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BY HAND

August 21, 2013

TO: Governor Andrew M. Cuomo

FROM: Elena Ruth Sassower, Director
Center for Judicial Accountability, Inc. (CJA)

RE: Achieving BOTH a Properly Functioning Legislature & Your Public Trust Act
(Program Bill #3) – the *Sine Qua Non* for “Government Working”
& “Working for the People”

We applaud your establishment of the Commission to Investigate Public Corruption. However, the purposes you’ve conferred upon the Commission are actually duties of a properly-functioning legislature, discharging its oversight and law-making functions.

Indeed, those purposes:

- “a. Investigate the management and affairs of the State Board of Elections...
- b. Investigate weaknesses in existing laws, regulations and procedures relating to the regulation of lobbying...and make recommendations to reform any weaknesses uncovered in existing State laws, regulations and procedures; and
- c. Investigate weaknesses in existing laws, regulations and procedures relating to addressing public corruption, conflicts of interest, and ethics in State Government...and make recommendations to reform any weaknesses uncovered in existing State laws, regulations and procedures.” (July 2, 2013 Executive Order #106, Sec. II)

are oversight responsibilities of a large number of committees of the New York Legislature. For example:

- the Senate Committee on Elections
- the Assembly Elections Law Committee
- the Senate Committee on Investigations and Government Operations
- the Assembly Committee on Oversight, Analysis and Investigation

- the Assembly Committee on Government Operations
- the Senate Committee on Codes
- the Assembly Committee on Codes
- the Senate Committee on Civil Service and Pensions
- the Senate Ethics Committee
- the Assembly Committee on Ethics and Guidance
- the Administrative Regulations Review Commission
- the Legislative Commission on Government Administration.

To that end, the Legislative Law gives legislative committees subpoena power and the ability to appoint subcommittees and commissions for the taking of testimony. And one of the functions of the Assembly Committee on Oversight, Analysis and Investigation is acting “as a resource to other Assembly standing committees, lawmakers and staff” by furnishing “technical assistance and guidance” for oversight. According to its 2012 Annual Report, it provides “each lawmaker” with “*A Guide to Legislative Oversight*”. In the event you are unfamiliar with this extraordinary 24-page guide, detailing the importance of oversight as an essential component to proper law-making, a copy is enclosed.¹

Consequently, would you not agree that high on the agenda of the Commission to Investigate Public Corruption should be the question as to what, for example, the Assembly Election Law Committee and the Senate Committee on Elections have been doing all these years in overseeing the Board of Elections and in revising and enacting pertinent laws, especially as Senate and Assembly rules explicitly require committees to engage in “oversight”, “studies”, “investigations”, and “analysis”²

¹ The “*Guide to Legislative Oversight*” and all other documentary substantiation identified herein are posted on a webpage for this letter on our website, www.judgewatch.org. The webpage is accessible from our “Latest News” top panel, via the hyperlink “THE PEOPLE LEAD: Securing Introduction & Passage of the Public Trust Act & a Constitutionally Functioning Legislature” Here’s the direct link: <http://www.judgewatch.org/web-pages/people-lead/aug-21-2013-ltr-to-gov.htm>.

² See, Current Senate Rule VIII “Standing Committees”:

Sec. 4: “c. Committee oversight function. Each standing committee is required to conduct oversight of the administration of laws and programs by agencies within its jurisdiction.

d. Each standing committee is required to file with the secretary of the senate an annual report, detailing its legislative and oversight activities. Such report shall be posted to the Senate web site.” (underlining added).

See, Current Assembly Rule IV “Committees”:

Sec. 1: “d. ...Each standing committee shall propose legislative action and conduct such studies and investigations as may relate to matter within their jurisdiction. Each standing committee shall, furthermore, devote substantial efforts to the oversight and analysis of the activities, including but not limited to the implementation and

The Commission will not have far to look for the answer. It was furnished, nearly a decade ago, by the Brennan Center for Justice in its landmark 2004 report “*The New York State Legislative Process: An Evaluation and Blueprint for Reform*”. Surely you are familiar with the report as its lead author was Jeremy Creelan, who you appointed as your “Special Counsel for Public Integrity and Ethics Reform” even before you were sworn in as Governor in January 2011. The report opened with an Executive Summary whose first words were “New York’s legislative process is broken”. It then identified “Problem #1” as “DYSFUNCTIONAL LEGISLATIVE COMMITTEES”, stating:

“In most modern legislatures, committees ‘are the locus of most legislative activity.’^{fn}. Committees have two principle functions: first, to enable legislators to develop, examine, solicit public and expert feedback upon, and improve bills in a specific area of expertise and to convey the results of their work to the full chamber; and second, to oversee certain administrative agencies to ensure that they fulfill their statutory mandates. New York’s committee system generally does not serve either of these functions.”

The report chronicled that New York’s Legislature was the most dysfunctional of any state legislature and Congress – and sparked a fledgling reform movement among legislators and some legislative rules changes. Among these, a 2005 revision of Assembly Rules to require all standing committees to conduct annual oversight hearings of the performance of agencies and programs within their jurisdictions. This spurred the Assembly Committee on Oversight, Analysis and Investigation to update its “*Guide to Legislative Oversight*”.

Yet, ultimately, little substantively changed – and this was the subject of two subsequent Brennan Center reports bearing titles reflecting that reality:

- “*Unfinished Business: New York State Legislative Reform*” (2006); and
- “*Still Broken: New York State Legislative Reform*” (2008)³.

administration of programs, of departments, agencies, divisions, authorities, boards, commissions, public benefit corporations and other entities within its jurisdiction.”

Sec. 4: “b. Consistent with the provisions of subdivision d of section one of Rule IV hereof, the chairperson of each standing committee shall call at least one public hearing after the adoption of the state budget regarding the implementation and administration of programs of departments, agencies, divisions, authorities, boards, commissions, public benefit corporations and other entities within the jurisdiction of such committee. The purpose of such public hearing shall include, but not be limited to, the impact, if any, of the state budget on the implementation and administration of the programs within such entities’ jurisdiction.” (underlining added).

³ According to the Brennan Center’s 2008 report, “In 2006 and 2007, most standing committees met infrequently or not at all. Almost no oversight hearings or hearings on major legislation occurred.” (at p. 1).

The report noted that even with the 2005 Assembly rule requiring oversight, Assembly committees had made “no real effort to fulfill that responsibility”. It identified that “the Assembly Oversight and Analysis

All three reports detailed that the reason for the dysfunction and brokenness of the Legislature was its partisan rules, vesting domineering powers in the Senate Majority Leader and Assembly Speaker, rendering the committee system moribund and eviscerating a legitimate legislative process. Yet, the solution was *readily at hand*. Amendment of Senate and Assembly rules, which Senators and Assembly members could do at any time. And every two years, there was a ready-made opportunity, as the first order of business of every newly-elected Senate and Assembly was to vote on rules.

Ironically, just as the criminal charges against Senator Malcolm Smith, announced by U.S. Attorney Preet Bharara on April 2, 2013, started the chain of events that led to your establishing the Commission to Investigate Public Corruption, so it was Senator Smith's election as Senate Majority Leader by his Senate colleagues, in January 2009, on a pledge to advance Senate rules reform, that led to the beginnings of a functioning Legislature.⁴ The fulfillment of that potential lay in the Temporary Senate Committee on Rules and Administration Reform, established by Senator Smith on his first day as Majority Leader by a resolution he introduced and the Senate approved. His words at that time deserve to be recalled:

Committee, with a very specific mandate, ha[d] not held a meeting of its members in years"; had "recently held its first hearing in 18 months", but, even still, its chairs had collected annual stipends of \$12,500. (at p. 6).

On the Senate side, it noted that "over the past three years, the *only* oversight pursued by the Senate Committee on Investigations and Government Operations – wh[ich] has overlapping jurisdiction in the Senate – was the so-called 'Troopergate' scandal." (italics in original, at p. 7).

It also furnished a case study entitled "Oversight Nowhere in Sight" involving the Board of Elections and New York's non-compliance with the federal "Help America Vote Act of 2002" (HAVA), where what was at stake was \$230 million in funding and violations so egregious as to result in a Justice Department lawsuit against the state. As to the absence of legislative oversight, it stated:

"At least four committees in the state legislature have jurisdiction over election issues, most directly the Election Law Committee in the Assembly and the Elections Committee in the Senate, in addition to the oversight committees in both houses. These four committees have been silent on the state's failure to comply with federal election law. None of these committees have held a single hearing devoted to State Board of Elections oversight or HAVA compliance since the Department of Justice lawsuit, failing to assist in formulating a plan to move forward or to investigate compliance delays.

By contrast, the New York City Council has held a number of hearings related to the State Board's failure to comply with HAVA..." (at p. 8).

⁴ Under his leadership, the Senate Judiciary Committee, chaired by Senator John Sampson, held oversight hearings on the Commission on Judicial Conduct, for the first time in 22 years, combining these with hearings on the court-controlled attorney disciplinary system, which, upon information and belief, had never been the subject of public hearings since its inception 29 years earlier. Chairman Sampson also held oversight hearings on the 31-year old "merit selection" process to the New York Court of Appeals, as to which, upon information and belief, there also had never been oversight hearings. Nevertheless, and in the face of testimonial and documentary evidence presented and proffered at these 2009 oversight hearings of systemic corruption, no investigation was ever undertaken, no findings of fact and conclusions of law were ever made, and no committee reports ever rendered.

“We have said that one of our first orders of business is to reform the Rules of the Senate to give members meaningful deliberation of legislation and to foster bipartisan agreement on matters of public interest. Today, we are making good on that promise.

This morning we created a new committee on rules and administration – a bipartisan commission – to review the full Senate Rules and adopt a process for greater transparency that allows greater public input into our legislative process, as well as provides for greater authority for individual members....

Imagine a fully functioning legislature where Senate committees function like real committees, where members debate and even amend bills in the committee, where members of the Majority and Minority introduce bills onto the floor for a vote, and those votes are recorded. And, where budget conference committees and individual members are able to negotiate final bills with their Assembly counterparts.” (underlining added).

The extraordinary potential of the Temporary Senate Committee on Rules and Administration Reform was crushed in the aftermath of the June 8, 2009 Senate coup, which encompassed a struggle over rules reform. In its brief life, however, the Temporary Committee held four public hearings, in Syracuse, Albany, Manhattan, and Long Island, at which it took testimony from 51 witnesses – including three Brennan Center witnesses, Mr. Creelan among them. The testimony was as shocking as the Brennan Center reports. Former Senators Nancy Lorraine Hoffman, Franz Leichter, and Seymour Lachman spoke candidly and scathingly – the latter two at the February 26, 2009 hearing in Manhattan at which Mr. Creeland testified. In pertinent part, former Senator Leichter said:

“The rules changes required for a properly functioning process are not unknown, complex or difficult to implement. They have been identified in reports, recommendations and the proposals of a few legislators. I want to focus on what my experience has shown is a major problem – the AUTOCRATIC power invested in the leader of each House.

The power of the Speaker and the Majority Leader is so vast that they control all aspects of how the Legislature functions. They appoint committee chairs, members’ committee assignments, determine what bills are brought to the floor for a vote, decide who gets additional pay – lulus –, award staff allowances, make office assignments and equipment, authorize use of facilities, allocate member items – that is earmarks –, authorize mailings, and so on. They also control the Legislative Budget, which is not itemized as are the Executive and Judicial Budgets, and its opaqueness allows the shifting of monies at the leaders’ whim. In addition, the State’s porous campaign finance laws allow them to raise millions in contributions which they can fairly easily transfer to legislators who are in competitive election districts – but only if they have followed the Leaders’ dictates. The leaders’ domination over the process is absolute.

The remaining 210 legislators are basically reduced to supernumeraries. They are like the spear carriers in Aida. They fill the stage but their voices are not heard. I once proposed – only partly in jest – that the State might save money by having just one Assembly member and one Senator. I may be drawing the picture very starkly but essentially I am correct. The ‘three men in a room’, the end of session avalanche of bills, the failure to address pressing economic and social issues, the refusal to bring to the floor bills most members support, the marginalization of the minority in each House all flow from the leaders’ outsized power.” (pp. 1-2 of written testimony, read at the hearing, capitalization in original, underlining added).

This abomination was then summed up by former Senator Seymour Lachman, in a single sentence:

“...To say that the only vote that matters, the only one that counts, is the vote for leader is only a slight exaggeration.” (p. 1 of written testimony, read at the hearing).

These four public hearings were followed by four public meetings at which the nine-member Commission – its co-chairs Senators David Valesky and John Bonacic and its members, Senators Joseph Griffo, Jeffrey Klein, Kevin Parker, Jose Serrano, Andrea Stewart-Cousins, Daniel Squadron, and former Senator George Winner, Jr. – discussed and deliberated over rule changes to empower Senators and committees so that bills introduced would go through a robust legislative process of committee deliberations, public hearings, mark-ups for amendments, votes – all reflected in substantive committee reports – followed by Senate and Assembly floor debate, amendments, and votes, with conference committees to reconcile divergent versions of the bills passed by each house.

How surprising it then was that upon your becoming Governor, on a platform that pledged to “clean up Albany” and end the “dysfunction” and “mess”, and hiring Mr. Creelan to give you an assist, you did not seek to break the stranglehold of domination wielded by the Senate Majority Leader and Assembly Speaker or to use your “bully pulpit” to champion Senate and Assembly rules reform. Instead, you reverted to behind-closed-doors “three men-in-a-room” deal-making governance, which this year was expanded to four men by the inclusion of Senator Klein, itself shocking when one considers his participation as a member of the Temporary Senate Committee on Rules and Administration Reform.

Underscoring your own shocking disregard of legitimate legislative process in favor of brokered deals with legislative leaders, then sped through the Legislature for rubber-stamp approval, was what you said at a press conference on April 16, 2013. Having announced the Public Trust Act five days earlier with great particularity as to its provisions, you answered press inquiries about your talks with leaders by saying they were going “swimmingly” (at 10:20 mins.) and that your failure to “release” bill language was because:

“Normally when we release bill language before an agreement, it means the probability of that bill passing is very, very low.” (at 10:55 mins.)⁵

You then tried to back away from this, the next day, on The Capitol Pressroom:

“You have a little fun and then they take it seriously. Some bills are for press releases, and some are good faith proposals, and some are just posturing. And that was the point I was trying to make”.⁶

It was more than a week later that you finally released the Public Trust Act, your Program Bill #3, delivering it to the Senate and Assembly. Was it a “good faith proposal” or “just posturing”? What did you think would happen to it at that point? Were you unaware that Assembly Speaker Silver and Majority Coalition Leaders Skelos and Klein, with whom you were then and thereafter negotiating behind-closed-doors, were not themselves sponsoring the Public Trust Act nor furnishing it to rank-and-file legislators for sponsorship, with the consequence that it was never introduced because it had no sponsors?

And when you publicly berated the Legislature for failing to act – explaining that this was the reason you were creating the Commission to Investigate Public Corruption – did you not know that Assembly Speaker Silver and Majority Coalition Leaders Skelos and Klein were also withholding from rank-and-file legislators your Program Bills #4, #5, and #12, which you had rhetorically joined with Program Bill #3 as your corruption-fighting package, such that all four program bills had no sponsors and were never introduced?

To read the Public Trust Act – not to mention its accompanying memorandum and the June 11, 2013 letter of all 62 of this state’s district attorneys, Republican and Democratic, urging its passage – and to watch your April 9, 2013 and June 11, 2013 press conferences on the subject – is to know:

- that if any legislation could halt public corruption, it was this;
- that had it been introduced, no legislator, including Assembly Speaker Silver and Majority Coalition Leaders Skelos and Klein could have opposed it, and certainly not publicly; and
- that, if accorded legitimate legislative process, it would have passed overwhelmingly, if not unanimously.

⁵ April 16, 2013 press conference, video clip in “*Cuomo won’t give AG election enforcement powers*”, Capitol Confidential, Jimmy Vielkind).

⁶ April 17, 2013, Capitol Pressroom, Susan Arbetter; Also, April 25, 2013, “*Where’s the bills?*”, Capitol Report, Curtis Schick.

As you publicly encourage citizens to actively participate in their government, because that is how government and democracy work best⁷, you will be pleased to know that we have taken steps, *on your behalf*, to have the Public Trust Act introduced by our Senator, Senator George Latimer, and by our Assembly member, Assemblyman David Buchwald, consistent with the Senate and Assembly informational guides, "*How a Bill Becomes a Law*" and "*The Legislative Process and YOU*", which instruct that if you have an idea for legislation, all you have to do is contact your legislator.

Our idea was to have Senator Latimer and Assemblyman Buchwald introduce the Public Trust Act and to take steps to ensure that it has the kind of legitimate legislative process that is reflected by those guides and detailed by the Brennan Center reports, with discussion in committee, public hearings, amendments, votes – all embodied in substantive committee reports – followed by Senate and Assembly floor debate, amendments, votes – and a reconciliation of different bills through a conference committee. A copy of our August 13, 2013 letter to Senator Latimer and Assemblyman Buchwald, setting this forth, is enclosed.

As therein stated, we call upon you to actively endorse our efforts to achieve passage of the Public Trust Act in this fashion. Will you do this? And will you ask your Senator and your Assemblyman to sponsor the Public Trust Act, consistent with "*How a Bill Becomes a Law*" and "*The Legislative Process and YOU*"?

You will be pleased to know that Assemblyman Buchwald is not just our Assemblyman, but yours – and that he is ready to sponsor the Public Trust Act. However, he would like your go-ahead. Will you give it to him?

As for your Senator, he is Senator Greg Ball. Enclosed is a copy of the "*How a Bill Becomes a Law*" guide that Senator Ball furnishes to constituents, like you. Will you request him to join with our Senator Latimer as a co-sponsor of the Public Trust Act, as our August 13, 2013 letter proposes?

You have the state's biggest "bully pulpit". You can easily achieve enactment of the Public Trust – and do it in a way that models what is necessary if we are to truly get "government working" and "working for the People": a properly functioning Legislature, such as we do not have.

We look forward to your speedy, affirmative response.

Thank you.



⁷ Your website, CitizenConnects: <http://www.governor.ny.gov/citizenconnects/>:

"Governor Cuomo believes that government works when the voice of the people rings strong and true. Democracy works best when people are most engaged. It's your government: own it! ...Governor Cuomo encourages you to make your voice heard!"

- Enclosures: (1) *"A Guide to Legislative Oversight"*
(2) CJA's August 13, 2013 letter to Senator Latimer & Assemblyman Buchwald
with its enclosures *"How a Bill Becomes a Law"*;
"The Legislative Process & YOU"; and *"There Ought To Be A Law"*
(3) Senator Ball's imprinted guide *"How a Bill Becomes a Law"*

cc: Senator George Latimer
Assemblyman David Buchwald
Senator Greg Ball
The Public & The Press