1st citizen-taxpayer action (Albany Co #1788-2014) CJA v. Cuomo, et al.: March 23, 2016 verified second supplemental complaint

AS AND FOR A SIXTEENTH CAUSE OF ACTION

Three-Men-in-a-Room, Budget Dealing-Making is Unconstitutional, *As Unwritten* and *As Applied*

458. Plaintiffs repeat, reiterate, and reallege ¶¶1-457, with the same force and effect as if more fully set forth herein.

A. Three-Men-in-a-Room Budget Deal-Making is Unconstitutional, *As Unwritten*

459. The procedure governing the submission and enactment of the state budget is laid out in Article VII, §§1-7 of the New York State Constitution. Upon the Governor's submission of the budget to the Legislature pursuant to §2, the procedure, is spelled out in §§3, 4.[36]

460. Pursuant thereto, once the Governor submits the budget, it is within the legislative branch. He has thirty days, as of right, within which to submit any amendments or supplements to his bills, following which it is by "consent of the legislature". He also has the right "to appear and be heard during the consideration thereof, and to answer inquiries relevant thereto." Further, the Legislature may request the Governor to appear before it – and may command the appearance of his department heads to "answer inquiries" with regard to the executive budget. Based thereon, and in such public fashion, it may "consent" to the Governor's further amending and supplementing his budget.

461. Neither the Constitution, nor statute, nor Senate and Assembly rules authorize the Governor, Temporary Senate President, and Assembly Speaker to huddle together for budget negotiations and the amending of budget bills – and it is an flagrant violation of Article VII, §§3, 4 and Article IV, §7, transgressing the separation of powers, for them to do so.

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36 Article VII, §3 is quoted at ¶¶377, 379, *supra*. Article VII, §4 is quoted at ¶369.

462. Consistent with the Court of Appeals decision in *King v. Cuomo*, 81 N.Y.2d 247 (1993) – and for the multitude of reasons that decision gives with respect to the bicameral recall practice – such three-men-in-a-room, budget deal-making must be declared unconstitutional.

463. The parallels between the bicameral recall practice declared unconstitutional in *King v. Cuomo* and the challenge, at bar, to three-men-in-a-room budget deal-making are obvious. Only minor alterations in the text of the decision in *King v. Cuomo* are needed to support the declaration here sought, as by the below bold-faced & bracketed insertions to pp. 251-255:

"The challenged [] practice significantly unbalances the law-making options of the Legislature and the Executive beyond those set forth in the Constitution. By modifying the nondelegable obligations and options reposed in the Executive **[and Legislature]**, the practice compromises the central law-making rubrics by adding an expedient and uncharted bypass. The Legislature **[and Executive]** must be guided and governed in this particular function by the Constitution, not by a self-generated additive (see, *People ex rel. Bolton v Albertson*, 55 NY 50, 55).

Article IV, §7 and **[Article VII, §§1-4]** of the State Constitution prescribes how a **[budget]** bill becomes a law and explicitly allocates the distribution of authority and powers between the Executive and Legislative Branches…

The description of the process is a model of civic simplicity…

The putative authority **[for behind-closed-doors, three-men-in-a-room budget deal-making]** 'is not found in the constitution' (*People v Devlin*, 33 NY 269, 277). We conclude, therefore, that the practice is not allowed under the Constitution….

When language of a constitutional provision is plain and unambiguous, full effect should be given to 'the intention of the framers ... as indicated by the language employed' and approved by the People (*Settle v Van Evrea*, 49 NY 280, 281 [1872]; *see also, People v Rathbone*, 145 NY 434, 438). In a related governance contest, this Court found 'no justification ... for departing from the literal language of the constitutional provision' (*Anderson v Regan*, 53 NY2d 356, 362 [emphasis added]). As we stated in *Settle v Van Evrea*:

> '[I]t would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision plain and precise in its terms.
>
> 'That would be *pro tanto* to establish a new Constitution and do for the people what they have not done for themselves' (49 NY 280, 281, *supra*).

Thus, the State's argument that the **[three-men-in-a-room budget deal-making]** method, in practical effect and accommodation, merely fosters the underlying purpose of article IV, §7 **[and article VII, §§1-4]** is unavailing (see, *New York State Bankers Assn. v Wetzler*, 81 NY2d 98, 104, *supra*).

If the guiding principle of statutory interpretation is to give effect to the plain language (*Ball v Allstate Ins. Co.*, 81 NY2d 22, 25; *Debevoise & Plimpton v New York State Dept. of Taxation & Fin.*, 80 NY2d 657, 661; McKinney's Cons Laws of NY, Book 1, Statutes §94), '[e]specially should this be so in the interpretation of a written Constitution, an instrument framed deliberately and with care, and adopted by the people as the organic law of the State' (*Settle v Van Evrea*, 49 NY, at 281, *supra*). These guiding principles do not allow for interstitial and interpretative gloss by the courts or by the other Branches themselves that substantially alters the specified law-making regimen. Courts do not have the leeway to construe their way around a self-evident constitutional provision by validating an inconsistent 'practice and usage of those charged with implementing the laws' (*Anderson v Regan*, 53 NY2d 356, 362, supra; *see also, People ex rel. Burby v Howland*, 155 NY 270, 282; *People ex rel. Crowell v Lawrence*, 36 Barb 177, *affd* 41 NY 137; *People ex rel. Bolton v Albertson*, 55 NY 50, 55, *supra*).

The New York Legislature's long-standing **[three-men-in-a-room budget deal-making]** practice has little more than time and expediency to sustain it. However, the end cannot justify the means, and the Legislature, even with the Executive's acquiescence, cannot place itself outside the express mandate of the Constitution. We do not believe that supplementation of the Constitution in this fashion is a manifestation of the will of the People. Rather, it may be seen as a substitution of the People's will expressed directly in the Constitution.

The Governor has been referred to as the 'controlling element' of the legislative system (4 Lincoln, The Constitutional History of New York, at 494 [1906]). The **[three-men-in-a-room budget deal-making]** practice unbalances the constitutional law-making equation… By the ultra vires **[]** method, the Legislature **[and Executive]** significantly suspends and interrupts the mandated regimen and modifies the distribution of authority and the complementing roles of the two law-making Branches. It thus undermines the constitutionally proclaimed, deliberative process upon which all people are on notice and may rely. Realistically and practically, it varies the roles set forth with such careful and plain precision in the constitutional charter…

Though some practical and theoretical support may be mustered for this expedient custom (*see, e.g.*, 4 Lincoln, *op. cit.*, at 501), we cannot endorse it. Courteous and cooperative actions and relations between the two law-making Branches are surely desirable and helpful, but those policy and governance arguments do not address the issue to be decided. Moreover, we cannot take that aspirational route to justify this unauthorized methodology.

The inappropriateness of this enterprise, an 'extraconstitutional method for resolving differences between the legislature and the governor,' also outweighs the claimed convenience (Zimmerman, The Government and Politics of New York State, at 152). For example, '[t]his procedure 'creates a negotiating situation in which,

under the threat of a full veto, the legislature **[through its Temporary Senate President and Assembly Speaker negotiate with]** the governor, thus allowing him to exercise *de facto* amendatory power'' (Fisher and Devins, *How Successfully Can the States' Item Veto be Transferred to the President?*, 75 Geo LJ 159, 182, quoting Benjamin, *The Diffusion of the Governor's Veto Power*, 55 State Govt 99, 104 [1982]).

Additionally, the **[three-men-in-a-room]** practice 'affords interest groups another opportunity to amend or kill certain bills' (Zimmerman, *op. cit.*, at 152), shielded from the public scrutiny which accompanies the initial consideration and passage of a bill. This 'does not promote public confidence in the legislature as an institution' because 'it is difficult for citizens to determine the location in the legislative process of a bill that may be of great importance to them' (*id.*, at 145, 152). Since only 'insiders' are likely to know or be able to discover the private arrangements between the Legislature and Executive when the **[three-men-in-a-room]** method is employed, open government would suffer a significant setback if the courts were to countenance this long-standing practice.

> In sum, the practice undermines the integrity of the law-making process as well as the underlying rationale for the demarcation of authority and power in this process. Requiring that the Legislature adhere to this constitutional mandate is not some hypertechnical insistence of form over substance, but rather ensures that the central law-making function remains reliable, consistent and exposed to civic scrutiny and involvement.
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> ...It is no justification for an extraconstitutional practice that it is well intended and efficient, for the day may come when it is not so altruistically exercised.
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> Appellants are entitled, therefore, to a judicial declaration that the **[three-men-in-a-room]** practice is not constitutionally authorized."

464. At bar, the unconstitutionality is *a fortiori* to that in *King* because, unlike with bicameral recall, no Senate and Assembly rules "reflect and even purport to create the [three-men-in-a-room] practice" (at p. 250) AND such budget deal-making by them, conducted behind-closed-doors, is UNIFORMLY derided as deleterious to good-government.

465. Further underscoring the unconstitutionality of three-men-in-a-room budget dealmaking is the Court of Appeals decision in *Campaign for Fiscal Equity, Inc. v. Marino*, 87 N.Y.2d 235 (1995), where the Court held that the Legislature's withholding of a passed-bill from the Governor violates Article IV, §7. In addition to resting on *King v. Cuomo*, the Court reiterated:

> "The practice of withholding passed bills while simultaneously conducting discussions and negotiations between the executive and legislative branches is just

another method of thwarting open, regular governmental process, not unlike the unconstitutional 'recall' policy, which, similarly, violated article IV, §7.", *id*, at 239.

466. Additionally, the "three-men-in-a-room" shrinks the two-branch 213-member legislature to just two members, flagrantly violating the constitutional design, which recognized in size a safeguard against corruption. *Cf.*, *The Anti-Corruption Principle*" by Zephyr Teachout, Cornell Law Review, Vol 94: 341-413.[37]

B. Three-Men-in-a-Room Deal-Making is Unconstitutional, *As Applied*

467. Three-men-in-a-room budget deal-making, *unwritten* in the Constitution, in statute, and in Senate and Assembly rules, is entirely unregulated.

468. That it takes place behind-closed-doors, out of public view, is a further constitutional violation – violating Article III, §10: "The doors of each house shall be kept open", as well as Senate and Assembly rules consistent therewith: Senate Rule XI, §1 "The doors of the Senate shall be kept

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37 The framers were "obsessed with corruption" and "one of the most extensive and recurring discussions among the delegates [to the Constitutional Convention] about corruption concerned the size of the various bodies." It was the reason they made the House of Representatives larger than to the Senate because, in their view, "[t]he larger the number, the less the danger of their being corrupted."

> "Several delegates reiterated a relationship between size and corruption, suggesting that it was, or at least was becoming, conventional wisdom. Magistrates, small senates, and small assemblies were easier to buy off with promises of money, and it was easier for small groups to find similar motives and band together to empower themselves at the expense of the citizenry. Larger groups, it was argued, simply couldn't coordinate well enough to effectively corrupt themselves.
> ...
> Notably, George Washington's only contribution to the Constitutional Convention arose in the context of a debate about the size of the House of Representatives.[fn.] First, it would take too much time for representatives in a large legislative body to create factions. Second, differences between legislators would lead to factional jealousies and personality conflicts if the same corrupting official tried to buy, or create dependency, across a large body. Because secrets are hard to keep in large groups, and dependencies are therefore difficult to create, the sheer size and diversity of the House would present a formidable obstacle to someone attempting to buy its members.
> Madison claimed that they had designed the Constitution believing that 'the House would present greater obstacles to corruption than the Senate with its paucity of members.'[fn.] ..." (at p. 356).

open"; Assembly Rule II, §1 "A daily stenographic record of the proceedings of the House shall be made and copies thereof shall be available to the public" and Public Officers Law, Article VI "The legislature therefore declares that government is the public's business...".

469. Compounding the unconstitutional exclusion of the public from the three-men-in-a-room budget negotiations is that the three-men do not, thereafter, disclose the extent of their discussions and changes to budget bills. As illustrative, neither last year nor the year before was there any memo, itemized sheet, or report setting forth their agreed-to changes to the Legislative/Judiciary budget bills – each unamended bills prior to the three-men-in-a-room huddle, but, after the huddle, introduced as amended bills and referred to the fiscal committees. Nor were the changes identified by italics, underscoring, or bracketing in the amended bills' formatting – at least with respect to the Judiciary/Legislative budget bills.

470. That what they have done to alter massive budget bills, in secret and without full disclosure to legislators and the public, they then speed through the Legislature on a "message of necessity", dispensing with the requirement that each bill be "upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage", pursuant to Article III, §14, further compounds the constitutional violations.