

## **Avenues to a Senate Floor Vote without the Consent of the Republican Leadership**

The latest scandals in Albany have increased the calls for passage of a new anti-corruption package. Many editorial boards and good government groups have argued that such a package must include comprehensive campaign finance reform, with public financing, lower limits, and increased disclosure and transparency as essential elements of such reform.<sup>1</sup>

Governor Cuomo has backed such an approach. The Assembly recently passed a comprehensive campaign finance reform bill, the Senate Democrats have introduced an identical bill, and the Independent Democratic Conference (the “IDC”) has introduced its own campaign finance reform bill—all of these bills include proposed voluntary public financing systems. Though a few particulars in the proposals are different, they are for the most part quite similar. If the parties are willing to negotiate in good faith, there should be room for compromise on all of the differences.

While there is significant support for comprehensive campaign finance reform both in the legislature and from the Governor, Dean Skelos has made clear that he objects to comprehensive campaign finance reform. Although the members of his conference make up a minority of senators, Republicans have entered into a coalition agreement with the IDC. The new rules passed by this coalition give Co-Leaders Dean Skelos and Jeffrey Klein various ways of preventing bills from making it to the floor for debate and a vote, including “joint control” over which bills may be filed on the “active list.”<sup>2</sup>

At first glance, this arrangement—as well as the Majority Coalition’s consistent use of Republican Sen. Thomas Libous as floor leader—would appear to give Co-Leader Skelos veto power over any bill. In the normal course, bills are not voted on by the Senate unless they are on the active list. However, the Rules do not require that a bill be on the active list in order to be voted on, and there are clear exceptions. For example, a bill reported straight to third reading from the Rules Committee may appear only on a supplemental calendar, and the rush at the end of the session can result in bills not on the active list being called up.<sup>3</sup> Under the right circumstances, it should be possible to get a bill to the Senate floor without Skelos’s permission.

The principle that animates this discussion is that any open procedural question is decided by the Presiding Officer, subject to the possibility of that decision being overturned by a majority of the Senate. Since the votes of all the Democrats and the IDC comprise a majority, and Co-Leader Klein controls the Presiding Officer on days when he is Temporary President, there are almost certainly several ways for a campaign finance reform bill to get a vote on the floor of the Senate. What follows is an exploration of two of these ways.

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<sup>1</sup> See, e.g., Editorial, *Alarm Bells in Albany*, N.Y. Times, May 12, 2013, A20, <http://www.nytimes.com/2013/05/13/opinion/alarm-bells-in-albany.html>.

<sup>2</sup> Rule IX, § 6.

<sup>3</sup> See Rule VIII, § 2.

## Hand Down from the Assembly

The Senate Rules allow a bill to be considered by the Senate through a message from the Assembly without a Senate sponsor.<sup>4</sup> This is called a “hand down,” and it permits a bill that is not on the active list to be voted on by the Senate. This mechanism has been used several times in recent years. The Marriage Equality Act was passed in 2011 as a hand down, as was a bill concerning payments to rural hospitals in 2012.<sup>5</sup> At least two bills have passed as hand downs this year. On January 28, a bill concerning interest calculations on retirement contributions passed as a hand down, and on May 8, a bill authorizing New York City to implement a tax exemption was passed as a hand down.<sup>6</sup>

Pursuant to Rule VI, the Senate is required to take up messages from the Assembly third in the order of business, even before the chamber may act on matters on the Senate Calendar: Every session day, the Presiding Officer asks if there are messages from the Assembly after the reading of the journal and the presentation of petitions.<sup>7</sup> The Rules are silent, however, on the procedure for hand downs to receive votes.

When the Senate Rules do not speak to a particular question, the house is “governed by the generally accepted rules of parliamentary procedure which flow from general principles of common law.”<sup>8</sup> Among the most fundamental principles of parliamentary procedure are the authority of a house of the legislature to regulate its own procedure<sup>9</sup> and majority control.<sup>10</sup> In the New York State Senate, the Presiding Officer has the authority to enforce and interpret the Rules, subject to appeal and overruling by a majority of the members.<sup>11</sup> Therefore, the Rules’ silence on the procedure for voting on a hand down gives the Presiding Officer the opportunity to ensure that a bill handed down from the Assembly is voted on without the consent of Co-Leader Skelos, as outlined by the following plan.

*Step 1: The Governor and legislative leaders negotiate and agree on a bill.*

The Governor, IDC, Senate Democrats, and Assembly Democrats could negotiate and draft a campaign finance reform bill that they agree should be passed in both chambers (in a sense, this

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<sup>4</sup> Rule VII, § 1.

<sup>5</sup> Transcript of Senate Session, June 24, 2011, <http://open.nysenate.gov/legislation/transcript/regular-session-06-24-2011> (passing A. 8520 and A. 8354); Transcript of Senate Session, June 21, 2012, <http://open.nysenate.gov/legislation/transcript/regular-session-06-21-2012> (passing A. 10094B).

<sup>6</sup> Transcript of Senate Session, Jan. 28, 2013, <http://open.nysenate.gov/legislation/transcript/regular-session-01-28-2013> (passing A. 2296); Transcript of Senate Session, May 8, 2013, <http://open.nysenate.gov/legislation/transcript/regular-session-05-08-2013> (passing A. 7153).

<sup>7</sup> See Rule VI, §§ 3(a)(2), 4. After the reading of the journal,

<sup>8</sup> *Heimbach v. New York*, 89 A.D.2d 138, 147 (N.Y. App. Div. 1982) (quoting *Board of Educ. v City of New York*, 41 N.Y.2d 535, 541 n.3 (N.Y. 1977)); Mason’s Manual of Legislative Procedure § 37 (1989) [hereinafter Mason’s Manual] (“Gaps in the rules of procedure should be filled by the adoption of fair methods according to accepted parliamentary principles.”).

<sup>9</sup> N.Y. Const. art. III, § 9; Mason’s Manual § 3.

<sup>10</sup> Mason’s Manual § 50(1).

<sup>11</sup> Rule X, § 4(c); see also Mason’s Manual § 240(1).

plan would allow the current bills in each house to be “conferenced” even before passage of a Senate bill).

*Step 2: The Assembly passes the bill.*

The negotiated bill should be introduced in the Assembly and passed soon after the State Constitution’s three day aging requirement has been met.

*Step 3: The Senate takes up the bill as a message from the Assembly.*

The Assembly could send the bill to the Senate as a hand down on a day when Sen. Klein is the Temporary President and the Presiding Officer is an IDC member. Although messages from the Assembly are third in the Senate’s order of business, in the past they have been taken up later in the day, during the reading of the calendar, when the floor leader asked the Presiding Officer to return to messages from the Assembly. For the purposes of this plan, it doesn’t matter whether the hand down is taken up at the beginning of the day or returned to later. Because the Majority Coalition floor leader, Republican Sen. Libous, will presumably not be a part of the execution of this plan, another senator would need to rise and point out that there is a message from the Assembly.

*Step 4: The bill is ordered to a third reading and gets a vote.*

Co-Leader Klein could move that the bill be ordered to a third reading, under the theory that Rule VI, §§ 3(a)(2) and 4, requires an immediate vote on a hand down.<sup>12</sup> In the past, bills that were handed down from the Assembly were ordered to third reading on motion of the Majority Leader (prior to this year) or both Majority Coalition Leaders. But there is nothing in the Rules to require that both Majority Coalition Leaders—or even one—so move. After Sen. Klein’s motion, the Presiding Officer would order the bill to a third reading, and it would go to a vote.

Republicans would presumably object to the bill going to a third reading and a vote. But since the Rules are silent on how bills introduced via messages from the Assembly are voted on, the Presiding Officer could rule that an immediate vote is required. Specifically, Republicans might argue that the Presiding Officer can’t order a bill to a third reading without a motion from both Majority Coalition Leaders or that unanimous consent is required for a hand down to go to a vote. But neither is explicitly required by the Rules, so the Presiding Officer could rule against those objections.<sup>13</sup>

Republicans could appeal such a ruling, but it requires an affirmative vote of a majority of all members elected to overrule the Presiding Officer.<sup>14</sup> If all the Democrats and IDC members vote to uphold the ruling, the appeal would fail, allowing the bill to the floor.

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<sup>12</sup> The Rules provide that “[e]very bill shall receive three readings previous to its being passed,” and that a bill must be voted on immediately after its third reading. Rule IX, § 2.

<sup>13</sup> Unanimous consent was not requested for past hand downs to be voted on. The Rules require unanimous consent only in three specific situations having to do with resolutions to amend the State Constitution, confirmation of gubernatorial nominations, and senators’ ability to speak after the completion of the order of business. Rule VII, § 9(c); Rule VIII, § 6; Rule X, § 4.

<sup>14</sup> Rule X, § 4(c).

The fact that both of this year's hand downs were not voted on until both Majority Coalition Leaders moved that they be ordered to a third reading arguably means that such a motion is part of the established practice of the house. As a general matter, the established practice of the body governs,<sup>15</sup> but if the Presiding Officer rules a given way and is upheld by the majority of the house on appeal, the prior practice becomes irrelevant. Republicans could argue that Senate convention requires both Majority Coalition Leaders to move that a hand down be ordered to a third reading before the bill can be voted on.<sup>16</sup> But the Rules do not require a motion from the Leaders, allowing the Presiding Officer to rule that it is not necessary. Furthermore, none of the past examples involved a ruling from the Presiding Officer that this motion was necessary, which would have precedential effect. Rather, there are merely two examples of hand downs for which Sens. Klein and Skelos made a motion not required by the Rules.

Other than arguing the procedure outlined here is improper, Republicans may have procedural options to delay a vote. Any senator can move to lay the bill aside, initiating debate.<sup>17</sup> The Rule giving the Majority Coalition Leaders the power determine the active list also gives them the power to lay aside bills for five days.<sup>18</sup> Sen. Skelos might attempt to invoke this rule to set the bill aside, but since a hand down bypasses the third reading calendar and active list completely, this provision does not apply. Finally, a Republican senator might move to send the bill to committee, but that motion would fail if all the Democrats and IDC voted against it.

### **Hostile Amendment**

The Rules allow a non-sponsor to amend a bill over the objection of the sponsor with a vote of the majority of members elected, a procedure called a "hostile amendment."<sup>19</sup> A campaign finance reform bill could be added as a hostile amendment to a bill already on the active list and, with the help of a message of necessity, the bill could be brought to a vote the same day, so long as the amendment and strategy below had the support of 32 members of the Senate (presumably all members of the IDC and Democratic Conference).

*Step 1: Notice of the amendment is given.*

Under Rule IX, a copy of a proposed hostile amendment must be given to the sponsor of the bill, as well as the Journal Clerk, two hours prior to the time for the Senate to convene.<sup>20</sup> Although it

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<sup>15</sup> Mason's Manual § 39(1).

<sup>16</sup> It's also possible that the Journal Clerk would refuse to perform the third reading, either because of the departure from practice or because Skelos has control over the funding of the office of the Secretary of the Senate, which employs the Journal Clerk. Generally, the Journal Clerk simply follows the directions of the Presiding Officer. The Rules are silent on what happens if the Journal Clerk does not follow a ruling of the Presiding Officer. On the other hand, the Rules don't expressly require that the third reading be done by the Journal Clerk, so conceivably the Presiding Officer could do it. In the alternative, the Presiding Officer could direct the Secretary of the Senate to perform the third reading. If he refuses, he is arguably unable to discharge the duties of his office, in which case the Temporary President has the power to appoint an acting Secretary who will comply. N.Y. Legis. Law § 6(5).

<sup>17</sup> See Mason's Manual §§ 332, 333. Debate on bills is limited to four hours, and debate can be closed after two hours. Rule X, § 3(d).

<sup>18</sup> Rule IX, § 6.

<sup>19</sup> Rule IX, § 4(a).

<sup>20</sup> *Id.*

should be possible to choose the bill to be amended in part based on whether the sponsor would cooperate with this plan and therefore not call attention to the proposed amendment, giving the Journal Clerk a copy would alert the Republicans (as the Journal Clerk reports to the Republicans). That would not reveal the entire plan, but it would allow Republicans some time to strategize in opposition.

*Step 2: The bill is amended.*

If the bill sponsor does not accept the proposed amendment, the question is put to the house and the amendment will pass with a vote of the majority of the members elected. If the Democrats attempt to get a campaign finance bill through by amending a bill on some other topic, Republicans will object that the amendment is not germane.<sup>21</sup> But the Presiding Officer will be able to rule that the amendment is germane, and with all Democrats and IDC members voting favorably, an appeal of that ruling would fail.

*Step 3: The Governor sends a message of necessity, which is accepted by the Senate.*

Although a bill that is amended needs a new bill print and must age three days, a message of necessity from the Governor would obviate the aging requirement.<sup>22</sup> The Governor could send the message on his own initiative without a request from legislative leaders.<sup>23</sup> Coordination between the IDC, Senate Democrats, and the Governor's Office would allow the message of necessity to be delivered immediately after the amendment is passed. Assuming that the floor leader is not part of this plan, another senator would need to rise to point out that there is a message at the desk, and then the message of necessity could be accepted by a majority vote.

*Step 4: The amended bill is voted on.*

Normally, an amended bill would remain on the third reading calendar but be removed from the active list because of the aging requirement. But with a message of necessity, the aging requirement is no obstacle. A message of necessity received the same day that the bill is amended would also provide occasion for the Senate to take up the bill and vote on it without waiting for it to be put on the active list for another day.<sup>24</sup> The Presiding Officer could order the bill to a third reading immediately after the message of necessity is accepted, on a motion from Sen. Klein or another senator.

*Step 5: The bill is acted on by the Assembly.*

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<sup>21</sup> See Rule VII, § 4(b) (“[N]o amendment shall be allowed to any bill which is not germane to the original object or purpose thereof.”).

<sup>22</sup> Rule IX, § 1.

<sup>23</sup> The Governor typically sends messages of necessity only at the request of the Speaker and Majority Leader, a custom that would eliminate the element of surprise if followed here. But the Governor has the constitutional power to send messages of necessity on his own initiative. N.Y. Const. art. III, § 14; JOSEPH F. ZIMMERMAN, THE GOVERNMENT AND POLITICS OF NEW YORK STATE 155 (2d ed. 2008) (“[A]lthough he is free to transmit a message of necessity at his discretion, the governor usually only sends messages at the request of the legislative leaders . . .”).

<sup>24</sup> The Rules require that the bill “be upon the desks of all Senators in final form, not necessarily printed, before its final passage,” so a copy of the amended bill would need to be produced ahead of time if the amendment, message of necessity, and vote on the amended bill are to happen in quick succession. Rule IX, § 1.

The amended bill will need to be passed by the Assembly or successfully conferenced. For this reason, the bill chosen to amend by adding campaign finance reforms must be one that the Assembly will not object to.

As with a hand down, Senate Republicans will likely have objections to this process. They could object that it is not in order for the amended bill to go to a third reading after the message of necessity was accepted. The Rules do not expressly require a third reading under such circumstances; neither do they prohibit it. This means the Presiding Officer can rule that a message of necessity concerning an amended active bill requires a vote.

In the past, bills have received a third reading immediately after the message of necessity was accepted, but they originated from the Rules Committee or were budget bills reported by the Finance Committee; both committees can send bills straight to a third reading.<sup>25</sup> This provides a strategic consideration for choosing the bill to be amended: If it was reported out of the Rules Committee, there should be no question that it can go straight to a third reading.

Other than arguing the procedure outlined here is improper, Republicans may have procedural defenses available, including delay by debating the bill. For amendments offered by the bill sponsor, the Rules allow the chair of the committee that reported the bill to recommit the bill to committee without vote, debate, or explanation.<sup>26</sup> Republicans may try to recommit the amended bill. But the use of a hostile amendment, for which the Rules do not expressly allow recommitment, would allow the Presiding Officer to rule an attempt to recommit out of order.

### **Timing for Hand Down and Hostile Amendment Strategies.**

Sen. Skelos is Temporary President for the remainder of May. Skelos and Klein alternate control daily in June, which means the only session days Klein and the IDC will be in control of the chamber for the rest of the session are June 3, 5, 11, 13, 17 and 19. Both the hand down and the hostile amendment strategy must be initiated on a day when the IDC controls the Senate.

As noted above, the Majority Coalition Leaders can lay aside bills on the active list for up to five days.<sup>27</sup> This rule cannot be successfully invoked by Sen. Skelos for the hand down bill because that process bypasses the active list altogether, but it could probably be invoked for a bill amended under the hostile amendment strategy.<sup>28</sup>

If an amended bill is laid aside pursuant to Rule IX, § 6, it could only be for a maximum of five calendar legislative days, so the bill would still have to come to a vote unless the session ended

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<sup>25</sup> For example, the NY SAFE Act was ordered to third reading immediately after the message of necessity was accepted. Transcript of Senate Session, Jan. 14, 2013, <http://open.nysenate.gov/legislation/transcript/regular-session-01-14-2013> (passing S. 2230).

<sup>26</sup> Rule IX, § 4(c).

<sup>27</sup> Rule IX, § 6.

<sup>28</sup> Arguably, a message of necessity might prevent the bill from being laid aside in this way, in that it requires immediate action. However, the Court of Appeals, in dicta, has said that the legislature is not required to act on a message of necessity within any specific time frame. *Finger Lakes Racing Ass'n v. N.Y. State Off-Track Pari-Mutuel Betting Comm'n*, 30 N.Y.2d 207, 220 (N.Y. 1972).

first. This means the hostile amendment must be introduced by the IDC or Democrats no later than June 11,<sup>29</sup> unless the Senate agrees to remain in session past June 20, in which case it could be introduced as late as June 19.<sup>30</sup> Five or more days after the bill is laid aside, on a day that Klein is Temporary President, Klein or another senator could raise a point of order, arguing that the bill must be taken up because the five day period has elapsed. An IDC-controlled Presiding Officer could rule that the bill must be voted on and the Democratic-IDC majority could reject any appeal.

Sen. Skelos could try to lay aside the amended bill a second time, after the first “lay aside period” had passed—the Rule does not expressly prohibit Leaders from laying a bill aside multiple times. In order to prevent this, Sen. Klein would ideally be the Temporary President at the end of the five-day period. As already noted, for the remainder of the session, Klein will be Temporary President on alternating days starting June 3. A five day period starting after June 3, 5, or 11 would end on another day that Klein is in control. However, Skelos could try to lay the bill aside for less than five days to ensure that it comes back on a day that he or another Republican is the Presiding Officer. If so, and if Skelos tried to lay the bill aside again, Democrats and the IDC could successfully appeal a ruling of the Presiding Officer with their majority.

### **Special session**

In addition to, and independent from, these procedural avenues to get a bill to vote without Sen. Skelos’s consent, Governor Cuomo could try to force Skelos to put a campaign finance bill to a vote by calling a special session of the legislature or just the Senate.<sup>31</sup> Even without any procedural maneuvering during the special session, the Governor might be able to force a vote simply by keeping the Senate in special session until the Co-Leaders allow a vote on a campaign finance bill that has already passed the Assembly.

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<sup>29</sup> It is not clear from Rule IX whether the five-day period includes the day the bill is laid aside or starts on the following day. The discussion here conservatively assumes that the Rules allow a bill to be laid aside for the longer period: five days starting the day *after* the bill is laid aside.

<sup>30</sup> Senator Klein would be Temporary President in July. This means that even if a hostile amendment was approved and laid aside after June 11, he could ensure passage so long as the Senate remained in session through July and he had 32 votes in support at that time.

<sup>31</sup> N.Y. Const. art. IV, § 3.