

## Center for Judicial Accountability, Inc. (CJA)

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**Subject:** Henry Greenberg -- RE: In search of scholarship: "Budgets and the Balance of Power: The Lasting Impact of Silver v. Pataki and How It Shapes the Future of Government in New York State"-- June 16, 2015 forum

Dear All,

Due to a typo in Henry Greenberg's e-mail address on the Rockefeller Institute's list of "Constitutional Convention Experts", he did not receive my below April 18<sup>th</sup> e-mail and, presumably, Mr. McGuire's response. The exchange is below – with two non-substantive corrections made to my initial April 18<sup>th</sup> e-mail, pertaining to the March 29, 2017 date of the order to show cause, returnable April 28, 2017.

Thank you.

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**From:** James McGuire [<mailto:jmcguire@hsgllp.com>]  
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**Subject:** RE: In search of scholarship: "Budgets and the Balance of Power: The Lasting Impact of Silver v. Pataki and How It Shapes the Future of Government in New York State"-- June 16, 2015 forum

This is all stuff and nonsense (indeed, to use Bentham's delicious phrase, "nonsense on stilts"). The reason for the rule is discussed in the constitutional history – Stimson, in particular, as I recall – and in the briefs in the COA cases (and the lower courts). And it's obvious: Without it, executive budgeting simply disappears; if the legislature can alter one item, it can alter all of them and you are right back to legislative budgeting and the entire purpose of the amendments that later landed in Article 7 is undone. In fact, if my recollection is correct, Stimson said, in words or substance, "Without it you have nothing."

But I should not be understood as taking the position that my friend, Prof. Bonventre, will agree with me!

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**Subject:** In search of scholarship: "Budgets and the Balance of Power: The Lasting Impact of Silver v. Pataki and How It Shapes the Future of Government in New York State"-- June 16, 2015 forum

**TO: Rockefeller Institute of Government/Deputy Director of Operations Robert Bullock**

I thank you for taking the time to speak with me yesterday morning – not only because you are the Rockefeller Institute of Government’s coordinator of the consortium of entities working to educate the public on the 2017 constitutional convention ballot question, [http://www.rockinst.org/nys\\_concon2017/](http://www.rockinst.org/nys_concon2017/), but because you were among those who worked behind-the-scenes to make possible the June 16, 2015 forum “*Budgets and the Balance of Power: The Lasting Impact of Silver v. Pataki and How It Shapes the Future of Government in New York State*”, which the Rockefeller Institute of Government sponsored with Albany Law School’s Government Law Center.

As discussed, I learned about the June 16, 2015 forum last year, while examining what scholarship, if any, the New York State Law Revision Commission had done on the state budget and other areas of the law that urgently require review and revision. I spoke with the executive director of that budget-starved Commission, Albany Law School Professor Rose Mary Bailey, as well as its chair, Peter Kiernan. Both told me about the June 16, 2015 forum – and did so in response to my inquiries to them about scholarship on the state budget and the Court of Appeals’ 2004 consolidated decision in *Silver v. Pataki/Pataki v. Assembly and Senate*, 4 NY3d 75 – as to which, I told them, I had found very little.

Unfortunately, the 2015 forum in which Mr. Kiernan participated – whose videos and accompanying continuing legal education syllabus I have posted on the “budget resource webpage” of CJA’s website: <http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/supreme-ct/2016/budget-resource-page.htm> -- only reinforced the exigent need for scholarship. Apart from the participants’ inability to meaningfully answer the question posed by moderator Henry Greenberg: “Let’s talk about the budget process circa 2015 and look forward. Does it work? Does anything need to be fixed? Is it exactly as it was? Is there something that requires constitutional reform?”, or to furnish a constitutional basis for representations about Governor David Paterson’s “extender budget”, none of the participants discussed, or even mentioned, the most important reason for the non-alteration clause of Article VII, §4 of the New York State Constitution restricting the Senate and Assembly in their amending of the Governor’s appropriation bills

other than for the Legislative and Judiciary budgets, to which several participants did not even give acknowledgment. This reason is explicit in Article VII, §4 itself, but was barely referred to in the plurality opinion of then Judge Robert Smith – and not at all in his remarks at the June 2015 forum, nor in the remarks of Governor Pataki’s former chief counsel James McGuire, architect of *Pataki v. Assembly*, whose 2011 article “*Pataki v. Assembly: The Unanswered Question*”, in the New York State Bar Association’s Government, Law & Policy Journal, included in the CLE syllabus, was also silent on the subject. Such reason – which the Assembly’s 2004 briefs to the Court of Appeals in *Silver v. Pataki* had highlighted and the dissenting opinion of then Chief Judge Judith Kaye had made reasonably prominent – is that, pursuant to Article VII, §4, once the Senate and Assembly reconcile each budget bill they have amended by the mandated striking or reducing of appropriation items, it becomes “law immediately without further action by the governor”. In other words, the New York Constitution, which does not enshrine the start of the fiscal year, provides for a “rolling budget”, enacted bill-by-bill – a constitutional scheme that makes obvious the flagrant unconstitutionality of what has become the all-encompassing finale of the budget “process”: the behind-closed-doors “three-men-in-a-room” budget dealmaking and amending of budget bills by the Governor, Temporary Senate President, and Assembly Speaker, adding on millions, if not billions, of dollars to achieve an “on-time” budget – is utterly irreconcilable and repugnant to what is laid out by Article VII, §§3, 4, 5, and 6 of the New York State Constitution – including the budgetary transparency contemplated by Article VII, §3 and required by Article III, §10.

A week and a half ago, I spoke with Mr. Greenberg, who, as you know, chairs the New York State Bar Association’s Committee on the New York State Constitution: <http://www.nysba.org/CustomTemplates/Content.aspx?id=71176>. I reiterated to him that I had been unable to find scholarship on the Court of Appeals’ *Silver v. Pataki/Pataki v. Assembly and Senate* decision or, for that matter, on the constitutional provisions governing the New York State budget. This is also what I told you.

**By this e-mail, I am formally requesting that the Rockefeller Institute’s listed six-member team of “Constitutional Convention Experts” – four of whom were participants in the June 16, 2015 forum – Professor Gerald Benjamin, Professor Peter Galie, Richard Brodsky, and Henry Greenberg – and its other two team members, Christopher Bopst and Henrik Dullea – identify where I might find:**

- (1) **scholarship on the Court of Appeals’ 2004 *Silver v. Pataki/Pataki v. Assembly and Senate* decision – and the constitutional provisions relating to the New York State budget;**
- (2) **scholars to whom I might furnish the “on-the-ground”, empirical evidence that the New York State budget is so flagrantly “OFF the constitutional rails” and violative of the *Silver v. Pataki/Pataki v. Assembly and Senate* 2004 Court of Appeals decision and Article VII, §§4, 5, 6 and Article III, §10 of the New York State Constitution as to mandate SUMMARY JUDGMENT declarations nullifying the newly-enacted budget for fiscal year 2017-2018 – relief being sought by a March 29, 2017 order to show cause, returnable on April 28, 2017.**

Needless to say, I also request their expert, scholarly assessment of the March 29, 2017 order to show cause. It is accessible from CJA’s website, [www.judgewatch.org](http://www.judgewatch.org), via the prominent homepage link: “CJA’s Citizen-Taxpayer Actions to End NYS’ Corrupt Budget ‘Process’ and Unconstitutional ‘Three Men in a Room’ Governance” – and I showed you, as likewise Mr. Greenberg before you, the webpage for it. The direct link is here: <http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2016/9-2-16-osc-complaint/3-29-17-osc.htm>.

In the event Mr. Greenberg has not yet furnished the link for the webpage of the March 29, 2017 order to show cause to the members of the State Bar's Committee on the New York State Constitution – which I requested that he do so that each member might recognize the imperative of the Committee rendering a report on Article VII of the New York State Constitution – which it has not yet done – and of voting on other appropriate action, including steps to securing the State Bar's filing of an *amicus curiae* brief on the constitutional issues presented by the March 29, 2017 order to show cause, I reiterate that request now. As Mr. Kiernan is a member of the State Bar's Committee on the New York State Constitution, with Mr. Bopst a participant therein, I ask their endorsement of same. I will separately forward this e-mail to State Bar President Claire Gutekunst.

As Professor Vincent Bonaventure also participated at the June 16, 2015 forum, I left a voice mail for him yesterday, as yet unreturned. Therefore, by copy of this e-mail to him, I request that he – like the Rockefeller Institute's six-member team of "Constitutional Convention Experts" – likewise answer the above two questions – and furnish his scholarly assessment of the constitutional issues it presents. He anticipated that the Court of Appeals 2004 decision in *Silver v. Pataki/ Pataki v. Assembly and Senate* would open the way to another case. CJA's unfolding citizen-taxpayer action, challenging the constitutionality of the budget, with its March 28, 2017 order to show cause, is that case – one which intervenors and *amici* can powerfully expand and develop with their own powerful scholarship and constitutional insights.

Time being of the essence, I thank everyone, in advance, for their expeditious response to the straightforward evidentiary and legal presentation of the March 29, 2017 order to show cause. Certainly, too, I invite response from Messrs. Smith and McGuire – to whom I am also sending this e-mail.

Meantime, I would appreciate if you would furnish me with the names of the two scholars who raised questions and comments in the final "Discussion from the Trenches" portion of the June 16, 2015 program, but whose names are not indicated by captions on the videos, so that I might contact them on the subject of necessary scholarship. As for former Assembly majority counsel, Bill Collins, architect of the *Silver v. Pataki* litigation, who raised for discussion, *inter alia*, the unconstitutionality of "notwithstanding any other provision of law" clauses in budget bills – an aspect of unconstitutionality challenged in CJA's unfolding citizen-taxpayer action -- I would appreciate if you would forward this e-mail to him, with my request that he contact me, as I have not been able to locate contact information for him.

Thank you.

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