From: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>
Sent: Thursday, June 27, 2019 5:31 PM

To: vbonv@albanylaw.edu; greenbergh@gtlaw.com

Subject: **RE: GAPS in scholarship on the NY Court of Appeals, including: (1) its 2004 Silver v. Pataki decision; (2) its subversion of appeals of right -- & mandatory appeals by leave; (3) Judiciary Law §14 & disqualification/ disclosure by the Court's judges**

Dear Professor Bonaventre & State Bar President Greenberg –

The below revises the e-mail sent to you earlier today. It makes minor, non-substantive corrections – plus one addition: the inclusion of the text from plaintiff-appellants' March 26, 2019 letter (at pp. 21-22) under the heading: "In Conclusion: New York's Constitution Has Been Undone by Collusion of Powers".

Apologies for any inconvenience.

Elena Sassower

From: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>
Sent: Thursday, June 27, 2019 10:58 AM
To: 'vbonv@albanylaw.edu' <vbonv@albanylaw.edu>
Cc: 'greenbergh@gtlaw.com' <greenbergh@gtlaw.com>

Subject: GAPS in scholarship on the NY Court of Appeals, including: (1) its 2004 Silver v. Pataki decision; (2) its subversion of appeals of right -- & mandatory appeals by leave; (3) Judiciary Law §14 & disqualification/disclosure by the Court's judges

TO: Professor Vincent Bonaventre/Albany Law School

This follows up the voice mail message I left for you yesterday morning (518-472-5856), requesting to speak with you about building scholarship on the New York Court of Appeals – and advising you that germane thereto is CJA's citizen-taxpayer action against New York's three government branches, challenging the constitutionality of the state budget, including the Judiciary budget and the commission-based judicial pay raises it embeds, NOW at the Court of Appeals.

I previously alerted you to the citizen-taxpayer action, including by the below April 18, 2017 e-mail, whose context was 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*", sponsored by Albany Law School and the Rockefeller Institute of Government.

My April 18, 2017 e-mail, entitled "In search of scholarship…", stated that I had been unable to find scholarship about the 2004 Court of Appeals decision in *Silver v. Pataki/Pataki v. Assembly & Senate*, 4 NY3d 75, or, for that matter, about provisions of the New York State Constitution governing the state budget. It specifically inquired where I might find:

(1) scholarship about that 2004 decision – and the constitutional provisions relating to the 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" (capitalization in the April 18, 2017 e-mail).

The paragraph relating to you read:

> "As Professor Vincent Bonaventre 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…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 29, 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."

I have no record of a return call or other response from you. Did you respond? And did you ever develop your cheeky and suggestive, though not deeply analytical, oral remarks at the June 16, 2015 forum into a law review article or other written commentary? I see nothing on your "New York Court Watcher" blog: http://www.newyorkcourtwatcher.com/p/this-blog.html, reflecting that you did. Nor have I found anything on the website of the Center for Judicial Process, the "independent organization devoted to the interdisciplinary study of courts and judges" of which you are founder and director, http://www.judicialprocessblog.com/2010/11/welcome-to-center-and-judicial-process.html.

Henry Greenberg, Esq.,the recently-installed president of the New York State Bar Association, who moderated the June 16, 2015 forum, introduced you as "New York's preeminent commentator of our state's highest court, the Court of Appeals" and "the leading commentator on the Court of Appeals, probably its finest student in the modern era". Why then would you not undertake in-depth, record-based scholarship about the *Silver v. Pataki* decision – or promote same by other law professors and experts of the New York State Constitution – and by students?

Indeed, are you – and the students you are teaching and mentoring – engaged in the kind of scholarship proposed ten years ago in the Albany Law Review article "*Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*"? Its author, University of the Pacific law professor Gerald Caplan, recognized that the legitimacy of judicial decisions can only be determined by comparison with the record. In his words, "…Performance assessment cannot occur without close examination of the trial record, briefs, oral argument and the like…' (73 Alb. L. Rev. 1, at 53): http://www.albanylawreview.org/Articles/Vol73_1/73.1.0001%20CAPLAN.pdf.

To assist you in developing this kind of record-based scholarship of the 2004 *Silver v. Pataki* decision – and of CJA's groundbreaking citizen-taxpayer action embracing it – here's the link to CJA's webpages of the record of the citizen-taxpayer action, now before the Court of Appeals: http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/record-ct-of-appeals.htm. Most relevant to the Court's 2004 *Silver v. Pataki* decision are the following:

(1) Plaintiff-appellants' March 26, 2019 letter in support of their appeal of right – at pages 21-22, where, under the title heading "In Conclusion: New York's Constitution Has Been Undone by Collusion of Powers", are two substantial footnotes, annotating the text:

> "No fair and impartial tribunal, constitutionally charged, as this Court is, with reviewing appeals wherein is 'directly involved the construction of the constitution of the state', could fail to discharge that duty here.
>
> What is before the Court, on this appeal of right, is catastrophic. Gone is the constitutional design of separation of executive and legislative powers – replaced by collusion of powers that has undone our State Constitution. And more than the budget is at issue. It is the very governance of this State, as the budget has become a pass-through for policy having nothing to do with the budget – the 'proposed legislation, if any' of Article VII, §3 having become separated from its meaning in Article VII, §2: 'proposed legislation, if any, which the governor may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures [of the budget]',[fn] further foisted by constitutionally unauthorized 'non-appropriation' Article VII budget bills.[fn]" (underlining in the March 26, 2019 letter); and

(2) Plaintiff-appellants' June 6, 2019 motion for leave to appeal – at pages 16-18, summarizing four inexplicable aspects of the *Silver v. Pataki* decision, as follows:

> "As reflected by appellants' March 26, 2019 letter, by its conclusion entitled 'New York's Constitution Has Been Undone by Collusion of Powers' (at pp. 21-22), the Court's 2004 *Silver v Pataki* decision inexplicably:
>
> - did not clarify that the meaning of 'proposed legislation, if any' of Article VII, §3 is the same as in Article VII, §2: 'proposed legislation, if any, which the governor may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures [of the budget]' – in other words, does not authorize inclusion of 'policy' unconnected with revenue; and
>
> - did not declare that the Governor's so-called 'non-appropriation' Article VII budget bills, excepting his purported revenue bill, are unconstitutional, as they plainly are because they unbalance the separation of powers, constitutional design.

> No less inexplicable is the decision's failure to have interpreted the clause in Article VII, §4: 'Such an appropriation bill shall when passed by both houses be a law immediately without further action by the governor' so as to enunciate what is obvious from its plain language – and what appellants' fifth cause of action and the record thereon highlights [R.108-109 (R.177-186, R.214-219), R.737, R.829, R.800-803], namely, that New York has a rolling budget, enacted bill by bill, upon the Senate and Assembly each amending and passing the Governor's 'appropriation bills', consistent with Article VII, §4 and reconciling their differences.
>
> Then, too, there is the decision's inexplicable failure to address the constitutionality of the 'notwithstanding…any other law to the contrary' provisions in the budget bills [R.164-167, R-116-117], although this was an important issue at the November 16, 2004 oral argument before the Court.[fn]
>
> All four of these aspects of unconstitutionality embraced by the Court's 2004 *Silver v. Pataki* decision are issues in this citizen-taxpayer action appeal." (underlining in the June 6, 2019 motion, pp. 16-18).

By the way, am I correct that you have also not written any law review articles or other commentary – including *via* your "New York Court Watcher" blog and website for the Center for Judicial Process – about Judge Robert Smith's 2010 whistle-blowing dissent in *Kachalsky v. Cacace*, 14 NY3d 743, regarding the Court of Appeals' subversion of the appeal of right guaranteed by Article VI, §3(b)(1) of the New York State Constitution "wherein is directly involved the construction of the constitution of the state or of the United States"? Such dissent, on which plaintiff-appellants' March 26, 2019 letter in support of their appeal of right materially relied (at pp. 8-9), is now again before the Court on Appeals by their May 31, 2019 motion for reargument/renewal & vacatur, determination/certification of threshold issues, disclosure/disqualification & other relief. Among the threshold issues it seeks to have the Court determine or certify is the following:

> "Is this Court's substitution of the language of Article VI, §3(b)(1) of the New York State Constitution and CPLR §5601(b)(1), granting appeals of right 'wherein is directly involved the construction of the state or of the United States', with a *sua sponte* ground to dismiss because 'no substantial constitutional question is directly involved' unconstitutional, *as written, as unwritten, and as applied*?" (underlining in the notice of motion and at ¶23).

What is your opinion of this threshold issue, discussed at ¶¶19-23 of the May 31, 2019 motion?

Am I also correct that you have written nothing about the mandatory leave to appeal to the Court of Appeals, contained within the last sentence of Article VI, §3(b)(6) of the New York State Constitution? As pointed out by plaintiff-appellants' June 6, 2019 motion for leave to appeal, "the Court does not appear to have rendered any interpretive analysis about this mandatory leave to appeal" (at p. 5, underlining in the original). Do you disagree? And if so, where can the Court's interpretive analysis be found? And if not, what is your opinion of plaintiff-appellants' own "rudimentary analysis", set forth at pages 5-10 of the June 6, 2019 motion?

Finally, am I further correct that you have undertaken no scholarship as to how the Court of Appeals has handled issues of disqualification and disclosure pertaining to its *own* judges, involving Judiciary Law §14? Virtually the entirety of plaintiff-appellants' May 31, 2019 motion pertains to disqualification/disclosure, including by the first two threshold issues it asks the Court to determine or certify:

> "Whether Judiciary Law §14 and *Oakley v. Aspinwall* [3 NY 547 (1850)] bar New York State judges from 'sit[ting]…or tak[ing] any part in' this citizen-taxpayer action in which they have huge financial and other interests – and, if so, can it be transferred to the federal courts, including pursuant to Article IV, §4 of the United States Constitution: 'The United States shall guarantee to every State in this Union a Republican Form of Government'?";
>
> "If this citizen-taxpayer action cannot be transferred to the federal courts, whether this Court's judges can invoke the 'Rule of Necessity' to give themselves the jurisdiction that Judiciary Law §14 removes from them – and, if so, are there safeguarding prerequisites to prevent their using it to act on their biases born of interest, as, for instance, the 'remittal of disqualification' procedure specified by §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, where the judge states he believes he can be fair and impartial notwithstanding the existence of grounds for his disqualification pursuant to §100.3E?";

Do you agree that these threshold questions are, as the motion identifies (at ¶26), "unchartered territory" and "first impression"? And do you agree that the Court's duty with respect to them and the disqualification and disclosure the motion seeks is to render "a reasoned decision comparable to the Court's decision in *New York State Criminal Defense Lawyers v. Kaye*, 95 NY2d 556 (2000), as set forth at ¶6?

Kindly give me the benefit of your responses, as soon as possible – including the names of other law professors expert in the New York Court of Appeals and the New York State Constitution so that I can apprise them of what is assuredly one of the most explosive and far-reaching lawsuits to *ever* come before the Court so that they can begin scholarship based on its record and offer the Court their *amicus curiae* assistance. As time is of the essence and State Bar President Greenberg should, like yourself, have a roster of such law professors at his disposal, I am cc'ing him, requesting same – and further requesting that he furnish notice of the citizen-taxpayer action, whose record is fully accessible from CJA's website, www.judgewatch.org, *via* the prominent homepage link "CJA's Citizen-Taxpayer Actions to End NYS' Corrupt Budget 'Process' & Unconstitutional 'Three Men in a Room' Governance", to the State Bar's many appropriate committees, for their prompt examination and report.

For your convenience and that of State Bar President Greenberg, here's the direct link to CJA's webpage for *Silver v. Pataki/Pataki v. Assembly & Senate*, http://www.judgewatch.org/web-pages/searching-nys/law/silver-v-pataki.htm, posting the November 16, 2004 oral argument at the Court of Appeals, the Court's December 16, 2004 decision, such underlying briefs and lower court decisions as I was able to secure and the truly minuscule "scholarship" of the 2004 decision as I was able to find, *to wit*:

- the VIDEOS and CLE materials for the June 16, 2015 forum; and

- the VIDEO and "Issue Brief" for the May 30, 2019 forum "*New York's Budget Process: Time for a Rebalance?"*, sponsored by the Empire Center for Public Policy, in honor of Governor Hugh Carey.

Thank you.

Elena Sassower, Director
Center for Judicial Accountability, Inc. (CJA)
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914-421-1200

From: Center for Judicial Accountability, Inc. (CJA) [mailto:elena@judgewatch.org]
Sent: Tuesday, April 18, 2017 11:09 AM
To: robert.bullock@rockinst.suny.edu
Cc: nylrc@albanylaw.edu; pkiernan@schiffhardin.com; benjamig@newpaltz.edu; galie@canisius.edu; richardbrodsky@msn.com; greenbergh@gtlaw.com; cbopst@aol.com; hnd1@cornell.edu; vbonv@albanylaw.edu; rsmith@fklaw.com; James McGuire <jmcguire@hsgllp.com>

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/, 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, *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 April 28, 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 Bonaventre 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 29, 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.

Elena Sassower, Director
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