

AT A TERM OF THE
SUPREME COURT OF THE
STATE OF NEW YORK,
COUNTY OF ALBANY, ON
THE ____ DAY OF JUNE, 2009

PRESENT: _____ J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of
Senator George Winner, and Senator John Flanagan,
Individually and as members of the New York State Senate
Petitioners,

-against-

Angelo Aponte, individually, and in his official capacity as
Secretary of the New York State Senate, and
Thomas Testo, individually, and in his official capacity as
Journal Clerk of the New York State Senate,
Respondents.

**INDEX NO.
ORDER TO
SHOW CAUSE**

X

**Upon the verified petition of Senators George Winner and John Flanagan
and upon all of the papers and proceedings heretofore had herein, it is hereby**

ORDERED, that respondents herein show cause before an I.A.S. term of this
court held in and for the County of Albany, at the Courthouse thereof, more specifically,
at the Albany County Courthouse at Eagle Street, New York, at 9:30 AM in the forenoon
of the ____ Day of June, 2009, or as soon thereafter as counsel may be heard, why an
order of this court should not be made and entered pursuant to the provisions of CPLR
Article 78, CPLR 6301, CPLR 3001 the New York State Legislative Law and the Rules
and the New York State Senate as follows:

1. Compelling the preservation and protection of the official records of
the Senate,

2. Prohibiting the entry of false information in the Journal and other records of the Senate, and prohibiting the transmission or publication of Senate Records with false inaccurate or incorrect entries, and
3. Compelling and mandating that Respondent Aponte cease and desist his activities which interfere with the Petitioners' ability to perform their duties as members of the New York State Senate,
4. Compelling and mandating Respondent Aponte to keep the doors of the Senate Chamber open for the members thereof, and all others entitled to access to the Senate Chambers,
5. Compelling and mandating Respondent Aponte to accord the petitioners access to bill jackets and all other legislative materials necessary for them to perform their duties as Senators,
6. Compelling and mandating that Respondent Aponte provide that all functionalities of the Senate Chamber be operational when the Senate is in session, including but not limited to lighting, public address systems, telephones, and equipment,
7. Compelling and mandating the respondent Aponte to allow for the television and internet broadcasting of Senate Sessions in accordance with the Senate Rules,
8. Prohibiting the Respondent Aponte from interfering or threatening Senate Staff person so as to interfere with Petitioners' ability to participate in legislative sessions,
9. Mandating and compelling the Respondent Aponte to provide adequate staffing for Senate sessions, including but not limited to provision for a stenographic record thereof,
10. Mandating and ordering that Respondent Aponte take no action to prevent Petitioner Winner from ascending to the Rostrum in the Senate Chamber,
11. Compelling and mandating Respondent Aponte to implement the lawful orders and directives of the President Pro Tempore and Vice President Pro Tempore of the Senate pursuant to Sections 6 and 12 of the Legislative Law and the Rules of the New York State Senate, and to cease and desist from his activities designed to obstruct the Legislative process,
12. Compelling and mandating that Respondent Aponte provide to the members of the Senate true and accurate copies of the Journal, calendars and other legislative documents as required by law,

SUFFICIENT CAUSE APPEARING THEREFOR, IT IS HEREBY

ORDERED, that the Respondent Aponte, Secretary of the Senate, is hereby
TEMPORARILY ENJOINED AND RESTRAINED from destroying, altering, making

false entries upon, or otherwise disposing, or causing to be destroyed, altered, or allowing or causing false entries to be made upon, or otherwise allowing or causing disposal, of any and all records in possession of the State Senate including the Journal of the New York State Senate, the transcription of the proceedings of the Senate, the bill jackets, the roll calls and other records of the proceedings of the New York State Senate, and it is further

ORDERED, that Respondent, shall forthwith provide to the Petitioners Counsel, and shall file with this Court certified copies of the Journal of the New York State Senate for June 8, 2009, and it is further

ORDERED, that Respondent Aponte shall produce upon the return date specified herein all communications, directives, memoranda, and related documents with and between Respondent Aponte and Senators Espada and Skelos, the Temporary President and Vice President of the Senate (respectively), and it is further

ORDERED, that the Respondent Aponte shall not allow any or cause to be made any entries in the Journal of the Senate pending the hearing and determination of this matter,

SUFFICIENT CAUSE APPEARING THEREFOR, leave is hereby granted to the Petitioner(s) to submit, upon the hearing of this Order to Show Cause and any adjournments thereof, and the argument thereof, such additional evidence, exhibits, and other proof as may be necessary, and it is

ORDERED, that proof of service may be filed with the Court on the return date specified herein,

AND IT IS HEREBY

ORDERED, that service of a copy of this order, together with a copy of the papers upon which it is granted, on the Respondents thereof as follows:

(1) Upon Respondent Angelo Aponte, Secretary of the Senate, by leaving a copy of said order and papers at the Offices of the said Secretary of the Senate, or by delivering same to said Respondent, on or before the ____ day of June, 2009, and or, alternatively, at the option of the Petitioners, same may be served by enclosing said papers in a post paid wrapper addressed to such Respondent at the State Capitol and deposited with a depository of the United States Postal Service via EXPRESS MAIL, on or before the ____ day of June 2009, and further that such service shall be deemed due, timely, good and sufficient service thereof, and such service shall constitute sufficient notice hereof.

E N T E R

DATED: JULY ____, 2009
ALBANY, NEW YORK

Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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Senator George Winner, and Senator John Flanagan,
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**INDEX NO.
VERIFIED
PETITION**

_____ X
TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Senator George Winner and Senator John Flanagan, by their attorneys do hereby petition the Court, and the petition respectfully shows as follows:

THE PARTIES

- (1) Senator George Winner, is a member of the New York State Senate elected to represent the 53rd Senate District for the term 2009 -2010.
- (2) Senator John Flanagan, is a member of the New York State Senate elected to represent the 2nd Senate District for the term 2009 -2010.
- (3) Respondent Angelo Aponte was chosen by the Senate to be secretary of the Senate in 2009. Respondent, as Secretary of the Senate, is the administrative officer of the State Senate.
- (4) By law Respondent Aponte is the custodian of and responsible for securing all Senate Documents.
- (5) On June 8, 2009 the Senate adopted new rules and elected new leadership.

- (6) The Senate Journal containing the roll calls evidencing the adoption of new Senate Rules, and the election of the current Senate Leadership is annexed hereto as EXHIBIT A.
- (7) The roll calls entered in the Journal are, and have been held to be, conclusive proof of the action of the legislature, see, Heimbach v. State of New York, 59 N.Y.2d 891 (1983).

PRELIMINARY STATEMENT

- (8) Upon information and belief, as detailed herein the elected leadership of the Senate has, since June 8, 2009, issued several directives to the Secretary of the Senate regarding, *inter alia*, operation of the house, legislative sessions, and personnel matters.
- (9) Respondent Aponte has refused to honor these directives, and further, has actively engaged in activities designed to deprive Senators of their ability to do their jobs, stymie the operations of the Senate and to terrorize the professional staff of the Senate so that they will obey him, rather than perform their Senate duties as directed by the Temporary President and the Majority Leader.
- (10) Aponte, has set about dictating to Senators how, when, and if they may perform their duties.
- (11) As members of the New York State Senate your Petitioners are entitled to certain rights, documents, budgetary considerations and access to facilities, including but not limited to the senate chamber, in

order to perform their duties without the interference of the Secretary of the Senate.

FIRST CAUSE OF ACTION

- (12) As State Senators, Petitioners are entitled to access to the Chamber of the New York State Senate in order to perform their duties.
- (13) The laws of this State require that the doors of the Senate Chamber be, and remain open. The Constitution of the State of New York, Article II, Section 10, and the Rule XI of the New York State Senate Rules require that the chambers be open.
- (14) Your petitioners have the right to enter the chamber and deliberate with their colleagues in legislative sessions.
- (15) At several junctures during the 2009 Legislative Session Respondent Aponte, in contravention of Law and the Rules of the New York State Senate, closed the doors of the Senate Chamber and barred the Senators from access thereto.
- (16) Further, on occasions when the Senators have found the chamber to be open and accessible, Respondent Aponte has caused the public address system, lights and other facilities necessary for the conduct of Legislative Session to be switched off, making the conduct of legislative business difficult and hindering the Petitioners in the performance of their duties in contravention of Law and the rules of the Senate.

- (17) During the June 8, 2009 session Respondent Aponte or his designee, actually caused the lights in the Senate Chamber to be extinguished, turned off the public address system, and cut off video and audio feeds which provide the public the ability to follow Senate proceedings during the course of the session (as provided for in the Senate Rules).
- (18) Access to the Chamber of the Senate of the State of New York, particularly by the members of the Senate, should not be subject to the whim of Respondent Aponte. The law must be observed, and the Chamber kept open.
- (19) Accordingly, Petitioners are entitled to Declaratory and Injunctive Relief as against Respondent Aponte, allowing them access to the Senate Chamber and providing for the functionalities of the Senate Chamber to be fully operational (including lighting, the public address system, internet broadcasting of session, TV broadcasting of session, telephones, necessary documents accessible and available).

IN AND AS FOR A SECOND CAUSE OF ACTION

- (20) Petitioners respectfully repeat and reallege each and every allegation contained in the preceding paragraphs as if same were fully set forth herein.
- (21) Regular Session of the New York State Senate was scheduled for June 23, 2009, at 2:00 PM in the Senate Chamber.

- (22) In addition, the Governor proclaimed a Special Session of the Senate to be held at 3:00 PM in the Senate Chamber on June 23rd.
- (23) By memo dated June 23, 2009, Respondent Aponte denied Members of the Senate the use of the chamber for regular session called for 2:00 PM. EXHIBIT B. Aponte referred to the Session as a “conference” rather than a session.
- (24) By its terms, Aponte’s writing of June 23, 2009 refers to Senator Skelos as “Minority Leader” – attesting to Aponte’s refusal to abide by the June 8, 2008 actions of the Senate, and his continued refusal to obey the Law and Senate Rules by actually preventing Senate employees from performing their duties in connection with the legislative session.
- (25) In a continued pattern of say one thing and do something different, Petitioners and other Senators were later informed that the Senate Chamber was open and available to them.
- (26) Petitioners found the chamber opened, but with the public address system switched off for the members of the coalition of Senators that they stand with. Supporters of Senator Malcolm Smith and his political apparatchik Aponte.
- (27) Additionally, no bill jackets were available to Petitioners.
- (28) Respondent Aponte personally intervened to prevent the Petitioners from creating a stenographic record of the Senate Session.

- (29) After instructing the Senate Stenographer NOT to record the Senate Session presided over by Petitioner Winner and participated in by Petitioner Flanagan; Respondent Aponte prevented Petitioners from bringing a stenographer into the chamber.
- (30) Petitioner Winner, was duly designated by the Temporary President to preside, and had been previously selected by a majority of the Senate to preside over Senate Session, was blocked from ascending the rostrum at the head of the chamber by a Sergeant at Arms.
- (31) Petitioner Winner, in order to avoid an unseemly confrontation, then stood in front of the rostrum and presided over the session.
- (32) The Journal Clerk did not appear for the session. An unknown female appeared at the Journal Clerk's post, with no documents in hand. She did not participate in the session. Senate employees were designated to fill the roles of the Journal Clerk, the Parliamentarian, and other staff roles.
- (33) Upon entering the Chamber, Petitioners found that a total of some sixty two Senators were present in the chamber, as the Senators supporting Respondent Aponte and his patron, Senator Smith, had been admitted to the Senate Chamber by Respondent Aponte prior to the chamber being opened to Petitioners.
- (34) Session proceeded, bills were passed, however Respondent Aponte has prevented access to the materials needed to annotate the Journal

and bill jackets so that the legislation may be advanced, and, as appropriate, chaptered into law.

- (35) Accordingly, Petitioners seek orders of this Court Prohibiting the Respondent Aponte from interfering or threatening Senate Staff person so as to interfere with Petitioners' ability to participate in legislative sessions; Mandating and compelling the Respondent Aponte to provide adequate staffing for Senate sessions, including but not limited to provision for a stenographic record thereof; Mandating and ordering that Respondent Aponte take no action to prevent Petitioner Winner from ascending to the Rostrum in the Senate Chamber; Compelling and mandating Respondent Aponte to implement the lawful orders and directives of the President Pro Tempore and Vice President Pro Tempore of the Senate pursuant to Sections 6 and 12 of the Legislative Law and the Rules of the New York State Senate, and that Respondent cease and desist from his activities designed to obstruct the Legislative process.

IN AND AS FOR A THIRD CAUSE OF ACTION

- (36) Petitioners respectfully repeat and reallege each and every allegation contained in the preceding paragraphs as if same were fully set forth herein.

(37) Upon information and belief, Respondent Aponte has exceeded his authority under the Legislative law and the Rules of the New York State Senate by commanding the Journal Clerk, official stenographer, Filing Clerks, the Sergants at Arms, and the various department heads and employces in the State Senate to disregard the orders of the President Pro Tempore and the Vice President Pro Tempore of the Senate.

(38) This has materially interfered with and hindered the ability of individual Senators, including Petitioners, to deliberate in legislative session and perform other duties including but not limited to the introduction of bills, the advancement and passage of bills, the hiring of staff, and communication with constituents.

(39) Senators Flanagan and Winner have bills on the calendar of the Senate which have been place on the “active list” of legislation to be considered in the Senate.

(40) Upon information and belief, the arbitrary, capricious, and ultravires actions (and/or refusals to act) by Respondent Aponte which interfere with Petitioners’ ability to carry out their duties as Senators and which interfere with and impede the legislative process, include, but are not limited to, his actions either directly or by order:

- a. Locking the doors of the Senate Chamber preventing Senators from entering the chamber to do business,

- b. Turning off the lights and public address system in the Senate Chamber during scheduled sessions,
- c. Turning off the television cameras in the chambers which, according to Senate rules, should be operational to provide for the broadcasting of sessions of the Senate,
- d. Locking the file drawers where “bill jackets” essential for moving legislation from one house of the legislature to the other, or to the Governor, are maintained, or alternatively, emptying the file drawers where these items are regularly stored, and secreting the bill jackets and other legislative materials.
- e. Closing the document room (which is the source of copies of all Senate bills) during regularly scheduled hours of operation.
- f. Preventing the staff from attending regular sessions of the Senate, particularly the official stenographer and the Journal Clerk’s staff,
- g. Ordering Senate staffers not to respond to the legitimate orders and requests of the elected leadership, Senators Espada and Skelos under the threat of immediate termination of their Senate employment,
- h. Instructing the Sergeants at Arms NOT to clear protesters from the Senate Lobby during session, which action physically

jeopardized the safety of Senators and resulted in an assault upon at least one Senate Staff member.

- i. Instructing the Sergeants at Arms NOT to allow Petitioner Winner to ascend to the podium and take the traditional seat of the presiding officer of the Senate,
- j. Interfering with the ability of Senators to access the services of the Legislative Bill Drafting Commission so as to impede the introduction of legislation,
- k. Preventing a stenographic record of the Senate Sessions of June 23, 2009 (Regular and Special Sessions) because he determined not to recognize the sessions as legitimate,

(41) Respondent Aponte has prohibited Respondent the Journal Clerk from appearing in the Senate Chamber and allowing the Journal Clerk's staff to perform their necessary functions during sessions of the Senate.

(42) Respondent Aponte, on certain dates, including June 10, 2009 caused the drawers at the front desk of the Senate Chamber to be locked. This prevented access to the "bill jackets" the official records of legislation.

(43) On June 15, 2009, and thereafter, certain drawers of the front desk of the Senate were found to be opened but empty, the bill jackets and related materials having been removed.

- (44) These materials are essential for the Petitioners to perform their legislative duties.
- (45) Petitioners respectfully request an order of this Court as against Respondent Aponte, mandating that he return all bill jackets and other legislative materials to the Senate Chamber.
- (46) Further, Petitioners request an order of this Court mandating that the New York State Senate make these materials available to Senators Espada and Skelos or their designee (Petitioner Winner) for use during legislative sessions, as well as make these materials available to the Petitioners and other Senators as needed.
- (47) Finally, Petitioners respectfully demand an order of this Court compelling Respondent Aponte to comply with the provisions of the Constitution, Legislative Law, and Rules of the New York State Senate.

IN AND AS FOR A FOURTH CAUSE OF ACTION

- (48) Petitioners respectfully repeat and reallege each and every allegation contained in the preceding paragraphs as if same were fully set forth herein.
- (49) There are unconfirmed reports of Respondent Aponte's intention to replace the Journal Clerk of the Senate with a political functionary who will carry out his directives to destroy and/or alter the Journal entries which establish the election of Senators Espada and Skelos as the leadership of the New York State Senate and the Senate Rules.

- (50) Upon information and belief, Respondent Aponte has already caused to be created an alternate stenographic record of the proceedings of June 8, 2009, which differs from the official stenographic record entered in the Senate Journal.
- (51) Upon information and belief, Respondent Aponte, to further his political goals, will attempt to alter and/or destroy the Journal of June 8, 2009, and the subsequent session dates. Petitioners truly fear such an act is possible.
- (52) Obviously, if Respondent Aponte planned such an act he would not be inclined to announce it to the public or the members of the Senate.
- (53) Such alteration and/or destruction of government documents would constitute criminal activity.
- (54) Plaintiffs truly fear that Aponte will attempt to enter into the Senate Journal a revisionist history of the events of June 8, 2009 as well as the several sessions held thereafter.
- (55) Further, Petitioners fear that the Respondent may make false or incorrect entries and notations in the Senate Journal as to the disposition of bills.
- (56) False or incorrect entries into the Senate Journal may make legislation subject to legal challenges, and materially impairs Petitioners' rights as Senators and citizens of this State.

- (57) There can be no harm to any party by way of a restraining order which prevents a criminal act.
- (58) Petitioners believe that an order of the Court is required to prevent the destruction and/or fraudulent alteration of these government documents.
- (59) Accordingly, Petitioners demand a Preliminary Injunction and Temporary Restraining order prohibiting the illegal entries upon, alteration, and/or destruction of Senate documents and the transmission and publication of such documents with such illegal, inaccurate or improper entries.

IN AND AS FOR A FIFTH CAUSE OF ACTION

- (60) Petitioners respectfully repeat and reallege each and every allegation contained in the preceding paragraphs as if same were fully set forth herein.
- (61) Rule V, Section 3 of the Rules of the New York State Senate Rules require the Secretary of the Senate to "... have journals, bills, calendars, messages and other documents printed and distributed in the manner required by law".
- (62) Further, Section 22, Legislative Law calls for the printing, distribution and safekeeping of the Journal of the Senate by the Journal Clerk and the Secretary of the Senate.

- (63) The Journal and Calendar of the Senate have not been published by the Secretary of the Senate since the Journal of June 8th was approved on June 11, 2009.
- (64) The Journal of June 8, 2008 was approved by the Senate at it's next Session, and is in final form and ready to be printed and distributed to the Senators.
- (65) Upon information and belief, the Respondent Aponte has prohibited the publication of these documents by the Respondent Journal Clerk, and has refused to allow them to be placed upon the Senators' desks in violation of the Senate Rules and the Law.
- (66) Accordingly, Petitioners seek a mandamus against the Respondents so that the Journal, calendars, and related documents, for June 8, 2009 and each of the ensuing session days (June 11, 15, 16, 17, 18, and 22, 2009) is printed and distributed to the Senators and the public.
- (67) Further, Petitioners seek a declaratory judgement against Respondents declaring their right and entitlement under the law and rules to copies of said documents from the Secretary and the Journal Clerk.
- (68) A temporary restraining order preventing Respondent from engaging in illegal activities has been requested due to the irreparable harm that will be created by false entries in Senate Records.
- (69) These pleadings are certified as non-frivolous by counsel pursuant to the Rules of the Courts of New York State.

(70) No prior application for the relief requested herein has been made to any Court.

(71) Expedited hearing of this matter is respectfully requested.

(72) Service upon the offices of the Secretary of the Senate has been requested so as to expedite this proceeding.

WHEREFORE, Petitioners respectfully request the signing of this Order to Show Cause, the granting of the TRO contained therein, and a final order of this Court:

1. Compelling the preservation and protection of the official records of the Senate,
2. Prohibiting the entry of false information in the Journal and other records of the Senate, and prohibiting the transmission or publication of Senate Records with false inaccurate or incorrect entries, and
3. Compelling and mandating that Respondent Aponte cease and desist his activities which interfere with the Petitioners' ability to perform their duties as members of the New York State Senate,
4. Compelling and mandating Respondent Aponte to keep the doors of the Senate Chamber open for the members thereof, and all others entitled to access to the Senate Chambers,
5. Compelling and mandating Respondent Aponte to accord the petitioners access to bill jackets and all other legislative materials necessary for them to perform their duties as Senators,
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7. Compelling and mandating the respondent Aponte to allow for the television and internet broadcasting of Senate Sessions in accordance with the Senate Rules,
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9. Mandating and compelling the Respondent Aponte to provide adequate staffing for Senate sessions, including but not limited to provision for a stenographic record thereof,
10. Mandating and ordering that Respondent Aponte take no action to prevent Petitioner Winner from ascending to the Rostrum in the Senate Chamber,

11. Compelling and mandating Respondent Aponte to implement the lawful orders and directives of the President Pro Tempore and Vice President Pro Tempore of the Senate pursuant to Sections 6 and 12 of the Legislative Law and the Rules of the New York State Senate, and to cease and desist from his activities designed to obstruct the Legislative process,
12. Compelling and mandating that Respondent Aponte provide to the members of the Senate true and accurate copies of the Journal, calendars and other legislative documents as required by law,

together with the relief requested in this petition, and such other further and different relief as the Court may deem to be just and proper in the premises.

DATED: June 23, 2009

John T. Casey, Jr., Esq.

47 2nd Street
Troy, New York 12180
518 274 4830

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COUNTY OF ALBANY

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