CENTER *for* JUDICIAL ACCOUNTABILITY, INC.*

Post Office Box 3002
Southampton, New York 11969

Tel. (631) 377-3583

E-Mail: cja@judgewatch.org
Website: www.judgewatch.org

Elena Ruth Sassower, Director & Founder
Doris L. Sassower, President & Founder

Eli Vigliano, Special Counsel
Harold Somer, Board Chairman

October 27, 2011

HOLDING GOVERNMENT ACCOUNTABLE:

"NO PAY RAISES FOR NYS JUDGES WHO CORRUPT JUSTICE – THE MONEY BELONGS TO THE VICTIMS!"

OPPOSITION REPORT TO THE "FINAL REPORT OF THE SPECIAL COMMISSION ON JUDICIAL COMPENSATION"

PRESENTED TO:

Andrew M. Cuomo, Governor of the State of New York
Dean G. Skelos, Temporary President of the New York State Senate
Sheldon Silver, Speaker of the New York State Assembly
Jonathan Lippman, Chief Judge of the State of New York

IN SUPPORT OF:

(1) Legislation Voiding the Commission's Judicial Pay Recommendations;

(2) Repeal of the Statute Creating the Commission;

(3) Referral of the Commissioners to Criminal Authorities for Prosecution;

(4) Appointment of a Special Prosecutor, Task Force, and/or Inspector General 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

Written by: Elena Ruth Sassower
Elena Ruth Sassower, Director

---

* **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.

"The appellate, administrative, disciplinary, and removal provisions of Article VI are safeguards whose integrity – or lack thereof – are not just 'appropriate factors', but constitutional ones. Absent findings that these integrity safeguards are functioning and not corrupted, the Commission cannot constitutionally recommend raising judicial pay.[fn4]"

> "[fn4] Such safeguards are properly viewed as comparable to the 'good Behaviour' provision of the U.S. Constitution, immediately preceding – and in the same sentence as – the prohibition against diminishment of federal judicial compensation [U.S. Constitution, Article III, §1]."

(concluding paragraph of analysis of Article VI of the New York State Constitution, based on the Court of Appeals' February 23, 2010 decision in the judicial compensation lawsuits, presented by the Center for Judicial Accountability's August 8, 2011 letter to the Commission on Judicial Compensation (at pp. 3-4) and August 23, 2011 letter to Chief Administrative Judge Ann Pfau (pp. 2-4) – whose accuracy is uncontested by them and other judicial pay raise advocates.)

TABLE OF CONTENTS

TO: Appointing Authorities of the Special Commission on Judicial Compensation
Andrew M. Cuomo, Governor of the State of New York
Dean G. Skelos, Temporary President of the New York State Senate
Sheldon Silver, Speaker of the New York State Assembly
Jonathan Lippman, Chief Judge of the State of New York

INTRODUCTION

On August 29, 2011, pursuant to statute, the Special Commission on Judicial Compensation presented you, the appointing authorities of its Commissioners and the highest constitutional officers of our state's three government branches, with a Report in support of its recommendations to raise judicial salaries 27% over the next three years. Those recommendations have the force of law unless overridden by the Legislature by April 1, 2012.

This Opposition Report calls upon you to initiate a legislative override. As hereinafter shown, the Commission's skimpy one-sided Report is statutorily non-conforming, constitutionally violative, and the product of a tribunal disqualified for interest and actual bias.

The 27% judicial pay raise recommended by the Commission's four-member majority Report, strategically made to appear modest by the Dissenting Statements of three Commissioners for more immediate and larger pay raises, is unsupported by any finding that current "pay levels and non-salary benefits" are inadequate. Such pay raise recommendations are frauds upon you and the public, achieved by obliterating the existence of citizen opposition to any judicial pay raises, championed by our non-partisan, non-profit citizens' organization, Center for Judicial Accountability, Inc. (CJA), and all the facts, law, and legal argument presented in support.

Neither the Report nor Dissenting Statements make any findings as to that opposition – reflective of the Commissioners' knowledge that findings would expose their judicial pay recommendations as unsupported by relevant evidence and unconstitutional by the very February 23, 2010 Court of Appeals decision in the judicial compensation lawsuits that gave rise to the statute creating the Commission.

Because of the Commissioners' fraud, including their cover-up of the fraudulence of the February 23, 2010 Court of Appeals decision as to the purported separation of powers violation by the Legislature and Governor in "linking" judicial pay raises with legislative pay raises (Exhibit E-1, pp. 3-10)[1], this Opposition Report also calls upon you to initiate legislation to repeal the Commission statute on grounds of fraud and because it is deleterious to the public and unconstitutional, *as written and applied*.[2]

---

[1] All exhibits – as likewise this Opposition Report – are posted on CJA's website, www.judgewatch.org, accessible *via* the top panel "Latest News" and left side panel "Judicial Compensation – State –NY". For your convenience, the exhibits are also furnished in an accompanying Compendium of Exhibits.

[2] The unconstitutional application of the Commission statute is hereinafter particularized. As to whether, without constitutional amendment, the legislative and executive branches can, by statute, delegate judicial compensation to an appointed commission, whose recommendations do not require affirmative

This is not the first time that CJA is communicating with you about the Commission. By letters dated May 23, 2011, June 23, 2011, and June 30, 2011 (Exhibits A-1, B-2, C-3), we notified you that the Commission was "inoperative and inaccessible to the public" during the first half of its statutorily-fixed 150-day existence and, additionally, that its Chairman, William C. Thompson, Jr., was disqualified for interest, unless the Commission disagreed with the proposition that systemic corruption in New York's judiciary, encompassing supervisory and appellate levels and the Commission on Judicial Conduct, disentitled it to any pay raises.

The Commission has never disagreed with that proposition – and this Opposition Report picks up where our May 23rd, June 23rd, and June 30th letters left off. It provides an analysis of the Commission's Report and simultaneously summarizes the official misconduct and fraud of Chairman Thompson and the six other Commissioners in the second half of the Commission's 150 days.

It so doing, this Opposition Report identifies the substantiating evidentiary proof:

> (1) CJA's continuum of further correspondence with the Commissioners, dated July 12, 2011 (Exhibit D-1), July 13, 2011 (Exhibit D-2), July 19, 2011 (Exhibit E-1), July 21, 2011 (Exhibit D-4), August 1, 2011 (Exhibit G), August 5, 2011 (Exhibit H), August 8, 2011 (Exhibit I), August 17, 2011 (Exhibits J-1, J-2), August 19, 2011 (Exhibit J-6), August 23, 2011 (Exhibit K-1), August 26, 2011 (Exhibit L), and September 2, 2011 (Exhibit M);
>
> (2) the video of my testimony at the Commission's one and only public hearing – on July 20, 2011 – and the documentary evidence I furnished in support, most importantly, the October 15, 2002 and October 24, 2002 final two motions before the Court of Appeals in CJA's second public interest lawsuit against the Commission on Judicial Conduct, as well as the testimony and documentary evidence of other citizen opponents to judicial pay raises;[3] and
>
> (3) the videos of the Commission's meetings on July 11, 2011, August 8, 2011, and August 26, 2011.[4]

---

legislative and executive action to become law, such will be separately presented.

[3] The video of the Commission's July 20th hearing was posted on the Commission's website shortly after CJA's July 21st letter (Exhibit D-4). However, it has been inaccessible since August 26th, a fact pointed out by CJA's September 2nd letter (Exhibit M).

As the Commission did not have a stenographer present at the hearing and has not had the video stenographically transcribed, I transcribed my own testimony from the video. It is the first enclosure to CJA's August 8th letter (Exhibit I).

[4] Although the videos of the Commission's August 8th and August 26th meetings are posted on the Commission's website, there is no posted video of the July 11th meeting (Exhibit M).

Such evidentiary proof would *easily* support criminal prosecution of Chairman Thompson and the Commissioners – and their convictions for official misconduct and corruption. Absent legislative override, their betrayal of their duties will cost the People of this State hundreds of millions of taxpayer dollars in unwarranted judicial pay raises and statutorily-linked pay raises for district attorneys[5], while simultaneously robbing them of the means provided by New York's Constitution for securing judicial accountability.[6] Consequently, this Opposition Report additionally calls upon you to discharge your own official duties by referring Chairman Thompson and the Commissioners to criminal authorities.

Finally, as any increase in judicial compensation is unconstitutional absent predicate findings that our state judges are discharging their constitutional duties to render fair and impartial justice and that mechanisms are in place and functioning to remove corrupt judges – which neither the Report nor Dissenting Statements make – this Opposition Report calls upon you to secure official investigation of the documentary and testimonial evidence of systemic judicial corruption presented to the Commission, which it unlawfully and unconstitutionally ignored, without findings, so as to recommend judicial pay raises.

Such official investigation, be it by the Governor's appointment of a special prosecutor, the Legislature's appointment of a task force, or the Chief Judge's appointment of an inspector general, encompasses the evidence the public supplied and proffered to the Senate Judiciary Committee in connection with its 2009 hearings on the Commission on Judicial Conduct and the court-controlled attorney disciplinary system.[7] CJA's May 23rd letter to you stated (Exhibit A-1, pp. 3-4) that this

---

[5] See "*Raises for Justices Mean Higher Pay For Some D.A.s*" by John Caher, New York Law Journal, September 1, 2011, quoted, in pertinent part, at p. 24, *infra*.

[6] *See* constitutional analysis in CJA's August 8th letter to the Commission (Exhibit I, at pp. 3-4) and in CJA's August 23rd letter to Chief Administrative Judge Ann Pfau (Exhibit K-1, at pp. 1-4), whose accuracy is uncontested by the Commission, Chief Administrative Judge Pfau, the judicial-legal establishment, and other advocates of judicial pay raises who testified at the Commission's July 20th hearing (Exhibits J-2, J-3, J-4, J-5, J-6, J-7, K-2).

[7] These Senate Judiciary Committee hearings, held on June 8, 2009 and September 24, 2009, were each videoed and stenographically recorded by the Committee. CJA's website posts both the videos and stenographic transcripts, accessible *via* the top panel "Latest News" and left side panel "Judicial Discipline-State-NY".

Most immediately germane to the judicial compensation issue is the testimony of Regina Felton, Esq. at the September 24, 2009 hearing, as the judge against whom she filed numerous judicial misconduct complaints with the Commission on Judicial Conduct, all dismissed, was a co-petitioner in one of the judicial compensation lawsuits.

Other important testimony involving the Commission on Judicial Conduct's dismissal of facially-meritorious, documented judicial misconduct complaints is that of James A. Montagnino, Esq. (at the June 8, 2009 hearing), Nora Drew Renzulli, Esq. (at the September 24, 2009 hearing), Pamela Carvel (at the June 8, 2009 hearing), and Catherine Wilson (at the September 24, 2009 hearing).

evidence disentitled the state judiciary to any increased pay and that there had been "No Investigation, No Findings, and No Committee Report" with respect thereto. It called upon you to appoint a special prosecutor, task force, and/or inspector general to investigate that evidence in the event the Senate Judiciary Committee did not investigate and report on it, as was its duty to do. Although the May 23rd letter was sent to the Senate Judiciary Committee's chairman, Senator John Bonacic, its ranking member, Senator Ruth Hassell-Thompson, its 21 other members, and to its former chairman, Senator John Sampson, who, as the Senate's Minority Leader, is an *ex officio* Committee member, expressly so they could identify for you, for the Commission on Judicial Compensation, and for the public what they intended to do with the information and documentation the public supplied and proffered at the Senate Judiciary Committee's June 8, 2009 and September 24, 2009 hearings – and for the aborted December 16, 2009 hearing – we have received no response (Exhibit A-2). Nor have we received any response from them to CJA's June 23rd and June 30th letters, which we also sent them (Exhibits B-2, C-3). Have you?

The Fraudulence of Chairman Thompson's August 29, 2011 Transmitting Letter

The fraudulence of the Commission's August 29, 2011 Report begins with Chairman Thompson's nine-sentence August 29, 2011 letter, attached to the Report, transmitting it to you. Most significant are the material deceits of the three sentences of its second paragraph.

The first of these sentences is:

> "The Commission has considered various factors in setting what we believe are appropriate judicial compensation levels in light of the State's current fiscal situation." (Report, at p. i, underlining added).

The phraseology "various factors" appears in the Commission's Report as "a variety of factors" in the section entitled "Statutory Mandate":

> "Pursuant to its statutory authority, the Commission must take a variety of factors into consideration in making its final recommendations, *including, but not limited to...*" (Report, at p. 4, underlining and italics added).

Neither "various factors" nor "a variety of factors" accurately reflect the statute. The statutory language is:

> "In discharging its responsibilities...the commission shall take into account all appropriate factors *including, but not limited to...*" (underlining and italics added).

This statutory language requires the Commission to affirmatively determine whether there are factors *other than* the six listed by the statute which are "appropriate" – since, obviously, unless the Commission considers "all appropriate factors", its findings and recommendations cannot be "appropriate". By contrast, neither "various factors" nor "a variety of factors" impose an obligation

on the Commission to consider any "factors" other than the six the statute lists.

The Report does not purport that the Commission has considered "all appropriate factors" – making it non-conforming with the statute on its face. This reflects the Commission's willful failure to consider "all appropriate factors" in fact, as documentarily established by CJA's August 8th letter to the Commission (Exhibit I, pp. 3-4), demonstrating – without contradiction – that systemic judicial corruption embracing supervisory and appellate levels and the Commission on Judicial Conduct is not only an "appropriate factor", but one of constitutional magnitude.

The second sentence of Chairman Thompson's second paragraph is:

> "The Commission received and considered many comments and letters, many of which are attached to and referenced in this report." (Report, at p. i, underlining added).

This is false. The Report does not attach or reference "many" of the "comments and letters" the Commission received. The Commission's Report appends only five attachments. The first is the statute creating the Commission, to which, as herein shown, it is not in compliance, *inter alia*, by the Commissioners' willful failure to consider "all appropriate factors". The other four attachments, in the order of attachment, are:

- the 38-page submission of the Office of Court Administration (OCA);
- the OCA's 629-page Supplemental Appendix;
- the 269-page submission of the Coalition of New York State Judicial Associations; and
- the 5-page written testimony of Robert Megna, Director of the New York State Division of the Budget.

These are the only specific comments and submissions "referenced" by the Report – and this only in footnotes (##4, 6, 7, 12, 14, 16, 17).

Since the Commission's website posts all four of these attached submissions, there was no purpose to their being annexed, other than to give an appearance of bulk and an illusion of weightiness to a Report of barely eight pages, with its generous margins, blank spaces, and charts, as likewise to the three-and-a-half pages of Dissenting Statements, spread out on five pages. This, in addition to affording implicit endorsement to the OCA and Judicial Coalition submissions, whose material fraudulence was demonstrated by CJA's letters and submissions to the Commission – to which the Report does not refer or annex.

As for the "comments and letters" of other citizen opponent to judicial pay raises, they, too, are neither referred-to nor annexed by the Report.[8]

---

[8] The Commission's website posts "comments and letters" from the following citizen opponents to pay raises: Catherine Wilson, Daniela Fahey, Ellen Chorba, Judith Herskowitz, Joan Teresa Kloth-Zanard, Kate

The third sentence of Chairman Thompson's second paragraph is also false:

> "**ALL** of the comments and submissions that have been received by the Commission may be found on the Commission's website: www.judicialcompensation.ny.gov" (Report, at p. i, bold and capitalization added),

which is replicated by the Report's footnote 13:

> "See Commission website for **ALL** submissions received: www.judicialcompensation.ny.gov." (Report, at p. 7, bold and capitalization added).

In fact, the Commission's website does not post "ALL of the comments and submissions" received. This was pointed out by CJA's September 2nd letter (Exhibit M), to which there was the most gradual supplementing of the website thereafter. Among CJA's comments and submissions that are still not posted are all CJA's correspondence received by the Commissioners as indicated recipients. Among these:

- CJA's July 19, 2011 letter to Attorney General Eric Schneiderman (Exhibit E-1), particularizing the fraudulence of the judiciary's judicial compensation lawsuits and of the Court of Appeals' February 23, 2010 decision underlying the statute creating the Commission[9] – to which I directly referred in my testimony at the July 20th hearing;

Johnson, Kevin Patrick Brady, Raymond Zuppa, Esq., Terrence Finnan, William Galison. Of these, the latter three testified at the Commission's July 20th hearing. Three other citizens also testified on July 20th against judicial pay raises, but did not furnish written comments: Jay Franklin, Susan B. Sattenbrino, Esq., and Henny Kupferstein. At least one citizen opponent to judicial pay raises submitted a letter to the Commission that is not posted on its website, Ike Aruti, Esq.

[9] This July 19th letter (Exhibit E-1) was also a FOIL request to the Attorney General for the record of the judicial compensation lawsuits. To the limited extent it has been furnished (Exhibit E-4), such further confirms the fraudulence of the judicial compensation lawsuits and of the Court of Appeals' February 23, 2010 decision. Indeed, nothing better demonstrates that there is NO separation of powers violation in "linking" judicial salaries to legislative salaries than the article the judicial plaintiffs themselves appended as Exhibit 18 to their April 3, 2008 summary judgment motion in *Larabee, et al. v. Governor, Senate, Assembly, and State of New York*. The article, "*How to Pay the Piper: It's Time to Call Different Tunes for Congressional and Judicial Salaries*" (Russell R. Wheeler and Michael S. Greve, Governance Studies, April 2007, pp. 1-18), describes, on the federal level, the practice and statutory codification of "linkage". The following is a pertinent extract:

> "Linkage in the federal legislative-executive-judicial context today means the same salary for district judges, members of Congress, and deputy cabinet secretaries and agency heads (hereinafter EL-IIs, denoting Level II of the Executive Schedule[fn15]). ...
>
> The only explicit statutory mandate to link high-level salaries appears in the 1989 Ethics Reform Act... it told the quadrennial commission that its pay recommendations 'for a Senator, a Member of the House of Representatives,...a judge of a district court..., a judge of the Court of International Trade, and each [EL-II] office or position...shall be equal'[fn19] – as

- CJA's August 5, 2011 letter to New York Times reporter William Glaberson (Exhibit H), exposing the deceit that judges are leaving the bench due to insufficient pay and particularizing a succession of facts establishing that there is no judicial pay "crisis" or separation of powers violation;

- CJA's August 23, 2011 and August 26, 2011 letters to Chief Administrative Judge Ann Pfau (Exhibits K-1 and L), particularizing the OCA's deceits as to the constitutional issues pertaining to judicial compensation – beginning with its deceit as to what we "know" from the Court of Appeals' February 23, 2010 decision.

The Commission's website also does not post most of the documentation I furnished at the July 20th hearing:

- CJA's October 15, 2002 and October 24, 2002 motions at the Court of Appeals in our public interest lawsuit against the Commission on Judicial Conduct, establishing that in three separate lawsuits in which the Commission was sued for corruption, it was the beneficiary of seven fraudulent judicial decisions, without which it would not have survived;[10]

- CJA's draft statement for the Senate Judiciary Committee's (aborted) December 16, 2009 hearing on the Commission on Judicial Conduct and court-controlled attorney disciplinary system, summarizing the documentary evidence establishing their corruption (Exhibit F-2);[11] and

---

they were in 1989. The Act also mandates equal salary recommendations for the Chief Justice, Vice President, Speaker, and equal salary recommendations for the majority and minority leaders and cabinet secretaries.[fn20]" (at p. 3, underlining added) [Exhibit E-4: FOIL request #110450 – at 001625]

The article additionally reveals no preclusion to linkage in any of the states – including those with salary-setting commissions (at p. 9).

The article appears in the Record on Appeal in *Larabee, et al. v. Governor, Senate, Assembly, and State of New York*, filed in the Court of Appeals by then Attorney General Andrew Cuomo, representing the Senate and Assembly (Vol. II, pp. 485-502). [Exhibit E-4: FOIL request #110450 – at 001623 - 40]. It is also accessible at:
http://www.brookings.edu/~/media/Files/rc/papers/2007/04governance_wheeler/04governance_wheeler.pdf.

[10] These final two motions and the substantiating case record are posted on CJA's website, accessible *via* the left side panels "Test Cases-State-NY (*Commission*)" and "Judicial Discipline-State-NY".

[11] CJA's webpage of the Commission's July 20, 2011 hearing, accessible *via* the menu of judicial compensation webpages for New York, posts and links to the documentary evidence particularized by the December 16, 2009 draft statement.

- Doris Sassower's March 6, 2007 written statement in opposition to Chief Judge Judith Kaye's reappointment to the Court of Appeals, particularizing her complicity in the corruption of the court-controlled attorney discipline system and its retaliatory use against a judicial whistle-blowing attorney (Exhibit F-4).[12]

Several of CJA's letters to the Commission, as well as enclosures to posted letters,[13] are also not posted. These included, until mid-September, CJA's August 17, 2011 letter (Exhibit J-1)[14] entitled:

> "Protecting the People of this State from Fraud: The Commission on Judicial Compensation's Duty to Identify the Case Presented by Opponents of ANY Judicial Pay Raises & to Make Findings with Respect Thereto, in Discharge of its Statutory Responsibilities" (August 17, 2011 letter, underlining in original title).

CJA's August 17, 2011 Letter to the Commission

CJA's August 17th letter (Exhibit J-1) is particularly significant as it anticipated what the Commissioners would find it necessary to do ***IF*** they were to recommend judicial pay increases – and which their Report and Dissenting Statements have done.

It opened by objecting to Commissioner Fiske's statement at the Commission's August 8th meeting that judicial pay raise advocates had "made a compelling case for an immediate increase" – which he did without mentioning the case presented by citizen opponents to any pay increases, whose very existence he and the other Commissioners ignored, as if it did not exist, making it appear as if the only opposition was on financial grounds by New York State Budget Director Megna. The August 17th letter stated:

---

[12] The Commission's website posts my companion March 6, 2007 statement in opposition to Chief Judge Kaye's reappointment based on her role in perpetuating the corruption of the Commission on Judicial Conduct (Exhibit F-3) as "Oral Testimony".

Posted as "Written Testimony" is the handout I provided the Commissioners before beginning my remarks, entitled "NO PAY RAISES FOR NYS JUDGES WHO CORRUPT JUSTICE – THE MONEY BELONGS TO THE VICTIMS!" (Exhibit F-1).

[13] None of the enclosures to CJA's August 8th letter (Exhibit I) are posted on the Commission's website, these being: (1) my transcription of my testimony at the Commission's July 20th hearing; (2) Comptroller Ed Reagan's 1989 report "*Commission on Judicial Conduct – Not Accountable to the Public: Resolving Charges Against Judges is Cloaked in Secrecy*", with his press release "*Commission on Judicial Conduct Needs Oversight*"; and (3) my transcription of my questions at the December 11, 2002 forum on the Commission on Judicial Conduct, co-sponsored by NYS Bar Association & Fund for Modern Courts.

[14] This omission was explicitly identified by CJA's September 2nd letter (Exhibit M), which transmitted a further copy, with its enclosures attached to the same pdf.

> "It is a fraud on the People of this State for any Commissioner to purport that advocates of judicial pay raises 'have made a compelling case' *without* confronting the opposition case against ANY judicial pay raises spearheaded by the non-partisan, non-profit citizens' organization, Center for Judicial Accountability, Inc. (CJA)...
>
> The first requirement of the Commission's 'report to the governor, the legislature and the chief judge', mandated by the statute creating the Commission, is for 'findings' [§1(h)]. Does the Commission plan to make no findings as to CJA's opposition case, including our assertion that advocates of judicial pay raises have inundated the Commission with fraud?" (August 17, 2011 letter, at p. 2, underlining, italics, and capitalization in the original).

After demonstrating that the Commission was adhering to frauds put forward by advocates of judicial pay raises that CJA had already demonstrated as such – as, for instance, that current judicial compensation was deterring qualified lawyers from becoming judges – the August 17th letter (Exhibit J-1) concluded by reiterating the significance of CJA's prior August 8th letter to the Commissioners (Exhibit I), pointing out that its title:

> "Threshold Issues Barring Commission Consideration of Pay Raises for Judges:
> (1) Chairman Thompson's Disqualification for Interest, as to which there has been No Determination;
> (2) Systemic Corruption in New York's Judiciary, Embracing the Commission on Judicial Conduct, as to which there has been No Determination; &
> (3) The Fraud & Lack of Evidence Put Forward by Advocates of Judicial Pay Raises" (August 8, 2011 letter, underlining in original title)

should have appended the words "as to which there has been No Determination" to the third threshold issue of fraud – paralleling the inclusion of those words as to the first and second threshold issues. This emendation was in the context of the letter's assertion to the Commissioners:

> "***IF*** you believe that the Commission can lawfully ignore CJA's August 8th letter without its members incurring liability for official misconduct and criminal fraud and without furnishing grounds for repeal of the statute creating the Commission, over and beyond the voiding of *any* Commission recommendation to raise judicial pay, you should secure an advisory opinion from the judges and lawyers who have made the supposedly 'compelling case' for judicial pay raises. Indeed, CJA calls upon you to seek their opinion – and to include it in your upcoming 'report to the governor, the legislature and the chief judge'." (CJA's August 17, 2011 letter, at p. 5, bold, italics, and underlining in the original).

The Commission's Report completely ignores CJA's August 8th letter – with no advisory opinion from a single judge or lawyer justifying what it has done.

CJA's August 8, 2011 letter to the Commission

Each of the three threshold issues particularized by CJA's August 8th letter (Exhibit I) are now grounds for all the relief this Opposition Report seeks: (1) overriding the Commission's recommendations; (2) repeal of the Commission statute; (3) criminal referrals of the Commissioners; (4) appointment of a special prosecutor, task force, and/or inspector general to investigate the evidence of systemic judicial corruption which the Commission unlawfully and unconstitutionally ignored, without findings, in order to recommend judicial pay raises.

As to the First Threshold Issue: Chairman Thompson's Disqualifying Self-Interest:

One does not have to be a lawyer – as each of you is – to know that disqualification is a THRESHOLD issue – and that the Commission could not lawfully proceed, absent a ruling by the Commission as to Chairman Thompson's disqualifying self-interest, particularized by our June 23rd letter (Exhibit B-1).

By July 20th, with no response from the Commission to that issue, I publicly raised it at the Commission's one and only hearing, in Albany. The video establishes what took place.[15] The Commission cut me off and allowed Chairman Thompson to cut me off, without any ruling, over my rightful protest. CJA's August 8th letter (Exhibit I) enclosed, as its first attachment, my transcription of my videoed appearance at the hearing, stating:

> "If the Commission – three of whose members are lawyers – believes that without ruling on Chairman Thompson's disqualification for interest, it can lawfully proceed to discuss 'specific raise levels for judges', it should state this publicly, with legal authority, disclosing the specifics of the disqualification detailed by CJA's June 23rd letter." (CJA's August 8, 2011 letter, at p. 2, underlining in the original).

The Commission's Report conceals the disqualification issue, totally.

As to the Second Threshold Issue: Systemic Judicial Corruption Constituting an "Appropriate Factor" for the Commission's Consideration, Having Constitutional Magnitude:

The August 8th letter (Exhibit I) presented the following constitutional analysis based on the Court of Appeals' February 23, 2010 decision:

> "As set forth by CJA's June 23rd letter, 'corruption and lawlessness of New York's state judiciary, infesting its supervisory and appellate levels', disentitles it to any boost in judicial compensation.

---

[15] CJA's September 2nd letter (Exhibit M) apprised the Commissioners that although its website posted a link for the video of its July 20th hearing, it was not, in fact, accessible. It is still not accessible.

Such corruption and lawlessness are not only 'appropriate factors" for your consideration under the statute requiring you to consider 'all appropriate factors', but your disregard of these factors would be unconstitutional pursuant to the very February 23, 2010 Court of Appeals decision in the judicial compensation cases that underlies the Commission's creation.

In that decision – whose fraudulence was particularized by CJA's July 19, 2011 letter to which I referred at the hearing – the Court of Appeals searched the New York State Constitution for a textual basis to reject the 'linkage' of judicial salaries with legislative and executive salaries and found 'significant' that although the legislature is vested with the power to raise salaries, the provisions relating to the compensation of judicial, legislative, and executive officers are not set forth in the legislative article of the Constitution, but within the separate articles for each branch. The Court held that it is within the separate judiciary article that determination is to be made as to whether, on 'its own merit', New York State judges deserve an increase in compensation.

Article VI is the judiciary article of the New York State Constitution and it provides not only appellate, administrative, and disciplinary safeguards for ensuring judicial integrity, but express procedures for removing unfit judges. Indeed, Article VI specifies three means for removing judges – the Commission on Judicial Conduct [§22], concurrent resolution by the legislature [§23], and impeachment [§24] – and these in the three sections that IMMEDIATELY precede §25(a) to which judges point in clamoring that inflation has unconstitutionally diminished their compensation:

> 'The compensation of a judge...shall not be diminished during the term of office for which he was elected or appointed.'

Of these three means for judicial removal provided by Article VI, concurrent legislative resolution and judicial impeachment exist in name only – having given way to the Commission on Judicial Conduct, as to which, more than 22 years ago, the New York State Comptroller issued a report entitled '*Not Accountable to the Public*', calling for legislation to permit independent auditing of its handling of judicial misconduct complaints.[fn2] Such never happened – and 20 years later, in 2009, at Senate Judiciary Committee hearings on the Commission on Judicial Conduct – the first legislative hearings on the Commission since 1987 – its corruption was attested

---

"[fn2] The Comptroller's 1989 Report and accompanying December 7, 1989 press release, '*Commission on Judicial Conduct Needs Oversight*', are posted on CJA's website, www.judgewatch.org, most readily accessible *via* the sidebar panel 'Library'. Because of its importance – and so that they may be physically part of this Commission's record – a copy of each is being furnished with this letter."

to by two dozen New Yorkers who provided and proffered supporting documentation – as to which, to date, there has been NO investigation, NO findings, and NO committee report.

It was CJA's position, presented by our May 23rd and June 23rd letters and reiterated by my July 20th testimony that:

> 'There must be NO increase in judicial compensation UNTIL there is an official investigation of the testimony and documentation that the public provided and proffered to the Senate Judiciary Committee in connection with its 2009 hearings and UNTIL there is a publicly-rendered report with factual findings with respect thereto... [and] until mechanisms are in place and functioning to remove judges who deliberately pervert the rule of law and any semblance of justice and whose decisions are nothing short of 'judicial perjuries', being knowingly false and fabricated.' (May 23, 2011 letter, capitalization in the original).[fn3]

Our position now is stronger. The appellate, administrative, disciplinary, and removal provisions of Article VI are safeguards whose integrity – or lack thereof – are not just 'appropriate factors', but constitutional ones. Absent findings that these integrity safeguards are functioning and not corrupted, the Commission cannot constitutionally recommend raising judicial pay.[fn4]" (CJA's August 8, 2011 letter, at pp. 2-4, underlining and capitalization in the original).

This constitutional analysis was quoted, *verbatim*, in CJA's August 23, 2011 letter to Chief Administrative Judge Ann Pfau (Exhibit K-1) – to which the Commissioners were indicated recipients. Entitled:

> "Ensuring that the Commission on Judicial Compensation is Not Led into Constitutional Error: Clarification of the Office of Court Administration's 'Memorandum discussing constitutional considerations in establishing pay levels' –

"[fn3] The correctness of this position may be seen from the federal statute for the Citizens' Commission on Public Service and Compensation, requiring that its review of compensation levels of federal judges, the Vice-President, Senators, Representatives, and others include 'any public policy issues involved in maintaining appropriate ethical standards' – with 'findings or recommendations' pertaining thereto 'included by the Commission as part of its report to the President' [2 U.S.C. §363]."

"[fn4] Such safeguards are properly viewed as comparable to the 'good Behaviour' provision of the U.S. Constitution, immediately preceding – and in the same sentence – as the prohibition against diminishment of federal judicial compensation [U.S. Constitution, Article III, §1]."

and the Substantiating Evidence" (underlining in the original title),

the letter highlighted the OCA's obligation – and that of judicial pay raise advocates – to confront the constitutional analysis and evidence of systemic judicial corruption presented by judicial pay raise opponents.

Neither the OCA nor judicial pay raise advocates have done so (Exhibits J-2, J-3, J-4, J-5, J-6, J-7, K-2). Nor has the Commission, whose Report, in addition to concealing CJA's August 8th letter (Exhibit I), conceals the statutory language requiring the Commission to consider "all appropriate factors".

The constitutional analysis and evidence presented by CJA and other judicial pay opponents of systemic corruption in New York's judiciary, encompassing integrity safeguards and judicial removal provisions, is entirely uncontested.

As to the Third Threshold Issue: The Fraud & Lack of Evidence Put Forward by Judicial Pay Raise Advocates

CJA's August 8th letter (Exhibit I) reiterated what I had stated at the July 20th hearing:

> "this Commission has been inundated by fraud from the advocates of judicial pay raises, who have furnished a combination of no evidence and irrelevant and misleading evidence to support their claims. From my list of '20 specific frauds', to which I referred, I sufficed to identify only one: their claim that we have 'a quality, excellent, top-rate judiciary with judges discharging their constitutional duties.
>
> The documentary evidence I left for you, on the table, at the July 20th hearing – the two final motions in CJA's lawsuit against the Commission on Judicial Conduct[fn5] – puts the lie to the supposed 'excellence' and 'quality' of a score of judges whose fraudulent judicial decisions, protecting the Commission on Judicial Conduct, are therein demonstrated, covering up the corruption of scores of other judges – William Thompson, Sr., pivotally among them – as documented in underlying case records.
>
> Unless you are intending to recommend judicial pay raises without predicate findings, based on evidence, that our New York State judges are doing their jobs, in compliance with the Constitution and the Rule of Law, and that safeguarding mechanisms are functioning, your obligation to the People of this State is to confront this rebutting evidence. As I reasonably suggested, *twice*, as you curtailed and concluded my presentation, you should call upon the advocates of judicial pay raises to assist you with fact-finding. ..." (CJA's August 8, 2011 letter, at pp. 4-5, underlining and italics in the original).

The Commission's Report contains NO "predicate findings, based on evidence, that our New York State judges are "doing their jobs in compliance with the Constitution and the Rule of Law, and that safeguarding mechanisms are functioning". Nor does the Report contain predicate findings, based on evidence, as to other key pretenses of advocates of judicial pay raises about which it gives the illusion of findings, while simultaneously concealing the litany of relevant facts and evidence highlighted by CJA's letters. Among these:

(1) that New York's state-paid judges are not civil-service government employees, but "constitutional officers" of New York's judicial branch;

(2) that the salaries of all New York's "constitutional officers" have remained unchanged since 1999 – the Governor, Lieutenant Governor, Attorney General, and Comptroller, who are the "constitutional officers" of our executive branch – and the 62 Senators and 150 Assembly members who are the "constitutional officers" of our legislative branch;

(3) that the compensation of New York's judicial "constitutional officers" is comparable, if not superior, to the compensation of New York's executive and legislative "constitutional officers", with the judges enjoying incomparably superior job security;

(4) that New York's executive and legislative "constitutional officers" have also suffered the ravages of inflation, could also be earning exponentially more in the private sector; and also are earning less than some of their government-paid staff and the government employees reporting to them;

(5) that as a co-equal branch, the same standards should attach to pay increases for judges as to legislators and executive branch officials – *to wit*, deficiencies in their job performance and governance do not merit pay raises;

(6) that outside the metropolitan New York City area, salaries drop, often markedly – as reflected by the county-by-county statistics of what New York lawyers earn – and there is no basis for judges in most of New York's 62 counties to be complaining as if they have suffered metropolitan New York City cost-of-living increases, when they have not, or to receive higher salaries, as if they have;[19]

(7) that New York judges enjoy significant "non-salary benefits"[20];

---

[19] CJA's August 5th and August 26th letters (Exhibits H, L) furnished the Commission with 21 pages of county-by-county statistics as to what New York lawyers earn, taken from the website of the American Bar Association's magazine, ABAJournal.com. These are annexed in the Compendium of Exhibits at Exhibit L.

[20] As to the non-salary benefits, see, *inter alia*, the description quoted at footnote 2 of CJA's August 1, 2011 letter (Exhibit G), including, the following by Stephen Kruger, Esq.:

(8) that throughout the past 12 years of "stagnant" pay, New York judges have overwhelmingly sought re-election and re-appointment upon expiration of their terms – and there is no shortage of qualified lawyers eager to fill vacancies;

(9) that the median household income of New York's 19+ million people is $45,343[21] – less than one-third the salary of New York Supreme Court justices.

This is demonstrated by CJA's analysis of the Report, herein furnished.

ANALYSIS OF THE COMMISSION'S REPORT

The Report begins with a two-page section entitled **"Members of the Special Commission on Judicial Compensation" (pp. 1-2)**. These consist of bios concealing that the Commissioners were appointed for political reasons. Indeed, the bios eliminate any information that might give rise to questions as to their impartiality – beginning with which appointing authority named them to the Commission.

Chairman William C. Thompson, Jr. is listed first, without identification that he is a democrat, appointed by democratic Governor Andrew Cuomo (who also named him as the Commission's Chair). Absent too is that he bears the name of his father, former Appellate Division, Second Department Justice William C. Thompson, whose pivotal role in systemic judicial corruption was a threshold issue before the Commission, both with respect to Chairman Thompson's disqualification for interest and the disentitlement of New York's judiciary from any pay raises (Exhibit B-1). Both issues are concealed by the Report and Dissenting Statements, without determination.

"...Judges and justices want the guaranteed salaries of judicial office, the tenure of judicial offices, and the prestige of judicial offices. On top of that, they want the very-high incomes which attend upon the entrepreneurial risks of private practice, e.g., clients dumping lawyers; clients fighting billings; breakings up of partnerships.

Griping and grumbling of judges and justices overlook payment, by the State of New York, of all their office expenses – from rent to cleaning and maintenance, from electricity to water to telephone to Internet account, from furniture to computer, from records clerks to guards, and from secretary to law clerk. Attorneys in private practice must pay all their office expenses out of gross income.

Sniveling and puling by judges and justices overlook their immunity from suit, even if official conduct is patently illegal, even if official conduct is malicious. An attorney in private practice can be sued for malpractice no matter that he did no wrong, so he must carry hefty, expensive professional liability insurance."

See, pp. 18-21, *infra*.

[21] This statistic is from The New York Times' website on New York, whose source is indicated as "Ny.gov".

The next three Commissioners whose names are listed are those who – together with Chairman Thompson – are the Commission's majority in its vote of recommendations. The first two are Richard Cotton, Esq. and William Mulrow, whose appointments by Governor Cuomo are concealed by the Report to hide the fact that the Commission's four-member majority consisted of all three of the Governor's appointees.

As to the fourth listed member, James Tallon, Jr., who is democratic Assembly Speaker Silver's appointee, his political background is significantly understated. He is described as having "represented Binghamton and parts of Broome County in the New York State Assembly for nineteen years". Not identified is that this democratic Assemblyman rose to be the Assembly's Majority Leader from 1987 to 1993.

The bios then continue with the Commission's three members whose names are preceded by double asterisks – the significance of which is identified in bold at the bottom of the Report's page 2, as if a footnote:

> " ** **Denotes members of the Commission that opposed the final recommendations of the Commission and did not join in this report. Each dissenting member has submitted dissenting statements which are attached to this report as Part Two.**"

The first two dissenters, Robert B. Fiske, Jr. and Kathryn S. Wylde, are each Chief Judge Lippman's appointees. That the Chief Judge's criterion for selection was not open-mindedness is exemplified by Ms. Wylde's selection. As President and CEO of the Partnership for New York City, she was already on-record as staunchly supporting judicial pay raises:

- in a December 1, 2006 press statement, urging immediate pay raises for New York's judges, thereafter utilized by the OCA for such propaganda as its 2008 report, "*They Deserve Better – Unanimous Support for Judicial Compensation Reform*";[22]

- by the Partnership's "meeting with Chief Judge Kaye on June 12, 2007 in an effort to galvanize support for the Judiciary's pay reform efforts"[23];

- by the Partnership's participation in support of judicial pay raises as an *amicus curiae* before the Court of Appeals in the judicial compensation lawsuits.

---

[22] This report is included in the OCA Supplemental Appendix (pp. 229-230), appended to the Commission's Report.

[23] So-identified by the May 2007 report, "*Judicial Compensation in New York: A National Perspective: Report to the Chief Judge of the State of New York* " (at p. 22), requested by Chief Judge Kaye, of the judiciary-allied National Center for State Courts.

As for Mr. Fiske, the original Whitewater prosecutor, he has a myriad of personal and professional relationships with establishment interests and individuals who support and would benefit from judicial pay raises. This, in addition to his interest in recommending judicial pay raises and not addressing CJA's pay raise opposition because he is "senior counsel" to a law firm that litigates before New York judges.

The third dissenter, Mark S. Mulholland, Esq., is the appointee of Temporary Senate President Skelos and "Managing Partner" of the law firm which employs Senator Skelos "of counsel". Having the politically-powerful Senator Skelos "of counsel" is plainly advantageous to Mr. Mulholland's firm – and Mr. Mulholland has an interest in not jeopardizing it by questioning judicial pay raises. Especially is this so as Senator Skelos' own brother, Peter Skelos, is an Appellate Division, Second Department justice who would directly benefit from a pay raise. Indeed, because Justice Skelos sits on the same court on which Chairman Thompson's father sat and has himself demonstrated the corruption of supervisory and appellate levels that disqualifies New York's judges from any judicial pay raises (Exhibit K-1, at pp. 4-6), Mr. Mulholland has an especial interest in not confronting CJA's judicial pay raise opposition based thereon.

The Commissioner bios are followed by the Report, which appears under the heading "**Part One: Final Report of the Commission" (pp. 3-10)**. It consists of three sections: I. "Introduction"; II. "Statutory Mandate"; and III. "Findings and Recommendations of the Commission".

The first section, **"Introduction" (p. 3)**, is a single four-sentence paragraph. It begins:

> "A diverse and thriving judiciary is central to every aspect of society. New York State is home to some of the most celebrated jurists and we must ensure that it continues to attract top talent to the bench. However, for several years, the State has failed to increase judicial pay and as a result, the State has started to lose some of its judicial talent..."

Excepting the true and completely generic nature of the first sentence, the only truthful finding is that "for several years, the State has failed to increase judicial pay". No finding is made here or elsewhere in the Report that New York's judiciary is "diverse" – or that it is "thriving", a peculiar and meaningless adjective as applied to the judiciary. As for "the most celebrated jurists", whose service presumably reflects excellence, not a single one is named. Likewise, neither here nor elsewhere in the Report is there any finding that current pay levels impact upon the state's ability "to attract top talent to the bench" – the predicate for a finding that judicial salaries are inadequate, which the Report does not make.

As for the finding that "as a result" of the failure to increase judicial pay, "the State has started to lose some of its judicial talent" – also a predicate for a finding that judicial salaries are inadequate – it is completely unsupported by any specifics, let alone proof. No statistical information is provided as to the numbers of judges who have been "lost", their names, or any facts that would warrant these unnamed, unnumbered judges to be deemed "judicial talent" such that their departures are a loss for

the public.

That there is no exodus from the bench or shortage of qualified lawyers eager to become judges could have been readily verified by the Commission. Much relevant information on these subjects was presented by CJA's August 1st, August 5th, August 17th, and August 26th letters (Exhibits G, H, J-1, L), including by their annexed correspondence with the bar associations and OCA. Also illuminating, the record of the judicial compensation lawsuits, available from the courts and Attorney General's office. As illustrative, the April 29, 2008 memorandum of law filed by then Attorney General Cuomo in opposition to the judicial-plaintiffs' motion for summary judgment in *Larabee, et al. v. Governor, Senate, Assembly, and State of New York*, stating:

> "The most plaintiffs have adduced – and can adduce, so far as defendants have been able to ascertain – is that a lone judge, among 1,300 State-paid judges, has resigned for the self-described reason of judicial compensation. Pl. Mem. at 10-11, 21-22, referring to a Supreme Court Justice in Utica (Oneida County.)[fn 11] (underlining added).

Its annotating footnote 11 was equally devastating to the claims of judicial pay raise advocates:

> "It would appear that at least two sitting State-paid judges, among other well-qualified attorneys, immediately expressed interest in running for the Oneida County Supreme Court position – specifically, the Oneida County Surrogate and the Utica City Court Judge. J. O'Hara, 'Justice To Quit, Cites No Pay Raise,' Syracuse.com (web site of *The Syracuse Post-Standard*), Jan. 11, 2008. Graber aff. Ex D." (at p. 18, underlining added). [Exhibit E-4: FOIL request #110450 – at 000054].

The two remaining sentences of this single-paragraph section cite to the "faltering" economy and "unprecedented budget crisis" "affect[ing] every citizen of the State" as the only counterbalancing "facts" in the Commission's determining "fair and reasonable" judicial salary levels.

The second section, "**Statutory Mandate" (pp. 3-4)**, consists of six sentences in three paragraphs. These materially truncate and conceal "Chapter 567 of the Laws of 2010 [that] created the Special Commission on Judicial Compensation". However, they also reveal further critical respects in which the Commission has not discharged its "statutory mandate".

Thus, the first sentence of this section identifies that the Commission was created to:

> " 'examine, evaluate and make recommendations with respect to adequate levels of compensation and non-salary benefits for judges and justices of the state-paid courts of the unified court system.'[fn1]" (Report, at p. 3, underlining added).

Yet, the Report and Dissenting Statements do not "examine, evaluate and make recommendations" as to "compensation and non-salary benefits". They are limited to judicial salary.

The Commissioners may be presumed to know the difference between salary and compensation[24] – the latter including, in addition to salary, "benefit contributions, expense reimbursements, other payments, and pensions". This difference was focal to the submissions sent to the Commission by one citizen opponent to judicial pay raises: Catherine Wilson (Exhibit F-5), a certified accountant with a bachelor's degree in accounting and a master's degrees in marketing and finance, who has worked as an international auditor for Fortune 100 companies and as a consultant, including to local government agencies.[25]

In a July 12, 2011 e-mail to the Commission (Exhibit F-5), Ms. Wilson stated:

> "OCA is being creative with their math when alleging that judges have not received any raises since 1999 – their statements are referring to base salary only. In reality, total judicial compensation has skyrocketed since 1999, thanks to creative (and non-statutory) accounting by OCA.
>
> OCA has circumvented the Legislature by allowing judges to collect *both* a pension and a salary for the same job (in defiance of generally accepted accounting rules which prohibit collecting two checks for one job, an act defined by auditors as *payroll fraud*), to collect an additional $5,000 in 'expenses' a year without any receipts (that raise was given to the judges in 2010 – it equates a 3.6% raise on their base salaries in 2010 alone), to receive payments for committee memberships (including taking their spouses along for all-expense-paid trips), to receive extra pay when serving in other courts, and to forego contributions for their benefits, including health care insurance and pensions – judges contribute nothing for their multi-million dollar pensions (NYS taxpayers now contribute at least $40,000 a year for each judge – an income benefit that the judges receive tax-free). The result of these accommodations by OCA has been to double the base salary of many sitting judges.
>
> I have tried to FOIL the total compensation (salary, benefit contributions, expense reimbursements, other payments, and pensions) for each and every judge since 1999

---

[24] To that end, the statute requires: "To the extent practicable, members of the commission shall have experience in one or more of the following: determination of executive compensation, human resource administration and financial management." (§1(b).

[25] Ms. Wilson identified these credentials, among others, in testifying before the Senate Judiciary Committee at its September 24, 2009 hearing on the Commission on Judicial Conduct and court-controlled attorney disciplinary system – and it was these credentials and her gripping testimony, identifying a means by which the state could not only tackle judicial corruption, but recover hundreds of millions of dollars, that prompted Senator Adams, at that hearing, to propose an investigative task force – to include Ms. Wilson – to which then Senate Judiciary Committee Chairman Sampson concurred (Exhibit A-1, pp. 2-3). The video and transcript of Ms. Wilson's testimony – and of the responses of Senators Adams and Sampson thereto – are posted on CJA's website (see fn. 7, *supra*).

> but despite NYS having clear FOIL laws, I have been rebuffed by the OCA. At a minimum, the actual total compensation received by the judges since the date of their last raises on their base pay must be provided [to] this committee for you to make a reasonable determination. This committee should also expand its purpose to include benefits and other compensation to assure that judges will not receive double-pay (as is the current case with salary and pensions)." (italics and underlining in the original).

Ms. Wilson's July 12-email (Exhibit F-5) quoted, in full, her prior June 19, 2011 letter to the Commission, similarly stating:

> "...to date, I have also yet to see any full transparency from OCA on the true compensation of the judges – please note: compensation is NOT equivalent to salary. Many judges serve on committees (the Matrimonial Commission cost over $3 million alone) and are compensated accordingly, they also receive extra pay for serving in other courts/parts, and as of 2011, OCA has approved allowing judges to [be] reimbursed up to $10,000 in 'expenses' – that last change was to 'compensate' the judges for not receiving a raise in their base salary (and OCA allowing judges to submit $5000 of these expenses without receipts violates IRS laws and generally accepted accounting standards for government). Will that $10,000 be erased if raises are approved? Also, in recent years, judges have seen their contributions to their pensions erased so they now contribute nothing – that alone can be worth at least $40,000 annually in extra compensation, a figure never added when the judges discuss 'salary' Judges contribute almost nothing to their benefits, benefits which could cost more than their base pay. But the most important issue to be addressed is the 'double-dipping': currently, judges who are re-elected conveniently 'retire' from their judgeship for one day, file for a pension, and then retake their oath of office the next day for their new elected term, thus judges are collecting two checks, a salary and a pension, for one job – as an auditor, that is clear payroll fraud. Thus this issue may only be addressed from a total compensation perspective factoring in the pension double-dipping, accounting for what benefits, if any, the NYS taxpayers should subsidize, and factoring in what additional payments, if any, judges should receive for serving on committees and working in other courts and court parts."

Yet, the Commission did not address "compensation and non-salary benefits"[26] – and its Report is

---

[26] Because the Commission's Report makes no mention of the $10,000 supplement, it does not answer Ms. Wilson's question "Will that $10,000 be erased if raises are approved?". According to the September 30, 2011 New York Law Journal, judges are now urging that the $10,000 supplement – whose cost to taxpayers is $12 million annually – be continued after the Commission-recommended pay increases go into effect, some even believing it should be "enhanced", "*N.Y. Judges' Group Asks to Keep Yearly $10K Stipend With Pay Hike*", by Joel Stashenko. The article is posted on CJA's "Press in Action" webpage for the judicial compensation issue.

non-conforming with the statute in that respect, constituting a further ground for legislative override of its judicial pay raise recommendations.

As hereinabove noted (pp. 4-5, *supra*), the Report is also non-conforming with the statute by its substitution of "a variety of factors" for "all appropriate factors"– thereby eliminating the Commission's "statutory mandate" to consider factors beyond the six explicitly listed.

Of the six explicit statutory factors this section recites (at p. 4), one is omitted:

> "the levels of compensation and non-salary benefits received by judges, executive branch officials and legislators of other states and of the federal government". (underlining added).

No explanation is given for this omission, but it may reflect the Commissioners' recognition of the incongruity of the statute directing their consideration of compensation and non-salary benefits of "executive branch officials and legislators of other states and of the federal government" – when the statute does not include those of this state, presumably because of the Court of Appeals' proscription on "linkage" in its February 23, 2010 decision.

This section also omits the resources and powers the statute gives to the Commission to discharge its important function[27] – thereby concealing that the Commission has availed itself of almost none. These resources and powers were identified by CJA's May 23rd and August 17th letters (Exhibit A-1, pp. 3-4; Exhibit J-1, pp. 4-5), which called upon the Commission to utilize them to verify the evidence of systemic judicial corruption presented by pay raise opponents and to expose the fraudulent claims of judicial pay raise advocates.

Additionally, the section omits that the statute requires that the Commission's Report contain more than "final, binding recommendations". It must also contain "findings, conclusions, [and] determinations" – as to which the Commission has made very few.

Although identifying the 150 days the statute gives the Commission for presenting its "final, binding recommendations", the section does not identify that the Commission was inoperative for more than

---

[27] §1(c): "The commission may meet within and without the state, may hold public hearings and shall have all the powers of a legislative committee pursuant to the legislative law."

§1(f): "To the maximum extent feasible, the commission shall be entitled to request and receive and shall utilize and be provided with such facilities, resources and data of any court, department, division, board, bureau, commission, agency or public authority of the state or any political subdivision thereof as it may reasonably request to carry out properly its powers and duties pursuant to this section."

§1(g): "The commission may request, and shall receive, reasonable assistance from state agency personnel as necessary for the performance of its functions."

half of those 150 days (Exhibits A-1, B-1, C-2), makes no acknowledgment of the obvious impact this has had on Commission's ability to discharge its statutory mission, and reserves to a footnote – its footnote 2 – that its recommendations may be "superseded by legislative action".

The third section, "**Findings & Recommendations of the Commission" (pp. 4-10)**, consists of an introductory three-sentence paragraph followed by three subsections.

The first introductory sentence:

> "In furtherance of its statutory mission, the Commission held meetings in New York City on July 11, August 8, and August 26, 2011 and a public hearing in Albany on July 20, 2011." (Report, at p. 4).

No specificity is provided as to the agenda/purpose of any of these three meetings and no information about the single public hearing, such as the number of persons testifying, who they were, and what they said.

The next sentence is:

> "The Commission received a number of written submissions, comments and testimony, which, in addition to the Commission members' independent research and thought, provided information relevant to the required statutory considerations and greatly informed these final recommendations." (Report, at pp. 4-5).

Again, no specificity. No information is furnished as to whether these "written submissions, comments and testimony" were consistent with each other – or contradictory, as those favoring and opposing judicial pay raises plainly were. Nor is there any specificity as to the Commissioners' so-called "independent research and thought" – which should have been, in the first instance, focused on finding the truth among the contradictory presentations of the advocates and opponents of judicial pay raises. This includes confronting conflicting definitions as to what constitutes adequate judicial pay, such as highlighted by CJA's August 26th letter (Exhibit L), quoting from the report of nearly 30 years ago by the Temporary State Commission on Judicial Compensation, chaired by William T. Dentzer:

> "'the judgment as to what level of pay is adequate should be based on whether a reasonable supply of well-qualified attorneys will make themselves available to become or remain judges in the courts concerned. The lowest pay which produces an adequate supply of well-qualified candidates for the various courts is the only pay level which is fair to State taxpayers; any higher pay would require unnecessarily high taxes.'" (underlining added by CJA's August 26th letter, at p. 4).

The Report conceals all divergence in the "submissions, comments and testimony", other than of Budget Director Megna, whose opposition to judicial pay raises it limits to the financial grounds he

put forward, not revealing his further ground that any increase not "distort" or "skew" the salary structure. This, of course, is what the Commission has done with respect to the salary structure of the "constitutional officers" of our state's three government branches and executive commissioners.

The next sentence (at p. 5) introduces the "findings of the Commission with regard to setting judicial compensation levels", broken down into three subsections: "a. Most Recent Judicial Salary Increase"; "b. Salary Comparisons"; "c. Other Factors", with a fourth subsection, "d. Recommendations", inferentially based on these "findings".

To be statutorily compliant, the "findings" should have addressed the six listed factors the statute requires the Commission "consider". They do not. Of the four economy-related factors:

- "the overall economic climate";
- "rates of inflation";
- "changes in public-sector spending"; and
- "the state's ability to fund increases in compensation and non-salary benefits",

there is a "finding" only as to one: "the overall economic climate" – reflective of the Commissioners' knowledge that "findings" as to the other three factors would establish the inappropriateness of ANY increase in judicial pay because in this period of recession, bordering on depression, there is significant deflation, particularly in housing costs, public-sector spending has been so cut that thousands of state employees have been terminated, including hundreds of judicial branch employees performing essential services[28], and because any increases would exacerbate the state's dire financial situation and necessitate additional cuts to essential services and termination of more state employees.

As to the two other explicit statutorily-required factors:

- "the levels of compensation and non-salary benefits received by judges, executive branch officials and legislators of other states and of the federal government"; and

- "the levels of compensation and non-salary benefits received by professionals in government, academia and private and nonprofit enterprise",

the "findings" of this subsection do not encompass "compensation and non-salary benefits" – as opposed to salary – and are so limited in other respects as to be essentially no findings.

---

[28] See Thomson Reuters' June 16, 2011 article "*New York judges ask for 41-percent raise, retroactive pay*", by Jennifer Golson, annexed to CJA's June 23rd letter (Exhibit B-1), identifying "a $170 million cut to the state court system's budget, which has led to the layoffs of 411 non-judicial court employees and the demotion or transfer of 241 others."

As illustrative, among the "professionals in government" whose salaries were "appropriate factors" for the Commission's consideration, but not considered by it, were the district attorneys in the 57 counties outside New York City, as their salaries are statutorily linked to judicial salaries. This was featured in a front-page New York Law Journal article on September 2, 2011, just days after the Commission's August 29, 2011 Report. Entitled "*Raises for Justices Mean Higher Pay For Some D.A.s*", it opened with three capitalized words, as follows:

> "A STATUTORY LINK between judicial and district attorney salaries means many upstate and Long Island chief prosecutors are in line for substantial pay increases over the next three years, and the increased cost may be entirely borne by counties already up in arms over 'unfunded mandates.'
>
> Under Judiciary Law §183-a, district attorneys in counties outside of New York City with more than 500,000 residents are entitled to the same salary as Supreme Court justices, and full-time prosecutors in counties with populations between 100,000 and 500,000 get paid the same as a county judge.
>
> The provision would affect 22 of 57 counties outside New York City....
>
> ...district attorney salaries, unlike judicial salaries are primarily a local expense.
>
> In the past, when judicial salaries were determined by the Legislature, lawmakers routinely added an offset to help cover the additional expense for prosecutors imposed on counties.
>
> For instance, the last time judicial and district attorney salaries were increased, in 1999, the state picked up between 36 percent and 42 percent of the cost of the D.A. raises, depending on the county.
>
> But in this round, the Legislature and governor are not involved in setting judicial, and therefore district attorney, salaries and, so far, there is no offset. And the counties, already reeling over a new law that imposes a limit on property tax increases and perpetually leery of mandates that do not come with money, are alarmed.
>
> 'It was incredibly irresponsible [to not factor in district attorney salaries while debating judicial salaries], especially as the counties are all earnestly working to cap their property taxes,' said Stephen J. Acquario, executive director of the New York State Association of Counties.
>
> William C. Thompson Jr., the former New York City comptroller and the chairman of the now dissolved pay commission was not immediately available for comment....
>
> ...spokesman for Assembly Speaker Sheldon Silver, D-Manhattan, said that if the matter is addressed, it will have to be addressed in Mr. Cuomo's budget for the next fiscal year, which begins on April 1, 2012, the same day the first phase of the raises takes effect.
>
> Mr. Cuomo's Division of Budget did not respond to several inquiries on the issue this week." (capitalization & bracketed text in original article by John Caher).[29]

---

[29] The full article is posted on CJA's webpage of "The Press in Action" on the judicial compensation issue.

"a. Most Recent Judicial Salary Increase" (pp. 5-6):

As reflected by its title, this subsection pertains only to "salary", not "compensation or non-salary benefits". The subsection consists of six paragraphs in two paragraphs, with a chart. Its "findings" are few and materially misleading.

The subsection asserts that there have been "only six" increases in judicial salaries since 1977 when the state "became responsible for paying all judicial salaries pursuant to the Unified Court Budget Act". No information is furnished to support the inference that there should have been more than six judicial salary increases during these 34 years. Nor is any information supplied as to the number of salary increases during these same years given to other public officers of comparable status – or who those comparable public officers might be. This with knowledge from CJA's July 19th and August 5th letters (Exhibit E-1, pp. 3-4; Exhibit H, p. 5) that the comparable public officers are the "constitutional officers" of the executive and legislative branches, because judges are the "constitutional officers" of the judicial branch.

Consistent with this concealment is footnote 4, stating only that "A comprehensive history of judicial salary adjustments since 1977" is "at 23-43" of the OCA's Supplemental Appendix. The relevant fact not identified by the footnote, but revealed by these Appendix pages, is that five of the six judicial salary increases since 1977 – including the "Most Recent Judicial Salary Increase" in 1999 – were "linked" to salary increases for state legislators and executive level officers.

As to that 1999 judicial salary increase, this subsection identifies only that it was the product of a recommendation of a commission appointed in 1997 by Chief Judge Kaye, thereafter enacted by legislature, setting the salaries of Supreme Court justices at the same level as the salaries of U.S. District Court judges: $136,700. It then goes on to state that "District Court judges have received several raises since 1999, and are currently paid an annual salary of $174,000." No information is given about these "several raises", such as if they were cost-of-living adjustments – which they were. Nor does the subsection identify that there is a statutory "linkage" between the salaries of federal district judges and the salaries of U.S. Senators and Representatives. The Commissioners' "independent research" could have easily revealed – including from the federal judiciary's own website – that for the past 20 years U.S. district judge salaries and salaries of U.S. Senators and Representatives have been identical.[30]

The subsection concludes with a chart of "Current judicial salary levels" of New York's state judges. Here too there is concealment. Undisclosed is that since 2010 the OCA has given each judge an annual supplement of $10,000, raised from $5,000, which it began giving judges in 2008. (*see* pp.

---

[30] http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/JudicialSalarieschart.pdf; See also ABA Recommendation and Report, February 2010, at p. 3: "all Federal Judges, and all Members of Congress, must make the same amount of compensation per year...", http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/ABA%20Resolution%202010%20-%20GS%20COLA%20for%20Judges.pdf. Also, fn 9, *supra*.

19-20, *supra*). This supplement:

> "is paid in a lump sum and does not require receipts. The lump sum, which is subject to taxes, can be used for commuting costs, Internet service, home security systems, life insurance and health care, marriage counseling and other expenses."

Assembly Member Nancy Calhoun has called it "backdoor compensation"[31] – but the Commission makes no findings as to anything but judicial salary.

"b. Salary Comparisons" (pp. 6-7):

The title here also reflects that the sole comparisons are to "salary" – not "compensation or non-salary benefits". This four-sentence subsection, consisting of two paragraphs, contains no relevant findings.

This subsection begins by stating:

> "The Commission has considered the salary levels of other New York State officials and employees as well as judicial salaries in other states.[fn7]"

However, the only New York State officials it identifies are:

> "the Governor ($179,000); the Attorney General ($151,000)[fn8]; the State Comptroller ($151,500);[fn9] Members of the Legislature ($79,500 plus a per diem);[fn10] and Executive Commissioners (maximum of $136,000).[fn11]" (Report, at p. 6).

These are identified as "other top New York State officials". Surely they are that, but so are innumerable other "top New York State officials" not included, as, for instance, the Governor's Secretary, Deputy Secretary, Counsel, and Communications Director, the Deputy Attorney General, the Deputy Comptrollers, and the Deputies to the various Commissioners.[32] A more accurate description of the Governor, Attorney General, State Comptroller, and Legislative Members is that they are the "constitutional officers" of our executive and legislative branches – just as judges are the "constitutional officers" of the judicial branch. (Exhibit E-1, at p. 3; Exhibit H, at p. 5; Exhibit I, at pp. 5-6).

Not stated in this subsection or elsewhere in the Report is that current salaries of New York's judicial "constitutional officers" are in-line with the salaries of New York's executive "constitutional

---

31 "*Assembly Member Offers Bill to Prohibit Payments to Judges*", by Joel Stashenko, New York Law Journal, February 1, 2011.

32 These officials are listed in the OCA Supplemental Appendix, Attachment 24.

officers" – and of "Executive Commissioners". And they far exceed the salaries of New York's legislative "constitutional officers" – a fact this subsection conceals by its doubly erroneous footnote 10:

> "*See* N.Y. Exec. Law Section 5. Note that members of the Legislature work on a part-time basis." (Report, at p. 6, underlining added),

annotating the legislative pay of "($79,500 plus a per diem)".

"N.Y. Exec. Law Section 5" is not the correct statutory provision for legislative pay. The correct provision is N.Y. Leg. Law Section 5 – and neither it nor the New York Constitution designate the legislature as "part-time".[33]

The Commissioners' "independent research" could have easily confirmed that the pretense that our state legislators are "part-time" is to disguise that even with per diems, legislative salaries are significantly less than judicial salaries. Indeed, CJA's July 19th and August 5th letters (Exhibits E-1, at p. 4; Exhibit H, at fn. 10) identified this in rebutting the pretense of judicial pay advocates and the Court of Appeals' February 23, 2010 decision that our legislators are "part-time".

Consequently, comparisons to the salaries of the Governor, Attorney General, Comptroller, Legislators, and Executive Commissioners[34] furnish no basis for any finding – and none is made –

---

[33] See "*Legislative Pay Daze*", by Jack Penchoff, State News, February 2007, pp. 10-12, summarizing findings of the report of the Council of State Government, *State Legislator Compensation: A Trend Analysis* by Keon S. Chi:

> "Professional legislatures are generally comprised of full-time legislators who have no legal limits on their regular sessions. The nine states with professional legislatures also are the highest paid – California, Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania and Wisconsin." ("*Legislative Pay Daze*", underlining added).

> "In New York, for example, where the legislature is full-time, the annual legislative salary declined 8.3 percent between 1975 and 2005. Meanwhile, per capita income for residents of the Empire State rose 56.92 percent." ("*Legislative Pay Daze*", underlining added).

[34] See the April 29, 2008 memorandum of law in *Larabee, et al. v. Governor, Senate, Assembly, and State of New York* by then Attorney General Andrew Cuomo – which stated, in pertinent part:

> " the salaries of many or most judges are considerably higher than the salaries of agency commissioners with huge responsibilities for the public health, safety and welfare, such as the Commissioner of Corrections, an official earning less than a Supreme Court Justice who is in charge of 32,262 employees and over 62,000 State prison inmates; Commissioner of Mental Retardation and Developmental Disabilities, 23,862 employees; Commissioner of Mental Health, 17,329 employees; Commissioner of Transportation, 9,809 employees; Commissioner of Health, 6,547 employees; Commissioner of Taxation and Finance, 5,119 employees. N.Y. Executive Law 169; 2006 New York State Statistical Yearbook (31st rev. ed.), Nelson A. Rockefeller Institute of Government, at 269-71." (at p. 22). [Exhibit E-4: FOIL request

that current judicial salary levels are inadequate. This is why these comparisons are not used by judicial pay advocates.

Tellingly, this subsection relegates to its footnote 7 the salary comparisons which judicial pay raise advocates favor:

> "A salary list of various New York State employees can be found in the Coalition of New York State Judicial Associations' 'Presentation to the New York State Judicial Compensation Commission,' June 10, 2011 (the 'Coalition Submission') at 102 -115. A salary list of salaries of New York City lawyers in private practice and physicians can be found in the Coalition Submission, at 133-137 (Appendix D)." (Report, at p. 6).

As these do show gross disparity with judicial salaries, placing them in a footnote, without even identifying the salary figures they contain, is inexplicable, except as an implicit concession of the correctness of CJA's position that their use lacks legitimacy. Notably, there is no finding that they are appropriate guides for judicial salary determination.

As for the subsection's additional comparisons:

> "Annual salaries of the judges at the trial court level in the northeast are as follows: New Jersey ($165,000); Pennsylvania ($164,602); Connecticut ($146,780); and Massachusetts ($129,624).[fn12] The current salary of a U.S. District Court Judge is $174,000" (Report, at p. 7),

this section makes no findings as to the weight that should be given to the salaries of other states' trial judges – and conceals that in each of the four cited northeast states the highest state court judges are earning MORE than the governor. This undisclosed fact is reflected, however, by the OCA's Supplemental Appendix, Attachment 23, which shows the following:

	Trial Judges	Judges of Highest Court	Governor
New Jersey:	$165,000	$192,705	$175,000
Pennsylvania:	$164,602	$195, 138	$74,914
Connecticut:	$146,780	$175,645	$150,000
Massachusetts:	$129,624	$151,239	$140,535

#110450 – at 000058].

No finding is made as to why, in these four states, the highest state court judges are paid MORE than the governor – or why such would be appropriate to this state. Indeed, the Report conceals that under the Commission's pay raise recommendations, New York would be paying its Court of Appeals judges, Appellate Division and Appellate Term justices, Administrative Judges, and the Court of Claims Presiding Judge MORE than the governor – with ALL judges other than those in select city courts outside New York City earning MORE than the Lieutenant Governor, the Attorney General, Comptroller, and most Executive Commissioners.

As for the $174,000 "current annual salary of a U.S. District Court judge", no contextual particulars are given. The most important of these: that the salaries of U.S. District Court judges are the SAME as the salaries of U.S. Senators and Representatives, deputy cabinet secretaries, and agency heads – all being statutorily linked (see fn. 9, *supra*).

"**c. Other Factors**" (at pp. 7-8): This three-paragraph subsection, consisting of eight sentences, contains the most limited findings – mostly by inference – and none addressed to "compensation and non-salary benefits", as opposed to "salary".

Only a single "other factor" is discussed: the supposed "economic harm" suffered by New York's judiciary:

> "Many of the submissions received by the Commission detail the economic harm that has befallen New York's judges as a result of the stagnated pay and highlighted the need for a fairly compensated judiciary.[fn13] For example, as a result of the lack of salary increases for the past twelve years, pay for New York's Supreme Court justices currently ranks twenty-first in the nation and last in the nation when salary is adjusted for cost of living.[fn14] Cost of living, as determined by the Consumer Price Index – Northeast Urban Region ('CPI-U')[fn15] has increased by approximately 41 percent since 1999.[fn16]. Over the same period, caseloads for State judges have also steadily increased.[fn17]" (Report, at p. 7).

Except by inference, this paragraph makes no findings as to the "economic harm" purportedly "detail[ed] by the "submissions received". Tellingly, it does not even identify which "submissions" provide such "detail". This includes its unhelpful annotating footnote 13:

> "*See* Commission website for all submissions received: www.judicialcompensation.ny.gov." (Report, at p 7).

This concealment is not surprising, as the posted submissions are evidentiarily deficient as to "economic harm": lacking adequate detail and substantiating proof. Indeed, although the Report nowhere mentions testimony received at the July 20th hearing as to "economic harm", any competent judge would have rejected the scant, laughable presentations that were made, after appropriate cross-examination, of which there was none.

Nor is "economic harm" demonstrated by the "example" that "pay for New York's Supreme Court justices currently ranks twenty-first in the nation and last in the nation when salary is adjusted for cost of living". A ranking of 21st among 50 states is not "economic harm", nor even the supposed bottom rung rating "when salary is adjusted for cost of living".[35] As pointed out by CJA's August 5th letter (Exhibit H, p. 5), the 1999 salary level is roughly three times greater than New York's median household income.[36]

As for the supposed 41% cost of living jump since 1999, such high living costs are not uniform throughout the state, but confined to the metropolitan New York City area – a fact pointed out by CJA's correspondence (Exhibit H, pp. 5-6), as likewise its solution (Exhibit L, pp. 5-7), quoting the report of the Temporary State Commission on Judicial Compensation under William Dentzer's chairmanship:

> "...there are significant differences in the cost of living in various areas of the State; and [] 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 each office, which, while perhaps adequate in part of the State, might be inadequate or excessive in the rest of the State.[fn]"

---

[35] As stated by then Attorney General Cuomo in his December 7, 2007 reply memorandum of law in *Larabee, et al. v. Governor, Senate, Assembly, and State of New York*, in support of defendants' motion to transfer the action and to dismiss it for failure to state a cause of action:

> "New York's purported ranking among the states...is irrelevant... The New York's judiciary can only be assessed in relation to New York's Executive and Legislative branches, not in relation to circumstances in foreign states which have no impact on judges and justice here." (at pp. 15-16). [Exhibit E-4: FOIL request #110450 – at 000017-18].

[36] According to the April 29, 2008 memorandum of law of then Attorney General Cuomo in *Larabee, et al. v. Governor, Senate, Assembly, and State of New York*, opposing plaintiff-judges' summary judgment motion:

> "U.S. Census Bureau figures show that New York's rates of judicial compensation place...judges at the highest income levels – as high as the top 5%. ...
>
> An often-cited scholarly study of current census figures shows that any salary above $120,212 ranks in the top 5% in the United States. T. Piketty & E. Saez, 'Income Inequality In The United States: 1912-2002,' at Table 2, a study produced in part with a grant from the MacArthur Foundation available at elsa.berkeley.edu/~saez/piketty-saezOUP04US.pdf.[fn] Similarly, according to a table drawn from the U.S. Census Bureau's Public Use Microdata Sample of the 2006 American Community Survey, in 2006 8.1% of New Yorkers employed full-time earned more than $120,000 per year, whereas plaintiff Judge Larabee earns $136,700 (N.Y. Jud. Law §221-e), plaintiff Judge Neno earns $119,800 as a Cattaraugus County Court Judge (N.Y. Jud. Law §221-d), and plaintiff Judges Wright and Nunez earn $125,600 (N.Y. Jud Law §221-g).[fn]" (at pp. 21-22, underlining added). [Exhibit E-4: FOIL request #110450 – at 000057-58].

Nor do increased caseloads reflect economic harm. Rather, they reflect the need for increased numbers of judges, as no amount of increased pay can enable judges to accommodate caseloads that exceed human capacity – as has long been the reality in the courts and whose result has been catastrophe and injustice to litigants[37], concealed by the OCA in its push for judicial pay raises, utterly dwarfing its advocacy for more judges to handle crushing caseloads.

Here again, the only counterbalancing factor to the supposed "economic harm" suffered by New York's state judges, entitling them to a pay raise, is the state's fiscal situation: "a projected deficit of $2.5 billion next year".

"d. Recommendations" (pp. 8-10): The inference of this subsection, consisting of seven sentences in two paragraphs and an OCA-prepared "salary chart", is that the Commission's recommendations are supported by the "findings" recited in the three prior subsections.

This is false. There is no finding in the Report that current "compensation and non-salary benefits" are inadequate – and, without that, there is no statutory basis for any recommendation to upwardly adjust judicial salaries.

This subsection explains the Commission's recommendation as follows:

> "The Commission has determined that the appropriate benchmark at this time for the New York State judiciary is the compensation level of the Federal judiciary. The Commission recognizes the importance of the New York State judiciary as a co-equal branch of government and recognizes the importance of establishing pay levels that make clear that the judiciary is valued and respected. The Federal judiciary sets a benchmark of both quality and compensation – New York State should seek to place its judiciary on par. That is where New York State compensation was in the late 1990's and our recommendation is to re-establish this benchmark with a phase-in period that takes account of the State's current financial challenges." (Report, at p. 8).

This is nonsense. The New York state judiciary is a co-equal branch of government not with the federal judicial branch – as this subsection implies – but with the two other branches of New York state government. The Report contains no finding that because salaries of New York state judges

---

[37] *See*, the Senate Judiciary Committee's October 30, 2009 Report, *Kids and Families Still Can't Wait: The Urgent Case for New Family Court Judgeships*:

> "...Family Court's caseload crisis has grown beyond administrative remedies and short-term fixes. With calendars as large as those that many courts now typically experience, only a prompt infusion of new Family Court judgeships—commensurate with dockets—can ensure that New York's family justice system does not collapse under its own weight." (at p. 2)

have not been increased since 1999, New York's judiciary has not been treated as a "co-equal branch". Nor could it since, as highlighted by CJA's advocacy, the salaries of New York state judges are comparable, if not superior to, the salaries of executive and legislative "constitutional officers", who have also not had pay raises since 1999 – with judges enjoying vastly superior "non-salary benefits" as, for example, tenure in office and "job security". Under such circumstances, the state judiciary is "valued and respected", no less, if not more, than the other branches of our state government.

Moreover, the systemic judicial corruption that infests New York's state judiciary provides no basis for "valu[ing] and respect[ing] it by salary increases. Certainly, the failure of the state judiciary to confront the evidence of corruption presented by judicial pay raise opponents or to otherwise respond to CJA's opposition advocacy, as for instance, our showing of the judiciary's fraud in connection with the pay raise issue, reflects that it is New York's judiciary which does not "value[] and respect[]" itself.

As for the Commission's determination:

> "that all New York State judges shall receive phased-in salary increases over the next three fiscal years, starting on April 1, 2012, with no increase in fiscal year 2015-16. State Supreme Court Justices will achieve parity with current Federal District Court judges salaries by the third fiscal year and will be paid an annual salary of $160,000 in fiscal year 2012-13, $167,000 in 2013-14 and $174,000 in 2014-15. All other judges will receive proportional salary increases." (Report, at p. 8),

suffice to say that the September 9, 2011 memo of Appellate Division, First Department Justice David B. Saxe to his judicial brethren,[38] suggesting:

> "a viable Article 78 challenge may exist against the determination of the 2011 Judicial Compensation Commission on the ground that its recommendation contradicts both its own implicit finding and its mandate",

further reflects how arbitrary and capricious such determination is. As there stated:

> "The legislature created the commission to 'examine, evaluate and make recommendations with respect to *adequate* levels of compensation' for state court judges (L.2010 ch. 567). While the compensation levels it arrived at would normally be treated as an implicit determination that each level of compensation was adequate compensation for that calendar year, that assumption is questionable here. The

---

[38] According to the New York Law Journal, whose September 30, 2011 article "*N.Y. Judges' Groups Ask to Keep Yearly $10K Stipend With Pay Hike*", by Joel Stashenko discussed and provided a link to the memo, Justice Saxe had circulated it 'on the judges' online discussion site". The article, with the memo, are posted on CJA's "Press in Action" webpage for the judicial compensation issue.

commission clearly did not come to the three graduated salary levels by determining what would be adequate in each of the three years; rather, because the third year's compensation was set at the current salary paid to federal district judges, $174,000, there is every reason to infer that the commission considered the minimum adequate level of compensation for state judges, not only in 2014, but right now, to be the level at which the federal bench is currently paid. Indeed, the comments of members of the commission in the course of its proceedings provide further support for that conclusion. Nevertheless, having determined the salary level that it deemed adequate for an increase was to bring the state judges in parity with the federal judges, the commission then adopted a planned increase that left the state judges with an *inadequate* salary for the first two years, by not raising salaries to that adequate level until April 1, 2014. In so doing, it violated its very mandate.

Even if we were to accept that the commission actually concluded that $174,000, the current salary level of federal district court judges, was needed to pay adequate compensation for 2014, but that a lesser amount was needed to pay adequate compensation for 2012 and 2013, the commission had no basis to find that the adequate salaries for 2012 and 2013 respectively was $14,000 and $7,000 less than the adequate salary level for 2014. Importantly, the graduated increase from 2012 to 2014 cannot be logically explained as intended to compensate for cost-of-living increases; that possibility is precluded by the lack of any increase for the final year of the four-year period the commission was assigned to address, and by the absence of any support for the calculation of COLAs in arriving at the graduated recommendations. Nor was there any basis for finding that the prevailing economic conditions would be different in 2014 than they would be in 2012 and 2013. While the gradual increase to the proper level is understandable as an attempt to make the increase more palatable to the legislature, it is nonetheless an improper award of a less-than adequate salary in the face of a mandate to make adequate adjustments." (italics in the original memo).

The Report concludes with "**Part Two: "Dissenting Statements" (pp. 11-15)**. These consist of Dissenting Statements of Commissioners Robert Fiske, Jr., Esq., Kathryn Wylde, and Mark Mulholland, Esq., each more fraudulent than the Report.

Whereas the Report rests largely on false inferences, the Dissenting Statements rest on false affirmative statements adopting deceits of judicial pay raise advocates. Here, too, CJA's pay raise opposition exposes these deceits, which is why the Dissenting Statements, like the Report, make no mention of that opposition, let alone findings as to its presentation of fact, law, and legal argument.

"**Dissenting Statement of Robert B. Fiske, Jr." (pp. 11-12)** begins by purporting that his recommendation is based on "taking all of the statutory factors into account". In so doing, he disregards that the listed statutory factors are not exclusive, that they specify not just "salary", but "compensation and non-salary benefits" – which he does not purport to have considered – and that

the facts relevant to the listed statutory factors were concealed and misrepresented by judicial pay raise advocates. Commissioner Fiske adopts all their concealment and misrepresentation.

Commissioner Fiske's overarching deceit is that New York's judges are entitled to cost-of-living increases – for which he furnishes no legal authority. From this he argues that as a result of their not getting any cost-of-living adjustments since 1999, "judges have been underpaid for more than a decade" and have "suffered financial injury...over the last twelve years", representing a loss to each individual judge of "$330,000" and a savings to the state of "approximately $515 million to spend in other areas". Such tracks Chief Administrative Judge Pfau's testimony and submission to the Commission – the falsity of which was exposed by CJA's August 26th letter (Exhibit L, pp. 2, 5), which stated, in pertinent part:

> "...New York State judges have NO constitutional right to cost-of-living adjustments. This is perfectly clear in the Court of Appeals' February 23, 2010 decision in the judicial compensation lawsuits that underlie the Commission...
>
> Yet nowhere is this acknowledged in your Submission to the Commission, whose references to, and quotes from, the Federalist Papers and 'Framers' (at pp. 7, 8, 13) give the opposite impression. Indeed, your Submission – like your July 20th written 'Remarks' to the Commission and your oral testimony on that date – refer to cost-of-living adjustments (COLAs) as if these were something to which the judges are entitled and were due, so much so that you describe the judges as having 'given up to the State half a billion dollars'[fn]. This you deem to be their money that the State was able to use for a dozen years, such that increasing judicial pay is actually only returning to the judges the money that was theirs.
>
> ... Certainly, you do not reveal that institutionalizing COLA-adjusted judicial salaries would distort the constitutional balance between the co-equal government branches. You nowhere identify that New York's judges are the 'constitutional officers' of our judicial branch – just as the Governor, Lieutenant Governor, Attorney General, Comptroller are the 'constitutional officers' of our executive branch and just as our 62 Senators and 150 Assembly Members are our 'constitutional officers' of our legislative branch – all of whose salaries, identically, do not have adjustments for cost of living...." (CJA's August 26, 2011 letter, at pp. 1-2, capitalization and underlining in the original).

Also false is Commissioner Fiske's assertion:

> "While salaries have remained stagnant, caseloads have climbed, leading to a significant increase in the number of judges leaving the bench." (Report, at p. 12).

No annotating footnote substantiates this sentence and it is unclear whether Commissioner Fiske is implying that the "significant increase" in judges leaving the bench – at a rate he does not identify –

is attributable to "stagnant" salaries, rising caseloads, or both. In any event, CJA's August 5th letter (Exhibit H) addressed the subject of judicial attrition and identified that the OCA does not record the reasons for judges leaving the bench, including the numbers whose departures result from age-mandated retirement.

Finally, with respect to Commissioner Fiske's concluding reference to "a constitutional violation twelve years in the making", such is a deceit. There is no "constitutional violation" resulting from not according judges a cost-of-living increase – as would be evident had he addressed ANY of the facts, law, or legal argument presented by CJA's August 26th letter (Exhibit L) or by our analysis of the Court of Appeals' February 23, 2010 decision, set forth by our July 19th, August 8th, and August 23rd letters (Exhibit E-1; Exhibit I, pp. 3-4; Exhibit K-1, pp 2-4).

"**Dissenting Statement of Kathryn S. Wylde" (p. 13)** also rests on the pretense that New York's judges are entitled to cost of living increases and concealment that they are "constitutional officers" of New York's judicial branch who have been treated as co-equals with the "constitutional officers" of New York's legislative and executive branches, none of whom have gotten cost of living increases since 1999. She states:

> "For twelve years, judicial salaries were held hostage to tangential considerations, exposing judicial leadership to public humiliation and diminishing their status. Ultimately, the judiciary was forced to sue the state in order to enforce its constitutional position as an independent, co-equal branch of government. In testimony, letters and reports, the judiciary made clear to the Commission that the long struggle for fair compensation was not about money, but equally about the extent to which the judiciary is valued and respected by the citizens of New York State." (Report, at p. 13).

The notion that "judicial salaries were held hostage" for twelve years rests on the proposition that New York's judges were entitled to cost-of-living increases during those years – whose falsity was demonstrated by CJA's August 26th letter (Exhibit L), without contest from the OCA, whose response was expressly sought.

Also false is that the judicial compensation lawsuits sought to vindicate the judiciary's "constitutional position as an independent, co-equal branch of government". In fact, the judicial compensation lawsuits and culminating February 23, 2010 Court of Appeals decision are fraudulent, fashioned from concealing the co-equality of the judiciary with the executive and legislative branches, neither of whose "constitutional officers" have received any pay raise since 1999 (Exhibit E-1, pp. 3-5).

Finally, the judiciary's "testimony, letters and reports" to the Commission were rebutted by CJA and other citizen opponents of judicial pay raises. These establish that it is the judiciary which does not "value[]" and "respect" its constitutional function by its systemic judicial corruption, involving supervisory and appellate levels and the Commission on Judicial Conduct, perpetuating lawlessness

and fraud in the courts.

"**Dissenting Statement of Mark S. Mulholland" (pp. 14-15)** also rests on the pretense that New York's judges are entitled to cost of living increases and concealment that they are "constitutional officers" of New York's judicial branch who have been treated as co-equals with the "constitutional officers" of New York's legislative and executive branches, none of whom have gotten cost of living increases since 1999. Thus, he states:

> "Judges have suffered powerlessly for twelve years while the Executive and Legislative branches have failed to agree to mete out even basic cost of living adjustments." (Report, at p. 14).

He also purports that "[d]espite being a co-equal branch of our tripartite government, New York's judiciary is powerless to set its own pay." This is false. The executive branch is also "powerless to set its own pay", as is the legislature, absent a legislative override of an executive veto.

As for his claim that raising judicial salaries to reflect the cost of living increases since 1999, "with consistent cost of living increases to follow" would have

> "ended an embarrassing era during which our judges have earned less than any other judges nationwide on a cost-adjusted basis, less than countless professionals within and without government, less than first-year law associates, and less even than the senior clerks who work for them" (Report, at p. 14),

such ignores that cost-of-living varies widely throughout the state and would throw the salaries of New York's judges out of alignment with the "constitutional officers" of the co-equal legislative and executive branches, whose salaries are also "less than countless professionals within and without government" and less than staff who work for them – all of which CJA pointed out (Exhibit E-1, p. 4; Exhibit H, pp. 5-6).

Finally, as to Commissioner Mulholland's assertion:

> "I discount the comments submitted to the Commission by the Governor's Budget Director, Robert Megna. He stated incorrectly that our judges should be paid and treated as other State officers and employees, without regard to their judicial status. He thus ignored or failed to understand that the Commission's job was to ensure the economic independence of the Judiciary as a co-equal branch of government. We were required specifically to consider the judiciary's unique status – not ignore it." (Report, at p. 15).

Budget Director Megna correctly understood – and articulated – that there is symmetry in the salaries of top state officers. What he lacked was the correct terminology: that judges are NOT "employees" or "other state officers". Rather, they are the "constitutional officers" of the judicial branch – just as

the Governor, Lieutenant Governor, Attorney General, and Comptroller are the "constitutional officers" of the co-equal executive branch, and the Senators and Assembly Members are the "constitutional officers" of the co-equal legislative branch. In other words, what Commissioner Mulholland purports to be their "unique status" is SHARED with New York's other "constitutional officers" with whom there is an appropriate co-equal "link".

CONCLUSION

The showing herein that the Commissioners' judicial pay raise recommendations are fraudulent, statutorily non-conforming, and constitutionally violative requires the responsive action here requested: legislative override of those recommendations; repeal of the statute; criminal referrals of the Commissioners; and your appointment of a special prosecutor, task force, and/or inspector general to investigate the documentary and testimonial evidence of systemic corruption in our state's judiciary, infesting supervisory and appellate levels and the Commission on Judicial Conduct, which the Commission on Judicial Compensation unlawfully and unconstitutionally ignored, without findings, so as to recommend pay raises.

To assist you in discharging your mandatory duties to the People of this State, this Opposition Report will be furnished to the seven Commissioners to afford them the opportunity to rebut its presentation of fact, law, and legal argument, if they can. It will also be furnished to judicial pay raise advocates who testified and made submissions to the Commission so that they, too, can rebut its presentation, if they can.

Absent action by you by this Election Day – November 8, 2011 – CJA will provide this Opposition Report to each state Senator and Assembly Member in support of a request for their sponsorship of legislation to override the Commission's recommendations and repeal the Commission statute. Should they fail to sponsor and advocate such legislation and, additionally, to endorse appointment of a special prosecutor, task force, and/or inspector general to investigate the judicial corruption evidence and render a report with findings, we will provide the Opposition Report to political parties and candidates interested in replacing them in the 2012 elections – when all Senators and Assembly Members are up for re-election – so that they can vindicate the public's rights by making judicial pay raises and judicial accountability the decisive election issues they rightfully are.

As stated in CJA's handout to each of the Commissioners at the July 20th hearing (Exhibit F-1) – **"NO PAY RAISES FOR NYS JUDGES WHO CORRUPT JUSTICE – THE MONEY BELONGS TO THE VICTIMS!"** Voters will find it easy to embrace so self-evident a proposition, as likewise CJA's further position that the money be used to rehire the hundreds of court employees terminated to save money and to staff new judgeships whose creation is warranted by caseload levels far exceeding capacity.

cc: Commission on Judicial Compensation
William C. Thompson, Jr., Chairman
Richard Cotton, Esq
William Mulrow
Robert Fiske, Jr., Esq.
Kathryn S. Wylde
James Tallon, Jr.
Mark Mulholland, Esq.
Judicial Pay Raise Advocates
New York State Budget Director Robert L. Megna
The Public & Press