

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

In the Matter of

DAVID A. PATERSON, as Governor of the State of New York,

Petitioner,

-- against --

ERIC ADAMS, JOSEPH P. ADDABBO, JR., JAMES S. ALESI,
DARREL J. AUBERTINE, JOHN J. BONACIC, NEIL D.
BRESLIN, JOHN A. DEFRANCISCO, RUBEN DIAZ, SR.,
MARTIN MALAVE DILAN, THOMAS DUANE, PEDRO
ESPADA, JR., HUGH T. FARLEY, JOHN J. FLANAGAN,
BRIAN X. FOLEY, CHARLES J. FUSCHILLO, JR., MARTIN
J. GOLDEN, JOSEPH A. GRIFFO, KEMP HANNON, RUTH
HASSELL-THOMPSON, SHIRLEY L. HUNTLEY, CRAIG M.
JOHNSON, OWEN H. JOHNSON, JEFFREY D. KLEIN, LIZ
KRUEGER, CARL KRUGER, ANDREW J. LANZA, WILLIAM
J. LARKIN, KENNETH P. LAVALLE, VINCENT L. LEIBELL,
THOMAS LIBOUS, ELIZABETH LITTLE, CARL
MARCELLINO, GEORGE D. MAZIARZ, ROY J. MCDONALD,
HIRAM MONSERRATE, VELMANETTE MONTGOMERY,
THOMAS P. MORAHAN, MICHAEL F. NOZZOLIO, GEORGE
ONORATO, SUZI OPPENHEIMER, FRANK PADAVAN,
KEVIN S. PARKER, BILL PERKINS, MICHAEL H. RANZEN-
HOFFER, JOSEPH E. ROBACH, STEPHEN M. SALAND, JOHN
L. SAMPSON, DIANE J. SAVINO, ERIC T. SCHNEIDERMAN,
JOSE M. SERRANO, JAMES L. SEWARD, DEAN G. SKELOS,
MALCOLM A. SMITH, DANIEL L. SQUADRON, WILLIAM
T. STACHOWSKI, TOBY ANN STAVISKY, ANDREA
STEWART-COUSINS, ANTOINE M. THOMPSON, DAVID J.
VALESKY, DALE M. VOLKER, GEORGE H. WINNER, JR.
and CATHARINE YOUNG, as Members of the New York State
Senate,

Respondents.

Index No. 5435-09

(Teresi, J.)

**AFFIRMATION OF
SHELLEY B. MAYER**

SHELLEY B. MAYER, an attorney duly admitted to practice in this State, under penalties of perjury, deposes and affirms as follows:

1. My name is Shelley B. Mayer, and I reside in Yonkers, New York.
2. I am an attorney in good standing, licensed to practice law in the State of New York.
3. I have been continuously employed by the New York State Senate since January 1, 2007. My current title is Chief Counsel to the Senate Majority.
4. My appointing authority is Respondent Senator MALCOLM A. SMITH, whom the Senate elected as Temporary President of the Senate and Majority Leader “for the years 2009-2010.” See Senate Resolution 1 (January 7, 2009).
5. As Chief Counsel to the Senate Majority, my duties include participation in litigation affecting the New York State Senate, including the above-captioned proceeding in which I represent Respondent Senators ERIC ADAMS, JOSEPH P. ADDABBO, JR., DARREL J. AUBERTINE, NEIL D. BRESLIN, RUBEN DIAZ, SR., MARTIN MALAVE DILAN, THOMAS DUANE, BRIAN X. FOLEY, RUTH HASSELL-THOMPSON, SHIRLEY L. HUNTLEY, CRAIG M. JOHNSON, JEFFREY D. KLEIN, LIZ KRUEGER, CARL KRUGER, HIRAM MONSERRATE, VELMANETTE MONTGOMERY, GEORGE ONORATO, SUZI OPPENHEIMER, KEVIN S. PARKER, BILL PERKINS, JOHN L. SAMPSON, DIANE J. SAVINO, ERIC T. SCHNEIDERMAN, JOSE M. SERRANO, MALCOLM A. SMITH, DANIEL L. SQUADRON, WILLIAM T. STACHOWSKI, TOBY ANN STAVISKY, ANDREA STEWART-COUSINS, ANTOINE M. THOMPSON and DAVID J. VALESKY (hereinafter the “DEMOCRATIC CONFERENCE RESPONDENTS”).
6. I respectfully submit this Affirmation in support of the Verified Answer by Democratic Conference Respondents, including the Affirmative Defenses raised therein. For

the reasons set forth below, mandamus should be denied and the Petition dismissed with prejudice.

7. By their Verified Answer, and as further described in this Affirmation, Democratic Conference Respondents seek dismissal on several grounds: *First*, that this proceeding is wholly non-justiciable and would be an improvident exercise of judicial authority on the instant facts; and *Second*, that Petitioner fails to state a claim on which relief can be granted. This proceeding relates intently on internal Senate procedures and thus are beyond the jurisdiction of this Court, especially on the current facts and circumstances in which Petitioner seeks to leverage intervention in ongoing political discussions within the Senate to resolve political matters wholly internal to a coordinate branch of government. On the merits, contrary to Petitioner’s claims, Democratic Conference Respondents duly convened each of the several Extraordinary Sessions called by Petitioner, and therefore mandamus to compel cannot lie against them. Petitioner’s argument to the contrary, asserting that the Senate cannot “convene” without the physical attendance of every single Senator in the Senate Chamber, is incorrect as a matter of law. Pursuant to its constitutional power to enact and apply its own Rules, the Senate routinely convenes and transacts legislative business without unanimous attendance or even a quorum. Furthermore, there is no constitutional basis by which the Senate, which Petitioner convened alone in Extraordinary Session, can enact bills into law unless Petitioner also convenes the Assembly in the same Extraordinary Session to pass the same bills. For each of the foregoing reasons, Petitioner has no “clear legal right” to the relief sought, and therefore the Petition must be denied.

**DISPUTED LEADERSHIP OF THE SENATE AND EFFORTS BY DEMOCRATIC
CONFERENCE RESPONDENTS TO RESOLVE THE RESULTING IMPASSE**

8. On January 7, 2009, the Senate enacted Senate Resolution 1 electing Respondent Senator MALCOLM A. SMITH as Temporary President of the Senate and Majority Leader for “the years 2009-2010,” and thereafter enacted Rules of the Senate for calendar year 2009 reflecting that the Temporary President and Majority Leader roles constitute a single office.

9. On June 8, 2009, Respondent Senator THOMAS LIBOUS purported to offer a Resolution that would elect Respondent Senator PEDRO ESPADA, JR., as Temporary President of the Senate and Respondent Senator DEAN G. SKELOS as Majority Leader. Senator SMITH thereafter commenced litigation challenging the validity of this Resolution, the purported elections of Senators ESPADA and SKELOS to the leadership positions they claimed then and still claim now to occupy, the establishment of a new Rules Committee, and the alleged substitution of new Senate Rules for 2009 and 2010.

10. On or about June 15, 2009, Respondent Senator HIRAM MONSERRATE, who on June 8 aligned with the Republican Conference, returned to the Democratic Conference, resulting in the Senate being tied 31-31. At the time this affirmation was written, this tie continues.

11. On June 16, 2009, Hon. Thomas McNamara, Acting Justice of the Supreme Court, granted Senator ESPADA’s motion to dismiss the suit on the grounds that the dispute was non-justiciable. See Smith v. Espada, Index No. 4912-09 (Sup. Ct. Albany Co., June 16, 2009) (McNamara, J.). In language prescient on the facts of the instant proceeding, in which the governor seeks to inject both the Executive and the Judiciary into the internal workings of the Senate, the Smith Court held:

“[A] judicially imposed resolution would be an improvident intrusion into the internal workings of a co-equal branch of government. The practical effect of having a court decide this issue would be that its decision, if only by perception, would have an influence on the internal workings of the Senate including the setting of the Senate agenda. To have a court do so would be improper. In the present context, the question calls for a solution by the members of the State Senate, utilizing the art of negotiation and compromise.” Id., at 4.

12. Immediately after the decision, Senator SMITH filed a Notice of Appeal.

However, in the spirit of Justice McNamara’s opinion urging negotiation, Senator SMITH voluntarily withdrew the Notice of Appeal without prejudice as a sign of good faith, and to foster an environment that could result in a compromise.

13. During the ensuing days, Democratic Conference Respondents repeatedly proposed bipartisan operating agreements that would temporarily put the ongoing leadership dispute aside and allow the Senate immediately to take up important public matters. These proposals would have provided for equal control of the legislative agenda, and equal influence over Senate governance, by representatives of the Democratic Conference and Republican Conference. Equally shared control of the Senate was included in the Bipartisan Operating Agreement that Democratic Conference Respondents repeatedly offered in various forms, including one tailored to the Extraordinary Sessions that are the subject of the instant special proceeding. The Bipartisan Operating Agreement that Democratic Conference Respondents proposed for these Extraordinary Sessions is attached hereto as Exhibit “A.”

14. Despite Justice McNamara’s plea for a negotiated settlement without judicial intervention, despite Senator SMITH’s good-faith withdrawal of the Notice of Appeal and despite Democratic Conference Respondents’ repeated offer to share leadership on a temporary basis to remove obstacles to immediate Senate action on legislation, the Republican

Conference consistently has failed to follow suit. To date, Senators ESPADA and SKELOS refused every Democratic offer of a temporary bipartisan operating agreement, offered no such plan of their own to set aside the leadership dispute, and even countenanced the commencement of new litigation by Respondent Senators GEORGE H. WINNER, JR., and JOHN J. FLANAGAN, the resolution of which turns on the very issue – the identity of the Temporary President of the Senate – that Senator ESPADA claimed in the Smith case was non-justiciable.

15. Because members of the Republican Conference refused to cooperate with the Democratic Conference Respondents in any meaningful way, and repeatedly refused to appear with Democratic Conference Respondents in the Senate Chamber, as shown below, these circumstances have rendered the Senate unable to achieve a quorum of 32 members to enact legislation. Apparently in response to these circumstances, Petitioner announced that he would begin convening Extraordinary Sessions of the Senate to compel the Senate to take up his legislative agenda.

THE EXTRAORDINARY SESSIONS OF JUNE 2009

16. On June 22, June 23, June 24, June 25 and June 26, 2009, Petitioner handed up to the Senate separate Proclamations calling Extraordinary Sessions of the Senate for the following days, in each case invoking the governor's authority pursuant to Article IV, section 3, of the New York State Constitution.

17. On authority of these proclamations, Democratic Conference Respondents convened in the Senate Chamber for the First Extraordinary Session on June 23, 2009, at 3:00 p.m.; for the Second Extraordinary Session on June 24, 2009, at 3:00 p.m.; for the Third Extraordinary Session on June 25, 2009, at 3:00 p.m.; and for the Fourth Extraordinary Session

on June 26, 2009, at 1:00 p.m. Because Petitioner only addresses the Extraordinary Sessions of June 23, June 24, June 25 and June 26, this Affirmation only responds to those four Sessions and not the further Extraordinary Sessions of the Senate that Governor Paterson called for June 27, June 28 and June 29.

18. In each of the four Extraordinary Sessions addressed by Petitioner, Democratic Conference Respondents appeared timely in the Senate Chamber, convened the Senate, received and read the Proclamation, and declared the Senate to be in Extraordinary Session.

19. In none of these instances, however, did members of the Republican Conference timely appear and remain in the Senate for the duration of its proceedings.

20. In the case of the First Extraordinary Session held on June 23, members of the Republican Conference were present in the Senate Chamber at the start of the Extraordinary Session, and therefore the Senate achieved the majority of Senators necessary to achieve quorum and enact legislation. See N.Y. Const., art. III, § 9. The members of the Republican Conference soon left the Chamber, however.

21. In the case of the Second Extraordinary Session held on June 24, members of the Republican Conference did not enter the Senate Chamber at all, notwithstanding that Petitioner called an Extraordinary Session of the Senate for that day. On information and belief, no member of the Republican Conference provided an official excuse or explanation to the Senate for his or her absence. Owing to these absences, there was no quorum to enact legislation. See N.Y. Const., art. III, § 9. Moreover, as further described below, there were no bills properly before the Senate in an Extraordinary Session because Petitioner convened the

Senate only. Without a quorum or bills to consider, the Senate adjourned the June 24 Extraordinary Session *sine die*.

22. In the case of the Third Extraordinary Session held on June 25, members of the Republican Conference failed to enter the Senate Chamber for the duration of that day's Extraordinary Session. Again lacking quorum and without bills properly before the Senate in Extraordinary Session, the Senate adjourned the June 25 Extraordinary Session *sine die*. Prior to that day's Session, members of the Republican Conference had indicated their refusal to attend jointly with Democratic Conference Respondents. Nonetheless, in order to facilitate ongoing negotiations aimed at resolving the impasse, Democratic Conference Respondents agreed not to object if members of the Republican Conference would enter the Senate Chamber after members of the Democratic Conference adjourned. Thus, after Democratic Conference Respondents convened and adjourned that day's Extraordinary Session *sine die*, the Republican Conference purported to hold their own "proceedings" in the Senate Chamber. These later "proceedings" were not recorded by the Senate Journal Clerk and are not part of the official Senate Journal.

23. In the case of the Fourth Extraordinary Session held on June 26, Democratic Conference Respondents convened and adjourned the Session in like fashion as the June 25 Extraordinary Session, for the same reasons of lack of quorum and lack of bills properly before the Senate, followed by the same purported "proceedings" by the Republican Conference after the Extraordinary Session adjourned *sine die*.

THIS CASE IS NOT JUSTICIABLE

24. If ever there were a separation-of-powers barrier to justiciability, it would be in this very proceeding, in which the executive seeks judicial intervention against one House

of the Legislature to compel actions of individual lawmakers and intrude on the internal procedures of the Senate in the context of a political dispute within the Senate.

25. Pursuant to the Senate's constitutional power to make and enforce its own Rules, see N.Y. Const., art. III, § 9, the attendance, recording of attendance, and compelling of attendance by Senators in the Senate Chamber each is an internal Senate matter. See e.g. Senate Rule IX, § 2.

26. As such, such matters are non-justiciable and unreviewable in this Court, see Campaign for Fiscal Equity, Inc. v. State of New York, 8 N.Y.3d 14, 28 (2006); Urban Justice Center v. Pataki, 38 A.D.3d 20, 27 (1st Dept. 2006) (quoting New York Pub. Interest Research Group v. Steingut, 40 N.Y.2d 250, 257 (1976)), lv. denied 8 N.Y.3d 958 (2007) -- particularly when the internal practices of the Legislature are involved. See e.g. Matter of Gottlieb v. Duryea, 38 A.D.2d 634 (3d Dept. 1971), aff'd 30 N.Y.2d 807 (1972), cert. denied 409 U.S. 1008 (1972).

27. Similarly, in adjudicating the selection of Senate officers, the Smith Court held that judicial intervention would be an "improvident intrusion into the internal workings" of the Senate, and that the "practical effect of having a court decide this issue would be that its decision, if only by perception, would have an influence on the internal workings of the Senate including the setting of the Senate agenda. To have a court do so would be improper." Smith, Index No. 4912-09, at 4.

28. Judicial intervention in the instant proceeding would be even more improvident. Under current circumstances in which the Senate remains tied 31-31, there is no practical way that an order of mandamus can result in the enactment of legislation -- whether in Extraordinary Session or otherwise -- without a political resolution between the parties. Thus,

absent a political resolution achieved within the Senate, which the Smith Court held could be achieved *only* within the Senate, mandamus to compel would be pointless. Conversely, with a political compromise by which the Senate returns to work, mandamus to compel would be moot. Accordingly, this Court should decline jurisdiction.

29. This Court should take judicial notice that, at approximately 8:30pm on June 24, 2009, Respondent Senator JOHN A. DEFRANCISCO stated on a prominent television program that he and the Republican Conference deliberately were holding up important bills, including matters on Petitioner's agenda for Extraordinary Sessions, in service of the Republican Conference overriding goal to wrest control of the Senate. This statement is available on the Internet at http://capitalnews9.com/Video/video_pop.aspx?vids=158193&sid=311&rid=12. This Court has no proper role in such a purely political matter within the Senate

30. This Court also should take judicial notice that Petitioner's stated purpose in calling these Extraordinary Sessions, day after day, is to achieve the political goal of making Senators "miserable." See Peters, "Paterson's Powers are Tested as Gridlock Drags On," N.Y. TIMES, June 27, 2009, at A24 (quoting Governor Paterson, speaking of Respondent Senators: "All I know is that we are going to keep them there and make their lives [] miserable"), available at <http://www.nytimes.com/2009/06/28/nyregion/28albany.html>. The Judiciary has no proper role in such a purely political matter between the governor and the Senate

31. Accordingly, on the totality of the facts and circumstances of this case, this proceeding is non-justiciable and the Petition therefore should be dismissed.

BECAUSE DEMOCRATIC CONFERENCE RESPONDENTS CONVENE EACH EXTRAORDINARY SESSION, MANDAMUS AGAINST THEM DOES NOT LIE

32. As demonstrated above, Democratic Conference Respondents timely appeared at the start of each Extraordinary Session called by Petitioner, and conducted such legislative business as the Constitution's quorum requirement allows.

33. Because Democratic Conference Respondents timely convened in each such Extraordinary Session, they have satisfied the very duties whose fulfillment Petitioner seeks mandamus against them to compel.

34. Petitioner therefore cannot establish a "clear legal right" to the relief requested against Democratic Conference Respondents, and the extraordinary remedy of mandamus to compel does not lie against Democratic Conference Respondents under article 78 of the Civil Practice Law and Rules. Council of the City of N.Y. v. Bloomberg, 6 N.Y.3d 380, 388 (2006); Matter of Brusco v. Braun, 84 N.Y.2d 674, 679 (1994); Spring Realty Co. v. New York City Loft Bd., 69 N.Y.2d 657, 659 (1986), app. dismissed 482 U.S. 911 (1987); Faso v. Misasi, 268 A.D.2d 145, 147-148 (3d Dept. 2000) (denying Article 78 mandamus relief to compel Clerk of the Assembly to convene Extraordinary Session).

THE GOVERNOR'S POWER TO CONVENE THE SENATE ONLY IS LIMITED TO ADVICE AND CONSENT TO NOMINATIONS

35. Petitioner's attempt to invoke his power to call the Senate only into Extraordinary Session for the purpose of "passing" legislation contravenes the constitutional history of this power. What is clear from the language and history of Article IV, section 3, of the New York State Constitution is that the governor may call the Senate alone into extraordinary session only to act on gubernatorial appointments, not to act on legislation.

36. This power to convene “the Senate only” was proposed by the Constitutional Convention of 1821, on motion by delegate Martin Van Buren (who also served as New York State Senator, U.S. Senator and President of the United States). The Constitutional Convention’s official records memorialize that “[t]he Amendment was supported ... *upon the ground that it might be necessary for the Senate, with whom was lodged a part of the appointing power, to be convened without the other branch of the Legislature.*” PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW YORK, at 552 (emphasis added). Thus, the purpose of the executive power to convene “the Senate only” in Extraordinary Session is to obtain Senate advice and consent to nominations, not to obtain the passage of legislation.

37. This executive power also must be interpreted in light of the other constitutional provision, discussed below, which requires that legislation, to be validly enacted, must be passed by both Houses of the Legislature in the same session. See N.Y. Const., art. IV, § 7.

38. Thus, an Extraordinary Session of the Senate only, by necessity, must be limited to the confirmation of appointees – a power reserved exclusively to the Senate – and cannot include acting on legislation.

39. Contrary to these constitutional provisions and their history, the crux of the Petition is that the executive power to “convene” the Senate in Extraordinary Session includes the power to compel every member of the Senate to be physically present in the Senate Chamber for a quorum call and, perhaps, even to vote on such legislation as the executive may demand. Such an interpretation is not merely novel: if accepted, it would entirely undermine the Constitution’s separation of powers between the Executive and the Legislature. As the

constitutional history, the Rules of the Senate and well-settled tradition all demonstrate, the governor's power to "convene" an Extraordinary Session of the Senate alone is limited to circumstances where gubernatorial appointments, as opposed to legislation, await action, and the act of convening "the Senate only" does not include the authority to dictate that any Senator be present in the Chamber, or that any piece of legislation be passed. Inasmuch as the Senate routinely convenes and transacts legislative business without unanimous attendance or even a quorum, plainly, the Executive's authority to "convene" does not include the power to compel attendance or take action on legislation. To hold otherwise would effectively render the governor a legislative actor – even a super-Majority Leader – of the upper House of Legislature in this State. This result is one that the Constitution cannot and will not abide.

**THE GOVERNOR’S POWER TO CONVENE THE LEGISLATURE
DOES NOT IMPLY POWER TO COMPEL A LEGISLATIVE QUORUM**

40. The New York State Constitution authorizes the governor to “convene the [L]egislature, or the [S]enate only, on extraordinary occasions.” N.Y. Const., art. IV, § 3. At such Extraordinary Sessions, “no subject shall be acted upon, except such as the governor may recommend for consideration.” *Id.*

41. This executive power to “convene” the Senate requires only that the Senate come into Session. It does not mean that all Senators must physically assemble in the Senate Chamber, as Petitioner requests this Court to compel.

42. Even if the governor’s section 3 power to “convene” the Senate implies a power to compel the Senate to take up the governor’s legislative agenda – a greatly over-broad reading that impermissibly would trample the independence of a co-equal branch of government – the Constitution itself allows the Senate to pass bills on assent of a bare majority of members,

whether or not all Senators are physically in the Chamber. See N.Y. Const., art. III, § 14. The Constitution also defines a “quorum to do business” merely as a majority of the Senate. See N.Y. Const., art. III, § 9. Thus, at most, the power to “convene” the Senate within the meaning of Article IV, section 3, cannot possibly convey the power Petitioner claims to compel every member of the Senate to physically attend the Senate Chamber at any moment of his choosing.

43. Moreover, the Senate routinely “convenes” to transact legislative business with less than a majority of its members in the Chamber. Pursuant to its constitutional power to determine the rules of its own proceedings, see N.Y. Const., art. III, § 9, Senate Rules clearly stipulate that the Senate “convenes” without a quorum present and that the power to compel a quorum of Senators to attend is within the discretion of the Senators in attendance. See Senate Rule IX, § 2(a).

44. The Senate can and routinely does convene to take legislative action with less than a majority of Senators present. Such legislative action includes the reading and approval of the official Senate Journal, to which courts must defer in construing legislative action, see e.g. People ex rel. Hatch v. Reardon, 184 N.Y. 431 (1906); City of Rye v. Ronan, 67 Misc. 2d 972 (Sup. Ct. New York Co. 1971); see also Ohrenstein v. Thompson, 82 A.D.2d 670 (3d Dept. 1981); the receipt and presentation of petitions; the receipt of official communications from the Assembly, governor and other state officers; the receipt and processing of reports of various Senate committees; and, critically, the advancement of bills through the legislative process. See generally Senate Rule V, § 3(a)(1)-(6). The Senate convenes without a quorum also to establish “legislative days” to permit the introduction of bills and resolutions when a full complement of Senators may not be physically in the Chamber, and to comply with the Constitution’s requirement that the Senate not adjourn for more than two days without consent of

the Assembly. See N.Y. Const., art. III, § 10. Only final enactment of some motions and resolutions, and final enactment of bills, require a quorum to be present. See Senate Rule V, § 3(b); see also N.Y. Const., art. III, § 14.

45. For the foregoing reasons, Petitioner is wrong that the Senate “convenes” only on unanimous attendance of all Senators, or even a majority of members elected. Rather, when the Senate duly convened in Extraordinary Session pursuant to each of Petitioner’s Proclamations, the Senate discharged its obligation pursuant to Article IV, section 3, of the Constitution. All other matters – including the enactment of legislation and whether to take up the governor’s legislative agenda – must remain within the discretion of the Senate in exercise of its constitutional independence.

46. Accordingly, Petitioner cannot demonstrate a clear legal right to the relief he seeks, and mandamus to compel therefore does not lie. See Council of the City of N.Y., 6 N.Y.3d at 388; Matter of Brusco, 84 N.Y.2d at 679; Spring Realty Co., 69 N.Y.2d at 659; Faso, 268 A.D.2d at 147-148. Moreover, because the Senate unquestionably can convene and take up legislative business without the unanimous “assembly” of all Senators that Petitioner seeks to achieve for political reasons, the relief Petitioner requests is greatly overbroad to any legitimate constitutional interest Petitioner may have. Accordingly, mandamus must be denied.

**THE CONSTITUTION DOES NOT AUTHORIZE THE ENACTMENT OF BILLS
IN EXTRAORDINARY SESSION OF THE SENATE ALONE**

47. As demonstrated above, Extraordinary Sessions of the Senate only are not properly called under the Constitution to act on legislation but to advise and consent to gubernatorial nominations: only an Extraordinary Session that convenes the Senate and Assembly together can result in the enactment of bills into law.

48. As Respondent Senators JOHN L. SAMPSON and MALCOLM A. SMITH informed Petitioner by letter after the adjournment of the First Extraordinary Session, that because Petitioner did not convene the Assembly in Extraordinary Session and only both Houses together can enact legislation into law by each passing the same bill in the same legislative session, Petitioner was placing before the Senate in the above-stated Extraordinary Sessions no bills that constitutionally could be enacted into law pursuant to Senate passage in such Extraordinary Sessions. The letter by Senators SAMPSON and SMITH to Petitioner informing him of these concerns is attached hereto as Exhibit "B." Because Petitioner placed before the Senate no bills on which the Senate alone could act in Extraordinary Session, the Senate had no choice but to adjourn the Extraordinary Sessions.

49. For this reason, even if this Court should order mandamus against Respondents to compel physical attendance in the Senate Chamber for Extraordinary Sessions of the Senate only, there is no possible way that such an order can result in legislation being enacted. The granting of such an order would achieve little but chaos and confusion, especially for high-visibility measures whose validity could be challenged if acted on in a Senate-only Extraordinary Session. Such disputes could create significant uncertainty and collateral litigation for years to come.

50. While Article IV, section 3, of the Constitution authorizes the governor to convene the Senate in Extraordinary Session without the Assembly, it does not follow that bills can become law on Senate enactment in such an Extraordinary Session. In order for bills to become law in Extraordinary Session, the governor also must convene the Assembly to pass the same bills in the same Extraordinary Session.

51. Rules of legislative procedure, which are binding on the Legislature and the Judiciary as a matter of law, are derived from several sources and take precedence in the following order: (a) constitutional provision and judicial decision thereon; (b) adopted rules; (c) custom, usage and precedent; (d) statutory provisions; (e) adopted parliamentary authority; and (f) parliamentary law. See Mason's Manual of Legislative Procedure § 4(2). Thus, absent clear constitutional or statutory authority, the longstanding custom of the Senate takes precedence and is binding.

52. Every bill, to be properly presented to the governor, must pass the Senate and Assembly in the same legislative session. See N.Y. Const., art. IV, § 7. It is the well-settled practice of this State that each legislative year constitutes a separate Session and, therefore, a bill could not be presented to the governor upon passage by one House in one year and the other House in another year. Likewise, it is the well-settled custom and practice of this State that a Regular Session of the Legislature and an Extraordinary Session of the Legislature are separate and distinct sessions for these presentment purposes. See id. There appears to be no precedent by which legislation has become law on passage by the Senate in Extraordinary Session and by the Assembly in Regular Session.

53. For these reasons, a bill passed by the Assembly during a Regular Session, and a separate bill passed by the Senate in Extraordinary Session, cannot be "same as" bills that can be presented to the governor for executive action under Article IV, section 7.

54. Similarly, the Legislature's constitutional and statutory power to call *itself* into Extraordinary Session by petition of its members does not allow either House to convene alone, but rather, requires both Houses to convene together. See N.Y. Const., art. III, § 18;

Legislative Law art. 2-A. Thus, not even the Legislature can convene an Extraordinary Session of one House only and thereby complete legislative action on bills.

55. Likewise, while some other state constitutions also authorize the governor to convene the Senate only in Extraordinary Session, and while some governors have done so for the purpose of confirming nominees, the non-partisan National Conference of State Legislatures reports that there appears to be no precedent by which any state enacted laws by convening the Senate only in Extraordinary Session to pass a bill that the lower House of its Legislature passed in Regular Session. This apparent dearth of precedent strongly suggests that the nationwide constitutional purpose of convening a State Senate in Extraordinary Session is narrowly limited to advice and consent to consider gubernatorial nominations, not to enact legislation.

56. Similarly, no state constitution empowers a governor to convene an Extraordinary Session of the Legislature's lower House alone. If the Senate could convene in Extraordinary Session for the purpose of passing bills, then there is no rational reason that the lower House of a State Legislature also should not be able to convene alone in the same manner and for the same purpose. Such is not the case, however. This consistent constitutional structure nationwide, banning the lower House of a State Legislature from convening in Extraordinary Session without the Senate, further demonstrates that the two Houses of a Legislature can enact bills only *together* in Regular Session or *together* in Extraordinary Session – not one House in Extraordinary Session and the other House in Regular Session.

57. Petitioner concedes that he did not convene the Assembly with the Senate in any of the above Extraordinary Sessions. Thus, because the Constitution limits the Senate in Extraordinary Session to consider only such matters as the governor properly places before it,

see N.Y. Const., art. IV, § 3, there were no bills before the Senate in any of the foregoing Extraordinary Sessions that could become law on Senate passage in such Sessions.

58. Likewise, until such time as Petitioner convenes the Assembly together with the Senate in Extraordinary Session to enact such measures as Petitioner may recommend, mandamus to compel the Senate alone to convene in future Extraordinary Sessions to act on bills cannot possibly achieve Petitioner's stated goal of achieving the enactment of legislation.

59. Mandamus does not lie where the officer against whom the proceeding is brought defends on the ground that the legal predicate for the official act he or she is asked to undertake is infirm. See e.g. Council of the City of N.Y., 6 N.Y.3d at 388; Matter of Carow v. Board of Educ., 282 N.Y. 341 (1936); People ex rel. Balcom v. Mosher, 163 N.Y. 32 (1900). As Petitioner's Proclamations convening the Senate in Extraordinary Session to consider bills did not also convene the Assembly, the predicate for these Extraordinary Sessions is invalid. Thus, Petitioner cannot demonstrate a "clear legal right" to the relief he seeks, and mandamus to compel must be denied. Council of the City of N.Y., 6 N.Y.3d at 388 (2006); Matter of Brusco, 84 N.Y.2d at 679; Spring Realty Co., 69 N.Y.2d at 659; Faso, 268 A.D.2d at 147-148.

CONCLUSION

60. For the foregoing reasons, mandamus does not lie and the Petition should be dismissed with prejudice.

Dated: June 29, 2009
Albany, New York

Respectfully submitted,


SHELLEY B. MAYER, ESQ.

Attorney for Democratic Conference Respondents

General Counsel to the Senate Majority
New York State Senate
Capitol 335
Albany, New York 12247
(518) 455-2711