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August 26, 2011

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

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

RE: PART 2 – 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:

CJA's August 23, 2011 letter to you analyzed the fourth and fifth "constitutional considerations" of your "Memorandum discussing constitutional considerations in establishing judicial pay levels", Attachment #7 of the Supplemental Appendix to your Submission to the Commission on Judicial Compensation.[1] Here now is an analysis of your first, second, and third "constitutional considerations" – and of your advocacy before the Commission pertaining thereto.

With respect to your first consideration, "Non-diminution", your Memorandum states, in pertinent part:

> "...To date, this prohibition has been understood in New York and most other jurisdictions to prohibit any reduction in nominal judicial compensation but not to affirmatively require steps to insulate the purchasing power of judicial salaries from gradual erosion by inflation...."

What you are actually saying is 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, whose lengthy discussion of the subject (at pp. 12-20) concludes as follows:

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[1] For your convenience, our August 23, 2011 letter, which enclosed your Memorandum, is posted on our website, www.judgewatch.org, most conveniently accessible *via* the top panel "Latest News" and our "Judicial Compensation-NY" homepage.

> "...it is evident from the history surrounding the enactment of our state Compensation Clause that, although the diminution in value of judicial compensation by inflation was a concern, the drafters decided that the best way to combat the effects of inflation was to count on the Legislature – the body directly accountable to the public – to assure the fair and appropriate compensation of the judiciary. We therefore determine that the Legislature's failure to address the effects of inflation in this case does not equate to a per se violation of the Compensation Clause." (at pp. 19-20).

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"[2]. 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.

Your proposal that the Consumer Price Index (CPI-U) be the basis for yearly adjustment of judicial compensation is, apparently, without precedent in the setting of judicial pay by other states and the federal government. If so, you reveal it elliptically and only in your July 20th written "Remarks":

> "Finally, the adoption of this standard by the Commission would set an extraordinary precedent in judicial compensation nationwide." (at p. 6, underlining added).

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. Instead, to conceal the co-equality of the "constitutional officers" vis-à-vis COLAs, you continually make it appear that the judges have been "singled out for special burdens [and] compelled to make sacrifices in a manner [and] duration not asked of other public professionals" (Submission, p. 8) and that the judges are government "employees", which they are not.[3]

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[2] While this letter was being written, the Commission removed the video of its July 20, 2011 hearing from its website, as a consequence of which the quote is approximate.

[3] Your July 20, 2011 oral testimony: "nearly everyone else in state government has had significant pay increases".

With respect to the second consideration "Adequacy", your Memorandum states, in pertinent part:

> "...the New York Constitution makes no express statement about the amount of judicial compensation and provides no fixed guidelines to guide deliberations. However, the separation-of-powers premise of a co-equal and effective Judiciary has prompted some states – whether by express constitutional directive or court action – to require that judicial compensation must be 'adequate.' In the words of the highest court of a sister stated, 'Without adequate compensation, a competent judicial system is not possible.' Adequacy, in turn, might be gauged by various measures and policy goals, including but not limited to –
>
> > -- recruiting and retaining sufficient numbers of suitably skilled and experienced attorneys for judicial service (based, for example, on the labor market for comparably skilled and experienced attorneys – for most courts at least 10 years' admission to the New York bar);..."

What you are actually saying is that the New York State Constitution contains NO provision that the compensation of judges be "adequate". And what you fail to say is that even though the Court of Appeals' February 23, 2010 decision read into the Constitution an "adequacy" standard that has no textual basis, it nonetheless did not rule that current judicial salaries were inadequate:

> "The *Chief Judge* plaintiffs posit that the current salaries of Judiciary Law article 7-B judges and justices are inadequate when compared to other legal positions in the public and private sectors. This argument is one that is best addressed in the first instance by the Legislature...
>
> "The argument for a cost-of-living increase is not that, in some objective sense, New York judges do not earn a living wage. Judges made no such argument when this litigation commenced in much better economic times and certainly do not press such a contention now...
>
> Judicial salaries need not be exorbitant, but they must be sufficient to attract well-qualified individuals to serve. Otherwise, only those with means will be financially able to assume a judicial post, negatively impacting the diversity of the Judiciary and discriminating against those who are well qualified and interested in serving, but nonetheless unable to aspire to a career in the Judiciary because of the financial hardship that results from stagnant compensation over the years (at p. 32-34, underlining added)."

Nor could the Court of Appeals have make a ruling of "inadequacy", using the first "measure and policy goal[]" identified by your Memorandum, *to wit*, "recruiting and retaining sufficient numbers of suitably skilled and experienced attorneys for judicial service". As Judge Smith put it, writing in dissent:

> "...I might well agree that separation of powers was violated if the actual or imminent effect of the Legislature's conduct were to make the recruitment of competent judges impossible, or render judges subservient to the other branches of government...
>
> Bad as the present situation is, neither of the disastrous conditions I have mentioned – a bench that cannot be filled with competent people, or one whose financial dependence makes it the slave of the Legislature – exists or is close to existing. It is a depressing truth that some of our finest judges have left, or are thinking of leaving, their jobs because of the Legislature's failure to deal with the salary issue; but it is also true that there are still plenty of able judges, and plenty of able people who would willingly become judges, even at today's pay levels. And I have seen no evidence of judicial subservience to the Legislature; the problem, if there is one, is to restrain judges' understandable displeasure with that branch of our government." (Smith dissent, at pp. 2-3, underlining added).

It must be noted that your recruitment/retention "gauge" is unaccompanied by such essential clarification as was articulated nearly 30 years ago by the Temporary State Commission on Judicial Compensation, chaired by William T. Dentzer, which proposed a "competitive adequacy" standard:

> "'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).

This quotation from page 5 of the Dentzer Report, appearing at page 6 of your "History of judicial salary reform in New York", Attachment #5 to your Supplemental Appendix [4], is not reflected by the second "constitutional consideration" of your Attachment #7, although plainly germane. Nor does your Submission or other advocacy claim that any of your judicial pay proposals are the "lowest pay" that would produce "an adequate supply of well-qualified candidates". To the contrary, your claim is that the recommended pay levels are necessary "to attract the very best and the brightest of legal minds" (Submission, at p. 15) and so that the public will be able "to continue to attract the most able individuals to public service" (written "Remarks", p. 1).

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[4] Your Attachment #5, "History of judicial reform in New York", is taken, substantially *verbatim*, from Appendix B "Legislative History of Judicial Salary Adjustments" of the Report "*Judicial Compensation in New York: A National Perspective*", rendered by the National Center for State Courts in May 2007, at the request of then Chief Judge Judith Kaye.

Your Memorandum also does not identify, let alone dispute, the further recommendation of the Dentzer Commission, paraphrased at page 6 of your "History of judicial salary reform in New York", Attachment #5:

> "that there are significant differences in the cost of living in various areas of the State; and that 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]"

It is without even acknowledging the "significant differences in the cost of living" throughout the State – or even the median household income of New York's 19+ million people: $45,343[5] – that your advocacy makes the blanket claim that judicial salaries are "inadequate" and that they have been "inadequate" since 2000, if not 1999 itself[6] – for which the judges deserve restitution for "underpayment caused by the judicial pay freeze" (Submission, at p. 14), amounting to $330,000 - $400,000 (or was it more?) for each judge[7]:

> "If the Commission were to propose some means of providing retroactive relief for these losses, the Judiciary would strongly support such a proposal." (Submission, at fn. 32).

With respect to the third constitutional consideration "Rationality in disparate pay levels", your Memorandum states, in full:

> "Where judges are paid different salaries, the Constitution requires that these disparities must have at least a rational basis: equal protection principles require that judicial pay distinctions cannot be arbitrary. This principle prompted a series of substantial lawsuits in New York that challenged pay disparities between judges of mainly county- and city-level courts doing comparable if not identical work. In some cases, courts found that laws fixing judicial salaries county by

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"[fn] In reaching its conclusions, the Temporary State Commission was aided by surveys conducted by consulting firms to assess the average compensation of litigators and the cost of living in various areas of the State."

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

[6] Your July 20, 2011 testimony: "17 years, almost a generation of judges that have gone with inadequate salaries, if you do not change this pattern".

[7] Because the Commission took down the video of its July 20, 2011 hearing (see fn. 2), the figures are from memory.

> county and city by city were irrational to the extent that they paid judges different salary levels even though the counties or cities in which they presided had similar living costs and dockets. While to date these principles have applied mainly to pay disparities *within* courts (*e.g.* Family Court, County Court, City Court), they also may be relevant to pay disparities *between* courts that share comparable or overlapping jurisdiction but carry different compensation levels." (italics are yours)

What you are actually saying is that judicial pay disparities are constitutionally acceptable where they have "a rational basis" and that "courts found" different "living costs" to constitute "a rational basis" for disparity. Nevertheless, your pay raise proposals treat New York as a homogenous whole – which it is not. This would be evident had you furnished the Commission with information as to the costs of living within New York's 62 counties and the average/mean income of attorneys in those counties, which you do not – because, as you assuredly know, they widely diverge and do not support the bald representation in your Submission (at p. 20):

> "Past commissions and commentators have criticized these disparities as irrational and called for their elimination.[fn 43] .We agree."

Indeed, your annotating footnote 43, which states:

> "See, *e.g.*, Report of the Jones Commission I (1987) (calling for pay parity among judges of the major trial courts); Report of the Jones Commission II (1992) (calling for further study and evaluation of the subject)"

materially omits the 1982 Dentzer Report, whose "principle recommendation", identified by your Attachment #5:

> "was for establishment of a two-tiered salary schedule for each judicial office, the first tier to represent the base salary for the office and the second to be the base salary increased by 16%. All judges of courts outside of New York City, and Westchester, Nassau and Suffolk Counties would receive the base salary... The rest of judges (*i.e.*, those in the New York City metropolitan area and on Long Island) would receive this new base salary plus a locational increment of 16%...."

Such omission is notwithstanding that this Dentzer Commission recommendation also appears, albeit with surprising less detail, in your Attachment #8. That Attachment, expressly titled "Memorandum discussing the problems of pay disparity in the New York court system", identifies (at p. 3) the Dentzer Commission as having taken the view that "a single statewide salary defies the reality that the cost of living varies considerably from area to area in the State...when it recommended a 16% pay increment for judges serving in the larger, metropolitan areas of the State."

As for your Submission's citation (at fn. 43) to "Jones Commission I (1987)", its recommendations, identified by your Attachment #5 (at p. 12), but not your Attachment #8, included:

> "a permanent State commission on compensation...[which] would be responsible for development of a special salary system for the Judiciary that...includes 'salary differentials for judges that [are] sensitive to the extraordinary costs of living in certain geographical areas of the state.' [Jones I], p. 6".

The same is true with your citation to "Jones Commission II (1992)": your Attachment #5 identifies (at p. 13) what your Attachment #8 does not, *to wit*, that it "suggested additional study of the pay parity issue by a statutory Temporary Commission on Judicial Compensation" – including as to "matters of geographic pay differentials..."

Finally, whereas your Memorandum's third "constitutional consideration" refers to "a series of successful lawsuits in New York that challenged pay disparities", your misnomered Attachment #8 "Memorandum discussing the problems of pay disparity in the New York court system" refers to "only minimally-successful litigation between judges and their employer, the State, alleging that these disparities are so irrational as to violate the Constitution's equal protection guarantee." (at p. 3). Conspicuously, neither Memorandum furnishes the names or citations of these lawsuits – presumably because they do not, in fact support your pay parity position. These should be furnished without delay.

Meantime, enclosed are statistics as to the mean/median salaries of New York lawyers in the 62 counties of this State[8] – reflective of the geographic differentials in living costs – relevant to the three "constitutional considerations" of your Memorandum hereinabove discussed, particularly, "Adequacy" and "Rationality in disparate judicial pay levels".

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The Commission on Judicial Compensation will be meeting later this morning and rendering its statutorily-required "report to the governor, the legislature and the chief judge" this weekend. Lest it be led into constitutional error, the Commission must have your immediate response.

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[8] These statistics are from the website of the American Bar Association Journal, inasmuch as the New York bar leaders who testified at the July 20, 2011 hearing have not responded to my requests to them for similar statistical information – including as to their own lawyer membership. CJA's July 26, 2011 and August 1, 2011 letters to these bar leaders, which were enclosed with our August 17, 2011 letter to the Commission on Judicial Compensation, are posted on our website, accessible *via* the top panel "Latest News" and sidebar panel "Judicial Compensation-NY" By copy of this letter to the bar leaders, we call upon them to supply you and the Commission with the information they have not supplied us. [see, also, p. 5, fn. 8 of our August 5, 2011 letter to New York Times reporter William Glaberson – also sent to the bar leaders and the Commission].

So that other advocates of judicial pay raises – judges, bar associations, lawyers – may assist you, copies of this letter are being sent to them.

Thank you.

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