

CENTER for JUDICIAL ACCOUNTABILITY, INC.*

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OPEN LETTER

December 7, 2012

TO: Independent Democratic Conference:
Senator Jeffrey D. Klein: 34th Senate District
Senator David J. Valesky: 49th Senate District
Senator Diane J. Savino: 23rd Senate District
Senator David Carlucci: 38th Senate District
Senator Malcolm A. Smith: 14th Senate District

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

RE ACHIEVING A “FISCALLY RESPONSIBLE, FULLY FUNCTIONAL SENATE”:
(1) Repudiation of your “historic bipartisan partnership” with a Senate Republican Conference headed by Senator Dean Skelos;
(2) Legislative override of the second and third phases of the judicial pay raises recommended by the August 29, 2011 Report of the Commission on Judicial Compensation, initiated by referring the evidence of unconstitutionality, statutory violations, and fraud to all relevant Senate Committees for discharge of their oversight responsibilities, pursuant to Senate Rules;
(3) Revision of Senate Rules to embody democracy-invigorating recommendations, made in 2009, by the bipartisan Temporary Committee on Rules and Administration Reform and, in 2011, by Resolution #357 introduced by Senators Liz Krueger and Daniel Squadron

The stated basis for your “historic bipartisan partnership” with Senator Skelos as leader of the Senate Republican Conference – according to your announcement, issued jointly with him – is that it will:

“continue the tremendous progress that has been achieved over the past two years in New York State. This new bipartisan governing coalition guarantees a fiscally responsible, fully functional Senate that will continue to produce positive results for all New Yorkers.” (underlining added).

* **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.

These first two sentences of your joint announcement are followed by three more, in the same vein:

“Two years ago, Independent Democrats and Senate Republicans put partisan differences aside to end the dysfunction, gridlock and reckless fiscal policies of the previous Senate leadership. This partnership returned function and order to the Senate Chamber, restored fiscal integrity, and produced remarkable accomplishments that have benefited all New Yorkers. Today’s agreement marks a bold new chapter in this partnership that will allow the Senate to continue pushing New York State forward, while ensuring that there will be no returning to the failed leadership of the past.” (underlining added).

Senator Skelos is then quoted as saying:

“The Senate Republican Conference has worked closely with the Independent Democratic Conference and Governor Cuomo to bring historic progress to New York. We’ve brought spending under control, ended Albany’s dysfunction, and consistently delivered the bipartisan results New Yorkers need and deserve...” (underlying added).

If this is what you truly believe then Senator Skelos has not informed you that the Senate’s dysfunction under his leadership has generated a lawsuit, brought by us, “on behalf of the People of the State of New York & the Public Interest”, to which he and the Senate are named defendants – and that the lawsuit challenges indefensible state expenditure: millions and, ultimately billions, of taxpayer dollars for judicial pay raises that are unconstitutional, statutorily-violative, and frauds upon the People of this State.

The facts are recited by the Verified Complaint¹ 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 details a completely dysfunctional Senate, particularly at the Senate Judiciary Committee level and spanning the period in which Senator Skelos was a Senate Committee member, covering up and perpetuating a systemically corrupt and wasteful state judiciary, resulting in vast and irreparable injury to the People of this State. It culminates in a recitation of Senator Skelos’ nonfeasance as Temporary Senate President, spanning from May 23, 2011 to March 30, 2012, when the lawsuit was commenced. Such would easily support a criminal prosecution of him for official misconduct and criminal fraud upon the taxpaying public – as will be further evident to you upon your publicly demanding that Senator Skelos 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, Assembly Speaker Sheldon Silver, 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;

¹ The paragraphs of the Verified Complaint pertaining to Temporary Senate President Skelos are ¶¶9, 73-83, 109-119, 121-125, 128-139.

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 report²;

- (b) upon receiving the dispositive document on which the Verified Complaint rests – CJA’s October 27, 2011 Opposition Report, addressed to him, Governor Cuomo, Assembly Speaker Silver, 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, Governor Cuomo, Assembly Speaker Silver, 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 Report³;
- (d) upon receiving CJA’s March 30, 2012 Verified Complaint, served upon him, Governor Cuomo, Assembly Speaker Silver, and Chief Judge Lippman on April 5, 2012, with a letter requesting review by “independent counsel”.

Inasmuch as two copies of the Verified Complaint – with its incorporated exhibits – were delivered by us on April 5, 2012 to the Senate Majority Program Counsel/Finance Office, which accepted service for Temporary Senate President Skelos and the Senate, we respectfully request that you obtain the Verified Complaint from them. We further request that you secure such findings of fact and conclusions of law as Temporary Senate President Skelos and/or Senate counsel made with respect to the Verified Complaint’s most important exhibit: CJA’s October 27, 2011 Opposition Report. This will give you all the evidence necessary to repudiate, as you must, any partnership with a Senate Republican conference having Senator Skelos as its head.

Obtaining the Verified Complaint and such findings of fact and conclusions of law as were made by Temporary Senate President Skelos and Senate counsel with respect to the October 27, 2011

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 Temporary Senate President Skelos, are recited at ¶¶78-83 of the Verified Complaint. They are Exhibits B-2 and C-3 to CJA’s October 27, 2011 Opposition Report.

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

Opposition Report is essential for a further reason. The second phase of the 27% judicial pay raises recommended by the Commission on Judicial Compensation's August 29, 2011 Report will take effect, automatically, on April 1, 2013, unless the Legislature overrides it before then. Absent your coming forward with findings of fact and conclusions of law, disputing the showing in the October 27, 2011 Opposition Report that the judicial pay raises are unconstitutional, statutorily-violative, and fraudulent, and addressing the further particulars of unconstitutionality presented by the Verified Complaint, your duty as Senators – not to mention as Senators aspiring to leadership positions – is to take steps to secure such legislative override of the second phase of judicial pay raises, as, likewise, of the third phase, which will take effect on April 1, 2014. Otherwise, these further judicial pay raises will be beyond the Legislature to ever repeal because of the non-diminution clause of the New York State Constitution, Article VI, §25(a). As it is, the first phase of the judicial pay raises is already beyond the Legislature's power to repeal, as it took effect on April 1, 2012. Thanks to Senator Skelos, the cost of this first phase to New York taxpayers is \$27.7 million dollars this year alone – with a comparable sum to be borne by taxpayers every year, in perpetuity, unless voided by the courts in a lawsuit, such as ours.

To accomplish a legislative override of the second and third phases of the judicial pay raises – and secure the other meritorious relief that our October 27, 2011 Opposition Report expressly requested and warrants:

(2) repeal of Chapter 567 of the Laws of 2010 creating the Commission on Judicial Compensation;

(3) referral of the members of the Commission on Judicial Compensation to criminal authorities for prosecution;

(4) appointment of a task force to investigate the documentary and testimonial evidence of systemic judicial corruption, infesting supervisory and appellate levels and the Commission on Judicial Conduct – which the Commission on Judicial Compensation unlawfully and unconstitutionally ignored, without findings, in recommending judicial pay raises,

we request that you refer the evidence of unconstitutionality, statutory violations, and fraud, presented by the Verified Complaint to all relevant Senate Committees having oversight responsibilities – as should have been done by Temporary Senate President Skelos upon his receipt of the October 27, 2011 Opposition Report, pursuant to existing Senate Rule IV, §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.”

The relevant standing Committees would certainly be the Senate Judiciary Committee, if not, additionally, the Senate Finance Committee, and possibly, the Senate Committee on Investigations

and Oversight. As the Senate's website does not identify the jurisdictions of the Senate's 33 standing committees, it is hard to know for sure.

Certainly, if you are truly committed to bipartisan governance and a "fully functional Senate", you should make as your platform and first priority that Senate rules be revised to embody the salutary and sensible reform recommendations made in April 2009 by the bipartisan Temporary Committee on Rules and Administration Reform. This we surely expect, as Senator Klein was a member of the Temporary Committee and Senator Valesky was its co-chair, both appointed by then Democratic Majority Leader Malcolm Smith, who has now joined your Independent Democratic Conference. In light of the broad-brush besmirchment of the 2009-2010 period of Democratic Senate majority leadership, which you use to further explain your "historic bipartisan partnership" with Senator Skelos, Senator Smith's powerful words on January 7, 2009, his first day as Senate Majority Leader, in creating the Temporary Committee on Rules and Administration Reform, deserve to be recalled:

"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. The commission will report back to us no later than the end of September.

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.

To my colleagues on both sides of the political aisle I say to you: we need your creativity and innovative approach to legislation and to policy that moves New York ahead. You will have an audience with me, and we will stand together and show strong and determined leadership.

We are one legislative body representing all of New York, it's time we start governing that way.

We will set our sights high for the first 100 days. But every day, we will dedicate ourselves to dispelling the notion that Albany has the most dysfunctional legislature in the nation. We will put aside the issues that divide us as partisans and individual legislators to harness the full potential of this glorious chamber and meet the needs of the people we were elected to serve."

To assist you – and other readers of this letter – in recalling the contents of the Temporary Committee’s April 21, 2009 “Draft Report”⁴, a copy will be posted, with this letter, on CJA’s website, accessible *via* the top panel “Latest News”. Also posted will be Senator Liz Krueger’s January 2011 resolution #357, co-sponsored by Senator Daniel Squadron, who was also a member of the Senate’s 2009 Temporary Committee on Rules and Administration Reform.

According to Senator Krueger’s January 18, 2011 press announcement “*No Reason to Wait: Senator Krueger & Senate Democrats Introduce Sweeping Bipartisan Rules Reforms*”, Resolution #357 was designed to “protect historic reforms passed in the Senate in 2009, and take additional proposals from both Republicans and Democrats to create a more fair, deliberative, and accountable Senate”. These are specified as “the recommendations issued by the bipartisan Temporary Committee on Rules and Administrative Reform, as well as a Senate Republican Report”. The unidentified “Senate Republican Report” is Senator John Bonacic’s three-member Republican minority report to the Temporary Committee’s April 21, 2009 “Draft Report”, which would have gone further than the six-member Democratic majority under Senator Valesky in transforming Senate rules.

Senator Krueger presented resolution #357 at the January 31, 2011 meeting of the Senate’s Standing Committee on Rules, at which Senator Thomas Libous, as Deputy Majority Leader, presided, in place of Majority Leader Skelos. Senator Libous’ remarks, both before and after the committee vote, was that he liked “a number of things” that Senator Krueger was proposing, but that it needed “some time to flesh out”, which would be done in “ongoing discussion in the changing of the various rules that affect the Senate”. He stated:

“Senator Skelos has announced that, in consultation with Senator Sampson, that there will be a committee set up as we continue, a working group, if you will, to continue to look at the changes in your resolution along with the changes that some of our members still wish to propose. So I, again, I applaud you for putting this resolution before us today... I think there are some pieces that we can look at in the future. And, I would say that there are a number of things here that will take some reasonable time to flesh out and I think they can be very positive as we move forward....

I would hope that we can take these items and present them to the working group so that we will be able to hopefully at another meeting implement many of your suggestions.”

Indeed, some days earlier, Senate Minority Leader John Sampson had written to Senate Majority Leader Skelos stating:

⁴ According to the April 21, 2009 “Draft Report” (at p. 5), the Temporary Committee’s website was www.nysenaterule.org. The “org” suffix would appear to be incorrect – and does not link. As for the website address, <http://www.senate.state.ny.us/sws/reform/index.html>, announced by the Temporary Committee, in a February 10, 2009 posting by Senator Valesky entitled “*Senate Rules Reform Committee Website Launched*”, it redirects to the Senate homepage.

“...I respectfully request you re-institute the Temporary Committee on Rules and Administration Reform. There should be a public, transparent, and bipartisan process led by Members of both Conferences, who will be charged with drafting permanent rules all 62 Members can support. In 2009, the Temporary Committee had six Majority Members and three Minority Members. Accordingly, should you agree to honor recent practice and precedent by reinstating the Temporary Committee, I will appoint Senator Jose M. Serrano, Senator Daniel L. Squadron, and Senator Andrea Stewart-Cousins to serve as the Minority Members of the Committee.

Provided adequate and public notice is given, these Members are ready to meet with representatives of your conference at any time and location of your choosing.

It is my hope we can build on the progress made in the 2009 Rules Reforms, and give New Yorkers greater confidence their voices will be heard in the Senate that is run in the serious and bipartisan manner these difficult times demand.”

Whether, under Senate Majority Leader Skelos, there was a “working group” or any committee formed or reinstated to further proposed rule changes, consistent with what the Republicans had articulated when they were in the minority, or what the Democrats articulated, when they were in the minority, we do not yet know. Our website will post the video of the January 31, 2011 meeting, as likewise such other materials pertaining to Senate rules changes as we are able to locate.

As there appears to be no centralized place where historical, contextual information about the evolution of the Senate’s rules can be obtained so as to get an accurate picture of who has stymied democracy-enhancing rule changes – and their reasons for doing so – we request that the Independent Democratic Conferences develop such site, in cooperation with both the Republican and Democratic Conferences. Suffice to say, it will be interesting to see the extent to which your intended new Senate rules will resemble the “long-term bipartisan Senate operating plan”, signed by all members of the Republican Conference and then Temporary Senate President Pedro Espada, Jr., summarized by a July 7, 2009 letter of Messrs. Espada and Mr. Skelos that was sent to all 62 of the Senate’s members. We will post a copy on our website so that it will be readily accessible to all concerned.

Unfortunately Senators, Democratic and Republican, freely rewrite history – even recent history – as suits their political interests and ambitions – and there has been a great deal of generalized besmirchment of Senate Minority Leader Sampson, who became leader of the Democratic Conference after Democratic Senators Espada and Hiram Monserrate crossed the aisle on June 8, 2009 to pact with Senator Skelos in what was deemed a Senate “coup”. The Verified Complaint particularizes facts pertaining to Senator Sampson, disqualifying him from any leadership role, indeed, as with so many other legislators, from any position of public trust⁵ That being said, we would be remiss in not crediting Senator Sampson, as Chairman of the Senate Judiciary Committee, from January 2009 through December 2010, for his leadership in holding unprecedented hearings on

⁵ The paragraphs of the Verified Complaint pertaining to Senator Sampson are ¶¶47-55, 62-67, 74-76, 78-83, 86, 94, 98, 120-125, 128-139.

“merit selection” to the Court of Appeals, as well as on the Commission on Judicial Conduct and court-controlled attorney disciplinary system. These he conducted, in 2009, without much support of Senate Judiciary Committee members, who were essentially absent from the hearings and whose lack of support, if not behind-the-scenes pressure on him, no doubt contributed to the Senate Judiciary Committee’s nonfeasance in failing to follow-through on the testimonial and documentary evidence presented and proffered, including its failure to issue any report pertaining to those hearings, let alone with findings of fact and conclusions of law. It may be a pure coincidence of timing, but the June 8, 2009 Senate “coup” put an early end to Senator Sampson’s June 8, 2009 hearing on the Commission on Judicial Conduct and attorney disciplinary system, then underway in a legislative hearing room – the first time in 22 years that any legislative committee held an oversight hearing of the Commission on Judicial Conduct and perhaps the first time, ever, that an oversight hearing was held of the court-controlled attorney disciplinary system.

Senators Klein and Skelos, both lawyers, have ties to the judiciary – Senator Klein having a law partnership with the son of a recently retired Appellate Division, Second Department justice and Senator Skelos having a brother sitting on that same court. They and other Senators will have to rise above such conflicts of interest in a “fully functional Senate”. Needless to say, in such “fully functional Senate”, the testimonial and documentary evidence which citizens presented and proffered at the 2009 Senate Judiciary Committee hearings will, at long last, be fully investigated and made the subject of findings in committee reports so that appropriate steps can be taken, including responsive legislation crafted and itself made the subject of hearings. We are counting on you to ensure that that happens, promptly.

We look forward to assisting you in actually achieving a “fiscally responsible, fully functional Senate” – beginning with your championing of a Senate vote for new leadership, both Democratic and Republican. In that regard, you would do well to follow the lead of Assemblyman Steve Katz, who has courageously come forward to urge his Assembly colleagues not to re-elect Sheldon Silver as Assembly Speaker based upon his abuse of that leadership position. A copy of our December 4, 2012 letter to Assemblyman Katz, entitled “ABOVE POLITICS: Championing an Honest, Accountable Legislature”, to which you are indicated recipients, is enclosed.



Enclosure

cc: Senator John Sampson: 19th Senate District
Senator Liz Krueger: 26th Senate District
Senator Daniel L. Squadron: 25th Senate District
Senator Ruben Diaz: 32nd Senate District
Assemblyman Steve Katz: 99th Assembly District