a storehouse of valuable information. Expenditures appear to be meticulously detailed, and line schedules are available for public inspection. But the line items do not add up to the real City budget . . . [T]here are thousands of dead lines in the budget, countless employees work out of [budget] line or out of title, and "loans and borrows" distort the budget accounts. . . . [T]he line items present an inscrutable mass of detail.

STATE CHARTER REVISION COMMISSION FOR NEW YORK CITY, CENTRAL BUDGET ISSUES UNDER THE

only a fitful spot-check of the proposed budget would be possible, willingly embraced line-by-line scheduling.

Aside from line-by-line scheduling, no significant changes were made until 1924.¹¹³ Thus, the 1897 Charter, as amended,¹¹⁴ and the increasing use of the line-by-line schedule represent the style of New York City budgeting for nearly twenty years.¹¹⁵

During that time, it became apparent that, for a budget of the size

NEW YORK CITY CHARTER 150-51 (1974) [hereinafter cited as CENTRAL BUDGET ISSUES].

For an example of a line-by-line schedule, see Appendix I.

113. In the same year, the State Legislature in passing the City Home Rule Law, ch. 363, [1924] N.Y. Laws 698 (amended 1928), took action that would affect the budget operations of New York City by allowing a greater measure of local self-government. Section ten of the City Home Rule Law created a new legislature for the City by providing:

[T]he local legislative body of a city shall be the board of aldermen . . . or other board or body now or hereafter vested by its charter . . . with jurisdiction to enact ordinances, and, if there be a board of estimate and apportionment, shall include such board of estimate and apportionment as a separate branch thereof. . . . If a local legislative body of a city consists of more than one branch, the local legislative body shall be known as the "municipal assembly" of such city.

The City Home Rule Law created an anomaly: two City Legislatures: (1) The Board of Aldermen as ordinance-maker, (2) the Municipal Assembly as the maker of "local laws," that is, laws, which, before passage of the City Home Rule Law, generally required approval by the State Legislature. The Municipal Assembly continued until January 1, 1938 when the 1938 Charter took effect. See L. TANZER, NEW YORK CITY CHARTER 27 (1937); HISTORY OF THE N.Y.C. LEGISLATURE, *supra* note 16, at 43-44.

This dual Legislature was certainly the most oddly structured in the City's history. Perhaps the State Legislature reasoned, in part, that if budget control was a proper legislative function, then by making the (executive) budget management group a legislative body it would have the best of both worlds—a small group of executives able to maintain tight control over the budget and a proper system of checks and balances.

The hope was to create a City legislature more active and properly responsive to its newly-granted powers. Unfortunately, it proved to be an unrealistic expectation:

But to those who had expected an active and independent body the Municipal Assembly was a sore disappointment. By 1924 the Board of Aldermen was considered as important to the city's government as a "fifth wheel." Its performance as the lower branch of the city's home rule legislature brought about no change in its reputation. Scheduled as fifteen minute sessions, the meetings of the Aldermanic Branch usually lasted ten. Most of the time was spent on the invocation and roll call. Normally the recommendations of the Committee on Local Laws were accepted without comment, consideration, or dissenting vote.

Id. at 45 (footnote omitted).

114. See note 67 *supra*.

115. This period began around 1908. One observer has noted that the departmental estimates were, even before the metropolitan consolidation in 1898 "exceedingly minute, giving the salaries of each officer or employee, and the specific purpose of each expenditure." N.Y.C. FINANCES, *supra* note 35, at 254.

and complexity¹¹⁶ of New York City's, such a relatively informal budget procedure was unsatisfactory, in that it resulted in an undue focusing on the minutiae of the budget, and in a failure to examine carefully overall budgetary consequences.¹¹⁷

In point of fact, the control systems that have traditionally operated in public budgeting are best characterized as audit check systems. This kind of conventional accounting approach fails to include in the overall budget analysis the net effect of a given appropriation.¹¹⁸ Therefore, while that appropriation may be found to be within the budget, it may, in fact, be "unproductive"; that is, it may not be accomplishing what it was budgeted to do. As such, the fact of that appropriation's budgeting—regardless of the fact that it is properly displayed on a line-by-line schedule, and that the budget books "balance"—should be reconsidered. Similarly, certain items which have been beneficial for the City should also be re-evaluated.

In an attempt to end this informality of budgetary process, the Board of Estimate and Apportionment created on June 1, 1924,¹¹⁹ the position of Director of the Budget as a mayoral office.¹²⁰ This post was created out of a desire for a more professional budget operation and in part, no doubt, to provide at least the appearance of non-political discretionary spending and less political personnel administration and contract purchasing. However, even after the creation of the position of Director of the Budget, the City's annual expense budget continued to be prepared by the Board of Estimate and Apportionment.¹²¹

116. [1924] BUDGET FOR THE CITY OF NEW YORK totalled \$375.4 million in a volume of 180 pages.

117. For a later assertion to this effect, that is also valid for this period, see 1 MAYOR'S COMMITTEE ON MANAGEMENT SURVEY, MODERN MANAGEMENT FOR THE CITY OF NEW YORK (1953). The Committee observed:

The line-item budget strangles management . . . without establishing effective or constructive control, or giving the public adequate information as to what any department is planning or is authorized to do.

Id. at 89.

Then committee-member Abraham D. Beame among others dissented from this majority view of the committee. *Id.*

118. *Id.* at 90.

119. New York, N.Y., Bd. of Estimate, Calendar Res. No. 8 (1924). For citation to the first budget line for "Director of the Budget," see note 122 *infra*.

120. N.Y.C. GUIDE TO MUNICIPAL GOVERNMENT, *supra* note 6, at 69.

121. HISTORY OF THE N.Y.C. LEGISLATURE, *supra* note 16, at 74. Until 1933 this document

The effect of the Director on the budget operation was disappointing. He lacked a formal, independent staff¹²² and had no significant, direct control over budget policy decisions.¹²³ The City legislature, therefore, amended the City Charter, in 1933,¹²⁴ to provide for the establishment of a Bureau of the Budget¹²⁵ (apparently composed of the staff formerly used by the Board of Estimate and Apportionment) to be headed by the Director of the Budget who "shall be appointed by and hold office at the pleasure of the Mayor."¹²⁶

The Director of the Budget was to be responsible for the preparation of the budget.¹²⁷ Toward this end, there seems to have been an attempt in the amendment to make the schedules more meaningful by requiring the budget to "contain a complete program."¹²⁸ This was not successful, because the "program" system was not comprehensively applied. That is, the concept of "program" is that of a generic activity wherever located, and as such, must be applied

[the City's annual budget] was drawn up by the Board of Estimate and Apportionment on the basis of estimates submitted by heads of departments and hearings before that body. *Id.*

122. [1924] BUDGET OF THE CITY OF NEW YORK 14. "Director of the Budget" does not show a supporting staff.

123. H. LEHMAN, THE FINANCES AND FINANCIAL ADMINISTRATION OF NEW YORK CITY, RECOMMENDATIONS AND REPORT OF THE SUB-COMMITTEE ON BUDGET, FINANCE, AND REVENUE, OF THE CITY COMMITTEE ON PLAN AND SURVEY xvii (1928):

At the present time the mass of estimates that come from the numerous departments and offices are worked over by the examiners of the Board [of Estimate and Apportionment] under the somewhat ill-defined joint direction of the Director of the Budget, an appointee of the Mayor, and the Director of Investigations, an appointee of the the Board of Estimate [sic]. It is these officers who prepare the budget.

124. Law of June 1, 1933, No. 11, [1933] N.Y. Local Laws 105, *amending* Charter Amending Act of 1901, 226.

125. *Id.* 226-b. Bureau of the budget. The bureau of the budget is hereby established, the head of which shall be the director of the budget. He shall be appointed by and hold office at the pleasure of the mayor, and his salary shall be as may be fixed from time to time pursuant to section fifty-six of the Greater New York charter. He shall appoint such subordinates and incur such expenses as may be duly provided for. Employees of the several departments of the city shall be eligible for transfer and appointment without examination to positions in the bureau of the budget so far as necessity for their service exists, notwithstanding any other existing law or regulation and the several sums of money appropriated in the city budget for the year nineteen hundred thirty-three to pay the salaries or compensation of such employees shall be transferred in due course to the bureau of the budget.

126. *Id.*

127. *Id.* § 226-c.

128. *Id.*

across the usual agency categories, if it is to be meaningful. For example, "public safety" as a program would include all those functions within a variety of agencies—police, fire, sanitation, etc.—relating to public safety. The amendment severely constrained the proper application of "program" by the requirement (in the very same sentence) that this "program" reflect the traditional City organization,¹²⁹ that is, police department, fire department enforcement units, sanitation police. Such a requirement, of course, defeats the purpose of a "program."

An attempt was also made to provide for the much-needed evaluation of budgetary consequences by empowering the Bureau of the Budget to survey each City agency "for the purpose of ascertaining instances of waste and duplication of effort to the end that [the director of the budget] may recommend the remedy to the mayor."¹³⁰ These powers of the Budget Director were attractive politically in that they introduced an element of control heretofore unavailable, with the onus of such control placed on a nonelective executive official: the Director of the Budget.

A. The Unalterable Base

Among its many effects, the continual reliance upon the line-by-line display has had the incidental effect of reinforcing the civil service system, because the Mayor and his principal executives, who were (and are) after all, politically sensitive, did not (and do not) list job titles not in some way a part of the civil service classification system.¹³¹ Consequently, such officials would hesitate to eliminate

129. *Id.* which provided in pertinent part:

The purpose and intent is that the budget so prepared shall contain a complete program giving the sources and estimated revenues of the city and county governments and the amounts required for the administration, maintenance and operation of the said governments. . . . The classification of these estimates shall be as nearly uniform as possible and shall, as far as practicable, exhibit clearly the functions performed by each department . . . and the purpose of appropriations made.

The provision on classification of estimates is now found, essentially unchanged, in NEW YORK, N.Y. ADMIN. CODE ANN., ch. 6, tit. A, § 112-5.0 (1971).

130. Law of June 1, 1933, No. 11, [1933] N.Y. Local Laws 105.

131. The civil service merit system was created by Law of May 4, 1883, ch. 354, [1883] N.Y. Laws 530. The civil service system is further reinforced, in two ways, by the collective bargaining system: indirectly, by reinforcing the line-by-line display by impliedly incorporating it in the collective bargaining agreement, and directly, by using the civil service system to describe the line-by-line display. For a discussion of collective bargaining, see text accompanying notes 251-62 *infra*.

listed civil service titles, lest the already potent civil service constituencies object. It must be remembered that municipal employees exert influence in two ways: that influence which reasonably organizable employees exert on their employer; and, in addition, political influence resulting from their status as voters (who tend to be politically active) capable of voting for (or against) the very employer in question.¹³² Thus, existing jobs are rarely eliminated, even though new jobs must necessarily be created as government functions, public needs, and available technologies change. This process of infinite expansionism is known as "incremental" budgeting:¹³³ the base is assumed to be virtually unalterable, ergo, the "logical imperative" that the budget becomes adjustable only by addition.¹³⁴ However, such alteration, though politically infeasible, is quite obviously necessary because (as has recently been made apparent) the City is a limited financial institution.

The problem, then, is clear: how to alter the "unalterable base."

One of the first innovations to appear in the budget as prepared by the newly-created Bureau of the Budget was the "Required Accruals" entry.¹³⁵ This device was originally designed to provide an adjustment for the statistically justified expectancy that all posi-

132. See, e.g. Darnton, *Crisis Spawns Host of Plans to Save City* N.Y. Times, Oct. 13, 1975, at 51, col. 7.

[T]he unions are a potent political force—they can campaign for or against a mayor and lobby on behalf of special legislation in Albany—and a Mayor is especially vulnerable to pressure from a discomforted [sic] public to avoid or end a strike.

Id.

133. See *POLITICS OF THE BUDGETARY PROCESS*, *supra* note 81, at 62.

Budgeting turns out to be an incremental process, proceeding from a historical base, guided by accepted notions of fair shares, in which decisions are fragmented, made in sequence by specialized bodies, and coordinated through repeated attacks on problems and through multiple feedback mechanisms.

Id.

134. The Local Law establishing the Bureau of the Budget provided in § 226-c for preservation of the historical budget base: "the estimates shall include particularly and in detail, the reasons for all individual increases or decreases compared with corresponding figures for the previous year," now found, essentially unchanged in NEW YORK, N.Y., ADMIN. CODE ANN., ch. 6, tit. A, § 112-6.0 (1971). Incremental budgeting is being increasingly discredited, and suggestions are being made that budgeters start, not from a historical base, but from a "zero base." See, e.g., P. PHYRR, *ZERO-BASE BUDGETING* (1973).

135. Required accruals were first budgeted in City of New York, Budget for 1924, although there was already a "fund for Salary and Wage Accruals." See [1924] BUDGET FOR THE CITY OF NEW YORK 6. The term accrual is not used here in its ordinary accounting sense of expenses incurred or income earned, but, rather, as salary expense which has not been incurred.

tions will not be filled all the time. Thus, a given agency might have its appropriations reduced by, say, ten percent, because it is predictable that over the course of a year that agency would only use an average of ninety percent of its personal service appropriations.

The "required accruals" device, therefore, would help to prevent fraud by those controlling the payrolls, who might be tempted to "appropriate" the excess for themselves, or the build-up of appropriations which could subsequently be transferred to other purposes and which might, then, have to be annualized in future budgets.¹³⁶

When required accruals were first used as an entry, they reflected the actual, predictable underexpenditure. Now, however, this entry is used as a gimmick to enforce savings without making a cut in the personal service schedules (the unalterable base). Thus, an agency which would predictably use ninety percent of its appropriations might now be given a "required accruals" entry of from twelve to twenty-three per cent.¹³⁷

This device leaves to the agency head some discretion as to which positions should be filled.¹³⁸ But as with most political solutions, this technique for avoiding unpleasant decisions has resulted in an improper ordering of priorities; instead of withholding appropriations from the least beneficial items first, the least politically powerful positions, regardless of value, tend to be those most reduced.¹³⁹

136. The City's Bureau of the Budget uses "annualize" to refer to the cost for the balance of a fiscal year; but as used here, it refers to providing the full fiscal year's cost at the then cost thereof.

137. See, e.g., [1975-76] EXECUTIVE BUDGET OF THE CITY OF NEW YORK 1154 providing with respect to the Parks, Recreation and Cultural Affairs Administration, Program IV "Parks Maintenance and Operations," the largest code thereof, a schedule total for the "Budget for 1974-1975 as Modified" (as of approximately March 15, 1975) of \$56.7 million with required accruals of \$7.1 million; and, at 835, with respect to the Youth Service Agency, Program VI, "Community Enrichment", a schedule total of \$2.6 million with required accruals of \$0.6 million.

138. This discretion will depend on the ability of an agency head to negotiate a blanket vacancy filing certificate. See New York, N.Y. Exec. Order No. 20 (Aug. 1, 1974) providing that "the Mayor may . . . require . . . agencies to cooperate with the Bureau of the Budget in realizing savings required to meet potential budget deficits that may arise during the fiscal year. . . ." The nearly hilarious irony of the verb "cooperate" shows up in the process of negotiating "excess accruals," that is, those accruals required in excess of the budgeted accruals which may be as much or more than the required accruals. When this happens, the "supporting schedules" became unsupportable schedules! See notes 139, 140 *infra* and accompanying text.

139. See note 137 *supra*. "Accrual" is defined as:

That portion of a personal service appropriation which it is anticipated will not be

The unalterable base is also reduced by the accounting device of "excess accruals." This is applied to a net appropriation, that is, an appropriation which has already been reduced by "required accruals." During the course of the budget year, the Budget Director might require that an agency head reduce a net appropriation by a given amount; the agency head would be required to maintain a percentage of the net appropriation as an "excess accrual." This results in an enforced savings; it is a form of impoundment.¹⁴⁰

B. The New York City Charter of 1938

Obviously, the misuse of "required accruals" and "excess accruals" is a further impediment to the proper evaluation of "budgetary consequences." In addition, the Bureau of the Budget's survey powers in this regard were still far from adequate. So, the 1938 City Charter revised and expanded the visitatorial authority of the Budget Director to provide that in the course of preparing the previously-mentioned surveys¹⁴¹ of the various departments, the Bureau of the Budget could "require any agency, or any officer or employee, to furnish data and information and to answer inquiries pertinent to such survey."¹⁴² On the basis of these surveys the Bureau of the Budget was to ascertain each agency's annual budgetary needs, prepare the expense budget for the fiscal year beginning on July first of each year,¹⁴³ and submit this proposed budget¹⁴⁴

spent in a fiscal year because of retirements and terminations of staff.

BUREAU OF THE BUDGET, INSTRUCTIONS FOR MODIFYING THE EXPENSE BUDGET 17 (1974). "Required accruals" probably started as a response to the Great Depression. See A. BUCK, BUDGETING AND FINANCIAL MANAGEMENT OF THE CITY OF NEW YORK 27 (1954). So successful was this technique that the Bureau of the Budget would, in time, assess "excess accruals," that is accruals against actual appropriations, which is a form of impoundment.

140. 1963 Charter § 123.b., *as amended*, (1975) provides that the Mayor "may set aside specified sums as necessary reserves . . ."

141. See text accompanying note 130 *supra*.

The 1938 Charter was adopted by referendum on Nov. 3, 1936, effective Jan. 1, 1938, pursuant to Law of Aug. 18, 1934, ch. 867 [1934] N.Y. Laws 519. The full legal history of the 1938 Charter and the full text thereof may be found in L. Tanzer, *New York City Charter* (1937).

142. 1938 Charter § 113.

143. *Id.* § 111. "The [1938] charter establishes, a fiscal year commencing July 1, in place of the calendar year on the basis of which the city formerly operated . . ." L. TANZER, *NEW YORK CITY CHARTER* 59 (1937).

The final budget under the calendar year system of The Greater New York Charter was for an eighteen-month period, January 1, 1938, through June 30, 1939. 1938 Charter § 952.b. The 1938 Charter permitted the new Board of Estimate to adopt a substitute budget for the

to the Board of Estimate¹⁴⁵ for adoption by the Board and, subsequently, by the Council.¹⁴⁶

This was just a small part of the Bureau of the Budget's increased involvement with the budget process as formalized by the 1938 Charter.¹⁴⁷ So great was the Bureau's increased involvement that there was, in fact, a shift in actual control over the budget from the Board of Estimate to the Bureau of the Budget.¹⁴⁸ The most signifi-

period from January 1, 1939, through June 30, 1939. *Id.* The Budget for 1938 withstood attack on its validity in *Dixon v. LaGuardia*, 166 Misc. 889, 2 N.Y.S.2d 466 (Sup. Ct. 1938), *aff'd*, 253 App. Div. 881, 2 N.Y.S.2d 477 (1st Dep't 1942). The case stemmed from an attempt to adopt a new budget for 1938 in January 1938. The court held in favor of budget finality, that is, once a budget is adopted for a given period it may not be changed except pursuant to specific authorization by law. *Id.*; accord *People ex rel. McGowan v. Havemeyer*, 1 Hun 61 (N.Y. Sup. Ct. 1874) (concerning the budget for 1873).

The finality principle has been consistently observed by the courts in dealing with New York City's budget. *See*, *Rushford v. LaGuardia*, 280 N.Y. 217, 222, 20 N.E.2d 547, 549 (1939), holding that the applicable charter section read "by the lamp of technical knowledge . . . of municipal budget making . . . [empowered the Board of Estimate to create, abolish, or change the salary of a position] only when it adopts a budget." *Accord*, *Cariello v. City of New York*, 10 App. Div.2d 846, 199 N.Y.S.2d 1020 (1st Dep't 1960); *Bergerman v. Gerosa*, 208 Misc. 477, 144 N.Y.S.2d 95 (Sup. Ct. 1955); *Rasmusson v. City of New York*, 88 N.Y.S.2d 103 (Sup. Ct. 1949), *aff'd*, 276 App. Div. 904 (1st Dep't), *aff'd*, 301 N.Y. 532, 93 N.E.2d 344, 94 N.Y.S.2d 904 (1950). *McCarthy v. LaGuardia*, 283 N.Y. 701, 28 N.E.2d 715 (1940) (holding that the Board of Estimate may reduce incumbents' salaries only when it adopts a budget); *Thoma v. City of New York*, 263 N.Y. 402, 189 N.E. 470 (1934) (holding that reduction in grade, and consequent reduction in salary, within the same position title during the budget year is not improper).

144. 1938 Charter §§ 111-32. "The budget, as it is now known, is termed by the new charter 'expense budget' to distinguish it from the capital budget." L. TANZER, *NEW YORK CITY CHARTER* 59 (1937). (footnote omitted).

145. The 1938 Charter shortened the name of the "Board of Estimate and Apportionment" to "Board of Estimate". 1938 Charter § 61. However, it retained the same membership, *id.*, and the same weighted voting requirements, *id.* § 62.

146. *Id.* §§ 121-25.

147. The New York city charter exercised the power granted by the City Home Rule Law, ch. 363, § 10, [1924] N.Y. Laws 699 to abolish the Municipal Assembly. For a description of the Municipal Assembly, see note 113 *supra*.

148. *See* MAYOR'S COMMITTEE ON MANAGEMENT SURVEY, 2 *MODERN MANAGEMENT FOR THE CITY OF NEW YORK* 80 (1953) providing that "the budget gives no outsider, or even the Mayor and the Board of Estimate, a basis for judging whether a particular bureau is overstaffed or understaffed . . ." *GOVERNING N.Y.C.*, *supra* note 80, at 368 provides:

In essence, the budget process is one in which the Mayor formally proposes to the Board of Estimate an almost incredible detailed "line item" budget which the Budget Director has in fact prepared and of which only he and his staff are masters.

But a court can miss this point. In *Dixon v. LaGuardia*, 166 Misc. 889, 898, 2 N.Y.S.2d 466, 474, the court stated:

The fear against hasty action which authorized the expenditure of huge sums of money

cant control which shifted to the Bureau, the power to make certain modifications,¹⁴⁹ was shifted by indirection.

To understand this fully, the notion of "appropriation" must be examined. Prior to 1938, "appropriation" was a relatively undefined, generic term.¹⁵⁰ As such, within the same budget it might be

was wholly allayed by the rigid and elaborate program set forth in the . . . charter. With respect to . . . the making of the budget, there was thus no fear that the taxpayers of the city of New York would not obtain the product of cool, calm, and considered judgment.

149. See text accompanying notes 158-74 *infra*.

150. The Charters of 1830 (§ 18), 1849 (§ 7), 1857 (§ 31), 1870 (§ 101), but not the 1871 amendment thereto, and 1873 (§ 112) use the term "appropriation" or "sum appropriated" without definition as in the passage cited in text at note 8.

The New York City and County Budget Appropriation Act of 1860, ch. 509, § 4, [1860] N.Y. Laws 1021 provided:

[I]n case any original appropriation so made by the mayor and common council of said city shall be found insufficient for the purpose for which the same was made, it shall be lawful for the said mayor and common council, and they are hereby empowered, upon the recommendation of the comptroller, to authorize by resolution or ordinance a transfer to the credit of such deficient appropriation of such amount or amounts as may be deemed necessary from any other appropriation or appropriations in which there may be an excess or surplus over the estimated expenditure to be made for the current year, on account of which the said last mentioned appropriation or appropriations were made, and the amount or amounts so transferred shall be deemed and taken the same and may be expended in the same manner as though the same had been originally embraced in such deficient appropriation.

In some years, different phrasing was used, *e.g.* the New York City Budget Appropriation Act of 1864, ch. 404, § 2, [1864] N.Y. Laws 939 provided:

[I]t shall not be lawful for any amount authorized by this act . . . to be transferred and appropriated to any other . . . purpose . . . unless the . . . purpose for which the amount was originally appropriated . . . shall have been fully accomplished and completed.

The New York City Budget Appropriation Act of 1874, ch. 308, § 2, [1874] N.Y. Laws 363 provided:

[T]he said board of estimate and apportionment shall have the power at any time to transfer any appropriation for any year which may be found, by the head of the department for which such appropriation shall have been made, to be in excess of the amount required or deemed to be necessary for the purposes or objects thereof, to such other purposes or objects for which the appropriations are insufficient, or such as may require the same

Thus was born the modern budget modification. With the incorporation of the above quoted provision in the Consolidation Act of 1882 § 207, *as amended*, Law of March 23, 1893, ch. 186, § 1, [1893] N.Y. Laws 314, the budget modification became a permanent part of the City's budget process, repeated in every Charter since. See 1963 Charter § 124; 1938 Charter §§ 127, 128; the Charter Amendatory Act of 1901 § 237; The Greater New York Charter § 237.

An early interpretation of the Charter Amendatory Act of 1901 § 237 is *Colihan v. Miller*,

used to describe both a single job-position (e.g., "Mayor") and the entire uniformed City police force. In the 1938 City Charter, section 123 established parameters for the concept of "appropriation," by describing it as *not* the equivalent of a single (supporting) line-item and limiting its use to "code items only."¹⁵¹ Now, in legal theory as well as practice, "appropriation" would apply to any grouping of expenses, that is, a traditional aggregation of lines assigned a "code"¹⁵² proposed by the Bureau of the Budget and adopted by the Board of Estimate.¹⁵³ The lines themselves were no longer the *budget* but only a supporting schedule to the budget¹⁵⁴—the budget proper would now be the various code-appropriations.¹⁵⁵

72 Misc. 140, 131 N.Y.S. 99 (Sup. Ct. 1911), which held that the Board of Estimate and Apportionment could transfer funds appropriated to positions in that year's budget to positions already established at fixed salaries but not otherwise funded in that year's budget. But the Board of Estimate and Apportionment could not, under the guise of modifying the budget, adopt, during the budget year, a resolution reducing incumbents' salaries, an action which it is empowered to take only when it adopts the annual budget. *Rushford v. LaGuardia*, 280 N.Y. 217, 20 N.E.2d 547 (1939). Nor can the budget be modified by (unlawfully) abolishing a position during the budget year and then imposing, as a condition to the discharged incumbent's restoration to the payroll, an unpaid leave of absence for the discharge period. *Toscano v. McGoldrick*, 300 N.Y. 156, 89 N.E.2d 873 (1949).

151. 1938 Charter § 123.

152. See CITY OF NEW YORK COMPTROLLER'S MANUAL (1972 ed.).

153. 1938 Charter § 123. See also *Brooklyn Pub. Library v. Craig*, 201 App. Div. 722, 194 N.Y.S. 715 (2d Dep't 1922) holding that a supporting schedule for a contract appropriation was advisory only and not binding on the contractor. This position was taken embryonically in 1938 Charter § 128 which provided:

The director of the budget, upon request of the head of an agency, shall, with the approval of the board of estimate, have power during any fiscal year to transfer an appropriation or part thereof from one line to another within the same schedule, provided the total appropriation for the applicable code item is not increased.

154. Despite this change of status of the supporting schedules, *Wilmerding v. LaGuardia*, 268 App. Div. 496, 52 N.Y.S.2d 169 (1st Dep't 1944), held that the 1938 Charter required: a comprehensive scheme for subitemization of budgetary code items through supporting schedules so as to (1) permit a comparison of items with similar appropriations for preceding years, (2) facilitate public hearings and discussion concerning the necessity for the proposed items of expenditure, and (3) enable the City Council to examine the budget as proposed and determine which items are proper and necessary.

Id. at 498, 52 N.Y.S.2d at 172. The plaintiff, Lucius Wilmerding, Jr., was an economist of note, author, *inter alia*, of PUBLIC SPENDING (1943).

155. For a discussion of the cases dealing with the level of detail required in the executive budget and in the appropriation acts for the State of New York, see Quirk, *Standing to Sue in New York*, 47 ST. JOHN'S L. REV. 429, 472-82 (1973).

The problem was put succinctly by Judge Breitel in *Hidley v. Rockefeller*, 28 N.Y.2d 439, 271 N.E.2d 530, 322 N.Y.S.2d 687 (1971) (dissenting opinion):

Despite language in [*People v. Tremaine*, 281 N.Y. 1, 21 N.E.2d 189 (1939)] to the

Thus, the line-by-line schedules, having become so surfeit with micro-data as to be rendered indecipherable¹⁵⁶ and thereby useless as control devices,¹⁵⁷ were replaced by the smaller, theoretically more manageable, code-appropriations schedule. The line-item schedule would now become merely advisory.

The impact of all this becomes clear when viewed in conjunction with section 128 of the 1938 Charter. That section granted the Bureau of the Budget the discretionary power to transfer money from one (supporting) schedule line or lines to any other line or lines within the same appropriation.¹⁵⁸ Approval of the Board of Estimate was required,¹⁵⁹ but such approval was a foregone conclusion, because the Board had been delegating such authority to the Director of the Budget via the terms and conditions since 1929.¹⁶⁰ When one considers that the Charter made the very structuring of the appro-

effect that a definable level of [budgetary] itemization by the Governor is required of him, that language is no more than explanatory elaboration of the process The rub is the meaning of itemization.

There is a constitutional mandate to itemize. There is no constitutional definition of itemization . . . and no inflexible definition is possible. Itemization is an accordion word. An item is little more than a "thing" in a list of things. A house is an item, and so is a chair in the house, or the nail in the chair, depending on the depth and purpose of the classification. The specificness or generality of itemization depends upon its function and the context in which it is used. In one context of a budget or appropriation bill and description of 1,000 police officers within a flexible salary range would be specific and particular; in another it would leave the appointing power with almost unlimited control. In one context an "item" of \$5,000,000 for construction of a particular expressway might seem specific; in another, void of indication when, how, or where the expressway or segments of it would be constructed. This suggests that there is something of a battle over words in debating the need for items, rather than a grappling with a functional concept.

Id. at 444, 271 N.E.2d at 533-34, 332 N.Y.S. at 691.

156. See text accompanying note 112 *supra*.

157. MAYOR'S COMM. ON MANAGEMENT SURVEY, 1 MODERN MANAGEMENT FOR THE CITY OF NEW YORK 7 (1953) states:

[T]he expense budget documents are themselves swamped by detail. They report the number of clerks and pencils but they do not give an understandable picture of what the departments are expected to accomplish.

158. This type of modification is, according to the oral tradition of the City's Bureau of the Budget, known as a "Modification Within" the same appropriation or simply as an "MW modification." For the pertinent text of the 1938 Charter see note 153 *supra*.

159. 1938 Charter § 128.

160. *Broderick v. City of New York*, 295 N.Y. 363, 378, 67 N.E.2d 737, 744 (1946) (dissenting opinion):

Ever since 1929 the budgets of the city in their "terms and conditions" have authorized the budget director to modify personal service schedules within code appropriations.

priations controllable by the Bureau of the Budget and made the line-entries of these appropriations only advisory, the extent of the grant of power under section 128 becomes obvious.

Modifications between or among appropriations,¹⁶¹ too, were easily controllable by the Bureau of the Budget, although they were not so completely within the Bureau's discretion as were modifications within appropriations. Section 127 of the Charter provided that such modification power was to be exercised by the Board of Estimate.¹⁶² However, requests for such modifications were made through the Director of the Budget¹⁶³ and, although authority to approve these requests was not delegated to the Director in the terms and conditions, it is safe to say that the Board did not consider itself to be antagonistic to the Bureau and that approval of the Board of Estimate, when requested by the Director, was routinely given.¹⁶⁴

The 1873 Charter¹⁶⁵ marked the establishment of the "executive oligarchy"¹⁶⁶ as a legitimate institution by allowing a de facto delegation of legislative power to an elective, executive management group (the Board of Estimate and Apportionment).¹⁶⁷ The 1938 Charter resulted in a further de facto delegation of budget control since the budget, instead of being controlled by the Board of Estimate, would now be controlled in fact by the Bureau of the Budget—a totally interior, non-elective executive group, thus enhancing the notion of an executive oligarchy. At this point, the input of any legislature, City¹⁶⁸ or State, into the budget is so remote as to lack even the pretense of reasonable legislative involvement.

161. This type of modification is, according to the oral tradition of the City's Bureau of the Budget, known as a "Modification Across" appropriations or, simply, as an "MA."

162. The 1938 Charter § 127 provides:

The board of estimate shall have power during any fiscal year to transfer such part of any appropriation as it shall deem to be in excess of the amount required to any purpose for which it shall deem the appropriation for such year to be insufficient, except that [mandatory appropriations could not be so transferred]

For provisions pertaining to mandatory appropriations, see note 197 *infra*.

163. See GOVERNING N.Y.C., *supra* note 80, at 367.

164. *Id.* at 368.

165. See note 38 *supra*.

166. See text accompanying notes 51-53 *supra*.

167. See text accompanying note 52 *supra*.

168. 1938 Charter § 21 which exercised the authority granted under the City Home Rule Law, ch. 363, § 10, [1924] N.Y. Laws 699, changed the City Legislature to its present general structure—a single-chambered council.

The delegation in the 1873 Charter was unsuccessfully challenged in *Townsend v. Mayor*.¹⁶⁹ The "delegation" resulting under the 1938 Charter¹⁷⁰ was challenged in *Broderick v. The City of New York*,¹⁷¹ decided by the court of appeals in 1946. In that case, the Director of the Budget exercised his discretionary section 128 power to transfer an appropriation within a schedule (as "approved" by the terms and conditions)¹⁷² by creating ten new deputy fire chief positions and eliminating ten battalion fire chief positions. The court of appeals held that the Board of Estimate had specifically to approve each such modification, and that the Board could not give its approval via the terms and conditions: "In that view . . . the official duty of the Board of Estimate under section 128—the duty to pass judgment upon actual transfers of appropriations—cannot be delegated."¹⁷³ It is clear that the court was straining to reach a construction of the Charter that was plainly unreasonable. The Charter provisions did intend to have delegated to the Director the power which he attempted to exercise in *Broderick*, but the court was responding to its own fear of having the budget controlled so significantly by a virtually autonomous bureaucracy, the Bureau of the Budget. In spite of *Broderick*, the Director continued to exercise unfettered control over modifications within appropriations, and a later, similar, court challenge resulted in a specious distinguishing of *Broderick*,¹⁷⁴ thereby upholding the Director's activities. It be-

169. See note 49 *supra*.

170. 1938 Charter § 128.

171. 295 N.Y. 363, 67 N.E.2d 737 (1946).

172. *Id.* at 370, 67 N.E.2d at 739.

173. *Id.* at 371, 67 N.E.2d at 740.

174. *Abarno v. City of New York*, 3 Misc. 2d 1053, 1059, 157 N.Y.S.2d 513, 520 (Sup. Ct. 1956), *aff'd*, 6 App. Div. 2d 1040, 178 N.Y.S.2d 1022, (1st Dep't 1958), which largely stemmed from an action by World War II veteran firemen who were suing to receive longevity credit for promotion and pay purposes for the enforced leaves without pay required by the City as a condition of their initial one-day appointments, to prevent loss of their civil service list status by reason of time-related lapse of the list. The City, relying on *Broderick*, (*see text accompanying notes 170-74 supra*), claimed that the creation of the new firemen positions was void *ab initio* in that there was never any final action by the Board of Estimate on the measure. 3 Misc. 2d at 1059, 157 N.Y.S.2d at 520. The court, while correct in its result, confused budgets with budget lines, distinguishing *Broderick* as involving "two budgets" (it actually involved two budget lines), whereas *Abarno* apparently involved only one budget line. 3 Misc. 2d at 1059, 157 N.Y.S.2d at 520-21. That distinction, unless it involves two units of appropriation, that is, an MA, *see text accompanying note 161 infra*, rather than an MW, *see text accompanying note 158 infra*, is meaningless, as is the observation that there was no

came apparent that the Director's powers were not to be limited in this regard, and there has been no subsequent challenge to the power of the Director of the Budget to make modifications within appropriations.

IV. The Present Law

The New York City Charter of 1963 streamlined the procedure for making budget modifications¹⁷⁵ and, in so doing, made the process more demonstrably "executive."¹⁷⁶ For example, the authority to make modifications within "units of appropriation"¹⁷⁷ ("MW's")¹⁷⁸

creation of high paying jobs and elimination of lower paying jobs in *Abarno* as there was in *Broderick*.

175. 1963 Charter § 124.

The 1963 Charter was drafted by the Charter Revision Commission of the City of New York established pursuant to Law of March 9, 1961, ch. 87, [1961] N.Y. Laws 107, adopted at the general election of Nov. 7, 1961 and fully effective, Jan. 1, 1963.

176. See STATE CHARTER REVISION COMMISSION FOR NEW YORK CITY, CENTRAL BUDGET ISSUES UNDER THE NEW YORK CITY CHARTER 98 (1974) [hereinafter cited as CENTRAL BUDGET ISSUES] which provides:

The current form of "identical" Council-Board participation in budget making evolved from a desire to strengthen the budgetary role of the City Council, but its actual effect has been to bolster the Mayor's position.

In addition to the budget modification methods outlined in the text accompanying notes 177-85 *infra*, amendment of the 1963 Charter pursuant to § 42 is available.

177. "Unit of appropriation" is the fundamental concept of the budget modification process prescribed by the 1963 Charter § 124.a.-.c. Section 124.e. of the 1963 Charter defines a unit of appropriation as either (1) all of the personal services lines in the supporting schedule "for a particular program, purpose, activity or institution" (*Id.* § 112.b.) together with that portion of the "other than personal services" (OTPS) which supports that unit of personal service lines, or (2) all of the OTPS appropriated for a particular agency. Thus, there is no longer any need for an OTPS MA since an entire agency is, by charter definition, a single unit of appropriation. *Id.* § 124.e. Indeed, as to OTPS budget administration, Bureau of the Budget involvement has been substantially reduced by virtue of the Mayor's specific non-withdrawal of MW power. New York, N.Y., Exec. Order No. 20, § 5 (Aug. 1, 1974). See note 178 *infra*.

178. Section 124.a. of the 1963 Charter provides:

Subject to the provisions of this charter, of the civil service law and of other applicable statutes, changes in schedules, within units of appropriation, activities or institutions, may be made prior to the commencement of or during the fiscal year by the head of the affected agency except that the mayor may withdraw from such affected agency, and upon such withdrawal, himself exercise the power to make such changes in such schedules applicable to such agency. Such changes shall be published in the City Record and written notice thereof shall be given to the mayor and the comptroller not less than ten days before the effective date thereof.

This section was amended in 1975 to make each agency's MW power more emphatic: each agency will administer its own personal services units of appropriation within each unit, subject to a quarterly spending allotment for each unit of appropriation. In setting these

is given directly to the particular agency head, subject to a discretionary power given to the Mayor to remove the authority to himself. Also, the authority to make modifications between or among "units of appropriations" or to transfer any unassigned unit(s) of appropriation to any agency ("MA's")¹⁷⁹ is left to the discretion of the Mayor,¹⁸⁰ who is required, at least ten days before the modification is to take effect, to publish notice of the modification in the *City Record*,¹⁸¹ and to give written notice to the Comptroller.¹⁸²

The only involvement left to the Board of Estimate by the 1963 Charter regarding the budget modifications processes concerns modifications between or among agencies and modifications that increase the total amount of the budget ("MN's").¹⁸³ In this situa-

allotments, the Bureau of the Budget will allow for setting aside "necessary reserves," that is, "excess accruals." See text accompanying note 140 *supra*.

179. Section 124.b. of the 1963 Charter provides:

The mayor may during any fiscal year transfer part or all of any unit of appropriation within any agency to another unit of appropriation within such agency or part or all of any unit of appropriation which has not been assigned to any agency, to any unit of appropriation within any agency for the purpose for which such unassigned unit of appropriation was originally established. Each such transfer shall be published in the *City Record* and written notice thereof shall be given to the comptroller not less than ten days before the effective date thereof.

Note that provision is made for an unassigned "unit of appropriation," which may permit a substantial budgetary change without Board of Estimate or City Council involvement. The entire "Miscellaneous" budget as displayed in the [1975-76] EXECUTIVE BUDGET OF THE CITY OF NEW YORK 331 for 1974-75 was \$916,446, 425 of which Program VIII—Unallocated Appropriations—was \$6,673,607. *Id.* Thus a considerable sum may be unassigned. 1963 Charter § 124.b., as amended, (1975) eliminates the unassigned unit of appropriation and limits the present (purely mayoral) MA to changes of plus or minus five percent.

180. Note that the 1963 Charter § 123.c. permits the Mayor to impose "limitations on the transfer or expenditure of funds appropriated in the budget . . ." Pursuant to this, the Mayor may force additional accruals through staff layoffs. See note 135 *supra*. This process is not an MN modification. *Allen v. Lindsay*, 66 Misc. 2d 705, 321 N.Y.S.2d 740 (Sup. Ct. 1971). For an explanation of the MN, see note 183 *infra*.

181. 1963 Charter § 124.b.

182. *Id.* Note that *id.* § 124.d. forbids any budget modification decreasing a mandatory appropriation. For mandatory appropriations under the 1963 Charter, see note 197 *infra*.

183. 1963 Charter § 124.c. provides in pertinent part:

Upon recommendation of the mayor, the board of estimate and the council may during any fiscal year transfer part or all of any unit of appropriation from one agency to another, or establish a new unit of appropriation within funds lawfully available therefor, or transfer all or part of any unit of appropriation for the purpose of establishing or adding to any new unit of appropriation, or change the terms and conditions of the budget; but in any such case there shall be public hearings . . .

This section providing for a Modification New (or simply, MN) has been administratively

tion, the Board of Estimate and the Council, acting upon the recommendation of the Mayor, have authority to approve the transaction.¹⁸⁴ However, public hearings must first be held upon ten days' notice (published in the *City Record*) and the Comptroller must be given written notice of the transaction within ten days after its occurrence.¹⁸⁵

The Charter, then, as to "modifications within" and "modifications across" by-passed the limitations imposed by *Broderick*:¹⁸⁶ the Mayor, not the Board of Estimate, has the authority to make these modifications; therefore, the issue whether the Board is wrongfully delegating the authority to make such modifications to the budget director is mooted—the Board cannot delegate what it does not have. Now, it is the Mayor who "delegates" the authority to the budget director.¹⁸⁷ The Board does not even inferentially control this delegation, because the Board no longer issues the terms and conditions since that, too, has become a mayoral function:¹⁸⁸ the Mayor is now required to publish the terms and conditions in the budget;¹⁸⁹ they can be found deeply ensconced in the supporting schedules.¹⁹⁰

Thus far, there has been no court action challenging the power of the Charter-referendum itself to delegate this heretofore "non-delegable," "legislative" function of the quasi-legislative Board of Estimate to the Mayor, or, for that matter, to question whether the Board should have had such power in the first place. Nor is there

interpreted as not requiring Board of Estimate or Council action when a new unit of appropriation is to be entirely funded by state or federal funds. 1963 Charter § 124.f., *as amended*, (1975) requires that the budget adoption procedure be used in the case of

(1) any proposed amendment to the budget respecting the creation of new units of appropriation, or (2) the appropriation of new revenues from any source, or (3) the proposed use by the city of previously unappropriated funds received from any source.

184. 1963 Charter § 124.c.

185. *Id.* § 124.f., *as amended*, (1975) provides that the regular annual budget adoption procedure shall be used.

186. *See* note 160 *supra*.

187. The Bureau of the Budget is in the Executive Office of the Mayor. 1963 Charter § 111.a. The Director of the Budget is appointed by the Mayor, *id.*, and serves at his pleasure, *id.* § 6.b.

188. *Id.* § 117.a.9.

189. *Id.*

190. *See, e.g., Supporting Schedules*, [1975-76] EXECUTIVE BUDGET FOR THE CITY OF NEW YORK 649-52. The supporting schedules are no longer even part of the budget. *See* text accompanying notes 154-55 *supra*.

likely to be such a challenge, although as to this last point there are some interesting obiter dicta in *Bergerman v. Lindsay*.¹⁹¹

The purpose of that action was to declare the Charter powers of the Board of Estimate constitutionally invalid because, assuming the Board's activities to be legislative, the Board composition violated the mandate of one-man, one-vote.

The lower court concluded that the major part of the "legislative and governmental" powers of the City lay with the Council; therefore, the Board could not be considered a "general governing body" subject to the one-man, one-vote principle.¹⁹² Nevertheless, that court stated: "Admittedly, however, *until* the 1963 revision of the City Charter, the Board did exercise far greater legislative powers than it has today and perhaps, until then, would have lent substance to plaintiff's alleged grievance"¹⁹³ The lower court was prepared to admit, apparently, that the Board had once had such significant legislative powers as to bring it within the ambit of the "general governing body" definition which would have required it to conform to the one-man, one-vote requirements as to its membership. Unfortunately, though the court stated that much of the Board's "legislative" power had shifted to the office of Mayor, the dicta were not extended to a discussion of the implications of such a shift.¹⁹⁴

In addition to the extensive grant of power over budget modifica-

191. 25 N.Y.2d 405, 255 N.E.2d 142, 306 N.Y.S.2d 898 (1969), *cert. denied*, 398 U.S. 955 (1970).

192. 58 Misc. 2d 1013, 1019-20, 297 N.Y.S.2d 421, 428.

193. *Id.* at 1016, 297 N.Y.S.2d at 424.

194. See text accompanying notes 49-53 *supra*. Earlier cases had, however, indicated that the whole budget process "is not legislative." See, e.g., *Lazinsk v. City of New York*, 163 App. Div. 423, 433, 148 N.Y.S. 808, 816 (1st Dep't 1914).

Other cases provide more particular indication of the legislative nature of the City's annual expense budget: *People ex rel. Collins v. Ahearn*, 120 App. Div. 95, 104 N.Y.S. 860 (1st Dep't 1907) holding that a budget appropriation for salaries in gross of a borough "bureau of highways was not a legislative establishment of a borough bureau of highways." The expense budget may, though, legislate negatively. *People ex rel. Kelly v. Dooley*, 169 App. Div. 423, 155 N.Y.S. 326 (2d Dep't 1915) holding that omission of salaries for more than a stated number of employees is a determination that the omitted number of employees shall not receive a salary; *accord*, *Ross v. LaGuardia*, 287 N.Y. 28, 38 N.E.2d 117 (1941). But when a budgeted reduction results in administratively permissible ordering of longer working hours, there has been no usurpation of the City Council's legislative powers. *Montreuil v. Board of Estimate*, 10 App. Div. 2d 266, 198 N.Y.S.2d 891 (1st Dep't 1960); *cf.* *Natilson v. Hodson*, 264 App. Div. 384, 35 N.Y.S.2d 537 (1st Dep't 1942), *aff'd*, 289 N.Y. 842, 47 N.E.2d 442 (1943).

tions, the process of adoption of the budget has also been made subject to the control of the Mayor, primarily through his appointee, the Budget Director;¹⁹⁵ the agency heads continue to submit their estimates to the Director;¹⁹⁶ the Director prepares the "executive" (*i.e.*, proposed) budget,¹⁹⁷ as well as the supporting line-item schedules;¹⁹⁸ and, to this end, the visitatorial powers of the Budget Director as found in the 1938 Charter have been retained.¹⁹⁹

The input of the Council or, for that matter, of the Board of Estimate regarding the adoption of the budget is nominal, at best.²⁰⁰ Either body may make any change it deems proper in the executive

195. 1963 Charter § 111.a.

196. *Id.* 112.a.

197. *Id.* §§ 111.b., 117 no longer require, as did the 1938 Charter § 119.1 that the executive expense budget include a report of the previous year's expenses. "The absence of these data makes it difficult to identify and separate the portions of the budget attributable to new and expanded programs from mandatory costs." *CENTRAL BUDGET ISSUES*, *supra* note 112, at 83. The new Charter amendments restore this requirement. 1938 Charter § 117.b.2., *as amended*, (1975).

Additional items that are probably mandatory are included in the *NEW YORK, N.Y. ADMIN. CODE*, ch. 6, tit. A, § 117.a.10-1.0 (1972). As to the Seventh regiment armory building, see note 83 *supra*.

In addition to the mandatory budget items, see note 83 *supra*, the 1963 Charter sets forth the following mandatory appropriations: various city sinking funds, *id.* ch. 11; debt service, *id.* § 113.a.3; the fund for extraordinary costs for snow and ice removal, *id.* § 117.a.6; tax deficiency account, *id.* § 127; tax appropriation and general fund stabilization reserve fund, *id.* § 128; sinking fund of the City of New York, *id.* § 271; the water sinking fund of the City of New York, *id.* § 272; the rapid transit sinking fund of the City of New York, *id.* § 273; and the transit unification sinking fund of the City of New York, *id.* § 273-a. *See also id.* §§ 113, 117 for more general provisions to the same effect.

The tax appropriation and general fund stabilization reserve fund, popularly known as the rainy day fund, has been subjected recently to gimmicking by the addition in 1964 and 1968 through 1975 of a provision mandating clear weather, that is by providing that no appropriation need be made thereto for the indicated years. 1963 Charter § 128.g., *as amended*, (1975).

The Bureau of the Budget uses mandatory in yet another sense: with respect to the submission of the annual departmental estimate, the current year's base—the unalterable base—is called the mandatory request, anything else the discretionary request. *See W. FARR, L. LIEBMAN & J. WOOD, DECENTRALIZING CITY GOVERNMENT: A PRACTICAL STUDY OF A RADICAL PROPOSAL FOR NEW YORK CITY* 121 (1972). Since the discretionary request is invariably ignored, the less appropriated not required gimmick, *see* note 234 *infra*, becomes crucial to increasing one's unalterable base by more than the legally "mandatory" amounts.

198. 1963 Charter § 117.b.2., *as amended*, (1975).

199. *Id.* § 111.b. *See* note 129 *supra*.

200. *Compare* 1963 Charter § 120 with *id.* § 121.c. In an attempt to make the City's expense budget less executive or mayoral, the 1963 Charter § 120.b., *as amended*, (1975) provides for adoption of a single expense budget (instead of separate adoption by the Board of Estimate and City Council). However, 1963 Charter § 120.d., *as amended*, (1975) will effectively deny the Mayor his Board of Estimate votes in connection with adoption of the expense budget.

budget, but each change is subject to veto by the Mayor.²⁰¹ In order to override a mayoral veto, a change made by either body must be submitted to both, and both must pass the identical change by a two-thirds vote.²⁰²

Thus, the Board of Estimate, having become "quasi-legislative" in character, was to suffer the same fate as the City legislature²⁰³—its power was transferred to the Executive! As for the City Council, it can be said that by adding section 124(f)²⁰⁴ to the Charter (giving itself total control over its own appropriation-modifications), the Council spared itself the ultimate indignity of having to ask the Executive to exercise the legislature's power on the legislature's behalf.

A. Program Budgeting

Aside from the shifts in control,²⁰⁵ the most significant effect which the 1963 Charter has on the budget process is the requirement that it "be a program budget²⁰⁶ and not a line item budget."²⁰⁷

The program concept is a serious attempt to provide an output analysis; it is, simply, an attempt to determine the net effect of budget appropriations. Essentially, programing has come to mean a micro-analytic system²⁰⁸ in which appropriation-objectives are

201. In a further attempt to make the expense budget less executive, 1963 Charter § 121.a., *as amended*, (1975) will effectively deny the Mayor a veto of any Council—Board of Estimate reduction or elimination, and *id.* § 121.b., *as amended*, (1975) will lessen somewhat the vote needed to override a mayoral budget veto.

202. 1963 Charter § 121.c.

203. See text accompanying notes 49-53 *supra*.

204. 1963 Charter § 124.f.

205. See text accompanying notes 175-90 *supra*.

206. Programming was first used by military planners. PROGRAM BUDGETING 86-87 (D. Novick ed. 1965). It was considered impressively successful and introduced into the entire federal establishment by a presidential memorandum of Aug. 25, 1965. *Id.* at v.

207. STATE CHARTER REVISION COMMISSION FOR NEW YORK CITY, FINAL REPORT 3 (1961) provides that the expense budget is "[t]o be a program budget and not a line item budget."

New York City has tried "performance budgeting" beginning with the 1956-57 expense budget. The supporting schedules for that year contained a number of schedules of units of work performed (*e.g.*, number of inoculations by the Department of Health) related to manhours expended. [1956-57] EXPENSE BUDGET FOR THE CITY OF NEW YORK. This effort does not appear to have decreased reliance on the line item budget or to have improved the quality of budgeting in New York City. For a general discussion, including New York State's experience, see *Symposium, Performance Budgeting: Has the Theory Worked?*, 20 PUB. AD. REV. 63, 69 (1960).

208. For an argument that microanalysis is "too particular" and that macroanalysis is

converted into data, which data, in turn, are more readily susceptible to formulaic comparison-analysis, thereby providing the budget planner with the opportunity to make more informed, more meaningful decisions as to the most useful allocations of scarce resources. In the words of a prominent writer:²⁰⁹

It focuses on the decisionmaking process, particularly the problems of data and analysis. Its first effort is simply the rational ordering of inputs and outputs, in which the initial emphasis is on the identifiable outputs—major objectives of government processes. It then attempts to order the inputs—government activities produced by manpower, material, real estate—so that comparisons among wide ranges of alternatives are feasible and meaningful.

Program budgeting starts with the structuring of the problem and ends with analysis of the data. Among the analytical tools, cost-benefit or cost-utility analysis that compares benefit or utility (outputs) with resources or costs (inputs) is a most prominent one.

As applied in New York City,²¹⁰ program budgeting consists of four broad ideas: (1) a *budget lexicon* which arrays government costs or budget estimates in output terms (rather than inputs or administrative groupings as in line item budgeting); (2) a rigorous mathematical analysis of the cost-benefit or cost-utility of various output arrays; (3) a system of rigorous mathematical analysis of alternate ways of reaching a given goal before the appropriation is defined; (4) a cost-utility or cost-benefit analysis of the cost of the

called for, see Foster & Smith, *Allocation of Central Government Budgets Over City Regions*, 6 URBAN STUDIES 210, 212 (1969).

209. PROGRAM BUDGETING, *supra* note 206, at viii.

210. CENTRAL BUDGET ISSUES, *supra* note 112, at 68. This effort, which began informally in 1967, was deliberately "opportunistic rather than systematic and comprehensive." *Hearings on The Planning-Programing-Budgeting System: Progress and Potentials, Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 90th Cong., 1st Sess., 89 (1967) [hereinafter cited as 1967 *Hearings*].

Program-planning-budgeting (PPB) became:

a separate but unequal component of the budget process. The examiners were in command of the all-important [budget] modifications . . . and it did not take agencies long to discover that PPB had little to do with budget lines. Yet PPB, as an analytic change agent, was selectively used by the Mayor and budget officials for some key policy decisions.

CENTRAL BUDGET ISSUES, *supra* note 112, at 69.

Indeed, the separation was complete—the line budget operation was on the twelfth floor of the Municipal Building and the program budget on the thirteenth. Every City budget officer knew that budget power lay on the twelfth floor.

life-of-the-program, or the cost of the program over at least a five-year period.

Because there was no statutory specification limiting the City's budget to a particular program technique,²¹¹ all of the above ideas appear in the City's budget to some degree. Budget directors for the various "superagencies"²¹² were also free to determine the technique or techniques to be used, with varying degrees of success.²¹³

Program budgeting, achieved by using any one of these techniques, or any combination of techniques, has the potential to "re-shape" the unalterable base,²¹⁴ thereby potentially making its various components more open to scrutiny and objective re-evaluation.

This "reshaping" effect can be easily illustrated by the use of a hypothetical budgeting project.²¹⁵ Suppose a City manpower agency was charged with maintaining full employment in New York City, with particular emphasis upon the unemployed and underemployed. The traditional line item budget categories for this project might appear as follows:

211. See note 207 *supra*. A consultant to the State Charter Revision Commission for the City of New York found that:

The [1963] Charter says very little about the content (as opposed to the form) of the Mayor's budget or the accompanying budget message. This is consistent with prevailing administrative theory that details of the budget process should be excluded from the basic law.

CENTRAL BUDGET ISSUES, *supra* note 112, at 81.

212. The superagencies are those agglomerations of the more traditional City agencies first specifically defined in THE MAYOR'S TASK FORCE ON REORGANIZATION OF NEW YORK CITY GOVERNMENT, CRACO REPORT (1966). The superagencies, known as administrations, are, with the exception of the Human Resources Administration, defined in the 1963 Charter chs. 56-63-A. The Human Resources Administration is defined in New York, N.Y., Exec. Order No. 28 (Aug. 14, 1966).

213. Frederick Hayes, former City Budget Director, in a prepared statement, noted: [The Human Resources] [A]dministration was the first City agency to launch its own PPBS effort without outside assistance. It presented for the fiscal year 1967-68, a completely new budget structure which identified expenditures by functional program areas and objectives. This has been a remarkable accomplishment for an agency which has virtually had to organize itself from scratch, and which is charged with administering some of the City's most critical and innovative programs.
1967 Hearings, *supra* note 210, at 97.

214. See text accompanying notes 131-34 *supra*.

215. This hypothetical budgeting project is taken from, but is not the same as, the budget programs for the Department of Employment, Human Resources Program. See [1975-76] EXECUTIVE BUDGET FOR THE CITY OF NEW YORK 315-18.

- I. Administration and Central Operations
- II. Neighborhood Centers
- III. Federally Funded Activities
- IV. State Funded Activities
- V. Employee Fringe Benefits

This array is convenient for audit check purposes. But it does not explain, really, what result the appropriation is intended to produce. The same project arrayed according to a program budget technique (*e.g.*, a budget lexicon) might be displayed this way:

Program I	Development of New Jobs Within the City
Program II	Training of the Unemployed for (these) New Jobs
Program III	Training of the Underemployed for (these) New Jobs
Program IV	Placement of those Trained into New Jobs
Program V	Follow Up of Those Placed
Program VI	Development of Careers for Those Placed
Program VII	Research

This array when examined with a statement of the project's goals—for example, how many new jobs are to be developed—is obviously much more meaningful to a budget planner (or to a legislature) than the typical line item display. This array is also advantageous in that sub-standard performance becomes easier to detect, sub-standard performance being hitherto all but undetectable.

However, this program budget array creates a series of administrative and audit check difficulties. For one, the source of funds (City, State, Federal, private) is no longer identified, thereby necessitating a subsidiary source-of-funds budget with a comparable subsidiary accounting system. Also, the usual administrative structure (*e.g.*, "Job Corps") which is useful in determining the total cost of a given administrative function no longer exists. To supply this, a subsidiary administrative budget must be created with a comparable subsidiary accounting system.²¹⁶ The need for salary control, too,

216. Section 123.a. of the 1963 Charter provides:

Except as otherwise provided by law, no unit of appropriation shall be available for expenditure by any agency until a schedule fixing positions and salaries or setting forth other expenses within such unit of appropriation, established subject to the provisions of this charter, of the civil service law and of other applicable statutes, shall have been approved by the mayor, copies of which schedules shall be filed by the director of the budget with the comptroller, the department of personnel and the affected agency. To the extent that such a schedule or any amendment or modification thereof departs or differs from the itemized information and supporting schedules included in the budget

requires that each employee appear as a total entity somewhere in the audit check system; each employee's total salary needs to be shown on one control line, though his performance might straddle several programs. For example, in the program budget illustration used above it is apparent that a single employee could be performing in Programs II, III, and IV. A system of "crosswalks,"²¹⁷ then, is necessary if salary control is to be maintained; that is, an accounting control system is needed which lists a single employee on one control line and arrays under that control line a distribution by person-hours of that employee's time according to the different program functions the employee performs, insuring that the employee receive one (and only one) paycheck per pay period.

Unquestionably, this is an enormous undertaking. But, it is made even more so, inasmuch as the accounting system is headed by an independently elected official outside of the budgeting system: the head of the accounting system is the Comptroller;²¹⁸ the head of the budgeting system is the Mayor.²¹⁹ The Comptroller and the Mayor are often political competitors and,²²⁰ predictably, neither is usually willing to subordinate his system to that of the other.

These difficulties result, unfortunately, in a compromised program budget in order that no traditional cost item, such as an employee's salary, be attributed to more than one program.²²¹ For our hypothetical budget project, a typical compromise has been:

message as submitted by the mayor . . . such schedule, amendment or modification shall be published forthwith in the City Record.

Unhappily, instead of being treated as an administrative budget subsidiary to a program budget, it has continued to be treated as *the* budget.

217. "Crosswalks" refers to an elaborate system of cross-references in which each item in the line budget can be totally tracked into the program budget and vice versa.

218. 1963 Charter § 93.f.

219. *Id.* §§ 111.a., 116.

220. A consultant to the State Charter Revision Commissioner for the City of New York found that:

During the few hectic days the Board and the Council have to review the executive budgets, the Comptroller's skill and information are indispensable. He can . . . provide the Board of Estimate with alternatives to the Mayor's budget.

CENTRAL BUDGET ISSUES, *supra* note 112, at 98.

221. A program budget presupposes a soundly functioning accounting system. Alas, that is just what New York lacks; as put by one business member of the newly created Emergency Financial Control Board, "Fundamentally, this city does not have an accounting system. I simply cannot conceive of a \$12-billion operation without an accounting system." Darnton, *The Control Board and How It Works*, N.Y. Times, Oct. 14, 1975 at 43, col. 4. As to federal funds, there is a constitutional duty to "account." U.S. CONST. art. I, § 9.

Program I	Administration
Program II	Executive Administration
Program III	Field Operations
Program IV	Job Development
Program V	Training and Placement
Program VI	Federally Funded Activities
Program VII	State Funded Activities
Program VIII	Research
Program IX	Employee Fringe Benefits

This compromise array has several adverse effects, the most obvious of which is the increase in the number of "units of appropriation,"²²² which causes a corresponding rise in the number of MA²²³ modifications.²²⁴ Also, the budget lexicon becomes vague and ultimately ineffective as a tool for defining governmental costs or budget estimates in output terms.

Thus, budgeting is left in a thoroughly disadvantageous position: budget analysis and planning are not at all advanced; and more purely executive rewriting of the budget occurs via the increase in modifications.

222. As previously explained, there must be at least one unit of appropriation for each program. See note 177 *supra*.

223. For a definition of "MA" modifications, see notes 161, 179 *supra*.

224. Ideally, under a program budget format, each agency (budget entity) would be a single unit of appropriation, thereby permitting each agency head who is entrusted with the 1963 Charter § 124.a. ("MW") power to exert MW and MA control over his own line budget without Bureau of the Budget involvement, thereby permitting the Bureau of the Budget to turn to larger concerns, but "[t]he Bureau is seemingly not concerned with encumbrances, free balances, and rates of expenditures (the normal approaches to budgetary controls) but rather with transfers and modifications . . . in the line-item appropriations." A. BUCK, BUDGETING AND FINANCIAL MANAGEMENT SURVEY OF THE CITY OF NEW YORK 34 (1951). A consultant to the State Charter Revision Commission for the City of New York found that:

Administration of the line schedules produces a massive flow of paper work and ties up over half of the Budget Bureau's staff. It involves thousands of minor and routine transactions, few of which have much to do with agency policies or performance. The mass of line controls makes it difficult for the Budget Bureau and the agencies to focus on objectives and results. Their attention is diverted to the *lowest* level of budget aggregation.

CENTRAL BUDGET ISSUES, *supra* note 112, at 132.

B. More Gimmickry

Sections 1514 and 1515 of the 1963 Charter, when read *in pari materia*, continue the long-standing requirement of a balanced budget.²²⁵ Gimmickry, some of which is as equally longstanding,²²⁶ is sometimes used to circumvent this requirement. Section 125 of the Charter, for instance, permits the carrying forward within a given appropriation of the previous year's unexpended, unencumbered City tax levy funds into the first six months of the current year's budget. This has an "inflationary" impact on that appropriation's program: if the program were budgeted for twenty million for the year and, in addition, carried forward five million from the previous year, it would have appropriations, obviously, of twenty-five million for that year; the following year, though, the agency head would request budgeting of twenty-five million for the program (instead of twenty, or twenty plus a reasonable percentage increase) in order to keep it operating at its current level.

At budget-adoption time, "balancing" can be made easier by overly-generous revenue estimation, which estimation, formerly a function of the Comptroller,²²⁷ is, under the present Charter, largely a mayoral function and part of the budget message.²²⁸

The Mayor and the State officials with whom he is negotiating, are anxious to reconcile the difference between the executive budget and the funds available. Understandably, the estimation of revenues becomes subject to rather optimistic re-evaluation. If, after a budget is agreed upon and adopted, this re-evaluation figure should prove incorrect, the resultant shortfall is usually covered by "budget notes."²²⁹

Anticipated receipts from State and Federal sources, which are "reappropriated"²³⁰ in the City budget, are also subject to this optimistic over-evaluation. If a particular program is being considered

225. Section 1515 of the 1963 Charter, *as amended*, (1975) will reinforce this requirement by adding a final sentence:

The tax rate shall be such [as] to produce a balanced budget within generally accepted accounting principles for municipalities.

226. See text accompanying notes 87, 108 *supra*.

227. 1938 Charter § 115.1.

228. 1963 Charter §§ 117.b.3.-4. See also *id.* § 113; CENTRAL BUDGET ISSUES, *supra* note 112, at 157.

229. CENTRAL BUDGET ISSUES, *supra* note 112, at 158.

230. Federal and state funds are, of course appropriated through the legislative processes therefor. The City of New York, unlike most cities, "re-appropriates" these already appropriated funds in its own budget, which swells the total budget substantially. Localities which do not re-appropriate federal and state funds handle such funds as memorandum accounts.

by Congress, City budget planners may prematurely include a percentage of the program expected to be allocated to New York in the City budget. If the program as finally adopted by Congress is less than anticipated (and therefore the funds for New York City are less) or if the percentage allocated to the City is less than expected, the deficiency, if already spent by the City, is covered by revenue anticipation borrowing made possible by an amendment to the (State) Local Finance Law.²³¹

In counter-point to over-estimation of revenues and Federal appropriations, another gimmick for finessing the requirement of a balanced budget is under-estimation of expenditures. Specifically, this might be accomplished by under-calculating certain continuing obligations, such as those to the City pension system, on the basis of outmoded actuarial assumptions.²³²

Thus, the budget is "reduced" because contributions to pensions are minimized. These insufficient contributions to the pension system result in the development of significant "unfunded accrued liability."²³³ This liability, in turn, leads to the practice of using fund capital—instead of interest produced by such capital—to meet the current pension obligations; carried to its extreme—the total depletion of fund capital—this gimmick could result in payment of the yearly pension system obligations entirely out of the annual expense budget, or worse, bankruptcy of the pension system.

A significant gimmick for balancing the budget is also one which involves, although indirectly, the underestimation of expenditures. The gimmick is a bookkeeping entry: "Less Amount Not Required Unappropriated."²³⁴ This gimmick is based on the same principle as the "Required Accruals"²³⁵ entry; if it is not possible to fund fully a program and, at the same time, maintain a balanced budget, a part of the appropriation will be subtracted from the total ("Less Amount Not Required Unappropriated") on the assumption that the program will not be operating at one hundred percent capacity,

231. N.Y. LOCAL FIN. LAW § 11.00 a.36 (McKinney 1968).

232. See, e.g. N.Y. Times, Oct. 26, 1975 at 1, col. 7.

233. This "unfunded accrued liability" has been estimated at about \$6.1 billion. *Id.* at 56, col. 4.

234. See, e.g., *Supporting Schedules* [1975-76] EXECUTIVE BUDGET OF THE CITY OF NEW YORK 4.

235. See text accompanying note 135 *supra*.

one hundred percent of the time. Clearly, application of this gimmick to several programs can go a long way toward balancing the budget. Afterward, should the entry prove to have been too large, that is, should the amount actually needed prove to have been "underestimated," the difference will be covered by "budget notes."²³⁶

The "Less Amount Not Required Unappropriated" entry can also have an inflationary impact. An agency head can request increased funding for the ensuing year by dropping the entry from the previous year's budget. The agency head can defend this increased funding by describing it as not an increase in the program itself, but merely an increase in the spending *rate* of that program.

If these gimmicks are not adequate or available, the requisite budget balance²³⁷ might be accomplished by shifting an appropriation out of the expense budget and into the capital budget. The capital budget is a wholly borrowed budget,²³⁸ ordinarily used exclusively for capital construction and maintenance. However, a series of amendments to the Local Finance Law²³⁹ has allowed certain traditional expense items to be paid by long-term (capital) borrowing, hence chargeable to the City's capital budget. The process, once begun, was quickly expanded to include items more and more remote from the general understanding of "capital": in 1960, capital planning which did not result in actual construction was treated as a capital expense;²⁴⁰ in 1964, the cost of special censuses was made chargeable to the capital budget;²⁴¹ in 1968, job and business oppor-

236. "[A]ny shortfall in actual revenues can be funded by budget notes." CENTRAL BUDGET ISSUES, *supra* note 112, at 158. These budget notes would be revenue anticipation notes. N.Y. LOCAL FIN. LAW §§ 25.00 c (McKinney 1968).

237. See note 225 *supra*.

238. See, e.g., 1963 Charter § 211.

239. Since the City's capital budget is wholly borrowed, a capital budget item must come within the terms of the N.Y. LOCAL FIN. LAW § 11.00 a.36(a) (McKinney 1968). A proper capital budget item may be an expense budget appropriation. *Paduano v. City of New York*, 45 Misc.2d 718, 257 N.Y.S.2d 531 (Sup. Ct.), *aff'd*, 24 App. Div. 2d 437, 260 N.Y.S.2d 831 (1st Dep't 1965), *aff'd*, 17 N.Y.2d 875, 218 N.E.2d 339, 271 N.Y.S.2d 270 (1966), *cert. denied*, 385 U.S. 1026 (1967) (holding that fluoridation equipment may be an expense budget appropriation).

240. Law of April 14, 1960, ch. 735, [1960] N.Y. Laws 2047 (codified at N.Y. LOCAL FIN. LAW § 11.00 a.62 (McKinney 1968)).

241. Law of April 3, 1964, ch. 284, [1964] N.Y. Laws 1116. (codified at N.Y. LOCAL FIN. LAW § 11.00 a.71 (McKinney 1968)).

tunity expansion programs were given the status of "capital expense,"²⁴² inasmuch as they resulted in permanent improvement of the salary-earning and therefore taxpaying potential of a class of citizens. In fact, this "capital" expenditure is treated as having a "period of probable usefulness"²⁴³ of *thirty years*,²⁴⁴ thereby allowing the borrowing for these programs to be done through the issuance of up to thirty-year bonds.²⁴⁵

Once adopted, the "balanced" budget is immediately subject to modification.²⁴⁶ Though this process of budget modification has been simplified, it is nevertheless sometimes desirable, and quite possible, to by-pass the formal processes of budget modification when reassigning personnel; "position lending" is the gimmick by which this unofficial re-assignment is accomplished. An agency head, for example, might obviate the need for a formal "MA" modification by reassigning ("lending") the employee to a different unit of appropriation without rearranging the budget.²⁴⁷

242. Law of June 22, 1968, ch. 1000, [1968] N.Y. Laws 2877 (codified at N.Y. LOCAL FIN. LAWS § 11.00 a.73 (McKinney Supp. 1975)).

243. N.Y. LOCAL FIN. LAW § 11.00 a. Probable usefulness is the maximum (capital) loan period for a given project purpose.

244. *Id.* § 11.00 a.73.

245. *Id.* § 11.00 a.

246. 1963 Charter § 124.a permits MW modifications within units of appropriation to be made "prior to the commencement of" or during the fiscal year. This permits uninterrupted continuation of changes made between March 15th, the closing date for modifications for preparation of the supporting schedules, *id.* § 117.b.2, and July 1st, the date the succeeding fiscal year begins, *id.* § 110. *Id.* § 124(a), *as amended*, (1975) omits this requirement, presumably as unnecessary when each agency administers its own line schedule.

247. It has been observed that:

Line controls also produce a budget of thousands of little "lies," as people work out of title or out of location, or even for agencies other than those to which they are budgeted. A frequent practice is for agencies to trade lines, that is, for one agency to lend a line to another agency in exchange for a line that it wants. In the Hospital Department alone there were an estimated 4000 "loans and borrows" during the fiscal year July 1970-June 1971. The total magnitude of this practice is impossible to calculate.

CENTRAL BUDGET ISSUES, *supra* note 112, at 132.

The problem of municipal employees working "out of title" is by no means a recent development. A 1952 report to the Mayor's Committee on Management Survey recognized this practice as widespread in New York's Civil Service. The report proposed tightening up personnel administration controls through centralization. W. SAYRE & H. KAUFMAN, PERSONNEL ADMINISTRATION IN THE GOVERNMENT OF NEW YORK CITY 734 (1952).

Position lending defeats the result in *People ex rel. O'Loughlin v. Board of Estimate & Apportionment*, 167 App. Div. 76, 152 N.Y.S. 625 (2d Dep't), *aff'd*, 216 N.Y. 625, 110 N.E. 1047 (1915). See note 248 *infra*.

More significantly, even the "MN" modification (which, remember, at least technically, is not completely within the control of the Mayor) can be by-passed. A politically sensitive agency (e.g., "Office of the Mayor") which might wish to appear officially to be sparsely staffed can effect the informal transfer of employees into it from other agencies; a reasonably well-staffed agency simply "lends" employees to the sensitive agency. The employees involved will continue to appear on the payroll of the lending agency.

Strictly analyzed, this lending is unlawful: it is a violation of the Charter requirements pertaining to modifications.²⁴⁸ But, not only is this gimmick winked at, it is institutionalized; the Vacancy Control Board, created in 1966²⁴⁹ for the purpose of centralizing the control of position-filling, actually facilitated the lending by issuing a position "filling certificate"²⁵⁰ to the lending agency after the Bureau of the Budget had been assured that the "lending" was to take place.

A gimmick originally used to by-pass budget limitations, which has become useful under current law, is the judgment fund abuse.²⁵¹ Retroactive salary increases for the previous fiscal year are often contained in collective bargaining agreements.²⁵² The Taylor Law apparently legalizes such agreements;²⁵³ nevertheless, the problem

248. See *People ex rel. O'Loughlin v. Board of Estimate & Apportionment*, 167 App. Div. 76, 152 N.Y.S. 625 (2d Dep't), *aff'd*, 216 N.Y. 625, 110 N.E. 1047 (1915), holding that the Register of Deeds, Kings County could not compel a transfer of funds from vacant position lines in order to pay already working temporary copyists hired to do the work of regular copyists who had been assigned to out-of-title work.

249. New York, N.Y., Exec. Order No. 5 (Jan. 19, 1966) implemented by Mayoral instructions in New York, N.Y. Exec. Order No. 5 (Jan. 24, 1966), *repealed* New York, N.Y. Exec. Order No. 24 (Dec. 9, 1974). The VCB, as it came to be known, consists of the First Deputy Mayor, Director of the Budget, and the Personnel Director. The Examination Division of the Bureau of the Budget is its staff, and, in effect, the VCB.

250. This is known as a "DM" (Directive of the Mayor) certificate.

251. See text accompanying note 101 *supra*.

252. CENTRAL BUDGET ISSUES, *supra* note 112, at 66.

253. The lawfulness of retroactive wage agreements had been recognized in *Timmerman v. City of New York*, 69 N.Y.S.2d 102 (Sup. Ct. 1946), *aff'd*, 272 App. Div. 1075, 70 N.Y.S.2d 140 (2d Dep't 1947), which upheld a retroactive agreement between the City Board of Transportation and its employees. The court, in finding the retroactive portion of the agreement supported by consideration, and therefore not a gift of public funds, observed:

What stronger moral consideration for the retroactive feature of the pay increase could there possibly be? The underpaid . . . and dissatisfied wage earners on the city's transit system were induced to continue working and to forego their right to give up their jobs on the assurance of the Board of Transportation that any increases would,

of administering these increases in accordance with budgetary requirements remains. To avoid having the full burden of these agreements appear in the current budget, the increases are treated as a "judgment and claim" against the City;²⁵⁴ they are then financed through judgment fund borrowing.²⁵⁵ Using this gimmick to finance retroactive agreements has potentially grave consequences. We have already seen that "judgment-fund contracts" were found, when strictly construed, to be ultra-vires and unenforceable;²⁵⁶ they were in excess of available appropriations and, as such, violated the statutory requirements governing municipal contracts.²⁵⁷ This strict contract rule apparently no longer obtains.²⁵⁸ However, it must be noted that the increases do apply, after all, to already existing, formally adopted units of appropriation. The collective bargaining retroactive increases, therefore, are nonetheless budget modifications. If these increases are paid from the judgment and claims fund, and if they are budget modifications, then they are MN budget modifications, because they obviously represent an increase in the total budget; as MN modifications, the collective bargaining increases are unlawful because they have not been made in accordance with the requirements of section 124.c. of the 1963 Charter concerning MN modifications. In fact, the increases *not* paid from the judgment and claims fund, but paid through the particular budget current when the agreement is made would, to the extent paid by transferring "excess accruals,"²⁵⁹ also be MN modifications; even though such a transfer would not increase the total budget it would inevitably be, to some extent, *across agencies*, which by definition is an MN modification. Again, modification of the budget would have been made in violation of the Charter MN modification requirements, and would again be unlawful. If these increases are

if practical, be made retroactive to July 1, 1946.

Id. at 108; *cf.* *Mahon v. Board of Educ.*, 171 N.Y. 263, 63 N.E. 1107 (1902), holding a retroactive grant of pension rights to retired teachers void as gift of a public funds.

The "Taylor Act" is the Public Employees' Fair Employment Act, N.Y. CIVIL SERVICE LAW §§ 200-14 (McKinney 1973). The Act apparently legalizes such agreements. *Id.* § 212 2.

254. CENTRAL BUDGET ISSUES, *supra* note 112, at 66.

255. *Id.*

256. See note 101 *supra*.

257. See notes 102, 103 *supra*.

258. For the law governing New York City contracts, see the 1963 Charter, ch. 13.

259. See text accompanying note 140 *supra*.

paid with actual funds hidden in the budget in operation when the agreement is made, they would be either MW or MA modifications to the extent funds were hidden within the units of appropriations for the agency whose budget lines are increased. The increases would be MA modifications, also, if they were hidden within an *unassigned* unit of appropriation found anywhere in the City budget. This hiding of funds, however—within an agency or in an unassigned unit of appropriation—does not appear to be sufficient to account for *all* the increases and does not, therefore, avoid the MN problems encountered above.

These legal difficulties could be alleviated by presenting the increases to the City Council and Board of Estimate for their (MN modification) approval. This might incidentally serve as a check on the size of such increases, because neither the Council nor the Board would be likely to approve increases which openly exceed available budgetary resources.

The lack of a significant check on the size of such increases creates, in part, the need to resort to gimmickry in funding the increases.

Gimmickry and manipulation of budget modifications began as an attempt by those managing the budget to expand their control. But, the reasons for their use began to change as the Bureau of the Budget began losing its usual control over such significant expenditures as employee salary increases. Salary increase control, for example, was diminished by a series of Executive Orders,²⁶⁰ which

260. The formal history of collective bargaining between the City of New York and its employees starts with the Interim Order on the Conduct of Relations between the City of New York and its Employees, July 21, 1954, *as amended*, March 14, 1955. This Interim Order was somewhat further formalized by New York, N.Y., Exec. Order No. 38 (May 16, 1957). Collective bargaining was firmly established by New York, N.Y., Exec. Order No. 49 (March 31, 1958) and implemented by Commissioner of Labor, *Procedures for Joint Collective Bargaining with the Director of the Budget and the Personnel Director under Executive Order No. 49* (1960) in NEW YORK, N.Y., DEP'T OF LABOR & DEP'T OF PERSONNEL, EMPLOYEE RELATIONS PROGRAM 30 (1965). These "procedures" explicitly involved the Director of the Budget as one of two officials with "joint authority and responsibility" concerning collective bargaining with certified employee organizations as to the "terms and conditions of employment." *Id.* at 30. New York, N.Y., Exec. Order No. 38 (Feb. 7, 1967) formalized the Office of Labor Relations which had existed since August, 1966. *Note, The Taylor Law, The OCB and the Public Employee*, 35 BROOKLYN L. REV. 214, 226 (1969). The City policy favoring written collective bargaining agreements was promulgated in 1967 in the New York City Collective Bargaining Law, 6 NEW YORK, N.Y., ADMIN. CODE ANN. ch. 54, § 1173-2.0 (1971), and redeclared in New York, N.Y., Exec. Order No. 52, § 1 (Sept. 29, 1967), *as amended*, Oct. 2, 1967.

among other things, established an Office of Labor Relations that acted, in effect, as a mini-Bureau of the Budget.²⁶¹ The shift of budget management power to the Mayor by the 1963 Charter caused a further reduction in the Bureau of the Budget's usual control.

Many expenditures, therefore, such as collective bargaining increases, developed a certain "mandatory" quality; now, the Bureau of the Budget's task is only to reshape the budget, in any way possible, in order to accommodate the cost of these increases. The collective bargaining-judgment fund gimmick is one way in which the budget managers strive to make this accommodation.

Budget managers seem now to employ gimmickry in an attempt to provide funding for appropriations over which they have relatively little control rather than for the usual, historical reason of enhancing their own power. These manipulative techniques provide some provisional relief as the actual cost of these appropriations—without sufficient funding to cover it—falls due.

Now, the abuses have become abused: the modification-gimmickry machinery is just not sufficient to absorb these constantly increasing expenses without disrupting the financial structure of the City. As a result, more and more oppressive, frightening debt is pushed into a future which comes closer with each succeeding budget.

C. Amendments to the Present Law

The Charter amendments, effective January 1, 1977, seemingly seek to control this abusive gimmickry. Some of the new amendment-changes might prove effective. The capital budget will no longer be available to finance expense appropriations;²⁶² the role of the City legislature has been increased to provide some check on

261. New York, N.Y., Exec. Order No. 38 (Feb. 7, 1967) provided in pertinent part: The Director of Labor Relations is authorized to negotiate labor agreements with the unions certified as representing the various groups of City employees, and to prepare and sign labor agreements on behalf of the Mayor.

This effectively eliminated the Bureau of the Budget from collective bargaining and confronted it with large increases which are in effect mandatory. *CENTRAL BUDGET ISSUES*, *supra* note 112, at 66.

The fact that the Office of Labor Relations is a mini-Bureau of the Budget may be seen in *Program IV* [1975-1976] *EXECUTIVE BUDGET OF THE CITY OF NEW YORK* 8, showing, for 1974-75, the Office of Management and Budget with 448 full time positions, and, at *Program VI*, showing, for the same year, the Office of Labor Relations with 70 full time positions.

262. 1963 Charter § 211.1.a., *as amended*, (1975).

the executive department,²⁶³ and, crucial to that end, a budget staff—the Legislative Office of Budget Review—will be appointed to monitor and interpret the budget process for the City Council and Board of Estimate.²⁶⁴

Certain amendment changes while appearing to be significant are, in fact, illusory. For example, attempts to control collective bargaining expenditures,²⁶⁵ while apparently sound, have within them the elements of ineffectiveness: the agreements must be concluded prior to the commencement of the fiscal year during which their provisions shall be in effect "[s]o far as practicable";²⁶⁶ and, "[n]o part of any retroactive wage or salary settlement shall be charged to the capital budget"²⁶⁷—but what of the judgment and claims fund? As such, these changes do not really assure any significant increase in control over these agreements.

V. Final Analysis

A. Audit Check Controls

Audit check controls over the budget need rigorous improvement. As unassuming as this conclusion may be, it is, nevertheless, starkly

263. *Id.* § 121.a., provides that the Mayor may not veto reductions or eliminations in the executive budget. This, it is urged, makes the budget less executive because under the present 1963 Charter § 121.b the budget may contain units of appropriation which a majority of the City Council and Board of Estimate have rejected, but not by a veto-overriding majority. *Id.* § 121.b., as amended, (1975) reduces the veto-override majority to two-thirds of all Council members and a majority of the Board members, excluding the Mayor. *Id.* § 120.b provides for adoption of single budget by both the Council and the Board, which prevents mayoral whipsawing. *Id.* § 120.d. denies the Mayor a vote on the adoption of his executive budget. The power granted in *id.* § 123.b., to either the Council or the Board to disapprove proposed MA's which change a unit of appropriation by more than five per cent is clearly illusory, in that it presupposes the units of appropriation have not been corrupted by gimmickry, see note 247 *supra*, and that they have been soundly devised in the first place, see text accompanying note 128 *supra*.

264. 1963 Charter § 45, as amended, (1975). It is comparable to the Congressional Budget Office, U.S.C. § 601-03 (1970), established July 12, 1954.

265. 1963 Charter § 1175, as amended, (1975) provides:

Not later than sixty days after the execution of a collective bargaining agreement, a copy shall be published in the City Record together with a statement by the mayor (1) of the total costs and current and future budgetary and economic consequences of the agreement and (2) of the implications and likely impact of the agreement on the efficient management of city agencies and the productivity of city employees.

This requires the Mayor to report a *fait accompli* and assumes that the City has the expertise to cost the agreement.

266. *Id.* § 1176.a. (emphasis supplied).

267. *Id.* § 1176.b. See text accompanying notes 237-38 *supra*.

valid. Special emphasis must be given to involving the City legislature in such controls.

Comprehensive legislation must yet be drafted which speaks to all the budget practices in current use. This legislation must anticipate the gimmickry, and then specifically and relentlessly prohibit it. History shows that *any* ambiguity will provide the basis for circumventing the desired audit check control. The language in the present Charter and the newly approved Charter amendments is not drawn tightly enough, is not sufficiently detailed, to be effective: such language has historically permitted gimmickry.

For example, as to the most notable failure of audit check controls, if a Charter amendment is to prevent collective bargaining agreements in excess of available revenues, it must provide: 1) that for each agreement a grand total, bottom line figure be calculated, which represents the total²⁶⁸ cost of that agreement. The City would then be free to agree to any method of distribution of that total, so long as that total was not exceeded; 2) that the City Council specifically approve each agreement; and 3) that at the time of approval, the City Council be required to enact the additional taxation necessary to provide revenues to finance fully each agreement. Anything less detailed or less comprehensive would create the likelihood of distortion of the actual costs and, subsequently, the disruption of the budget through gimmick financing.

In addition, while the budget tends—and, perhaps, needs—to be essentially a function of the executive department, the City legislature must be empowered and encouraged to hold budget managers accountable. This needs to be done, not so much from the political theory aspect of the need to maintain the balance of powers between departments of government, but from the perspective of increasing the kind and number of audit check controls and of ensuring an efficient, responsive budget. To this end, the Office of Legislative Budget Review can be instrumental.

A freshened dedication to audit checks can do much to prevent a

268. The suggestion here is that an overall dollar figure be agreed upon and that the unions decide whether to take it in wages, pensions, or other fringe benefits. If a union were to implement a plan that turned out to exceed the agreed cost, the union would make up the difference, or wages, pension contributions or other "fringes" would be reduced until the cost overrun had been recouped.

runaway budget.²⁶⁹ But audit checks (including such devices as the Emergency Financial Control Board,²⁷⁰ and bankruptcy procedures) *cannot*, history has demonstrated, *insure an efficient, responsive budget*. For this we still need a program system.

B. A Program System

The Charter's program requirement, unfortunately, never has been implemented. However, a program system can probably be successful, if a new approach is used and certain traditional notions are abandoned.

First, the program system must abandon the attempt to reduce the budgetary consequences to a packet of "manageable," micro-data. Creating an enormous micro-econometric system for the purposes of output analysis and program evaluation results only in overly complex, confusing, unrealistic formulations. In New York, we do not very much need sophisticated indicators in order to determine *goals*—goals have been determined politically, and always will be. New York needs instead a system which will help it to *achieve* its goals, quickly and efficiently.

Second, for the same reasons we do not need to create an output budget lexicon. Such lexicons can be deceiving as to the work actually being performed by employees, and if, as we have seen, the outputs program is compromised, the lexicon is worse than ineffective.

What is needed is a cross-check program system which can be easily cross-referenced with the line item budget. Then, the need for subsidiary accounts would be obviated. The cross-check program would use a budget lexicon which describes programs by traditional functions that appear in most agencies, *e.g.*:

269. For a graph showing the recent growth of New York City's budget, see Appendix II.

270. The Municipal Assistance Corporation Act, N.Y. Sess. Laws chs. 168-69 (McKinney Pamphlet, 1975), and the New York State Financial Emergency Act for the City of New York, N.Y. Sess. Laws ch. 868 (McKinney Pamphlet, 1975) have caused a temporary displacement of the City's regular budget process. The Financial Emergency Act creates an Emergency Financial Control Board, *id.* § 5, empowered to develop a City budget known as a "financial plan," *id.* § 8, and mandates that the City's Expense Budget be balanced in accordance with the "accounting system and procedures prescribed in . . . the public authorities law" *Id.* § 8.1.a. See note 225 *supra*.

	Public Library	Police Department	Fire Department	Parks Department
Library Program Function	—	\$X	\$Y	\$Z

Each program could then be independently evaluated as to its performance in each agency. How much money is spent by the Police Department on library function activities, and how many persons are so employed? How efficient is the Fire Department at maintaining its library system? Should the Parks Department maintain its own reference materials, or should they be combined with those of another agency?

The programming system arrayed above can supply answers to questions such as these.

And, those questions which require qualitative evaluation to be answered can have that evaluation made, not on the basis of abstract mathematical formulas, but on the basis of human experience: each program could be supervised and inspected by a program examiner, who would be responsible to the Bureau of the Budget. The examiner would be chosen from an agency whose primary function (*e.g.* public library) roughly coincides with the program function, unless there is no agency whose primary function resembles the program; in that case, the examiner would be chosen from a comparable primary function in private industry. Presumably, the examiner will know how to perform that function more expertly and efficiently than those to whom it is merely a secondary activity.

Thus, traditional notions of agency inviolability, and the unalterable base, can be made more responsive to changing needs. The superagency concept tried to supply this; those agencies tried to dissolve traditional agency inviolability by subordinating several traditional agencies to an administrative "overseer," which would define goals of the superagency group, rather than defining separate goals for each traditional agency. This was unsuccessful because it did not deal with the inviolability of the unalterable base as it existed within each traditional agency. The cross-reference program approach would not directly attack traditional agency lines, but, by analyzing program function in terms of traditional functions appearing in most agencies, would *circumvent* the usual agency insularity. Now, when we consider how best to achieve a given goal we

no longer need to limit the inquiry to how, say, the Police Department (or the particular superagency) achieves that given goal. The goal is, after all, a *City* goal, and all City agencies should, to whatever extent they efficiently can, participate in achieving the goal, regardless of their traditional orientation. To treat agencies of the City with the inviolability of the great departments of government is neither sound political theory, nor sound budget policy. It is merely waste.

The cross-reference system allows the Budget makers to shift appropriations, as a given function acquires a higher priority, according to program function, as well as according to agency, (that is, as well as according to primary function) thereby establishing a remarkably responsive budget.

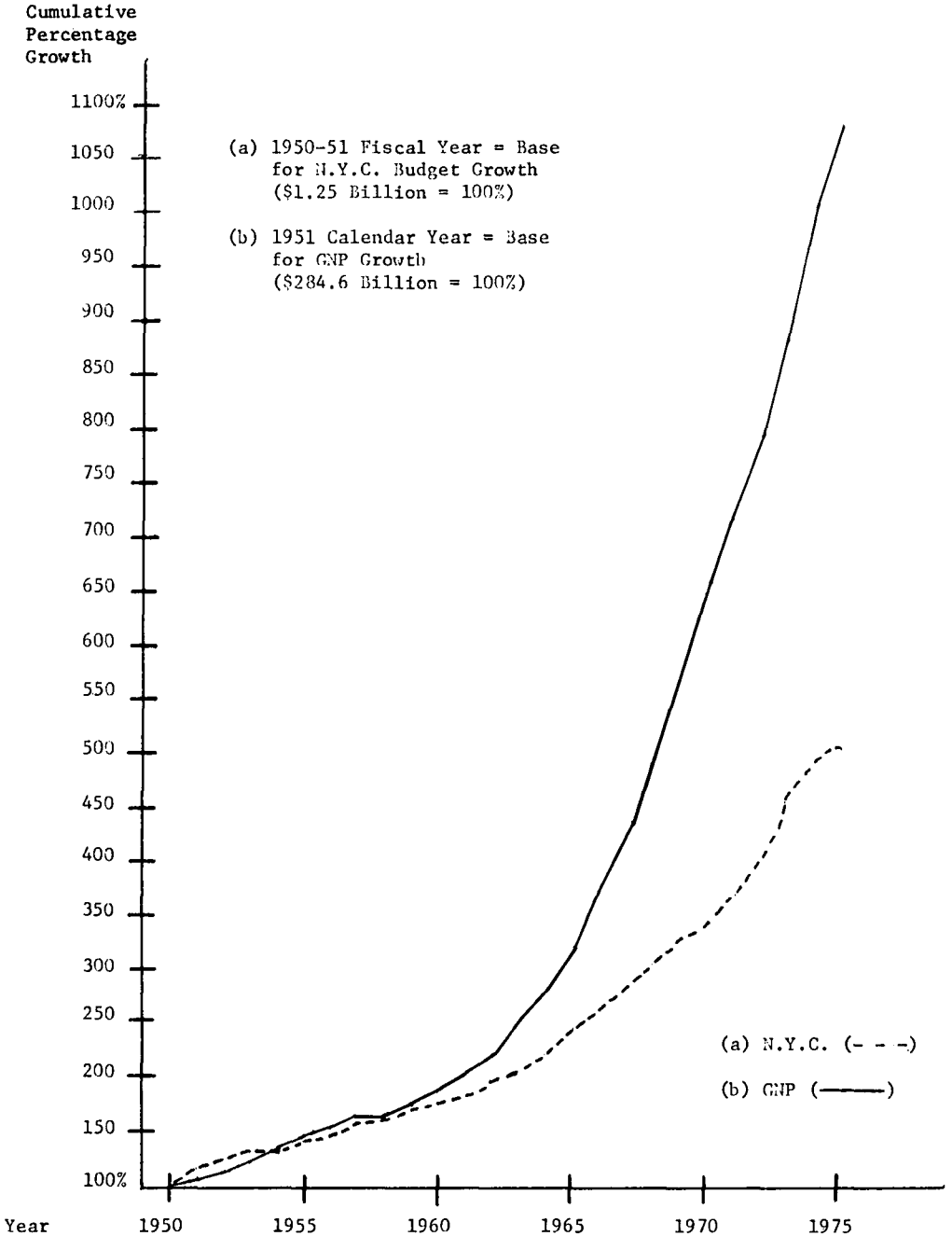
The City legislature, too, would benefit from this program system. Cross-referencing the program array with the line item supporting schedules would enable the legislature to make more informed judgments as to what agencies, or parts of agencies, were overstaffed or understaffed; waste and inefficiency (where to "trim the fat") would be more easily ascertainable. And, the interested public would find this program system comprehensible and meaningful.

This program system need not be implemented with Euclidian perfection in order to have any value; it does not need to be exhaustive in the area of functions (a few can be missed) nor do the functions need to be brilliantly designed. A few general programs could be plotted first: library, electronic communications, recreation, public safety. The list could be gradually expanded by both addition and division as the budget managers and analysts became familiar with the system.

It is quite clear that while audit check procedures may prevent over-budgeting, they do not provide for budgetary efficiency or responsiveness. They don't eliminate waste, they *balance* it. So, the essential goals of efficiency and responsiveness have never been achieved in the history of public budgeting. The program system is a way in which they can be achieved. A realistic program cross-reference system which simplifies budget analysis must be adopted, if New York City is to regain its prestige as an innovator of modern budgeting techniques.

APPENDIX II

Comparison of Cumulative Growth Rate
in New York City Budget and Gross National Product



APPENDIX I

002 MAYORALTY		BUDGET FOR 1974-1975 AS MODIFIED		
MAJOR PROGRAM, PURPOSE	ACTIVITY OR INSTITUTION	NO. OF POS.	RANGE	SCHEDULE LINE AMT.
01	EXECUTIVE MANAGEMENT	47		\$ 1,045,256
02	EXECUTIVE AND ADMINISTRATIVE SERVICES	62		829,152
04	OFFICE OF MANAGEMENT & BUDGET	452		8,541,523
05	YOUTH COUNSEL BUREAU	55		653,460
06	OFFICE OF LABOR RELATIONS	72		1,424,311.
07	NEW YORK CITY COMMISSION FOR THE UN & THE CONSULAR CORPS	9		188,390
08	OFF OF LOWER MAN DEVELOPMENT	22		400,699
09	MAYOR'S COMMITTEE ON THE JUDICIARY	1		42,700
10	COMMITTEE ON CITY MARSH			20,700
11	OFFICE OF MIDTOWN PLANNING & DEV	26		540,544
12	OFFICE OF JAMAICA PLNG & DEV	21		333,878
13	URBAN DESIGN COUNCIL	4		81,894
14	STATEN ISLAND DEVELOPMENT	7		120,823
15	OFFICE APPAREL IND P. DEV	9		180,895
16	OFFICE DOWNTOWN BROOKLYN DEV	15		331,163
17	EDUCATION TASK FORCE	20		279,078
19	EMPLOYEE SAL & WAGE ADJ ETC			304,432
20	EMPLOYEE FRINGE BENEFITS			4,846,000
21	OFFICE OF NEIGHBORHOOD SVCS	111		1,605,401
22	MAYORS OFFICE FOR VET ACTION	123		1,119,966
23	CIVIL DEFENSE & DISASTER CONTRL	17		390,352
24	OFFICE FOR THE AGING	399		9,191,804
25	BUREAU OF LABOR SERVICES	46		740,267
26	OFFICE OF THE HANDICAPPED	5		69,525
27	MAYORS OFFICE FOR VOLUNTEERS	8		120,180
28	OFFICE OF UPPER MANHATTAN	4		186,620
	TOTAL DEPARTMENT	1535		\$ 33,589,113
	LESS-			
04-73	APPROP IN CODE 05-02 DOSS WREP			\$ 44,689
04-74	APPROPRIATED IN CODE 05-02 DOSS (WREP)			12,436
06-73	APP IN CODE 05-02-DOSS WREP			24,565
06-74	APP IN CODE 05-02-DOSS WREP			7,308
20-98	PAYABLE FR FDS APPRD IN MISC			4,846,000
24-70	APPROP IN CD 516 DOSS (WREP)			578,680
24-71	APPROP IN CD 516 DOSS (WREP)			19,000
24-73	APPROP IN CD 516-05-02 DOSS (WREP)			6,400
24-74	APPROP IN CD 05-02 DOSS (WREP)			2,080
	NET TOTAL DEPARTMENT	1535		\$ 28,051,955
	PERSONAL SERVICE			\$ 18,901,634
	OTHER THAN PERSONAL SERVICE			9,150,321
	SOURCE OF FUNDS			
	TAX LEVY			\$ 10,281,249
	STATE AID			221,106
	FEDERAL AID			8,075,275
	FEDERAL AID			319,323
	FEDERAL AID			24,072
	FEDERAL AID			4,962
	FEDERAL FUNDS			580,263
	FEDERAL AID			34,595
	FEDERAL AID-COMM DEV SRS			8,511,110
	CAPITAL FUNDS			
	CAPITAL FUNDS			
01	EXECUTIVE MANAGEMENT	47		\$ 941,756
	PERSONAL SERVICE			103,500
	OTHER THAN PERSONAL SERVICE			
TOTAL	EXECUTIVE MANAGEMENT	47		\$ 1,045,256
01-01	PERSONAL SERVICE			
	EXECUTIVE			
1	MAYOR	1	60000	60,000
2	DEPUTY MAYOR	1	49849	49,849
3	ASSISTANT TO THE MAYOR	3	35725	107,175
4	DEPUTY MAYOR	2	45418	90,836
10	ASSOCIATE ASST CORPORATION COUNSEL, GRADE 4	1	1	1
13-15	CLERK GRADE 5	2	19860-21850	41,710
18	CHAUFFEUR ATTENDANT	1	10800	10,800
19	MOTOR VEHICLE OPERATOR	2	9300-10685	31,370
20	RESEARCH PROJECTS COORDINATOR	1	26112	26,112

Supporting Schedules, [1975-76] EXECUTIVE

EST. NO. 002 - 1

DEPARTMENTAL REQUEST FOR 1975-1976			EXECUTIVE BUDGET FOR 1975-1976		
NO. OF PDS.	SCHEDULE LINE AMT.	CHANGE	NO. OF PDS.	SCHEDULE LINE AMT.	CHANGE
47	\$ 1,063,118	\$ 17,862+	44	\$ 1,006,598	38,658-
59	754,928	74,224-	56	723,273	105,879-
426	8,602,971	61,448+	407	8,336,571	204,952-
55	678,150	24,690+	43	542,365	111,095-
64	1,405,425	18,886-	57	1,247,057	177,254-
9	199,640	11,250+	7	163,640	24,750-
22	503,315	102,616+	21	479,265	78,566+
1	43,275	575+	1	43,275	575+
26	10,800	9,900-	20	10,800	9,900-
21	604,324	63,780+	25	588,039	47,495+
4	411,480	77,602+	20	396,830	62,952+
4	86,618	4,624+	4	86,443	4,449+
7	156,611	35,188+	7	155,411	34,588+
9	198,841	17,946+	9	198,141	17,246+
15	353,258	22,095+	15	352,538	21,375+
18	233,110	45,968-		736,432	279,078-
	736,432	432,000+		5,670,000	824,000+
	5,670,000	824,000+		1,605,739	338-
101	1,570,328	35,073-	105	669,686	450,280-
78	902,831	217,135-	63	342,735	47,617-
17	424,135	33,783+	11	8,323,797	868,007-
207	8,478,152	713,652-	197	725,839	14,428-
46	761,149	20,882+	45	58,800	10,725-
5	84,980	14,755+	4	98,613	21,567-
8	124,913	4,533+	7	327,822	141,202+
4	330,122	143,502+	4		
1249	\$ 34,387,406	\$ 798,293+	1152	\$ 32,889,709	699,404-
		\$ 44,689+			\$ 44,689+
		12,436+			12,436+
		24,565+			24,565+
	5,670,000	7,308+		5,670,000	824,000-
		824,000-			578,680+
		578,680+			15,000+
		15,000+			6,400+
		2,400+			
		2,080+			2,080+
1249	\$ 28,717,406	\$ 665,451+	1152	\$ 27,219,709	832,246-
	\$ 19,422,985	\$ 521,351+		\$ 18,088,827	812,807-
	9,294,421	144,100+		9,130,882	19,439-
	\$ 10,780,793	\$ 499,544+		\$ 9,506,080	775,169-
	202,500	18,606-		160,000	61,106-
	8,011,073	64,202-		7,970,373	104,902-
		319,323-			319,323-
		24,072-			24,072-
		4,962-			4,962-
	580,263			580,263	
	9,142,777	34,595-		9,002,993	34,595-
		631,667+			491,883+
47	\$ 933,838	7,918-	44	\$ 888,838	52,918-
	129,280	25,780+		117,760	14,260+
47	\$ 1,063,118	\$ 17,862+	44	\$ 1,006,598	38,658-
1	60,000		1	60,000	
1	49,849		1	49,849	
3	107,175		3	107,175	
2	90,836		2	90,836	
1	1		1	1	
2	41,710		2	41,710	
1	10,800		1	10,800	
2	21,370		2	21,370	
1	26,112		1	26,112	

