CENTER for JUDICIAL ACCOUNTABILITY, INC.

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August 23, 2011

TO: New York Chief Administrative Judge Ann Pfau
Office of Court Administration

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

RE: 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 judicial pay levels" – and the Substantiating Evidence

Reference is made to your "Memorandum discussing constitutional considerations in establishing judicial pay levels", Attachment #7 to the Supplemental Appendix to your Submission to the Commission on Judicial Compensation.[1] A copy is enclosed for your convenience.

The memorandum asserts: "As a general matter, five constitutional interests appear to frame the judicial compensation issue for purposes of the Commission's deliberations". These it presents as: "1. Non-diminution. 2. Adequacy. 3. Rationality in disparate pay levels. 4. Independent merits-based analysis. 5. Public confidence in the effective operation of the Judiciary."

As to the "Independent merits-based analysis" – derived from the Court of Appeals' February 23, 2010 decision in the judicial compensation lawsuits – the memorandum states:

> "Separate from the amount of judicial pay, the Constitution requires that adjustments to judicial pay be considered on the merits and not 'linked' to either legislative or executive pay levels or extraneous policy issues. This result flows from the Judiciary's constitutional status as a co-equal branch of government whose

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[1] It took more than three weeks – and a FOIL request – before the Office of Court Administration finally provided us with the Supplemental Appendix, first requested on July 15th. On August 9th, Assistant Deputy Counsel Shawn Kerby directed us to the Commission's website on which the Supplemental Appendix had been posted on that day. The exchange of correspondence from July 15th to August 9th is posted on CJA's website, www.judgewatch.org, on the webpage entitled "Tracking the Submissions the Judicial Compensation Commission has Received". It is accessible *via* the top panel "Latest News", which links to that and related webpages.

> independence would be undermined if judicial salaries fixed by the other branches of government turned on irrelevant factors within the sole political control of the other branches. So held the Court of Appeals in the 2008-2010 judicial pay litigation, but the Court did not fully explicate which factors are appropriate policy considerations that the Legislature properly may weigh. As of this date, therefore, we know only that the particular combination of political events to which judicial salaries had been 'linked,' which conspired to frustrate enactment of a judicial pay adjustment, involved injection of inappropriate considerations." (underlining added)

That the Court of Appeals – due to self-interest and bias – "did not fully explicate which factors are appropriate policy considerations" does not mean those factors are not evident from the reasoning of its February 23, 2010 decision. CJA had no difficulty in explicating the decision to demonstrate that "corruption and lawlessness of New York's state judiciary, infesting its supervisory and appellate levels", are "appropriate" considerations, disentitling the judiciary to any pay raises. That explication, appearing in our August 8, 2011 letter to the Commission, is as follows:

> "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.
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> 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:
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> > '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 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 23rd 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

[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 [August 8, 2011] letter."

[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

letter, pp. 3-4, capitalization, italics, underlining in the original).

WHAT IS YOUR RESPONSE TO THIS EXPLICATION?

Isn't the correctness of our interpretation evident from the fifth "constitutional consideration" of your memorandum, "Public confidence in the effective operation of the Judiciary"? And would you not agree that its "constitutional" dimension is not, in fact, "Public confidence", but "the effective operation of the judiciary"? Stripped of its "public confidence" rhetoric, that fifth "constitutional consideration" is about the operation of Article VI and states:

> "The separation of powers requires that the Judiciary be...operated in a manner that ensures its effective operation as a branch of government able to successfully discharge its constitutional and statutory responsibilities to litigants, the other branches of government and the public... As with so much concerning the Third Branch,...fairness, expertise, neutrality and timeliness of court operations is a concern of the highest order because it goes to the Judiciary's core identity, purpose, and legitimacy... the judiciary's constitutional legitimacy as government's neutral arbiter of legal disputes..."

Isn't this the reason why, when you testified on July 20th before the Commission – as its first witness – you publicly attested that "for 13 years [since the 1999 judicial pay raise] judges have fulfilled their statutory and constitutional duties..." (at 05:25 mins.) and that you were "proud...of all the judges in this state who...do all the things they have to do because they took a constitutional oath to do it and they're doing it" (at 11:44 mins.)?

Isn't this also why your July 20th written "Remarks" expressly focused on "the institutional integrity of the Courts" – which you identified as "one of [the] major themes [of the formal Submission you had made to the Commission]? Isn't this also why, when you stated in those "Remarks" that you "hear...from all corners of the State" about "how important...integrity is to the trust and confidence that the public has in the justice system", and that they "thank [you]" and are "grateful" – as to which you appended not a single testimonial letter – you did not disclose that "from all corners of the State", the Office of Court Administration is flooded with complaints about systemic corruption infesting the judiciary?

On June 14, 2011, five weeks before you delivered your written "Remarks" to the Commission, I hand-delivered a letter to you at the Office of Court Administration, requesting that you revoke your Appellate Term designations of two Supreme Court justices, pursuant to Article VI, §8 of the New York Constitution. This, because they had "employed their judicial offices for illegitimate, ulterior purposes: willfully corrupting the appellate process in four related appeals...to cover up the corruption" of two White Plains City Court judges and, with it,

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III, §1]."

litigation fraud by attorneys, including the New York State Attorney General, representing the Clerk of White Plains City Court who, at the direction of one of the White Plains City Court judges – its Presiding Judge – had "tampered with and falsified court records."[4]

Summarized by the letter was not only corruption at two court levels – White Plains City Court and the Appellate Term for the Ninth and Tenth Judicial Districts – but at a third court level: the Appellate Division, Second Department, which, by a four-judge panel, had denied a 19-page motion for an appeal by leave, *if not by right*, and for referrals mandated by the Chief Administrator's Rules Governing Judicial Conduct, by a two-sentence decision & order concealing ALL the facts, law, and legal argument before it. Among these judges, Peter B. Skelos, the Justice Presiding of the panel and brother of Temporary Senate President Dean Skelos, an appointing authority for the Commission.[5]

The salaries of the City Court, Appellate Term, and Appellate Division judges, whose brazen betrayal of their oaths of office is documentarily established by the record of the case, are, collectively, nearly one-and-half million dollars a year, paid by New York taxpayers[6]. The consequences of what they did was to proliferate, for four years to the present, a landlord/tenant case in which I was the defendant and then appellant – whose dismissal I was entitled to, *as a matter of law*, in October 2007, as verifiable by ANY first year law student – at a cost to me of hundreds of thousands of dollars in legal time, a million dollars in counterclaims, and irreparable personal injury, including the loss of my home of over 20 years.[7]

So that the indicated recipients of this letter – the Commission, among them – may have the benefit of my June 14, 2011 letter to you, a full copy is attached, including its appended

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[4] The three Appellate Term decisions on those four appeals, whose fraudulence is particularized by the final April 25, 2010 motion I made in the Appellate Term for disqualification/disclosure, to vacate for lack of jurisdiction & fraud, reargument/renewal, leave to appeal, & other relief, have an ironic significance. They were rendered on February 23, 2010 – the same date as the Court of Appeals rendered its fraudulent decision in the judicial compensation lawsuits that ultimately gave rise to the Commission.

[5] Temporary Senate Skelos' appointee to the Commission is Mark Mulholland, a partner at the law firm at which Senator Skelos is counsel.

[6] White Plains City Court judges: $116,800-plus (2 & ½ judges); Appellate Term justices (5+ judges): $139,800-plus; Appellate Division Justices (4 judges): $144,000-plus [source: Attachment #4 to your Supplemental Appendix: "Current judicial pay levels in New York State"].

[7] One of the key reasons for the "caseload crisis" is the mix of corruption and incompetence in our judiciary, perpetuating simple cases, spawning motions, appeals, and additional cases – a fact not acknowledged by advocates of judicial pay, such as you, who instead use the "caseload crisis" as another reason for why we should be paying judges more. ["They have performed heroically despite caseloads that have been rising and rising over these last years." (at 05:31 mins.)]

March 16, 2011 letter to the Appellate Division panel, setting forth "the chapter and verse" specifics of their fraudulent two-sentence denial of the motion I had made.[8] As highlighted therein, the corruption of these City Court, Appellate Term, and Appellate Division judges was accomplished by their corrupting of procedures for judicial disqualification/disclosure, designed to ensure "fairness" and "neutrality". Such is a current replication of the corruption of judicial disqualification/disclosure procedures, previously documented by the record of CJA's public interest lawsuit against the Commission on Judicial Conduct, spanning from 1999 to 2002, about which I testified at the July 20th hearing. These two cases: the long-ago concluded Judicial Conduct Commission case and the yet-to-be concluded Landlord/Tenant case[9] – each "Test Cases" – were specifically in my mind, with others, when I stated at the hearing: "Well that's the problem with our judiciary – they don't address their disqualification for interest and their bias" and that the "*modus operandi* in this state" is "fraudulent judicial decisions. The judiciary of this state is corrupt, pervasively, systemically corrupt." (at 03:23:44 mins.).

Prior to making those declarations, I identified that the advocates of judicial pay raises – of which you are one – had furnished "NO EVIDENCE" of the supposed "excellence" and "quality" of our state's judiciary, entitling it to a pay raise, whereas those opposing any pay raises because of its pervasive corruption, "have the evidence to back up their positions" (at 03:17:09 mins – 03:17-49 mins). Based on your referral of my June 14, 2011 letter to the Commission on Judicial Conduct, I take it you are not available to review that evidence.[10]

Time is short. The Commission on Judicial Compensation will be rendering its statutorily-required "report to the governor, the legislature and the chief judge" this weekend and meeting for the last time on Friday. Lest it be led into constitutional error, both as to the "Independent merits-based analysis" it is required to undertake and the evidence actually before it on that issue, the Commission must have your immediate response.

So that other advocates of judicial pay raises – judges, bar associations, lawyers – may assist you in furnishing the Commission with what your memorandum purported not to "know" and in

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[8] The full case record is posted on CJA's website, accessible *via* the sidebar panel "Test Cases" – which brings up a menu page that includes "NY-Landlord/Tenant". For your further convenience, however – and so that the record may be more directly before the Commission – the e-mailing of this letter to you and the other recipients, including the Commission, will be accompanied by a direct link to the record of that case.

[9] Still pending in the Appellate Division is the reargument motion described at pages 4-6 of CJA's June 14, 2011 letter to you.

[10] Apparently, you were not available to review the evidence furnished with the June 14, 2011 letter, as you referred it to the Commission on Judicial Conduct. Your June 16, 2011 letter to me, as well as the Commission's June 29, 2011 letter to me, which did not acknowledge that it was you who had made the referral in enclosing "some background material about the Commission, its jurisdiction and its limitations", are posted on CJA's website. The complaint remains pending, with the miscreant judges free to victimize others at taxpayers' expense.

assessing the evidence that CJA provided it in prior correspondence, at the hearing, and herein, copies of this letter are being sent to them.

Thank you.

Enclosures: (1) Supplemental Appendix Attachment #7:
"Memorandum discussing constitutional considerations in establishing judicial pay levels"
(2) CJA's June 14, 2011 letter to Chief Administrative Judge Pfau
Attachments:
(1) December 7, 2007 and September 23, 2008 Administrative Orders
(2) "Introduction" and "Questions Presented" from three appeal briefs
(3) March 16, 2011 letter to Appellate Division Panel Justices:
(Peter) Skelos, Eng, Hall, Lott
(4) May 23, 2011 letter to Commission Appointing Authorities:
Cuomo, (Dean) Skelos, Silver, Lippman

cc: 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
Advocates of Judicial Pay Raises
The Public & The Press