CENTER for JUDICIAL ACCOUNTABILITY, INC.*

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Elena Ruth Sassower, Director

BY E-MAIL & BY HAND

December 4, 2012

New York State Assemblyman Steve Katz
99th Assembly District
824 Route 6
Mahopac, New York 10541

RE: ABOVE POLITICS: Championing an Honest, Accountable Legislature:
Voting Out Assembly Speaker Sheldon Silver &
Voting In Non-Partisan, Good-Government Assembly Rule Changes

Dear Assemblyman Katz:

Thank you for your courageous leadership in urging your fellow Assembly members not to re-elect Sheldon Silver as Assembly Speaker when they reconvene in January for the new legislative session.

However, Assembly Speaker Silver's cover-up of the sexual improprieties of Assemblyman Vito Lopez and use of taxpayer dollars for an out-of-court settlement – which is the sole basis upon which your letter to your Assembly colleagues entreats them to vote against the Assembly Speaker – is but the smallest fraction of the governmental corruption for which Mr. Silver, as Assembly Speaker, is directly responsible and for which he must be repudiated by Assembly members.

Illustrative is Assembly Speaker Silver's cover-up of the corruption of the Commission on Judicial Compensation and, with it, the corruption of New York's state judiciary, whose result – this year alone – is the theft of $27.7 million taxpayer dollars for judicial pay raises that are not only unconstitutional and statutorily-violative, but fraudulent. Such has generated a lawsuit, naming Assembly Speaker Silver as a defendant, brought by our non-partisan, non-profit citizens' organization, Center for Judicial Accountability, Inc. (CJA), "on behalf of the People of the State of New York & the Public Interest".

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* **Center for Judicial Accountability, Inc.** (CJA) is a national, non-partisan, non-profit citizens' organization, working to ensure that the processes of judicial selection and discipline are effective and meaningful.

The facts pertaining to Assembly Speaker Silver's official misconduct and criminal fraud are recited by the Verified Complaint[1] and corroborated by its incorporated exhibits. The Verified Complaint is posted on CJA's website, www.judgewatch.org, most conveniently accessible *via* the top panel "Latest News". It is a must-read for those, like yourself, who champion the position, so well-stated by your letter to your Assembly colleagues, that:

> "...While we may disagree on how to govern, the people of the state of New York deserve to have an open, honest, and transparent government.
>
> If Assemblyman Sheldon Silver is re-elected as speaker, then we are not only showing New York, but the rest of the nation, that we have no backbone, no moral compass, and no integrity when it comes to honest government. If Assemblyman Sheldon Silver is re-elected as Speaker, we are confirming New York's worst fears that its elected officials are above the law...
>
> At its core, this is a moral issue -- not partisan. There is common ground for all of us to responsibly occupy...We cannot be expected to govern effectively and with the confidence of our constituents if Assemblyman Sheldon Silver is allowed to retain his position".

The Verified Complaint chronicles a major governmental scandal, directly involving Assembly Speaker Silver. As such, it reinforces your call that Mr. Silver not be re-elected Assembly Speaker. This will be further obvious upon your publicly demanding that he account for what he did:

(a) upon receiving CJA's May 23, 2011 letter, addressed to him and the other three appointing authorities of the Commission on Judicial Compensation – Governor Andrew Cuomo, Temporary Senate President Dean Skelos, and Chief Judge Jonathan Lippman – apprising them that 53-days into the Commission on Judicial Compensation's 150-day tenure, it was inoperative and inaccessible to the public; asking whether they agreed that systemic judicial corruption was an "appropriate factor" for the Commission's consideration in determining the adequacy of judicial compensation, pursuant to the statute; and calling upon them to take steps to ensure official investigation of the evidence of systemic judicial corruption that witnesses had presented and proffered at public hearings before the Senate Judiciary Committee in 2009, which were aborted and as to which there had been no investigation, no findings, and no committee report[2];

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[1] The paragraphs of the Verified Complaint pertaining to Assembly Speaker Silver are ¶¶11, 73-83, 109-119, 121-125, 128-139.

[2] CJA's May 23, 2011 letter is recited at ¶¶73-76 of the Verified Complaint and is Exhibit A-1 to the October 27, 2011 Opposition Report.

See, also, CJA's follow-up June 23, 2011 and June 30, 2011 letters, also sent to Assembly Speaker Silver, recited at ¶¶78-83 of the Verified Complaint. They are Exhibits B-2 and C-3 to CJA's October 27, 2011 Opposition Report.

(b) upon receiving the dispositive document on which the Verified Complaint rests – CJA's October 27, 2011 Opposition Report, addressed to him, Governor Cuomo, Temporary Senate President Skelos, and Chief Judge Lippman, detailing the unconstitutionality, statutory violations, and fraud of the Commission on Judicial Compensation's August 29, 2011 Report recommending 27% judicial pay raises;

(c) upon receiving CJA's March 2, 2012 letter, addressed to him and Governor Cuomo, Temporary Senate President Skelos, and Chief Judge Lippman, calling upon them to disgorge their findings of facts and conclusions of law with respect to CJA's October 27, 2011 Opposition Report[3];

(d) upon receiving CJA's March 30, 2012 Verified Complaint, served upon him, Governor Cuomo, Temporary Senate President Skelos, and Chief Judge Lippman on April 5, 2012, with a letter requesting review by "independent counsel".

Indeed, because the Verified Complaint, with its incorporated October 27, 2011 Opposition Report can, with publicity, completely transform a corrupt, political landscape and, at long last, bring HONEST, ACCOUNTABLE government to this State, I will hand-deliver a copy to your district office so that you can use your "bully pulpit" to more powerfully build a coalition of Assembly members who will do what they are duty-bound to do: take action that will remove the adjective "dysfunctional" that routinely precedes description of New York's Legislature.

The Verified Complaint chronicles profound dysfunction in New York's Legislature, particularly at the committee level, involving legislation, nominations, and oversight. That is why the Assembly and Senate are also named defendants[4]. Tellingly, Assembly Speaker Silver and Temporary Senate President Skelos either failed to furnish CJA's October 27, 2011 Opposition Report to the relevant Assembly and Senate committees so that they might take action consistent therewith, or those committees failed to act. Similarly, and notwithstanding we served the Assembly and Senate with their own copies of the Verified Complaint, separate from the copies for Messrs. Silver and Skelos, there is no evidence the Verified Complaint ever reached the rank-and-file legislators or even the relevant committees so that they might learn of the travesties being challenged.

In 2004, 2006, and 2008, the Brennan Center for Justice issued reports detailing that New York's Legislature – under Mr. Silver's leadership in the Assembly – is the most dysfunctional in the nation, largely because Assembly and Senate rules give inordinate power to the Assembly Speaker and Temporary Senate President/Senate Majority Leader. These important reports, reflecting that Assembly and Senate rules can easily be changed by democratic vote of Assembly members and Senators, are entitled:

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[3] The March 2, 2012 letter is annexed as Exhibit Q to the Verified complaint and summarized at ¶¶121-125, 138-139 thereof.

[4] See, *inter alia*, Verified Complaint, at ¶¶7(c),10, 12, 37-39, 47-55, 62-67, 69-83, 126.

- "*The New York State Legislative Process: An Evaluation and Blueprint for Reform*" (2004);
- "*Unfinished Business: New York State Legislative Reform*" (2006); and
- "*Still Broken: New York State Legislative Reform*" (2008).

All three of these reports – and the 1997 article "*Albany's Travesty of Democracy*" by former Senate counsel-turned law professor Eric Lane that inspired them – are also posted on CJA's website, accessible *via* the top panel "Latest News". Because of their significance, I will, likewise, hand-deliver copies to your district office.

Needless to say, we would be honored to assist you in vindicating the People's right to an HONEST, ACCOUNTABLE state Assembly – and thank you, in advance, for your continued advocacy. Based on what we have here presented, we have no doubt that if, as an Assembly member, you utilize your access to the public and press, you will succeed in emboldening Assembly members to recognize their duty to vote out Assembly Speaker Silver and to vote for Assembly rule changes consistent with the nonpartisan proposals of the Brennan Center – both for the benefit of ALL New Yorkers.

Yours for a quality judiciary &
an honest, accountable legislature,

ELENA RUTH SASSOWER, Director
Center for Judicial Accountability, Inc. (CJA)

Enclosures: All hand-delivered, with the following attached:
(1) Executive Summary to CJA's October 27, 2011 Opposition Report
(2) "*Albany's Travesty of Democracy*" by Eric Lane, City Journal (1997)
(3) Introduction to "*Still Broken: New York State Legislative Reform*" (2008)

cc: Senate Independent Democratic Conference
Senator Jeffrey Klein
Senator David Carlucci
Senator Diane J. Savino
Senator David J. Valesky

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Election Day, November 8, 2011

EXECUTIVE SUMMARY

OPPOSITION REPORT TO THE "FINAL REPORT OF THE SPECIAL COMMISSION ON JUDICIAL COMPENSATION"

On August 29, 2011, the Special Commission on Judicial Compensation rendered a "Final Report" to Governor Andrew Cuomo, Temporary Senate President Dean Skelos, Assembly Speaker Sheldon Silver, and Chief Judge Jonathan Lippman recommending a 27% salary increase for New York State judges over the next three years.

These salary recommendations will automatically become law and cost New York taxpayers hundreds of millions of dollars – unless overridden by the Legislature by April 1, 2012. Nevertheless, NONE of New York's bar associations, scholars, funded "good government" organizations, or media have critically examined the Commission, its Report, or the Court of Appeals' February 23, 2010 decision in the judiciary's judicial compensation lawsuits against the Governor and Legislature that propelled enactment of the statute creating the Commission.

Such critical examination has been done, however, by the unfunded, non-partisan, non-profit citizens' organization, Center for Judicial Accountability, Inc. (CJA). Embodied in an October 27, 2011 Opposition Report, it demonstrates that the Commission's Report is "statutorily non-conforming, constitutionally violative, and the product of a tribunal disqualified for interest and actual bias". Indeed, it demonstrates that the Commission's Report is a "fraud upon the public", achieved by concealing the citizen opposition to any judicial pay raises, championed by CJA, and all the facts, law, and legal argument presented in support.

Based thereon, CJA's Opposition Report calls upon the Governor, Temporary Senate President, Assembly Speaker, and Chief Judge – to whom it is addressed – to secure:

(1) legislative override of the Commission's judicial pay recommendations;

(2) repeal of the statute creating the Commission;

(3) referral of the Commissioners to criminal authorities for prosecution; and

(4) appointment of a special prosecutor, task force, and/or inspector general to investigate the documentary and testimonial evidence of systemic judicial corruption, which the Commission unlawfully and unconstitutionally ignored,

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without findings, in order to recommend judicial pay raises.

CJA's constitutional challenge to the Commission's pay raise recommendations is based on CJA's analysis of Article VI of the New York State Constitution, as drawn from the Court of Appeals' February 23, 2010 decision – an analysis which CJA placed before the Commission three weeks before its August 29, 2011 Report. It demonstrated that any increase in judicial compensation is unconstitutional, absent predicate findings that New York state judges are discharging their duties to render fair and impartial justice and that mechanisms are in place and functioning to remove corrupt judges. The Commission's Report makes no such findings and conceals the analysis, whose accuracy it does not dispute (at pp. 1, 3, 10-13).

CJA raises a ***further constitutional challenge*** in questioning whether, without a constitutional amendment, it was constitutional for the legislature and executive branches to delegate judicial compensation to an appointed commission whose recommendations do not require affirmative legislative and executive action to become law – which is what they did by the statute creating the Commission (at fn. 2).

The Commission's statutory violations, particularized by CJA's Opposition Report, are:

(1) ***In violation of the Commission statute***, the Commission's judicial pay raise recommendations are unsupported by any finding that current "pay levels and non-salary benefits" of New York State judges are inadequate (at pp. 1, 16, 31);

(2) ***In violation of the Commission statute***, the Commission examines only judicial salary, not "compensation and non-salary benefits" (at pp. 18-21, 25-31);

(3) ***In violation of the Commission statute***, the Commission does not consider "all appropriate factors" – a violation it attempts to conceal by transmogrifying the statutory language "all appropriate factors" to "a variety of factors" (at pp. 4-5, 21);

(4) ***In violation of the Commission statute***, the Commission makes no findings as to five of the six statutorily-listed "appropriate factors" it is required to consider (at pp. 21, 23-24);

(5) ***In violation of the Commission statute***, the Commission does not consider and makes no findings as to "appropriate factors" presented by CJA's citizen opposition as disentitling New York's judges from any pay raise – whose appropriateness is uncontested by the Commission and judicial pay raise advocates. Among these:

(a) evidence of systemic judicial corruption, infesting appellate and supervisory levels and the Commission on Judicial Conduct – demonstrated as a constitutional bar to raising judicial pay (at pp. 10-13); and

(b) the fraudulence of claims put forward to support judicial pay raises by judicial pay advocates (at pp. 13-15), including their concealment of pertinent facts, *inter alia*:

(i) that New York's state-paid judges are not civil-service government employees, but "constitutional officers" of New York's judicial branch;

(ii) that the salaries of all New York's "constitutional officers" have remained unchanged since 1999 – the Governor, Lieutenant Governor, Attorney General, and Comptroller, who are the "constitutional officers" of our executive branch – and the 62 Senators and 150 Assembly members who are the "constitutional officers" of our legislative branch;

(iii) that the compensation of New York's judicial "constitutional officers" is comparable, if not superior, to the compensation of New York's executive and legislative "constitutional officers", with the judges enjoying incomparably superior job security;

(iv) that New York's executive and legislative "constitutional officers" have also suffered the ravages of inflation, could also be earning exponentially more in the private sector; and also are earning less than some of their government-paid staff and the government employees reporting to them;

(v) that as a co-equal branch, the same standards should attach to pay increases for judges as increases for legislators and executive branch officials – *to wit*, deficiencies in their job performance and governance do not merit pay raises;

(vi) that outside the metropolitan New York City area, salaries drop, often markedly – as reflected by the county-by-county statistics of what New York lawyers earn – and there is no basis for judges in most of New York's 62 counties to be complaining as if they have suffered metropolitan New York City cost-of-living increases, when they have not, or to receive higher salaries, as if they have;

(vii) that New York judges enjoy significant "non-salary benefits";

(viii) that throughout the past 12 years of "stagnant" pay, New York judges have overwhelmingly sought re-election and re-appointment upon expiration of their terms – and there is no shortage of qualified lawyers eager to fill vacancies;

(ix) that the median household income of New York's 19+ million people is $45,343 – less than one-third the salary of New York Supreme Court justices.

These concealments – hallmarks of the judicial compensation lawsuits and of the Court of Appeals February 23, 2010 decision purporting a judicial pay raise "crisis" and separation of powers violation by the Legislature and Governor in "linking" judicial salaries to legislative salaries – are all replicated by the Commission's Report. In so doing, it simultaneously covers up the fraudulence of the lawsuits and that decision.

As set forth by the Opposition Report:

- judges have NO constitutional entitlement to cost of living increases (at pp. 34-35);

- there is NO separation of powers constitutional violation by "linkage" (at fn. 9); and

- the Commission's recommended judicial pay raise distorts and skews the appropriate symmetry in pay of the "constitutional officers" of New York's co-equal government branches (at pp. 36-37).

Beyond the actual bias of the Commissioners, proven by their constitutionally, statutorily, and evidentiarily-violative Report, the Opposition Report also identifies (at pp. 15-17) the disqualifying interest of several Commissioners – beginning with Chairman William C. Thompson, Jr. As highlighted (at pp. 2, 10, 13, 15), Chairman Thompson was the subject of a written application for his disqualification for interest, presented by CJA promptly upon his appointment to the Commission, which neither he nor the Commission determined in face of notice that the Commission could not lawfully proceed until that threshold issue was ruled upon. Such is itself grounds for voiding the Commission's judicial pay raise recommendations.

So that the Governor, Temporary Senate President, Assembly Speaker, and Chief Judge may have the assistance of the Commissioners and of judicial pay advocates in discharging their mandatory duties to protect the People of New York, CJA's Opposition Report identifies, in its "Conclusion" (at p. 37), that it is being furnished to the Commissioners, as well as to judicial pay raise advocates, so that they may have the opportunity to rebut it, if they can.

The "Conclusion" (at p. 37) also looks ahead to the 2012 elections, when every member of New York's Senate and Assembly is up for re-election, and lays out an agenda of citizen action to "vindicate the public's rights by making judicial pay raises and judicial accountability the decisive election issues they rightfully are", in the event the Governor, Temporary Senate President, Assembly Speaker, and Chief Judge fail to act. As stated:

> "Voters will find it easy to embrace so self-evident a proposition ['**NO PAY RAISES FOR NYS JUDGES WHO CORRUPT JUSTICE – THE MONEY BELONGS TO THE VICTIMS!**'], as likewise CJA's further position that the money be used to rehire the hundreds of court employees terminated to save money and to staff new judgeships whose creation is warranted by caseload levels far exceeding capacity."

CITY JOURNAL

Eric Lane

Albany's Travesty of Democracy

Democratic lawmaking needs debate, hearings, committee reports—all the machinery that winnows compromise out of the clash of opposite views. You won't find any of it in Albany.

Spring 1997

New York's Legislature taxes, spends, and regulates more energetically than almost any other state's. During its most recent session, completed last summer, it enacted more than 700 laws and appropriated over $60 billion, drawing on the $33 billion that it raised in direct taxes and on vast sums of federal aid. These decisions profoundly affect life in the entire state. In New York City alone, the Legislature lays down the law for everything from the sales tax and Medicaid, to police pensions and governance of the public schools.

But activist government should not be mistaken for democratic government—and Albany is anything but democratic. Yes, New Yorkers cast their votes for State Assembly and Senate, but when the vast majority of their representatives arrive at the Capitol, they don't legislate; they meekly follow the instructions of their legislative leaders. It is no exaggeration to say that the speaker of the Assembly and the majority leader of the Senate *are* the legislative branch in Albany. They pick the issues, close the deals, and—ultimately—make the laws. A newspaper photo from a few years back furnishes the perfect emblem for this system. In it, the majority leader of the Senate stands behind a member of his party who had just voted no on a bill that the leadership had sponsored. The leader's thumb is turned up—an order to the clerk to reverse the erring senator's vote.

As counsel to the minority Democrats in the State Senate from 1981 to 1986, I participated in this undemocratic leadership culture and supported it. In the course of my research and writing on the legislative process since then, I have had serious second thoughts. The Legislature's practices violate every principle of good lawmaking: they exclude most of the people's elected legislators from the process, squelch deliberation and the injection of new ideas, and deny the public any meaningful say in legislation or even the information they need to hold their elected officials accountable. The result for New York: sloppy laws that do not represent the views of the people. The State Legislature is an embarrassing throwback to the days of bossism and party machines—and we need urgently to fix it.

Consider the Legislature's moribund committee system. In healthy legislative bodies—in Congress or other state legislatures or even the New York City Council—committees do much of the heavy lifting. They introduce legislation, debate it, amend it in markup sessions, hear the opinions of outside experts and the public, and issue committee reports describing their intent and reasoning to fellow members and to the executive agencies and courts that will have to interpret their handiwork. Although party leaders sometimes coordinate such committee work from above, committee chairmen and members usually act independently, even defiantly; they are power centers in their own right.

Such a division of labor, and authority, is largely unknown in Albany. As a former legislative staffer

has neatly summarized the Legislature's committee life: "Nothing ever happens. A leadership-created agenda is followed and bills are voted on, always favorably. No debates or markup sessions are held, no amendments permitted. Nothing except votes are recorded." Needless to say, these meetings produce no committee reports, since there is, quite literally, nothing to report. And committee members make no effort to benefit from the knowledge of outsiders who might shed light on matters before the Legislature: former comptroller Ned Regan reports that during his 14 years as New York State's own chief financial officer, no committee ever asked him to testify, despite his repeated offers to do so.

As if to prove that committees in Albany are mere window dressing, leaders in both houses drop all pretense of needing them during the last month of each year's session, when the Legislature traditionally turns to the really important items on its agenda. Committees stop meeting altogether, and the leadership's top staff members take over as gatekeepers, with suppliant legislators lined up outside their doors in hopes of getting bills onto the legislative floor. I once asked the counsel to several former speakers how legislation gets on the docket in the Assembly: "Don't you guys have a rules committee?" Without missing a beat, he replied, "I'm it."

What explains the utter tractability of these committees? Plain lethargy, in part. Committee chairmen and ranking minority members are unaccustomed to doing legislative dirty work, despite receiving an additional $6,500 to $24,500 (on top of their $57,500 salaries) for taking on these "leadership jobs." And the Assembly speaker and Senate majority leader keep committees on the shortest of leashes. So great is their fear of committee independence that they appoint all substantive committee staff themselves, a prerogative reserved for chairmen in almost every other legislative body.

When a committee chairman nonetheless tries to strike out on his own, the Legislature's pashas move quickly to undercut him. Last year a long-time lobbyist and acquaintance of mine persuaded the chairman of a committee to champion a number of important reforms. Shortly thereafter, and much to his surprise, the lobbyist received an invitation to meet with the chamber's legislative leader to discuss strategy on these issues. Assuming that the committee chairman had arranged this rare get-together and would be in attendance, the lobbyist called the leader's staff to make an appointment—only to discover that the chairman was emphatically not on the guest list. The message was clear: the leader—and only the leader—handles serious business.

In the rare event that a committee chairman openly rebels, the leadership simply co-opts him. In exchange for fealty to the leader's broader agenda, the chairman will win greater authority within his own policy area, even the right to choose his own committee staff. But make no mistake: such empowerment of a certain legislator does not translate into a similar empowerment of his committee; it just makes him, in essence, the leader of his own small domain, with the ability to dictate its activities. As before, the committee will neither gather facts, hear the public, nor deliberate over legislation.

Go into either legislative chamber in Albany and you'll find no less of a leadership-orchestrated spectacle. Again, the contrast with other legislative bodies is instructive. In Congress, for example, members often engage in robust debate on the floor, especially on controversial measures. Members of both parties freely offer and adopt amendments, and it is difficult at times to predict how a bill will fare in a final vote, despite the best efforts of party leaders to ensure a certain outcome.

By comparison, the New York State Legislature looks like a meeting of the Supreme Soviet. When the leadership sends a bill to the floor in either chamber, members of the majority understand that their job is to see that it passes intact, without amendment or debate. The minority sometimes speaks out, contesting legislation as best it can, but members of the majority feel no obligation to reply and sit impassively until their colleagues run out of steam. The result of this charade: during almost every annual session of the Legislature, not a single bill goes down to defeat or is even amended.

The waning days of a legislative session always show this conspiracy of silence at its worst. With no legislation yet on the table for a vast range of "must" issues, the leaders of the Assembly and Senate hold a flurry of meetings with each other and with the governor; leadership staffers work round the clock, hammering out agreements acceptable to their bosses. And ordinary members? They wait in the wings for a signal to show up on the floor. Finally, clerks appear to distribute printed bills, each accompanied by a message of "necessity" from the governor, allowing the Legislature to ignore the state Constitution's requirement—meant to promote deliberation—of three days between the printing of a bill and the vote on it. Within 24 hours the legislative leader or his designee mounts the rostrum. He calls for a vote, and in short order, the bills pass without comment, their contents largely unknown to the members. To take just a few examples from the closing days of the 1996 session: the Legislature printed a 541-page, $18 billion bill covering Medicaid, mental health, and prisons on July 11 and passed it the next day; it printed a 463-page, $12 billion bill covering education and labor matters on July 12 and passed it that same day; it printed Governor Pataki's 53-page, $1.75 billion Environmental Bond Act on July 12 and passed it on the 13th. The elected officials who voted on these far-reaching measures barely had enough time to *turn* these hundreds of pages, much less to read or discuss them.

The Legislature's rubber-stamp procedures are not only undemocratic; they also conceal just how shoddy the laws made in Albany are. Once, when we in the Senate minority were miffed over the majority's refusal to provide us with our normal share of "members' items"—bills that give individual legislators money to distribute for "special needs" in their districts—we settled on a radical course of action: we would debate every bill on the floor for the full two hours allotted by the rules. Though deliberation wasn't exactly the intent of this exercise, we quickly discovered dozens of errors in the logic and grammar of bills—a predictable enough consequence of our Potemkin committees. Even members of the majority had to concede that bills deserved closer attention. Still, they refused to correct these errors, which would have required the unthinkable: amendments. As for us, having carried the day with our obstructionism, we allowed things to return to normal.

For members with legislative projects of their own, the leadership provides the only reliable avenue for getting a bill onto the floor: lose the support of the Assembly speaker or Senate majority leader and you lose all hope of even airing your proposal. During the interminable day-nights at the end of one session, a powerful member of the Senate majority—the chairman of an important committee—burst into my office at 3 am; he was on the verge of tears. He had sponsored a bill giving relief to a small group of New Yorkers injured by a certain drug, and his leader had promised to send it to the floor and see to its passage. The senator and his allies, including some Democrats, had already celebrated the victory. Now, one of the majority leader's staff informed him, the bill was dead: the state insurance industry had complained, and that was that. "Offer the bill as an amendment," I advised. "Or tell your leader that failure to consider the bill will lead to a rebellion." He gave a resigned smile and shuffled back out my door. Such resistance, he knew, would get him nowhere—except legislative Siberia.

On rare occasions, the legislative leaders do release their members from the yoke of party discipline. Usually it's a question of political survival. The Republican leader of the Senate, for example, would never demand that a member of his party from an urban district vote against rent control. There are also some matters of conscience, like the death penalty and abortion, on which the party takes no position and allows real debate. When casino gambling came up for a vote this past January, Senate Majority Leader Joseph Bruno decided not to force the outcome. After a lively exchange of views, the bill failed—the first to do so in the Senate in five years. In a revealing moment, Bruno conceded to the *New York Times* that such give-and-take made him uneasy: "To see a bill on the floor and hear some of the conversations . . . and to sit there and just watch it happen, I can tell you, is very difficult." To which one might add, only in Albany.

Defenders of the Legislature will protest that ordinary lawmakers do get to have their say on the substance of bills, just not in committee or on the floor. There is, after all, the weekly party conference. The leaders dominate these sessions, to be sure, but they give members a fairly free rein, allowing them to discuss legislation from every angle—or so the Legislature's defenders say. One former Assembly chieftain goes a step further, insisting that the party conferences are genuinely independent and warning that a legislative leader who ignores his party colleagues too long quickly finds himself out of a job.

In truth, party conferences are no substitute for the ordinary activities of legislating. Such meetings focus single-mindedly on politics. Standing at the head of a long table and facing his members, the leader describes important and politically controversial bills, the details of which he has usually worked out already at a separate meeting with the leader of the other chamber and often the governor. His aim is not to get advice on the substance of pending legislation but to test the tolerance of members for the stands that he has taken and to smoke out opposition. Legislators can gripe that a bill is bad policy, but they get a serious hearing only when they have something to say about how it might affect their own chances for reelection or some party constituency. If the politics of a bill is truly a problem, the leader may decide to amend it; at a minimum, an anxious legislator can win the right to vote against the party position. One consideration, above all, constrains the party conference and drastically limits its usefulness: the unwillingness of legislators to embarrass their leader by forcing any major renegotiation of a bill. By and large, a bill arrives at the party conference as a fait accompli.

It should come as no surprise that party conferences, the only forums in Albany where legislators actually discuss legislation, are the only legislative gatherings in the capital that are closed to the public. When a state court suggested several years ago that these meetings might violate the state's open-meetings law, the Legislature rushed to amend the statute in order to protect its cherished secrecy. Supporters of these closed-door sessions insist that they promote a free exchange of ideas, but anyone familiar with Albany knows that nothing of the sort takes place in party conferences. The conferences are closed not to allow legislators to discuss the public interest more candidly but to ensure that their constituents never discover just how little time they actually spend considering the public interest.

The great mystery of this leadership-dominated system is why the legislators put up with it. After all, the Assembly speaker and Senate majority leader do not hold their jobs by force of arms or act of God; they are elected by their colleagues. To survive, they must keep a majority of their fellow

partisans happy—and they don't always succeed. In 1995 Senate Republicans decided that they had had enough of Majority Leader Ralph Marino's heavy-handed tactics; they unseated him and put Joseph Bruno in charge. Legislators in Albany might brandish such a threat at any time to win more latitude for themselves, but they don't. So the puzzle remains: why do otherwise serious, aggressive, smart people choose to shut off their critical faculties and turn over lawmaking in the state to a handful of party bigwigs? Why do they allow themselves to be infantilized?

The answer is that, despite suffering the occasional indignity, most legislators in Albany are perfectly content with the present system. Some insist that forceful leadership is a requirement of good government. As one lawmaker has argued, "Without a strong leader, there would be constant turmoil; with too many hands on the wheel, nobody could drive the car." Indeed, every legislature needs able leaders to organize its operations, to meld disparate views, and—most important—to provide a single legislative voice against a unified executive in our system of checks and balances. But the legislative process is not, to borrow the legislator's metaphor, a car intended for a lone driver, steering from one point to another. The pull and tug of many hands is exactly the point of lawmaking in a democracy: representatives bring their different interests and priorities into open conflict, ensuring that no one gets everything and everyone gets something. The compromises that result are seldom perfect, but they approximate the public interest far better than any system of "strong leaders."

Most legislators abdicate their duties for less public-spirited reasons. While there is very little incentive for a lawmaker to challenge Albany's leadership culture, going along with it brings real rewards. The Assembly speaker and Senate majority leader hand out committee chairs and other leadership posts at their pleasure, and these jobs mean extra pay for members. The two chambers have also seen fit to give their leaders full control over the office budgets of individual legislators—an extraordinary power virtually unheard of in other legislatures. Favorites of the leaders can count on plenty of money for hiring staff, purchasing computers, and so forth.

For lawmakers in Albany, however, there is yet another prize for allowing the leadership to dominate the Legislature: help in winning reelection. Because the leaders control the most lavishly funded of the parties' campaign committees, loyal legislators don't have to worry constantly about fund-raising. And when redistricting rolls around every ten years, they can rest easy knowing that the leader would not consider even the smallest shift of favorable voters to another district.

No less important, by shirking the hard work of lawmaking and turning it over to the leaders, legislators can devote themselves to the easier, more rewarding tasks of public office: meeting with constituents, interceding with the state bureaucracy, attending political events, and speaking out on the issues. Such activities make legislators popular—many are minor celebrities in their districts—and they amount to the lightest of workloads: little wonder that so many lawmakers keep coming back to Albany decade after decade. The capital's political culture even supplies legislators with a ready excuse for the occasional vote that offends constituents: "The leader insisted."

Beyond these concrete rewards of loyalty to the leadership, the prospect of change just simply frightens many legislators. For them, the current process is familiar and predictable; they know and like their cushy place in it. What's more, whether liberal or conservative, they fear that any shift of power will destabilize the system, bringing about laws that they oppose. By comparison, deliberative democracy is an abstraction, something they neither know nor want.

Talk about the legislative process leaves most people cold, but it matters deeply that the State Legislature conducts its business with such disdain for representative government. In the first place, Albany's leadership-dominated political culture smothers any hint of bold or creative thinking about the state's pressing problems. An intellectual sameness permeates the whole process, making it difficult to identify a distinctively Democratic or Republican view on most issues.

The Legislature's slapdash lawmaking also perverts the separation of powers in state government, giving far greater authority to unelected officials. Poorly crafted laws translate into vast discretion for agency bureaucrats, who must try to figure out the Legislature's intent without benefit of committee reports, transcripts of floor debates, or other common legislative records. Courts, too, must apply statutes regardless of their ambiguity, so when a clear legislative intent is lacking, judges create one.

Finally, the Legislature's undemocratic ways breed contempt for state government. New Yorkers who know about Albany's slavish partisanship, last-minute deals, and debate-less votes rightly wonder why such a process should dispose of so much of their income and intrude so insistently in their lives and livelihoods. This class is small—most New Yorkers haven't the faintest idea what goes on in the capital—but it contributes to a growing cynicism about our democratic institutions.

What can be done to restore some integrity to the Legislature? First, committees should insist on more autonomy, with chairmen claiming their due authority over committee staff. Albany might then hold genuine hearings on controversial bills, a key step toward better lawmaking.

Second, the whole Legislature should operate far more in the light of day. All legislative meetings, including party conferences, should be matters of public record, and committees should be obliged to write a committee report for every bill they consider. Such records would bolster the Legislature's accountability and keep the executive and judiciary from overstepping their bounds when they apply and interpret the law.

These reforms would not require a constitutional amendment or even a statute. A simple majority vote in each house would do. How to get legislators to act? The coming months present several opportunities. New York's lawmakers desperately want a pay raise, having gone without one for eight years, and they intend to bring it up in the current session—a perfect time for commentators, talk radio hosts, and citizens to ask if they even deserve what they are currently paid. And this November the people of New York will vote on whether to call a constitutional convention. Introducing the reforms that I have described into the debate over this referendum might just get legislators' attention and prompt them to act on their own.

The Legislature's problems did not develop in a year and won't disappear in one either. Lasting change will come about in Albany only when reform becomes a standard election issue, like taxes, criminal justice, and the schools. Voters will have to press candidates on their willingness to turn the Legislature into a true representative body. Editorial boards and interest groups will have to stake their endorsements on a commitment to openness and deliberation. Today, legislators' complicity in the Albany system costs them nothing. Tomorrow, it should cost them their jobs.

BRENNAN CENTER FOR JUSTICE

STILL BROKEN: NEW YORK STATE LEGISLATIVE REFORM

2008 Update

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I. INTRODUCTION

"Dysfunctional" is the adjective ascribed to the New York State Legislature by two reports issued by the Brennan Center for Justice: *The New York State Legislative Process: An Evaluation and Blueprint for Reform* released in 2004 and the follow up, *Unfinished Business: New York State Legislative Reform 2006 Update.*

The legislative leadership largely dismissed the findings of the 2004 report. Assembly Speaker Sheldon Silver told the New York Times, "Nothing happens here in Albany, in the Assembly, without the input of the rank-and-file legislators."[1] Joe Bruno, who recently left the Senate after serving for 14 years as its Majority Leader, called the report "pure nonsense" and equated a more democratic process with that of a Third World country.[2]

Yet when the Legislature came back into session in early 2005, the Leaders announced rules changes—the first time in a generation—accompanied by self-congratulatory fanfare.[3] In press releases that described the reforms' aspirational effect on the Legislature, the Assembly Speaker and Senate Majority Leader claimed that the new rules would usher in an era of openness, effectiveness, and accountability. The Senate even went so far as to claim that it addressed most of the recommendations made by the Brennan Center.[4]

Unfinished Business: New York State Legislative Reform 2006 Update concluded that the changes on the whole, while a good start, were by no means transformative. The Legislature failed to adopt a comprehensive set of new rules that incorporated the Brennan Center's recommendations for making the legislative process more robust and democratic. Of the changes that the legislature did adopt, some, quite cynically, codified the status quo in new ways. The continued presence of these rules stifles rigorous deliberation and debate and hobbles the sincere efforts of a number of rank-and-file legislators to represent the best interests of their constituents and the state as a whole.

In 2006 and 2007, most standing committees met infrequently or not at all. Almost no oversight hearings or hearings on major legislation occurred. Not a single major bill was the subject of a detailed committee report. Leadership maintained near total control over what bills reached the floor. And on the floor, there was little substantive debate; every bill brought to the floor for a vote in either chamber passed.

The good news is that, for the first time in years, there is reason to hope that at least one chamber will begin to make the structural changes that could remake the legislature. Come January, majority control of the Senate may shift to the Democrats.[5] In 2007, likely incoming Senate President Pro Tempore Malcolm Smith introduced new rules in line with our previous recommendations (the one-house resolution failed along a party-line vote). During a Reform Day New York panel last year, Senator Smith reaffirmed his commitment to introducing the same package of rules reform "without question"[6] if the Democrats regained the majority. He previously stated, "We cannot truly reform the legislative process in Albany until we have successfully reformed the rules that govern the Legislature."[7] More recently, Senator Smith told the New York Times that the under his leadership, the Senate "would be more transparent, more participatory." Smith reaffirmed that rules reform under a Democratic majority would include broader latitude for members to put bills on committee agendas or vote them out of committee and onto the floor, abolishment of secretive canvass of agreement votes and restrictions on discharge motions, and the enactment of new rules requiring committee members to be physically present to vote.[8]

At a time when state revenues are shrinking—Governor Paterson forecast a $47 billion budget deficit over the next four years[9]—it has become all the more important for the legislature to be more creative and effective. The rules changes we recommend are a step toward this goal.

At the opening of 2009 session, both houses will once again have the opportunity to modify their rules. We urge the new Senate Majority to honor its commitment to genuine rules reform. The Assembly, which retains a super-majority in favor of the Democrats, should follow suit.

While the world of legislative rules may seem arcane, our capitol's dysfunction has received unprecedented attention over the period covered in this report thanks in part to the failure of New York City's congestion pricing proposal. For far too long, the leadership has failed to enact the changes necessary to remake the Senate and Assembly. Today, pressure to change the culture of Albany may have finally intersected with a new opportunity for reform.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

The quantitative analysis of the Legislature's performance in 2006 and 2007 and qualitative information from interviews with lawmakers reveal that the problems outlined in the original report still plague both chambers. Our analysis of the legislature's performance in 2006 and 2007 shows that the vast majority of problems identified in our previous two reports remain endemic in both chambers:

- In both chambers, but especially in the Assembly, leadership maintained a stranglehold on the flow of legislation at all stages of the legislative process.
- Committee meetings were infrequent in both chambers and sparsely attended in the Senate, where members can vote without being physically present.
- Most standing committees in both chambers failed to hold any hearings on major legislation or state programs within their jurisdictions.
- There were no detailed committee reports attached to major bills in the Senate, and the Assembly rules do not require substantive reports to accompany bills reported out of committee.
- Legislators introduced an extraordinary number of bills in both houses during each session, while only a small percentage received a floor vote.
- 100% of the bills that leadership allowed to reach the floor of either chamber for a vote passed with almost no debate.
- Senate records indicate that many of the bills that received a floor vote lacked critical and required information about their fiscal impact, usually passing the full chamber without any meaningful debate or dissent.

- The use of conference committees to reconcile similar bills in each chamber remained the exceedingly rare exception, rather than the rule.

- Member resources were distributed inequitably in both chambers on the basis of party, loyalty and seniority.

- Much of the legislative process remains opaque; records are difficult to obtain without burdensome "freedom of information" requests, and key records of deliberation—such as "no" votes on procedural motions in the Senate—are not maintained.

It is plain from this and other evidence explored in our latest update that New York's legislative process remains broken. In January 2009, each chamber will again have the opportunity to change their operating rules and begin to fix this process. Such changes will not require agreement between the chambers or gubernatorial approval. At a minimum, they should meet the following five objectives:

1. **Strengthen standing committees so that debate is robust and rank-and-file members can force a hearing or a vote, even over the objections of the committee chair (Discussed in greater detail on pages 4–12).**

2. **End the leadership stranglehold on bills coming to the floor (Discussed in greater detail on pages 12–16).**

3. **Allow ample opportunity for adequate review of all bills (Discussed in greater detail on pages 17–23).**

4. **Provide all members with sufficient resources and opportunities to fully consider legislation (Discussed in greater detail on pages 24–26).**

5. **With respect to all of the above, make records of the legislative process transparent and easily accessible to the public via the Internet (Discussed in greater detail throughout this report).**