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OPEN LETTER

December 31, 2012

TO: Assembly Speaker Sheldon Silver
Assembly Minority Leader Brian M. Kolb

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

RE: ENSURING AN INFORMED ASSEMBLY VOTE ON ASSEMBLY LEADERSHIP
& ASSEMBLY RULES:

(1) Your response to CJA's People's lawsuit against Assembly Speaker Silver & the Assembly – especially to the lawsuit's most important exhibit: CJA's October 27, 2011 Opposition Report to the August 29, 2011 Report of the Commission on Judicial Compensation;

(2) Your endorsement of legislative override of the second and third phases of the judicial pay raises recommended by the Commission on Judicial Compensation's August 29, 2011 Report by referring the evidence of unconstitutionality, statutory violations, and fraud to all relevant Assembly committees for discharge of their oversight responsibilities pursuant to Assembly rules;

(3) Your resolutions to revise Assembly rules consistent with the non-partisan, good-government recommendations of the Brennan Center's 2004, 2006, and 2008 reports and of the Senate's 2009 bipartisan Temporary Committee on Rules and Administration Reform, both its majority Democratic "Draft Report" and its Republican Minority Report.

On Wednesday, January 9, 2013, the New York State Assembly begins its 236th legislative session. As its first order of business, each Assembly member will call out his choice for Assembly Speaker and thereafter vote on Assembly rules.

Two years ago, without any debate, it was your two names which Assembly members called out in balloting for Assembly Speaker for 2011-2012. In a party-line vote, Assemblyman Silver captured the majority. Assembly rules for 2011-2012 were then adopted, also without debate by a party-line vote.

* **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.

Would you not agree that Assembly members are entitled to make informed decisions as to the fitness of those seeking their votes for Assembly Speaker – and as to Assembly rules which will subjugate them to the dictates of the Assembly Speaker and impede their ability to exercise independent judgment on behalf of the constituents they serve?

As you presumably know, on November 26, 2012, Assemblyman Steve Katz circulated a letter to his Assembly colleagues not to re-elect Mr. Silver as Assembly Speaker based on Mr. Silver's cover-up of the sexual improprieties of Assemblyman Vito Lopez and use of taxpayer dollars for an out-of-court settlement. In pertinent part, his letter stated:

“... While we may disagree on how to govern, the people of the state of New York deserve to have an open, honest, and transparent government.

If Assemblyman Sheldon Silver is re-elected as speaker, then we are not only showing New York, but the rest of the nation, that we have no backbone, no moral compass, and no integrity when it comes to honest government. If Assemblyman Sheldon Silver is re-elected as Speaker, we are confirming New York's worst fears that its elected officials are above the law...

At its core, this is a moral issue -- not partisan. There is common ground for all of us to responsibly occupy... We cannot be expected to govern effectively and with the confidence of our constituents if Assemblyman Sheldon Silver is allowed to retain his position”.

On December 4, 2012, our non-profit, non-partisan citizens' organization wrote to Assemblyman Katz commending him on his courageous stance, on behalf of good government, but pointing out that the basis upon which he was entreating his colleagues was but “the smallest fraction of the governmental corruption for which Mr. Silver, as Assembly Speaker, is directly responsible and for which he must be repudiated by Assembly members.”¹

We stated that illustrative was “Assembly Speaker Silver's cover-up of the corruption of the Commission on Judicial Compensation and, with it, the corruption of New York's state judiciary, whose result – this fiscal year alone – is the theft of \$27.7 million taxpayer dollars for judicial pay raises that are not only unconstitutional and statutorily-violative, but fraudulent” – and that this had embroiled the Assembly in a lawsuit which we have brought “on behalf of the People of the State of New York and the Public Interest”, to which the Assembly and Mr. Silver were named defendants.

Our letter identified that the Verified Complaint and its incorporated exhibits furnished the facts pertaining to “Assembly Speaker Silver's official misconduct and criminal fraud”² – and that these

¹ Our December 4, 2012 letter to Assemblyman Katz is posted on our website, www.judgewatch.org, accessible *via* the top panel “Latest News”, directly under this letter.

² The paragraphs of the Verified Complaint pertaining to Assembly Speaker Silver are ¶¶11, 73-83, 109-119, 121-125, 128-139.

reinforced Assemblyman Katz's call that Mr. Silver not be re-elected Assembly Speaker, as would further be obvious were Mr. Silver to publicly 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, Temporary Senate President Dean Skelos, 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; 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 report³;
- (b) upon receiving the dispositive document on which the Verified Complaint rests – CJA's October 27, 2011 Opposition Report, addressed to him, Governor Cuomo, Temporary Senate President Skelos, 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, Temporary Senate President Skelos, 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 Report⁴;
- (d) upon receiving CJA's March 30, 2012 Verified Complaint, served upon him, Governor Cuomo, Temporary Senate President Skelos, and Chief Judge Lippman on April 5, 2012, with a letter requesting review by "independent counsel".

We hereby call upon Mr. Silver to publicly respond to these four questions – and to come forward with the findings of fact and conclusions of law that he, as a lawyer, made with respect to CJA's October 27, 2011 Opposition Report – or as were made by Assembly counsel.

³ 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 Assembly Speaker Silver, recited at ¶¶78-83 of the Verified Complaint. They are Exhibits B-2 and C-3 to the October 27, 2011 Opposition Report.

⁴ The March 2, 2012 letter is annexed as Exhibit Q to the Verified Complaint and summarized at ¶¶121-125, 138-139 thereof.

We also call upon Mr. Kolb to demand that Mr. Silver publicly account – and to himself disclose when he first became aware of CJA’s October 27, 2011 Opposition Report and the lawsuit on which it is based⁵ and to identify the corrective steps he took to safeguard the public’s trampled rights. Indeed, inasmuch as Mr. Kolb prides himself on being sensitive to this state’s regional differences and on recognizing that a one-size-fits-all approach does not accord with the reality or interests of the eight million upstate New Yorkers⁶, we ask that he specifically respond to the showing made by our Opposition Report (at p. 30) that the uniform, statewide judicial pay raises recommended by the Commission on Judicial Compensation’s August 29, 2011 Report were in complete disregard of the significant cost-of-living differences between upstate and downstate, as to which, 30 years ago, the report of the Temporary State Commission on Judicial Compensation under William Dentzer had recognized:

“...it makes much more sense to adjust the salaries of judges who reside where it is more expensive to live to reflect that fact, rather than to establish a single salary for

⁵ Two copies of the Verified Complaint, with its incorporated exhibits, were served on April 5, 2012 on William F. Collins, counsel to the Assembly majority, who accepted service for both Assembly Speaker Silver and the Assembly. The entire lawsuit record is readily accessible from CJA’s website, www.judgewatch.org, via the top panel “Latest News”

⁶ See video of Mr. Kolb’s presentation at the November 29, 2012 forum “A New New York; The Constitutional Dimension”, at the Rockefeller Institute of Government, posted on the “Latest News” page of our website, under this letter, wherein he stated (at 14:08 minutes):

“...so I come from upstate, I am the only upstate leader at the legislators’ leaders’ table. But I wear two hats, or three hats. One, I represent my district. Number two, I represent all the members of our conference, which is statewide. And then I pride myself on being a voice at the table for upstate New York because, quite frankly, our state government is dominated by downstate interests and representatives – which I get, but you can’t forget the eight million people upstate that are trying to hang on with their finger nails. And people are losing their families and moving out of state because there’s not good paying jobs in upstate, that used to be a very strong manufacturing economy, that has taken a real hit. So there’s lots of ways to remedy all these issues, but we have to have a willingness to sit down and openly discuss it...and then recognize that we do have regional differences. And that’s another thing that I’ve suggested, let’s have more optional programs.

So if something really works for the New York delegation, for their constituents... let them have what they want to have on a local basis, but don’t burden Ontario County, or Yates County, or Wyoming County with a across-the-board state mandated program that does not fit the people that they serve and I think that’s the type of approach we have to start looking at regional, optional, more flexibility, and understand that we’ve all got different issues, priorities on the constituents that we represent. And I understand the needs of New York City legislators; I’m just saying you need to understand upstate. And most of our downstate legislators have never set foot in upstate New York, to travel around the state, just to get a flavor of how people live. They actually use cars to get back and forth to work. You know we’ve got an agricultural community... So there’s a lot of these variances.”

each office, which, while perhaps adequate in part of the State, might be inadequate or excessive in the rest of the State”.

So as to further demonstrate your fitness for leadership, please confirm that consistent with Assembly Rule IV, §4(d), you will refer the evidence of unconstitutionality, statutory violations, and fraud, presented by the Verified Complaint to all relevant Assembly committees having oversight responsibilities – including the Assembly Judiciary Committee, the Assembly Ways and Means Committee, and possibly, the Assembly Committee on Governmental Operations and the Assembly Committee on Oversight, Analysis and Investigation. This, to initiate a legislative override of the second and third phases of the judicial pay raises recommended by the Commission on Judicial Compensation, which will otherwise take effect, automatically, on April 1, 2013 and April 1, 2014, respectively. Should you fail to do so, 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 Assembly Speaker Silver, its \$27.7 million dollar cost to New York taxpayers this fiscal year will be comparably repeated every year, in perpetuity, unless voided by the courts in a lawsuit, such as ours.

Referral of the Verified Complaint to appropriate Assembly committees is also necessary to secure for the People of New York the other meritorious relief expressly sought and mandated by CJA’s October 27, 2011 Opposition Report:

- (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.

It would appear that Assembly Speaker Silver either failed to furnish the October 27, 2011 Opposition Report to the relevant Assembly committees so that they might take action consistent therewith, or those committees failed to act. Similarly, and notwithstanding we served the Assembly with its own copy of the Verified Complaint, separate from the copy for Speaker Silver, there is no evidence it ever reached rank-and-file Assembly members or even relevant committees so that they might learn of the travesties being challenged.

In 2004, the Brennan Center for Justice issued the report, “*The New York State Legislative Process: An Evaluation and Blueprint for Reform*”, followed in 2006 by a second report, “*Unfinished*”

Business: New York State Legislative Reform”, and then, in 2008, by a third report, “*Still Broken: New York State Legislative Reform*”. These detailed that New York’s Legislature – under Mr. Silver’s longtime leadership in the Assembly – is the most dysfunctional in the nation, largely because Assembly and Senate rules give inordinate power to the Assembly Speaker and Temporary Senate President/Senate Majority Leader.

Notwithstanding these reports, essential rules reforms have yet to be made – and the Assembly, which in 2005 took the lead in beginning such reform, subsequently lagged behind the Senate. Indeed, whereas in January 2009, the Democratically-controlled Senate, under the leadership of then Majority Leader/Senate President Malcolm Smith, formed a bi-partisan Temporary Committee of Rules and Administration Reform to examine and report on Senate rule changes, the Assembly’s Democratic majority, under Mr. Silver, does not appear to have engaged in any similar effort. As for the Assembly’s Republican minority which has the most to gain by reform of Assembly rules, it has apparently failed to effectively carry the rules reform banner – especially since Mr. Kolb became the Assembly’s minority leader in April 2010. The result may be seen in the Assembly’s passage, without debate, of Chapter 567 of the Laws of 2010, at one minute before midnight on November 29, 2010 in Extraordinary Session, having received same from the Governor, on a Message of Necessity⁷, with no committee hearings prior thereto and a total lack of legislative oversight thereafter.

We are trying to ascertain – precisely – where responsibility lies for our dysfunctional and reckless leader-driven legislative branch. As there appears to be no centralized place where either Assembly members or the public can obtain historical, contextual information about the evolution of Assembly rules, we request that each of you, as respective leaders of the Assembly’s Democratic majority and Republican minority, coordinate with each other in the creation of such an Assembly webpage.

Meantime, we have created an “Assembly Rules Reform Resource Page” on our website, www.judgewatch.org, accessible via the top panel “Latest News”. Among the noteworthy postings, a November 19, 2004 announcement by Assemblyman Michael Fitzpatrick entitled “*Fitzpatrick Calls for Assembly to Make Reform Priority No. 1 in 2005: Joins Assembly Minority Conference and Brennan Center to Urge Rules Changes*”. In pertinent part it stated:

“Assemblyman Michael Fitzpatrick (R, C, I-Smithtown) and fellow members of the Assembly minority conference were joined at an Albany press conference...by representatives of the Brennan Center for Justice at New York University School of Law to urge legislative reform as the first order of business when the Assembly returns for its new session in January.

‘The Brennan Center report ‘The New York State Legislative Process: An Evaluation and Blueprint for Reform,’ ranked our state Legislature the most dysfunctional and

⁷ The Governor’s message of necessity to the Assembly and the Assembly’s votes in the Rules Committee, Ways and Means Committee, and on the floor of the Assembly are posted on the “Rules Reform Resource Page” of our website www.judgewatch.org, accessible via the top panel “Latest News”.

the least democratic in the nation,' said Assemblyman Fitzpatrick. 'Considering the facts and figures from the Brennan Center's analysis we, as the Legislature, need to address the problems that exclude rank-and-file lawmakers and the citizens they represent from the legislative process, and make this our priority for the 2005 legislative session.'

...

'It has been the minority conference who has advocated the reforms and rules changes necessary to make the Assembly less about the power of Speaker Silver and more about the role of each elected member from across the state,' explained Fitzpatrick.

The Assembly minority conference has offered sweeping reforms to the Assembly rules at the beginning of each legislative cycle for the past decade. Recently, all 47 minority members pledged support to the Assembly rules reforms recommended by the Brennan Center (with minor exceptions). The members also said they will support the latest version of a resolution sponsored by Assemblyman Scott Stringer (D-Y) and 26 other Assembly majority members as a positive first step toward achieving reform.

In addition to these proposals, the Assembly minority conference are advocating a number of measures that would move further toward achieving a more open, responsible, responsive state government in New York and giving greater voice to rank-and-file legislators.

'During the 2005 legislative session, the Assembly minority conference will be bringing every one of these reform proposals to the floor of the Assembly for a full vote,' said [Minority] Leader Nesbitt."

Indeed, at the opening of the 2005 Assembly session on January 5, 2005, then Democratic Majority Leader Paul Tokasz stated:

"Mr. Speaker, before I offer the resolution to adopt the rules for the Assembly as they are currently written, let me note that we do so in order to have rules in place which allow us to conduct the business of the day. Members should be aware that upon adoption of those rules, I will immediately give notice of the majority's intent to offer amendments to the rules of the Assembly. These amendments will include a number of significant reforms that we believe will improve the operation of this House."

Upon the passing of the resolution by a party-line vote – ayes 98, nays 44– he then stated:

"Mr. Speaker pursuant to the provisions of Rule IX, §1 of the Assembly Rules, I hereby give notice that on or after Monday, January 10, 2005, we will move to amend numerous provisions of the rules of the Assembly and permanent joint rules of the

Senate and Assembly.”

Thereupon, the Republican minority, by then Assemblyman Willis Stephens, Jr., similarly stated:

“Thank you, Mr. Speaker. Pursuant to provisions of Rule IX, §1 of the Assembly Rules, I hereby give notice that on or after January 10, 2005, the republicans will move to amend the rules of the Assembly and the permanent joint rules of the Senate and the Assembly.”

Yet, the legislative rules reforms, “while a good start, were by no means transformative” – and the Brennan Center so-reflected this by the titles of its 2006 and 2008 reports “*Unfinished Business...*” and “*Still Broken...*” – the latter report stating, in its “Introduction” (at p. 1):

“The Legislature failed to adopt a comprehensive set of new rules that incorporated the Brennan Center’s recommendations for making the legislative process more robust and democratic...

In 2006 and 2007, most standing committees met infrequently or not at all. Almost no oversight hearings or hearings on major legislation occurred. Not a single major bill was the subject of a detailed committee report. Leadership maintained near total control over what bills reached the floor. And on the floor, there was little substantive debate; every bill brought to the floor for a vote in either chamber passed.”

As for the Assembly’s 2007, 2009, and 2011 opening sessions at which, without debate, Mr. Silver was re-elected Speaker on party-line votes, the sum total of announcements regarding the Assembly rules, thereupon passed, without debate, on party-line votes, was as follows:

On January 3, 2007, by Democratic Deputy Speaker Earlene Hooper:

“...the Majority views reform not as a single event but as an ongoing process. As we adopt the current Rules, we do so with the knowledge that the improved operations of this Body remain a high priority.” (Assembly transcript, pp. 16-17).

On January 7, 2009, by Deputy Speaker Hooper:

“...as we adopt the current rules, we do so with the knowledge that the improved operations of this Body remain a high priority.” (Assembly transcript, p. 15).

And, on January 5, 2011, by Democratic Majority Leader Ron Canestrari:

“...the Majority and you, Mr. Speaker, view reform as an ongoing process and as we adopt the current Rules, we do so with the knowledge and understanding that the

improved operations of this House remain a high priority for us all.” (Assembly transcript, p. 14, underlining added).

We call upon Mr. Silver to substantiate, with specifics, the “ongoing process” of Assembly rules reform that has been the Democratic majority’s “high priority” over the past six years, as we have been unable to find evidence of it.

And we call upon Mr. Kolb to explain why, at these opening sessions of the Assembly, he and his predecessor Republican minority leaders have not introduced their own resolutions of Assembly rules, nor uttered a word of protest over the majority’s rules resolutions, failing even to explain the minority’s party-line no votes against their adoption.⁸ Suffice to note that at the November 29, 2012 forum on “A New New York: The Constitutional Dimension”, held at the Rockefeller Institute of Government, Mr. Kolb really had no answer to my question:

“...What are you going to do, come January, when the Legislature comes back into session and votes on the rules, as their first order of business and leadership, as their first order of business, to change the rules consistent with what is put forward by the Brennan Center...?”

as evident from my follow-up question:

“But, you’re the minority leader. Can’t you get the minority to vote in favor and get the majority’s support for a nonpartisan set of recommendations to make the Legislature function?”⁹

Assembly members must NOT vote for an Assembly Speaker who does NOT empower them by rules that enable them to properly represent their constituents, discharge their legislative duties, and that promote accountability of the Assembly and its members to the People of the State of New York. We, therefore, call upon each of you to promptly and publicly release the Assembly rules that you will be introducing for 2013-2014, with an accompanying memorandum identifying the extent to which they change the current Assembly rules to incorporate the salutary, non-partisan recommendations of the Brennan Center reports and/or of the Senate’s defunct Temporary Committee on Rules and Administration Reform – both its April 21, 2009 Democratic majority “Draft Report” and its April 21, 2009 Republican Minority Report.

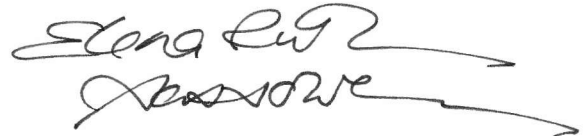
For your convenience, our “Rules Reform Resource Page” posts the Brennan Center’s three reports and links to a “Senate Rules Reform Resource Page” on which is posted not only the “Draft Report”

⁸ Inexplicably, the Assembly transcripts omit the announced Assembly votes on the majority’s rules resolutions that are heard, loud and clear, in the videos. The votes were: in 2007, ayes 104, nays, 35; in 2009, ayes 105, nays, 41; and in 2011, ayes 94, nays 49.

⁹ The video of Assembly Leader Kolb’s full remarks at the November 29, 2012 forum and my full public exchange with him are posted on the “Latest News” page of our website, beneath this letter.

and Minority Report of the Senate's Temporary Committee on Rules and Administration Reform, but also the videos, transcripts, and written statements pertaining to that Committee's hearings and meetings. May I strongly recommend that you view the Committee's February 26, 2009 New York City hearing, at which, upon the conclusion of testimony by former Senators Franz Leichter and Seymour Lachman, three representatives of the Brennan Center, responsible for its reports, testified: Professor Eric Lane, Lawrence Nordan, and Jeremy Creelan – the latter of whom stated with respect to rules reform:

'I don't think the Assembly will do anything ever....The leadership, I think, is entirely uninterested in doing anything, and they have been from the beginning.'

Handwritten signature of Steve Katz, consisting of two lines of cursive script with long horizontal strokes extending to the right.

cc: Assemblyman Steve Katz
Assemblyman Michael Fitzpatrick
All Assembly Members