

Report of the

State Commission on Judicial Conduct

to

Governor Mario M. Cuomo

Lieutenant Governor Stan Lundine

Comptroller Edward V. Regan

Ralph J. Marino, President Pro Tem of the Senate

Manfred Ohrenstein, Minority Leader of the Senate

Melvin H. Miller, Speaker of the Assembly

James R. Tallon, Jr., Majority Leader of the Assembly

Clarence D. Rappleyea, Jr., Minority Leader of the Assembly

Tarky Lombardi, Jr., Chairman, Senate Finance Committee

Saul Weprin, Chairman, Assembly Ways & Means Committee

Christopher J. Mega, Chairman, Senate Judiciary Committee

G. Oliver Koppell, Chairman, Assembly Judiciary Committee

Members, Senate Finance Committee

Members, Assembly Ways & Means Committee

Pursuant to Section 170 of the Executive Law, in response to  
a report of the State Comptroller (90-S-23) dated November 15, 1989.

## Background

On November 15, 1989, the State Comptroller issued a report (90-S-23) of an audit of the State Commission on Judicial Conduct. The report was given the title "Not Accountable to the Public: Resolving Charges Against Judges Is Cloaked in Secrecy."

The Comptroller's report contained one recommendation: the Commission should "Propose legislation to provide specific statutory authorization for access by the State Comptroller to Commission on Judicial Conduct non-public operating records for audit purposes."

Executive Law, Section 170 requires that within 90 days of the State Comptroller's report of an audit, the agency must state "what steps were taken to implement [the Comptroller's] recommendations, and, where recommendations are not implemented, the reason therefor."

### The Commission Respectfully Declines to Implement the Sole Recommendation in the Comptroller's Report

The Comptroller's final report of the audit of the State Commission on Judicial Conduct focused on the confidentiality provisions governing Commission proceedings and files. Section 45 of the Judiciary Law provides for confidentiality with certain limited exceptions.

The Commission's response to the Comptroller's request for unlimited access was that Section 45 appears to bar granting such access. Both the statute and case law suggest that the Comptroller's staff does not have authority to demand unlimited access to the Commission's files for the purpose of having the

Comptroller's office determine whether complaints are being properly considered and whether Commission decisions are appropriate.

It is important to underscore that the Comptroller's comprehensive financial audit of the Commission resulted in no recommendations for change and, in fact, a finding was made of no financial irregularities. Nor was any question raised about the Commission giving the Comptroller access to records that were required to justify expenditures. In short, the Commission's financial expenditures, records, policies and the like were found to be consistent with state policy and rules. The Commission fully cooperated with the auditors, who, incidentally, carried out their assigned tasks in a most thorough and professional manner.

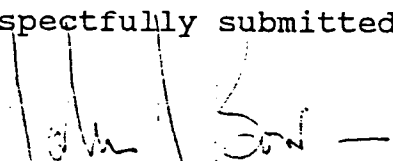
The Commission was aware during the audit that the Comptroller's final report would comment critically on the Commission's safeguarding its records and declining to provide unlimited access for the Comptroller to do an "operational" audit. (The auditors had asked to see files of dismissed complaints and to observe Commission staff while they were conducting investigations.) It would not have been a surprise to learn that the Comptroller was seeking an amendment to Section 45 of the Judiciary Law to permit such unlimited access. It was a surprise to learn that the Comptroller was recommending that the Commission should urge the legislature to amend Section 45. That recommendation seems inappropriate.

If the Governor and the legislature want the Comptroller to have that broad review power, the Commission, of course, would comply. But it should be the Comptroller's burden, not the Commission's, to make a case for such a legislative change. The Commission clearly is not in the best position to advocate such a change since it has serious doubts whether such a change is desirable. The Commission seriously questions whether the Comptroller should determine from an "audit" whether the Commission is exercising its discretion wisely, whether complaints worthy of investigation are being dismissed, whether complaints that lack merit are being investigated, whether judges who have been admonished should have been censured, etc.

Accordingly, the Commission is constrained to reject the only recommendation in the Comptroller's report of the audit. If such a recommendation is to be made, it should be made by the Comptroller, and the Commission would then be free to comment.

We trust that this letter complies with the Commission's obligation to report pursuant to Section 170 of the Executive Law.

Respectfully submitted,

  
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John J. Bower  
Chairman

January 31, 1990