

BRENNAN  
CENTER  
FOR JUSTICE

**Temporary Committee on Rules Reform  
New York State Senate  
Statement of  
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The Brennan Center for Justice thanks the Temporary Committee on Rules Reform for holding this hearing. The Brennan Center for Justice is a nonpartisan think tank and advocacy organization that focuses on democracy and justice. In the area of democracy we are committed to goals that support a government which is more representative, deliberative, accountable and accessible to the public.

In 2004, the Brennan Center released a report<sup>1</sup> (the “2004 Report”) that detailed the pervasive deficiencies in New York’s legislative process and offered a blueprint for reform. In 2006 and 2008, we followed up with additional reports<sup>2</sup> that found, despite claims of reform from Senate and Assembly Leadership, the fundamental barriers to a functional and effective legislature remained firmly in place.

The rules changes announced in the Senate last month represent an important first step towards the creation of a more transparent and accountable legislative chamber. We believe that if the operations of the Senate are to be substantially reformed, further rules changes are needed. We look forward to working with you to make these changes happen.

In our most recent report, the Brennan Center has laid out a list of rules changes we would like to see in the Senate.<sup>3</sup> As in our previous reports, these recommendations fall into six main categories:

- **Strengthening Standing Committees**, by allowing them greater independence and encouraging meaningful participation by rank-and-file members and bill sponsors;

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<sup>1</sup> JEREMY M. CREELAN AND LAURA M. MOULTON, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, THE NEW YORK STATE LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM (2004) [hereinafter *2004 Report*].

<sup>2</sup> LAWRENCE NORDEN, DAVID E. POZEN, AND BETHANY L. FOSTER, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, UNFINISHED BUSINESS: NEW YORK STATE LEGISLATIVE REFORM 2006 UPDATE (2006) [hereinafter *2006 Report*]; ANDREW STENGEL, LAWRENCE NORDEN, AND LAURA SEAGO, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, STILL BROKEN: NEW YORK STATE LEGISLATIVE REFORM 2008 UPDATE (2009) [hereinafter *2008 Report*].

<sup>3</sup> Proposed rules changes are listed on pages 34 and 35 of the 2008 Report, *available at* [http://www.brennancenter.org/content/resource/still\\_broken\\_new\\_york\\_state\\_legislative\\_reform\\_2008\\_update/](http://www.brennancenter.org/content/resource/still_broken_new_york_state_legislative_reform_2008_update/)

- **Removing Barriers to Full Consideration of Bills**, by allowing individual members, and not just leadership, to move bills to the floor for debate and vote;
- **Allowing Ample Opportunity for Adequate Review, Debate and Amendments of Legislation by Individual Members**, by, for example, revising legislative deadlines and the session calendar of all bills and requiring that all bills with fiscal impact are accompanied by thorough fiscal notes provided to members prior to the bill’s consideration in committee or on the floor;
- **Providing All Members with Sufficient Resources**, more equitably distributed in accordance with an objective standard;
- **Institutionalizing Conference Committees**, so that when bills addressing the same subject have been passed by both chambers, the prime sponsors from each chamber or the Speaker and Majority Leader can convene them; and
- **Making the legislative process more transparent** by making committee meeting minutes, fiscal notes, voting records, debate transcripts, and other products of the legislative process available on the internet within a reasonable period of time after their creation.

I will use this testimony to focus on three of these recommendations: strengthening standing committees; removing barriers to full consideration of bills; and institutionalizing conference committees.

#### A. Strengthening Standing Committees

In the 2004 Report, we noted that the State Legislature’s committees were weak and ineffective, failing to serve two core legislative functions:

... first, to enable legislators to develop, examine, solicit public and expert feed back upon, and improve bills in a specific area of expertise and to convey the results of their work to the full chamber; and second, to oversee certain administrative agencies to ensure that they fulfill their statutory mandates.<sup>4</sup>

Instead of anchoring the legislative process, we found that the committee system in New York “rarely include[d] significant deliberation, policy development, drafting, or amendments to legislation, even for major bills that become law.”<sup>5</sup> These failures contrasted starkly with the way committees functioned in Congress and most other state legislatures, where committees are “the locus of most legislative activity.”<sup>6</sup>

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<sup>4</sup> 2004 Report, at 5.

<sup>5</sup> *Id.*, at 6.

<sup>6</sup> 2008 Report, at 4.

New York's weak committee system led to weak legislation: more often than not, legislation did not reflect the collaborative engagement of experts, input from public hearings and reports, or discussion, deliberation, and debate among members of the public and the Legislature.

There were many reasons for the weak committee system. Among the most important reasons identified in the 2004 report were the following:

- The Speaker and Majority Leader exercised almost complete control over committee staffing, which deprived committees of the ability to prioritize, consider, and develop legislation independent of leadership.<sup>7</sup>
- It was far too difficult for rank-and-file members to compel a standing committee to hold public hearings on pending legislation or to oversee administrative agencies within the committee's jurisdiction. As we noted in 2004, that difficulty "undermines the effectiveness of the committees and the Legislature as a whole. The public is deprived of an important opportunity to have input into the formulation of policy legislation by their representatives. The Legislature is robbed of the benefit of hearing expert testimony and critiques of a proposed legislative approach...The legislators are deprived of a forum to educate themselves and to debate and mark up proposed legislation."<sup>8</sup>
- Committees were not required to draft (and rarely *did* draft) committee reports that set forth the purposes of a bill, the proposed changes to existing law, section-by-section explanation, cost-benefit analysis, procedural and voting history, or any individual members' comments on the bill. Instead, committees issued only Sponsors' Memoranda or Committee Bill Memoranda, which either ignored these topics altogether or addressed them in a superficial fashion. More meaningful committee reports, we noted, would allow the full chamber, the courts, and the public to gain a greater understanding of a bill's potential impact, and they would "encourage [], if not guarantee [], that the committee in question [would] in fact analyze, debate, and fully consider a bill."<sup>9</sup>
- Because legislators in both houses were assigned to so many committees – in the Senate, the average number of assignments was 8, more than in any legislative chamber in the country<sup>10</sup> – it became far less likely that they would attend most committee meetings and hearings, develop expertise through committee work, or otherwise devote themselves to the time-consuming work necessary to consider and shape effective legislation.
- New York made it more difficult than any other legislature in the country for a

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<sup>7</sup> 2004 Report, 11-12.

<sup>8</sup> *Id.*, 8-9.

<sup>9</sup> *Id.*, at 11.

<sup>10</sup> *Id.*, at 13.

rank-and-file member to obtain consideration of a bill by either her committee or the full chamber.<sup>11</sup>

In the years since the release of the 2004 report, the Senate has not taken the steps necessary to create an even moderately independent, deliberative committee process that could act as an incubator for policy – the kind of system used by Congress and so many other state legislatures.

Furthermore, because it remains nearly impossible for committee members to force their chair to hold a hearing or vote on specific legislation, New York's committee system does not provide a forum for members to debate and deliberate to ensure that favorably reported bills embody the best policy solutions to meet the public's interest. These concerns are borne out by the fact that in the last several years, almost no committee hearings were held specifically to review major legislation that was eventually enacted into law, and nearly all committee votes were unanimous.<sup>58</sup>

Moreover, the Senate Majority Leader still controls nearly all committee resources and continues to have the power to hire – and fire – all committee staff.<sup>12</sup> This means that the most significant policy development and legislative drafting are the responsibility not of committee members but of Central Staffers who are ultimately accountable to the legislative leaders.<sup>13</sup>

Finally, while the Senate rules passed in 2005 limited the number of committees on which a Senator could sit to seven, that threshold is still far higher than assignment limits in most states, and members are still too overburdened to participate effectively in committee deliberations.

Taken together with the absence of substantive committee reports, limits on forcing hearings or votes, low attendance rates at committee meetings, and the continued use of absentee voting in the Senate committees, these statistics paint a picture of a committee system that is barely functional – and very far removed from the public interest.

If the Senate is to create a strong committee system, it must make at least five changes to its legislative operating rules relating to committees:

- A minority of committee members must be able to force a public hearing on a bill unless a majority of the committee publicly votes to reject the request;
- One-fourth or more of a committee's members must be able to force a timely and public committee vote on a particular bill, even if the committee chair-person objects;
- Each committee should have the power to hire and fire professional committee

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<sup>11</sup> *Id.*, at 14.

<sup>12</sup> 2008 Report, at 5.

<sup>13</sup> 2004 Report, at 11 nn.67-68.

staff, independent of the preferences of the Majority Leader;

- All committees should be required to draft committee reports that set forth the purpose of any bill voted out of committee, as well as the proposed changes to existing law provided in the bill, a section-by-section explanation of the bill, a cost-benefit-analysis, the bill's procedural and voting history, and any individual members' comments on the bill; and
- Committee members must be physically present to cast votes on legislation before the committee.

## **B. Removing Barriers to Full Consideration of Bills**

As noted in the 2004 Report, the barriers to moving a bill from committee to consideration before the full chamber are greater in New York than in any other state.<sup>14</sup> Even when the vast majority of Senators have claimed to support a particular bill, the Senate Majority Leader has been able to prevent it from coming to the floor for debate and a vote.<sup>15</sup> The result is that all too often, the New York legislature avoids issues that are difficult or controversial even when a majority of New Yorkers believe they should be addressed.

In our previous reports, we have noted that there are several ways in which Senate leadership has prevented popular or important bills from getting to the floor for debate and a vote:

- First, the Senate placed “more restrictions than any other state legislature on motions to discharge a bill from a committee to the floor for a vote.”<sup>16</sup> Until recently, members could only discharge a bill from committee within the often narrow window between the 30<sup>th</sup> day after a committee has received a bill and the second Tuesday in April, and only then under the conditions that there is no more than one other discharge motion already on the calendar and the bill sponsor has given her consent. The January 2009 reforms only partially alleviated these restrictions.
- Second, Senate leaders had full control over the order of bills placed on the calendars – and full discretion over whether to place a bill on the calendar at all. As of 2004, the New York Senate and Assembly were two of only three chambers nationwide to grant leaders this power for the second-reading and special-order

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<sup>14</sup> *Id.*, at 14.

<sup>15</sup> See e.g., LAWRENCE NORDEN AND JEREMY CREELAN, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, *LOST IN THE SHADOWS: THE FIGHT FOR A SENATE VOTE ON WETLANDS PROTECTION LEGISLATION* (2005); see also Benjamin Klein, *Krueger asks for vote on ‘Super Bills,’* THE LEGISLATIVE GAZETTE, Jun. 18, 1007 (regarding bottle bill, wetlands legislation, and carbon emissions restrictions); see also 2004 Report, at 44-45.

<sup>16</sup> 2004 Report, at 14.

calendars, and two of only five chambers to grant leaders this power for the third-reading calendar (on which final votes on passage are taken).<sup>17</sup>

- Third, leadership has used the Rules Committee as a bottleneck to the progress of bills. The Rules Committee has the authority to refer bills to itself from any other standing committee, so long as it deems such referral “in the public interest.” Members cannot bring discharge motions before the committee, and unlike all other committees, the Rules Committee is exempted from the requirement that it provide notice of its meetings and copies of its agendas in advance.

In announcing rules changes this year, the Senate took some important steps in removing barriers to successful motions to discharge, including ending unrecorded “canvass of agreement” votes and requiring that all votes on motions to discharge to be recorded and made public. We would like to see some additional changes in this area. In particular, we recommend allowing sponsors of bills to put discharge motions to the Rules Committee (for a public vote), moving the cut-off date for discharge motions to later in the year,<sup>18</sup> lifting the restrictions on the number of discharge motions that are permissible on any given day, and reducing the number of days that a discharge motion must remain on the calendar before coming to a vote.

Even if a member manages to successfully discharge a bill from a standing committee, he or she has no guarantee it will receive a vote or debate on the floor. There must be some way for rank-and-file legislators to bring to a floor vote bills that have been favorably voted out of committee or have the support of a majority of members – even if the Majority Leader objects.

As we noted in our 2006 report, there are at least four different ways to achieve this:

- The Senate and Assembly could provide that, on the motion of a majority of members of the chamber, any bill will immediately come to the floor for a debate and vote. The United States House of Representatives and the Massachusetts Senate, among other chambers, have adopted similar practices. In both chambers, a majority of members can force a bill to the floor for a vote through a discharge vote (or series of discharge votes) both before *and* after the bill has been voted out of committee.<sup>19</sup>
- The Senate and Assembly could mandate that all bills come to the floor for debate and a vote within a certain number of days after they have been voted out of committee and passed through their automatic “second” and “third” readings. The California Senate and the Massachusetts Assembly, for example, have adopted this approach.<sup>20</sup>

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<sup>17</sup> *Id.*, at 22.

<sup>18</sup> The current deadline for motions to discharge is the fourth Tuesday in April, a week before the Assembly cut-off date and well before the Brennan Center’s recommended cut-off date of 5 days before the end of the legislative session.

<sup>19</sup> 2006 Report, at 24.

<sup>20</sup> *Id.*

- The Senate and Assembly could allow any member to bring a bill out onto the floor by his or her own motion once it has been reported out of committee, as is done in the Pennsylvania Assembly and Wisconsin Senate.<sup>21</sup>
- Finally, the Senate and Assembly could permit members to bring non-germane amendments to most bills. In practical terms, this would mean allowing legislators to obtain a floor vote on nearly any piece of legislation, as long as it was presented as an “amendment” to pending legislation, whether or not it was relevant to that legislation. This is often how minority party and rank-and-file members of the United States Senate have brought legislation to the floor.<sup>22</sup>

We applaud the steps the Senate has already taken to reform the discharge motion process. But even with these changes, the current rules still afford the leadership the power to prevent a bill from being considered by the full chamber, regardless of whether it has the support of a majority of members.

### C. Institute Mandatory Conference Committees

The 2004 report noted that New York had no established mechanism to reconcile differences between bills passed by the two houses and thereby “prevent complete legislative failure if the Speaker and Majority Leader [could not] resolve their differences directly in closed-door negotiations.”<sup>23</sup> All too often, the result has been gridlock, even for bills that have overwhelming popular and member support.

The situation in New York stands in stark contrast to that in other state legislatures, where the use of conference committees is routine: One 1999 study found that the average state chamber had used 59 conference committees in that year alone.<sup>24</sup> On the other hand, in New York, conference committees were used only rarely and never in a systematic fashion.<sup>25</sup> Instead, to pass a bill into law, one chamber often had to substitute the other chamber’s version of the bill for its own, with the leaders of the two chambers working out any differences without the input of rank-and-file members.

In the years since the 2004 report, the Senate and Assembly appear to have convened more conference committees reconciling bills than in the past, at least for budget resolutions and “non-major” legislation.<sup>26</sup> In addition to budget conference committees, there was a public conference committee to resolve differences in the State’s implementation of the federal Help America Vote Act (though this conference committee meeting came painfully late, long after New York failed to implement important elements of the Act –

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, at 36.

<sup>24</sup> NAT’L CONFERENCE OF STATE LEGISLATURES, CONFERENCE COMMITTEE USAGE (July 1999 and July 2003 Update).

<sup>25</sup> 2004 Report, 35-36.

<sup>26</sup> 2006 Report, at 25.

this delay eventually led the United States Department of Justice to sue New York State for non-compliance).<sup>27</sup> But for the most part, the budget conference committees were exceptions to the rule. In 2005 and 2006, conference committees on major legislation continued to be exceptionally rare.<sup>28</sup> For all practical purposes, the Speaker and Majority Leader must still resolve their differences before similar bills can be reconciled, regardless of the views of the public or other legislators.

Ultimately, the best way to ensure that similar bills in each chamber receive a conference committee is to adopt the recommendations in the 2004 Report: when bills addressing the same subject have been passed by both chambers, a conference committee should be convened at the request of the prime sponsor from each chamber or the Speaker and Majority Leader. Such conference committees should include members from each chamber and should proportionally represent the majority and minority of each chamber. The committee should convene for a “mark-up” session within two weeks of the request to reconcile the differences in the two chambers’ bills before final passage, and these sessions should be transcribed and open to the public.

This should be an easy change to make. Assembly leadership has, in the past, indicated a willingness to adopt a joint, mandatory rule for conference committees. If a rule similar to the one outlined above is adopted, conference committees should prove useful not only for overcoming the kind of legislative gridlock we’ve seen in the past in Albany, but also for making the legislative process more deliberative, more transparent, more effective, and – with the right procedures in place – more democratic.

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We congratulate the Senate for taking important first steps in changing the way the chamber operates, and establishing this committee for the purpose of adopting more complete, and needed, rules changes. We look forward to further discussions of these changes with you and the committee staff.

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, at 26.