

Center for Judicial Accountability

From: Center for Judicial Accountability <elena@judgewatch.org>
Sent: Tuesday, April 26, 2016 4:54 PM
To: 'eric.lane@hofstra.edu'
Cc: kbaxter@nysba.org; 'rkennedy@nysba.org'; kmchargue@nysba.org; rrifkin@nysba.org; kkerwin@nysba.org; bmahan@nysba.org; mcilenti@nycbar.org; ekocienda@nycbar.org; zteachout@gmail.com; zteachout@law.fordham.edu'; 'Frank Mauro'; deutsch@fiscalpolicy.org; 'benjamig@newpaltz.edu'; 'dmuzz@aol.com'; 'zimmer@albany.edu'; 'rb34@columbia.edu'; 'richardbrodsky@gmail.com'; 'carey.institute@wagner.edu'; 'galie@canisius.edu'; (jstone@syr.edu); 'Tom Gais'; 'cbopst@goldbergsegalla.com'; dfeldman@jjay.cuny.edu; 'Bonventre, Vincent'; 'rward@osc.state.ny.us'; 'jgard@buffalo.edu'; 'law-jaecklecenter@buffalo.edu'; dfriedfel@cbcny.org; 'cbrecher@cbcny.org'; 'mdoulis@cbcny.org'; dliebschutz@albany.edu; mpawluk@harrisbeach.com; donboyd5@gmail.com; capej@rockinst.org; ldadayan@albany.edu; dmatkin@albany.edu; richardnathan55@gmail.com; pstrach@albany.edu; 'lawrence.norden@nyu.edu'; 'denora.getachew@nyu.edu'; Blair Horner (bhorner@nypirg.org); 'bbheck1@yahoo.com'; 'lwwny@lwwny.org'; 'slerner@commoncause.org'; pkatze@commoncause.org; (ddadey@citizensunion.org); twerber@citizensunion.org; 'jkaehny@reinventalbany.org'; dominic@reinventalbany.org; 'EJM@EmpireCenter.org'; 'thoefer@empirecenter.org'; 'Bob Schulz'; fschwarz@cravath.com; elena@judgewatch.org
Subject: Thank you, Dean Lane! May you lead the way to building scholarship & informed discussion...the state budget!

Dear Dean Lane,

Thank you for your call this morning. As discussed, our March 23, 2016 verified second supplemental complaint in our citizen-taxpayer action implements your important law review article "*Albany's Dysfunction Denies Due Process*" in the context of the constitutionally-regulated budget process -- and cites to your article at ¶¶365, 423. The link to the second supplemental complaint is: <http://www.judgewatch.org/web-pages/searching-nys/budget/3-23-16-osc-2nd-supp-complaint.htm>.

I am eager for your expert opinion – and your help in building dialogue among constitutional scholars, the bar associations, “good government groups”, and by the media about the mountain of constitutional, statutory, and rule violations which the second supplemental complaint chronicles – all denying legislative due process – and totally upending the constitutional design for the budget, laid out in Article VII, Sections 1-7 and Article IV, Section 7. Most important in this regard are the 12th, 13th, and 16th causes of action – and you may want to start by reading them FIRST.

Also, as discussed, here are the following two links:

(1)to your February 26, 2009 testimony before the Temporary Senate Committee on Rules and Administration Reform:

https://www.youtube.com/watch?feature=player_embedded&v=W6A1oFIX7_Y. Senator Valesky's comment about the budget and request for the Brennan Center's assistance in the Senate's crafting of budget reform, in addition to legislative reform – and your response, following the response of Jeremy Creelan that one of the “fair” criticisms of the Brennan Center's 2004 report was that it did not specifically examine the budget – reinforce the far-reaching significance of our citizen-taxpayer action and the second supplemental complaint (video: 1:30 hours – 1:36 hours);

(2) to the March 23, 2016 testimony of Brennan Center senior counsel Fritz Schwarz before the Commission on Legislative, Judicial and Executive Compensation:

<http://nyscommissiononcompensation.org/hearings-legislative.shtml> (video: 45 minutes – 1:32 hours). Mr. Schwarz furnished the Commission with the Brennan Center’s 2004 report, stating:

“this presents a picture of a dysfunctional Legislature with three men in the room dominating the process with, next on the budget, no real hearings, with far too few committee hearings, with proxy voting and other things, and now I cannot answer the question of whether the problems with the State Legislature, that are presented here, are still problems, and I think that is something you would want to look at. If they are, it means that the legislature is not an effective body doing what the citizens deserve to have done by the Legislature.” (video: 56:50 minutes; Tr. 45-46).

“...I hope you, do, you know, analyze whether that has changed...I mean how do you do oversight? That’s an important legislative job. How do you do oversight with having regular committee hearings, not committee hearings once a year and which are truncated...” (video: 1:08 minutes; Tr. 52).

Indeed, the Commission’s first question was about the Brennan Center’s 2004 report – and how it should affect the Commission’s pay raise recommendations. Mr. Schwarz’ response was as follows:

“First, you have to decide whether this report, of 2004, is still valid. My impression is it is, but you need to independently decide that. Assuming it is, you know, it would be good if you sent a message, to the Legislature, that if you were a fully functioning Legislature you would have gotten a better pay raise. How you send that message I haven’t really thought through, but I think if you did send that message it might develop some incentives for them; which would be a healthy thing.” (video: 1:11 hours; Tr. 54-55).

That the Brennan Center’s 2004 report is “still valid” and that the Legislature “has fallen beneath a constitutionally acceptable level of functioning” (¶1315) is resoundingly proven by our second supplemental complaint. This includes by its showing that the very statute that created the Commission on Legislative, Judicial and Executive Compensation was the product of behind-closed-doors, three-men-in-a-room budget deal-making, completely devoid of legislative due process; with the Senate and Assembly, thereafter, each willfully and deliberately failing and refusing to undertake any oversight even in face of the evidence of unconstitutionality and unlawfulness that we furnished to both legislative leaders and rank-in-file-members.

By the way, the Commission’s March 23, 2016 hearing at which Mr. Schwarz testified– held at the same time as I was down-the-street at the Albany Supreme Court with an order to show cause to enjoin the three-men-in-a-room budget deal-making – yielded valuable testimony about the budget from Assemblyman Bill Nojay. After testifying about the Legislature’s inefficiency, driven by the compensation arrangement, with the actual time spent by legislators on the floor and at hearings amounting to no more than 2 hours a day during the 60 legislative days, he stated:

“The average legislator has very little to do with creating the budget, as I’m sure you realize. The average legislator has almost no vote in deciding how much money is in this line item or another, and that’s a separate discussion entirely in terms of legislative duties, but let’s not give the public the impression that 150 members of the Assembly, and 63 senators, are spending this week and next week deliberating the budget; they are not. They are presented with a budget that has been worked out by three men in a room, and legislative staff, and then vote up or down according to party lines and other consideration, but they are not spending their time in budget committees deciding whether one line or another goes up or down.” (video: 18 minutes; Tr. 16).

I have no doubt but that with your assistance – and that of other constitutional scholars, litigators, and “good government” types – CJA’s citizen-taxpayer action and second supplemental complaint will change all that.

Thank you.

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From: Center for Judicial Accountability [mailto:elena@judgewatch.org]

Sent: Monday, April 25, 2016 3:08 PM

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Subject: Request for the NYS Bar Association's Amicus Curiae/Intervention & Other Assistance in Lawsuit Challenge to the Constitutionality & Lawfulness of NYS Budget

This follows up my several voice mail messages for Kim McHargue beginning April 5th, to which I received no return call, culminating in my voice mail messages on April 15th for her and for Kathleen Baxter, Ronald Kennedy, and Kevin Kerwin, requesting the New York State Bar Association’s *amicus curiae*/intervention & other assistance in the Center for Judicial Accountability’s citizen-taxpayer action challenging the constitutionality and lawfulness of the budget, including the first-ever legal challenge to three-men-in-a-room budget deal-making.

The response I received, from Ms. Baxter is attached, stating “The Association does not have a committee that is charged with reviewing budget issues.”

I have today left a voice mail message for Ms. Baxter and a message for Mr. Kennedy *via* Administrative Assistant Barbara Mahan.

As briefly discussed with Ms. Mahan, below is my April 7th e-mail to Maria Cilenti, counsel for the New York City Bar Association, requesting the City Bar’s *amicus curiae*/intervention and other assistance in CJA’s lawsuit. Please deem that e-mail as constituting my written request to the New York State Bar Association for the same assistance.

As reflected by my April 7th e-mail, I had e-mailed Dean Eric Lane of Hofstra Law School on March 30th, apprising him that the lawsuit builds on his important law review article “*Albany’s Dysfunction Denies Due Process*”, and requesting his opinion and help in fostering dialogue, stating, in pertinent part:

“I am most eager to understand from you – a preeminent scholar of the Constitution and legislative process – how the budget “process”, as it has devolved over the years, including after the 2004 Court of Appeals decision in *Pataki v. Assembly & Senate/Silver v. Pataki*, is anything but the most brazen repudiation of the constitutional design laid out in Article VII, §§1-7 of the New York State Constitution.”

How pleased I am that Dean Lane is a member of the State Bar’s newly-formed Committee on the New York State Constitution – to which Mr. Rifkin and Mr. Kennedy are non-voting NYSBA staff liaisons – and to which Ms. Cilenti’s predecessor at the City Bar, Alan Rothstein, is the City Bar’s non-voting liaison.

I have left a phone message for Dean Lane this morning – and hope to speak with him tomorrow. I have also left a phone message this morning for Ms. Cilenti and am expecting her return call.

Finally, here's the link to CJA's newly-created menu webpage posting links for our March 23rd order to show cause in the lawsuit, the Attorney General's April 8th opposition papers, and my April 22nd reply – from which you can verify for yourself that the Attorney General has NO DEFENSE to the constitutional, statutory, and rule violations particularized – and is engaging in his standard *modus operandi* of litigation fraud to get the case “thrown”: <http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/supreme-ct/2016/2016-menu.htm>. Among the NYSBA committees that would have jurisdiction to address the Attorney General's litigation misconduct: the Committee on Attorney Professionalism and Committee on Professional Ethics.

In that regard – and as I inquired on April 15th in my phone message for Mr. Kerwin – is he related to Adrienne Kerwin, the Assistant Attorney General who has been defending the case?

Please advise as to all.

Thank you.

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From: Center for Judicial Accountability [<mailto:elena@judgewatch.org>]

Sent: Thursday, April 07, 2016 4:26 PM

To: mcilenti@nycbar.org

Cc: ekocienda@nycbar.org

Subject: Request for the City Bar's Amicus Curiae/Intervention & Other Assistance in Lawsuit Challenge to the Constitutionality & Lawfulness of NYS Budget

Dear Maria,

Thank you for giving me the opportunity to speak with you about my request for the City Bar's *amicus curiae*/intervention and other assistance in CJA's citizen-taxpayer action, which – on behalf of the People of the State of New York and the public interest – challenges the constitutionality and lawfulness of the NYS budget. The whole of the case is posted on CJA's website, www.judgewatch.org, accessible *via* the prominent hyperlink: “CJA's Citizen-Taxpayer Action to End NYS' Corrupt Budget ‘Process’ & Unconstitutional ‘Three Men in a Room’ Governance”. Most important is our March 23, 2016 order to show cause for a preliminary injunction and verified second supplemental complaint. The direct link is here: <http://www.judgewatch.org/web-pages/searching-nys/budget/3-23-16-osc-2nd-supp-complaint.htm>.

As discussed, I have been unable to find any reports by the City Bar's Committee on State Affairs about the state budget subsequent to its 2003 report "*The New York State Budget Process and the Constitution: Defining and Protecting the 'Delicate Balance of Power'*", (58 *The Record* 345): [http://www.judgewatch.org/lawsuit-budget/law/58 The Record 345.pdf](http://www.judgewatch.org/lawsuit-budget/law/58%20The%20Record%20345.pdf) – which concerned the important budget cases of *Pataki v. Assembly & Senate* and *Silver v. Pataki*, then headed to the Court of Appeals. Is it possible that notwithstanding the Court of Appeals' splintered and controversial 2004 decision – and the ensuing budget reform activity, including attempts at constitutional amendments – there was no follow-up reports from the Committee on State Affairs about the state budget?

In 2007, the Committee on State Affairs released a report entitled “*Supporting Legislative Rules Reform: The Fundamentals*”: [http://www.nycbar.org/pdf/report/Committee on State Affairs.pdf](http://www.nycbar.org/pdf/report/Committee%20on%20State%20Affairs.pdf), referencing the state budget, but mostly in passing. Primarily its 2007 report was focused on overhauling legislative rules vesting domineering powers in the leadership and its most noxious manifestation, the “three-men-in-a-room”. The report highlighted the flawed legislation that results from a flawed legislative process – using the example of Chapter 63, Part K, of the Laws of 2005 which created the Commission on Health Care Facilities in the 21st Century – and identified that the Committee on State

Affairs was intending to file an *amicus curiae* brief in one of the seven lawsuits that had been engendered by the Commission and the statute that gave rise to it.

The Committee on State Affairs did file an *amicus curiae* brief with the Court of Appeals, later that year: <http://www.judgewatch.org/judicial-compensation/mckinney-etc/mckinney-city-bar-amicus-brief.pdf> -- and its description of the statute and the “force of law” power it gave to the Commission’s recommendations was extraordinary:

“a process of lawmaking never before seen in the State of New York” (at p. 24);

a “novel form of legislation...in direct conflict with representative democracy [that] cannot stand constitutional scrutiny (at p. 24)”;

a “gross violation of the State Constitution’s separation-of-powers and...the centuries-old constitutional mandate that the Legislature, and no other entity, make New York State’s laws” (at p. 25);

“most unusual [in its]...self-executing mechanism by which recommendations formulated by an unelected commission automatically become law...without any legislative action” (at p. 28);

Unlike “any other known law” (at p. 29);

“a dangerous precedent” (at p. 11) that

“will set the stage for the arbitrary handling of public resources under the guise of future temporary commissions that are not subject to any public scrutiny or accountability” (at p. 36).

These quotes are featured in CJA’s citizen-taxpayer action, including at ¶391 of our March 23, 2016 verified second supplemental complaint. This, because an even more egregious “force of law” provision is part of the “three-men-in-a-room” budget statute that created the Commission on Legislative, Judicial and Executive Compensation, Chapter 60, Part E, of the Laws of 2015 – which we are challenging.

It is most urgent that the City Bar’s Committee on State Affairs – which is now the Committee on Government Ethics and State Affairs – contact me, as soon as possible – as the Attorney General’s papers are due tomorrow – and my responding papers two weeks later.

Meantime, below is some of my outreach to scholars and “good-government” groups, further summarizing the issues presented by the case – and attaching the press release I sent out.

Thank you.

Elena Sassower, Director
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From: Center for Judicial Accountability [<mailto:elena@judgewatch.org>]
Sent: Wednesday, March 30, 2016 4:51 PM

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Subject: "The Anti-Corruption Principle" -- & 3-men-in-a-room budget deal-making

Dear Professor Teachout,

I would greatly appreciate your return call, as soon as possible, concerning the Center for Judicial Accountability's legal challenge to New York's corrupt three-men-in-a-room budget deal-making – the first ever.

Our cause of action challenging the constitutionality and lawfulness of three-men-in-a-room budget deal-making, as *unwritten and as applied*, cites to, and quotes from, your excellent law review article "*The Anti-Corruption Principle*" about how the founding fathers saw smallness as lending itself to corruption. It appears at ¶466 of our March 23, 2016 verified second supplemental complaint, posted here: <http://www.judgewatch.org/web-pages/searching-nys/budget/3-23-16-osc-2nd-supp-complaint.htm> .

What is your opinion of our argument? And can you help in further developing this sixteenth cause of action, including by an *amicus curiae* brief?

In the hope of building dialogue as to that sixteenth cause of action – and developing effective corruption-fighting strategies among constitutional scholars, activists, and "good-government" types as to it and the other fifteen causes of action, I am furnishing this e-mail to the below recipients.

As the lawsuit is unfolding, with further papers from me due on April 22nd, I look forward to hearing from you – and them – soon.

Thank you.

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From: Center for Judicial Accountability [<mailto:elena@judgewatch.org>]

Sent: Wednesday, March 30, 2016 12:54 PM

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Subject: Lawsuit challenge to the constitutionality & lawfulness of NYS' budget "process" -- including 3-men-in-a-room budget deal-making

Dear Dean Lane,

Following up my phone messages for you at your law school office, I am pleased to inform you that your important 2010 law review article "*Albany's Dysfunction Denies Due Process*" – about which I spoke with you nearly three years ago -- has now given rise to a legal challenge to the Legislature's violations of legislative due process, including to its behind-closed-doors political conferences that substitute for debate and vote in committees and on the Senate and Assembly floor. Indeed, our March 23, 2016 verified second supplemental complaint (at ¶¶365, 423), addressed to the Legislature's constitutional, statutory, and rule violations with respect to the budget for fiscal year 2016-2017, cites to,

and quote from, your law review article. The webpage on which it is posted is here: <http://www.judgewatch.org/web-pages/searching-nys/budget/3-23-16-osc-2nd-supp-complaint.htm>.

Below is the March 28th e-mail I sent to the Brennan Center and other “good-government” groups – highlighting the lawsuit’s challenge to “three-men-in-a-room” budget deal-making and requesting their comments, suggestions, *amicus curiae* participation and/or intervention.

Please call me, at your earliest convenience, following your review of the verified second supplemental complaint – and, in particular:

- (1) its 12th cause of action (at pp. 36-53) “Nothing Lawful or Constitutional Can Emerge From a Legislative Process that Violates its Own Statutory & Rule Safeguards – and the Constitution”;
- (2) its 13th cause of action (at pp. 53-67) “Chapter 60, Part E of the Laws of 2015 [creating the Commission on Legislative, Judicial and Executive Compensation] is Unconstitutional, *As Written...*”, particularly its Parts D & E (at pp. 60-67); and
- (3) its 16th cause of action (at pp. 80-85) “Three-Men-in-a-Room Budget Deal-Making is Unconstitutional, *as Unwritten and as Applied*” .

Indeed, I am most eager to understand from you – a preeminent scholar of the Constitution and legislative process – how the budget “process”, as it has devolved over the years, including after the 2004 Court of Appeals decision in *Pataki v. Assembly & Senate/Silver v. Pataki*, is anything but the most brazen repudiation of the constitutional design laid out in Article VII, §§1-7 of the New York State Constitution.

To foster dialogue as to this important threshold question – and vindicating the public’s trampled rights – a copy of this e-mail is being sent to the Brennan Center and the other “good-government” groups.

Thank you.

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From: Center for Judicial Accountability [<mailto:elena@judgewatch.org>]

Sent: Monday, March 28, 2016 6:36 PM

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Subject: Lawsuit challenge to the constitutionality & lawfulness of NYS' budget "process" -- including 3-men-in-a-room budget deal-making

Dear Blair, Larry, Barbara, Susan, Dick, and John,

This follows up my phone calls and voice mail messages, advising that our nonpartisan, nonprofit citizens’ organization, Center for Judicial Accountability, Inc. (CJA), has brought what appears to be the first-ever legal challenge to the constitutionality of “three-men-in-a-room” budget deal-making.

As most of you know, for the past two years, CJA has been litigating a citizen-taxpayer action, on behalf of the People of the State of New York and public interest, challenging the constitutionality and lawfulness of the judiciary and legislative budgets for fiscal years 2014-2015 and 2015-2016 and the Governor's budget bills embracing them. Last Wednesday, March 23, 2016, we brought an order to show cause to expand the citizen-taxpayer action to fiscal year 2016-2017, setting forth the facts and law by a verified second supplemental complaint. Its sixteenth cause of action challenges the constitutionality of "three-men-in-a-room" budget deal-making, *as unwritten and as applied*.

CJA's website, www.judgewatch.org, posts the record of the entire two years of litigation in the case. It is accessible from our prominent homepage link: "CJA's Citizen-Taxpayer Action to End NYS' Corrupt Budget 'Process' & Unconstitutional 'Three Men in a Room' Governance". For your convenience, here's the direct link to the March 23, 2016 verified second supplemental complaint: <http://www.judgewatch.org/web-pages/searching-nys/budget/3-23-16-osc-2nd-supp-complaint.htm> .

We would greatly benefit from your comments and suggestions – and not only with respect to the sixteenth cause of action, but with respect to the other fifteen causes of action. Indeed, as the cause of good government would best be served by your *amicus curiae* assistance/intervention in the citizen-taxpayer action, I respectfully ask that you deem this e-mail my request for same.

Meantime, attached is the press release I have begun to circulate. Kindly bring it to the attention of your many media contacts – and, in the case of Citizens Union, which has its own in-house "Gotham Gazette", that it be submitted for coverage. In any event, I trust you will have no objection if I invite such members of the media who contact me in response to the press release to contact you for further informed comment about the case.

Thank you.

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