

## CENTER for JUDICIAL ACCOUNTABILITY, INC.

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August 17, 2011

TO: New York State Commission on Judicial Compensation  
William C. Thompson, Jr., Chairman  
Richard Cotton  
William Mulrow  
Robert Fiske, Jr.  
Kathryn S. Wylde  
James Tallon, Jr.  
Mark Mulholland

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

RE: 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

At the Commission's August 8<sup>th</sup> meeting, Commissioner Robert Fiske, Jr. announced his readiness to discuss increasing judicial compensation, stating:

"I believe that the OCA, the Coalition of New York State Judicial Associations, Former Chief Judge Judith Kaye, the bar associations, Corporation Counsel Michael Cardozo, Zachary Carter, the Chairman of Mayor Bloomberg's Committee on the Judiciary, Dennis Hughes, President of the New York State AFL-CIO, the Citizens Union, the League of Women Voters, Victor Kovner, Chair of the Fund for Modern Courts, the individual judges who testified in Albany and others, all, collectively and individually, have made a compelling case for an immediate increase in the range of the four alternatives that were set forth by Administrative Judge Ann Pfau in the OCA submission." (at 13:53, underlining added).

Commissioner Fiske's pretense that advocates of judicial pay raises "have made a compelling case for an immediate increase" was *without* identifying what examination, *if any*, he had made of the case presented by opponents of ANY judicial pay raises. Indeed, he concealed the very existence of such opposition case and its champion.

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). One does not have to be a former U.S. Attorney and the original Whitewater prosecutor – as is Commissioner Fiske – to know this. Yet at the August 8<sup>th</sup> meeting, not a single Commissioner saw fit to identify the opposition case of CJA and individual citizens<sup>1</sup>, let alone to articulate a duty to confront it with findings. This includes the Commission’s two other lawyer members: Mark Mulholland, who expressly “adopt[ed], virtually 100% of what Mr. Fiske said”, except that he opined that a case had been made to raise judicial pay substantially further (at 26:45), and Richard Cotton, a former law clerk to U.S. Supreme Court Justice William Brennan, whose sole comment was his request for “raise history” of senior executives at the cabinet level and below of the executive branch, which he based on Budget Director Megna’s testimony (at 01:42). This was also, essentially, the Commissioners’ sole response to Chairman Thompson’s repeated question as to what additional information they “needed” or “wanted to see” to be able to come to their conclusions (at 01:09; 06:30; 07:22; 32:15).

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?

As you know, at the Commission’s July 20<sup>th</sup> hearing I testified that I had made a list of “20 specific frauds” presented by witnesses testifying for judicial pay raises. Before being cut off, I sufficed to identify one: their deceit that we have “a quality, excellent, top-rate judiciary” – as to which they had presented NO EVIDENCE, as, likewise, NO EVIDENCE that mechanisms to ensure judicial integrity are functioning and not corrupted. To enable the Commission’s statutorily-required fact-finding, I furnished countering EVIDENCE – leaving on the table from which I testified the final two motions in CJA’s public interest lawsuit against the New York State Commission on Judicial Conduct, establishing that it had been “the beneficiary of a succession of fraudulent judicial decisions without which it would not have survived – including four of the Court of Appeals”.<sup>2</sup> In so doing, I *twice expressly* urged that you call upon the witnesses who had testified – particularly the bar associations – “to assist you with the fact-finding”.

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<sup>1</sup> These individual citizens who testified in Albany and/or made submissions include the following: William Galison, Jay Franklin, Raymond Zuppa, Esq., Terrence Finnan, Susan D. Sattenbrino, Esq., Henry Kupferstein, Catherine Wilson, Judy Herskowitz, Patrick Kevin Brady, and Joan Theresa Kloth-Zanard.

<sup>2</sup> The further documentary evidence I left for you, at the hearing, consisted of: (1) CJA’s December 16, 2009 written statement drafted for the Senate Judiciary Committee’s aborted December 16, 2009 hearing; and (2) CJA’s two March 6, 2007 statements, submitted to the Senate Judiciary Committee in opposition to confirmation of Chief Judge Kaye’s reappointment to the Court of Appeals.

Thereafter, I sent you three additional letters dated August 1<sup>st</sup>, August 5<sup>th</sup>, and August 8<sup>th</sup><sup>3</sup>, each also sent to the bar associations, particularizing further frauds by judicial pay raise advocates.

Yet, evident from your August 8<sup>th</sup> meeting is that even as to the specific frauds that my testimony and these letters resoundingly established, you nonetheless hold to them as truths<sup>4</sup> – so much so that not a single Commissioner took issue with Mr. Fiske’s statement:

“As testified to by the bar associations, Michael Cardozo, and Zachary Carter, the lack of even a cost of living adjustment has impacted the ability to attract and retain the highest quality lawyers to the judiciary, both from higher paying positions in the government and from private practice. An interesting statistics in recent years, only 18 percent of the new judges in the State of New York have come from private practice...” (underlining added).

The 18% statistic, whose origin Mr. Fiske did not identify, is presumably from the New York City Bar Association’s oral and written testimony at the July 20<sup>th</sup> hearing, where it pertained to “new judges in New York City”. The meaninglessness of that 18% statistic, which, according to the New York Law Journal, Commissioner Wylde had similarly regarded as a statewide statistic, was the subject of CJA’s August 1<sup>st</sup> letter entitled:

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<sup>3</sup> These letters, as likewise ALL CJA’s submissions to the Commission, are posted on CJA’s website, [www.judgewatch.org](http://www.judgewatch.org), on its specially designated webpage devoted to the judicial compensation issue, accessible *via* the top panel “Latest News” and side panel “Judicial Compensation: State-NY”.

<sup>4</sup> Leading off these frauds is using, as a relevant reference point, the salaries of government employees, mostly those whose pay is controlled by civil service, collective bargaining agreements and union contracts, concealing that New York State judges are “constitutional officers”, who are “co-equals” to our state’s other “constitutional officers” – the Governor, Lieutenant Governor, Attorney General, Comptroller, and Legislators – NONE of whom have had ANY pay raises or cost of living increases since 1999 – and that, if anything, the compensation of New York State judges is comparable, if not superior, to that of their fellow “constitutional officers”, with the judges enjoying incomparably superior job security-tenure benefits. Likewise, concealing the average/median income of New York’s 160,000-plus attorneys, statewide and by county, and New York’s average/median household income.

These concealments enable such further frauds as Commissioner Fiske spouted, *ad nauseum* – without any dissent by the Commissioners and endorsed by Commissioner Mulholland – that raising judicial compensation is about “fairness to the judges”, to correct a “national disgrace”, because they are “underpaid”, and “we can’t make it up to them” and that we must “correct a manifest injustice that has gone on for 12 years”, “costing the average judge...almost 400,000 [dollars] – which is money “taken from the judges” that they were entitled to – that has “impacted the ability to attract and retain the highest quality lawyers to the judiciary”, jeopardizing our “high quality forum to resolve disputes”, and its rendering of “fair and effective justice”, and that the Court of Appeals found “13 years of constitutional violations”, which is the Commission’s job to remedy.

In fact, that is NOT what the Court of Appeals found, quite apart from the fraudulence of its February 23, 2010 decision – particularized by CJA’s July 19, 2011 letter, to which I referred when I testified.

“Ensuring that the Commission on Judicial Compensation’s Recommendations and Report are Based on Evidence: The Absence of Evidence that Judicial Compensation has Deterred Qualified Private Sector Lawyers from Becoming Judges”.

Addressed to Commissioner Wylde, the other Commissioners, and the Law Journal, the August 1<sup>st</sup> letter was also addressed to all bar leaders who had testified at the July 20<sup>th</sup> hearing, *expressly for their response*.

Enclosed is CJA’s companion August 16<sup>th</sup> letter addressed to New York City Corporation Counsel Michael Cardozo and Chairman Zachary Carter, head of Mayor Bloomberg’s Advisory Committee on the Judiciary. Entitled:

“Ensuring that the Commission on Judicial Compensation’s Recommendations and Report are Based on Evidence: The Absence of Evidence that Judicial Compensation has Deterred Qualified Public Sector or Private Sector Lawyers from Becoming Judges”,

it exhaustively chronicles the deceit of both Mr. Cardozo’s July 20<sup>th</sup> oral and written testimony and Mr. Carter’s July 20<sup>th</sup> written statement. It, too, *expressly calls for their response*.

In view of the seriousness of these two companion letters – as likewise of CJA’s August 5<sup>th</sup> letter to New York Times reporter William Glaberson, entitled:

“Setting the Record Straight: Ensuring that the Public & New York’s Judicial Compensation Commission are Not Misled by New York Times’ Reporting & Editorializing about ‘Judicial Attrition’ and the Purportedly Insufficient Pay of New York State Judges”,

also sent to the bar leaders who testified on July 20<sup>th</sup>, your duty is to protect the People of this State from fraud by demanding their response, by subpoena if necessary.<sup>5</sup> Assuredly this is why the statute creating the Commission confers upon you – in the sections preceding its “findings” requirement – :

- “all the powers of a legislative committee pursuant to the legislative law”<sup>6</sup> [§1(c)];

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<sup>5</sup> According to Chairman Thompson, the Commission’s report will contain, in addition to recommendations, statistics – and “the statistics are the statistics” (at 10:52).

<sup>6</sup> See, *inter alia*, Legislative Law §62-a:

“Subpoenas; oaths. The chairman, vice-chairman or a majority of a legislative committee may issue a subpoena requiring a person to attend before the committee and be examined in reference to any matter within the scope of the inquiry or investigation being conducted by the committee, and, in a proper case, to bring with him, a book or paper. The provisions of the civil practice law and rules in relation to enforcing obedience to a subpoena lawfully

- “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...to carry out properly its powers and duties” [§1(f)];
- “reasonable assistance from state agency personnel as necessary for the performance of its functions” [§1(g)].

As the lawyer-Commissioners Fiske, Mulholland, and Cotton could surely confirm, the failure of advocates of judicial pay raises to deny or dispute CJA’s showing of fraud by them concedes it, as a matter of law. That showing, presented by the evidence I supplied on July 20<sup>th</sup> in support of my testimony and by CJA’s August 1<sup>st</sup>, August 5<sup>th</sup>, and August 8<sup>th</sup> letters – including the referred-to analysis of the Court of Appeals February 23, 2010 decision in the judicial compensation lawsuits, set forth by our July 19<sup>th</sup> letter, is entirely uncontested.

***IF*** you believe that the Commission can lawfully ignore CJA’s August 8<sup>th</sup> 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”.

As with CJA’s other letters, the title of our August 8<sup>th</sup> letter well reflects its content:

“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.”

Needless to say, as to the third threshold issue: “The Fraud & Lack of Evidence Put Forward by Advocates of Judicial Pay Raises”, it should have been followed by the same clause as followed the first and second threshold issues:

“as to which there has been NO Determination”.

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issued by a judge, arbitrator, referee or other person in a matter not arising in an action in a court of record apply to a subpoena issued by a legislative committee as authorized by this section. Any member of a legislative committee may administer an oath to a witness.”

A handwritten signature in black ink, appearing to read "Sara Dawson". The signature is written in a cursive style and extends across the width of the page with a long horizontal stroke at the end.

Enclosure: CJA's August 16, 2011 letter to NYC Corporation Counsel Michael Cardozo  
& Mayor's Advisory Committee on the Judiciary Chairman Zachary Carter (15 pages)

cc: Advocates of Judicial Pay Raises  
Public & Press