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COMMENT TO THE POST-COMMENT REVISED RULES OF THE NEW YORK STATE COMMISSION ON JUDICIAL NOMINATION

January 26, 2010

This responds to the Commission on Judicial Nomination's November 18, 2009 notice releasing its post-comment proposed revised rules for public comment.

Such notice repeats, *verbatim*, the pretense from the Commission's July 20, 2009 notice releasing its original proposed revised rules for public comment that the Commission has "served New York's citizens well for over 30 years" and that the proposed revisions will enable it to "continue to serve the public interest well" (underlining added). The falsity of this pretense was exposed by the Center for Judicial Accountability's (CJA's) September 21, 2009 comment to those original proposed rule revisions, which identified the uncontradicted testimonial and documentary evidence establishing:

> "that during a ten-year period, spanning nine nominations, the Commission wantonly endangered and injured the public by willfully disregarding its duty to adequately investigate candidate qualifications and that it not only deliberately failed to avail itself of credible sources of negative information concerning the candidates it was purporting to screen, but did so with knowledge that its key sources of negative information – the Commission on Judicial Conduct and the attorney disciplinary system – are dysfunctional, politicized, and corrupt.[fn.11]" (at p. 6)

As stated by CJA's September 21, 2009 comment, with underscoring for emphasis:

> "Nothing in the proposed revised rules will ensure the thoroughness of the Commission's investigation of candidate qualifications – the *sine qua non* of 'merit selection', without which its determination of nominee fitness is fatally flawed." (at p. 6, underlining in the original).

"fn.11 The substantiating documentation, all accessible from CJA's website, includes: (1) CJA's October 16, 2000 report detailing the Commission's corruption of 'merit selection' by its October 4, 2000 report of nominations; (2) the record of CJA's public interest lawsuit against the NYS Commission on Judicial Conduct, spanning from 1999-2002; and (3) CJA's written requests, testimony, and written statements to the New York State Senate Judiciary Committee pertaining to the Committee's hearings to confirm Court of Appeals nominees, spanning from 1998-2009. [See fns. 6 & 8]."

The same holds true with respect to the Commission's post-comment proposed rule revisions. Like the original proposed rule revisions, they are unconstitutional, inadequate, and evidentiarily-unsupported for all the reasons detailed by CJA's September 21, 2009 comment, with one exception – the Commission's deletion of its originally proposed Rule 7100.6(b): "The chairperson will request a meeting between the Commission and the governor or governor-elect to discuss the vacancy and efforts to recruit candidates."

As none of CJA's other objections are embodied in the Commission's post-comment proposed rules, the Commission's deletion of this proposed rule cannot be viewed as a response to CJA's constitutionally-grounded objection thereto[1] – but to the comments of others. Indeed, no other proposed rule was as uniformly objected-to in the comments received by the Commission – essentially all on constitutional grounds[2].

That the Commission even proposed 7100.6(b) is reflective of either a profound ignorance of a fundamental tenet of "merit selection" underlying the constitutional amendment that created the Commission or the degree to which – to appease political powers able to cause its records to be opened for official investigation – it was willing to subvert that tenet.

CJA's September 21, 2009 comment – herein incorporated by reference – details the necessity that the Commission's records be officially investigated. Such is reinforced by the Commission's failure to confront our showing as to the unconstitutionality, inadequacy, and evidentiary-baselessness of its proposed rule revisions, although expressly called upon to do so by the comment itself. As therein stated:

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[1] CJA's objection, at p. 11 of our comment, was as follows:

> "Likewise injecting politics into the evaluative process – and unconstitutional by reason thereof – is the proposed revised Rule 7100.6(b) 'The chairperson will request a meeting between the commission and the governor or governor-elect to discuss the vacancy and efforts to recruit candidates'[fn]. This is contrary to the theory of 'merit selection', whereby the Commission constrains the Governor – rather than serving as a means for his securing from it the nominee of his choice.[fn]"

[2] Comment of Roy L. Reardon, Esq.: "It is directly contrary to the entire purpose of the Commission , i.e. to eliminate political influence over the process"; Comment of Fund for Modern Courts: "...it may create the perception of a lack of Commission independence. The role of the Commission as the nominating body and the Governor as the appointing authority requires that each act independently" (at p. 3); Comment of American Judicature Society: "...as the commission was created to serve as an independent entity, it may create at least an appearance of impropriety for the governor to be involved at this stage of the process and with respect to individual vacancies..."; Comment (Editorial) of The Daily Freeman: "A private meeting between the commission and the governor about the selection of candidates? How does that further the constitutional intent of the commission to depoliticize the filling of judicial vacancies?..."; Comment of New York City Bar Association (by its Council on Judicial Administration): "WE ARE CONCERNED THE PROPOSED PROVISION (b) WOULD CREATE A PERCEPTION ISSUE AND WOULD APPEAR TO RE-POLITICIZE THE NOMINATION AND SELECTION PROCESS." (at p. 5).

"Beneficial as many of the Commission's proposed revised rules are, they are largely window-dressing. They neither ensure the integrity of the Commission's determination of supposedly 'well qualified'/'best qualified' candidates, nor provide any transparency with respect thereto. Such requires revision of the Judiciary Law, if not the Constitution – action incumbent upon the Legislature based upon the uncontradicted, document-supported, direct, first-hand testimony of [CJA director Elena Sassower] and [William] Galison before the Senate Judiciary Committee [at its hearings on the Commission on Judicial Nomination].

Should the Commission now choose to deny or dispute any aspect of our testimony – or [CJA's] above comments – it must do so, with specificity, so that the Senate Judiciary Committee may be properly guided in protecting the public's rights and interest. In any event, it is incumbent upon the Commission to respond, substantively to the foregoing, including by addressing the unconstitutionality of proposed revised Rules 7100.8(c) and 7100.8(d), consistent with the 'continuing dialogue' to which [former Commission] Chairman O'Mara twice referred in his written statement [to the Senate Judiciary Committee]:

> 'We appreciate the Committee's close attention to the process, and look forward to a continuing dialogue with the Committee and others vitally interested in the process.' (at p. 2 , underlining added)
>
> 'We look forward to a continuing dialogue with the Committee and its staff – and other interested parties…' (at p. 14, underlining added).[fn]"

(CJA's September 21, 2009 comment, "Conclusion": p. 15).

No competent and impartial tribunal, governed by appropriate rule-making procedures, could ignore the serious and substantial nature of CJA's comment. Either it had to contest our fact-specific, law-supported showing as to the unconstitutionality, inadequacy, and evidentiary-baselessness of the Commission's proposed rule revisions, or – failing to do so – modify those proposed rule revisions accordingly. That the Commission did neither further demonstrates its flagrant disregard for documentary evidence, legal argument, and the public interest – warranting investigation and disqualifying it as a body to be entrusted with the duty to evaluate candidate qualifications for our state's highest judges. Indeed, it foreshadows what can be expected from the Commission in its future evaluations of candidate qualifications: the Commission will continue to ignore evidence-based, law-supported presentations by CJA and others of the unfitness of favored candidates, such as highlighted by our comment (at pp. 5-6).[3]

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[3] The Commission's post-comment proposed rules expand public outreach, but only for purposes of increasing and diversifying the pool of potential candidates (as likewise potential Commission members), not for purposes of informing the public that notwithstanding the confidentiality provisions of Judiciary Law §66, it has an opportunity to provide the Commission with negative information about such potential candidates as may apply. Instead, the Commission's post-comment proposed Rule 7100.9 "Report to the governor"

Because the Commission's post-comment proposed rule revisions do not reflect CJA's comment whose accuracy it does not deny or dispute in any respect – and because its November 18, 2009 notice identifies that the Commission "carefully considered a number of comments" – rather than all comments – we sought information as to the Commission's procedures for evaluating comments. Our November 27, 2009 letter to the Commission, entitled "The Commission's 'Transparency' – & Compliance with F.O.I.L. and 22 N.Y.C.R.R. §7101", was addressed to its Counsel and Records Access Officer, Stephen P. Younger (Exhibit F-2)[4]. It requested:

> "information as to the procedures employed by the Commission on Judicial Nomination in reviewing comments received by it to its first draft of its proposed revised rules – and, pursuant to F.O.I.L. and the Commission's Part 7101 ('Rules for Public Access to Records'), any documents reflecting those procedures and compliance therewith."

As part thereof, we asked Mr. Younger to:

> "confirm that <u>each</u> of the Commission's members was furnished with CJA's comment – and not just, for example, the Commission's chair, former New York Court of Appeals Chief Judge Judith Kaye, a 'constitutional scholar' as to whose receipt of our comment we <u>specifically</u> request confirmation." (Exhibit F-2, underlining in the original).

The response – not from Mr. Younger, but from Assistant Counsel Norman W. Kee – was by a December 23, 2009 letter (Exhibit G-1), stating:

<u>completely</u> shifts that opportunity (& the Commission's obligation) away from the Commission by its new last sentence:

> "In order to enhance participation in the selection process, the report will also encourage the public to submit comments concerning the nominees to the Governor prior to the Governor's appointment of a nominee, in accordance with Section 68 of the Judiciary Law."

<u>So as not to mislead the public, this valuable and appropriate sentence should be balanced, elsewhere in the Commission's rules, by a provision alerting the public that, irrespective of the confidentiality provision of Judiciary Law §66, it may furnish the Commission with negative information about candidates it believes have applied for consideration.</u>

Legislative repeal of Judiciary Law §66, which would be consistent with the 1977 constitutional amendment creating the Commission, would clearly "enhance participation in the selection process" – a fact highlighted by CJA's comment (at p. 12):

> "Judiciary Law §66 is deleterious to 'merit selection' as it prevents members of the public from knowing who applied to the Commission so that they may come forward and provide it with information bearing on applicant fitness.".

[4] The exhibits annexed hereto continue the sequence of exhibits annexed to our September 21, 2009 comment.

> "...All members of the Commission received copies of all of the comments received, including [CJA's], and all comments were considered by the Commissioners and counsel to the Commission."

We sought clarification by a January 20, 2010 letter to Mr. Kee, with a copy to Mr. Younger (Exhibit H). Pointing out that he had not responded to our broader question as to the Commission's procedures for reviewing comments and for documents corroborating those procedures and compliance therewith, we gave the following illustration of what we were requesting:

> "whether, when 'all members of the Commission' 'considered' 'all comments', they did so at a meeting at which a quorum was physically present or present by phone or other technology, whether discussion was automatically had by the Commissioners and counsel as to every objection and recommendation of each comment – or whether one or more Commissioners had to request discussion of specific comment, objections, and/or recommendations. If so, how many Commissioners had to so-request – or was it left to counsel (meaning only Mr. Younger or also the Commission's deputy, assistant, and [senior] counsel) and/or Chairwoman Kaye to place specific comment, objections, and/or recommendations on the agenda for discussion? How many Commissions were then required to agree to the discussed objections and/or recommendations in order for them to be reflected in the Commission's post-comment proposed rule revisions? Assuming a vote was taken, was it open or confidential? Where are the Commission's written procedures governing its rule revision process, including as relates to conflicts of interest of its chair, counsel, and members – or does it have none?"

Mr. Kee's responding January 21, 2010 letter (Exhibit I) essentially ignored what we had asked, stating:

> "...All comments received were sent to all Commissioners. After receiving input from the Commissioners, a revised set of proposed rule revisions was circulated to all Commissioners.
>
> On November 3, 2009, the Commission had a telephonic meeting, called by the Commission Chair and attended by all Commissioners and counsel, to discuss the revised proposed rule revisions.
>
> On November 16, at a meeting called by the Commission chair, Commissioners Kaye, Friendly, Kassar, Kiam, Mansfield, Milonas, Morton, Nathan, and Schwartz, who were physically present at the meeting, and Commissioners Cirando and Lefcourt, who voted by phone, unanimously approved the redrafted proposed rules."

Thus, Mr. Kee did not identify the existence of any written procedures governing the Commission's rule-making process, which he did not furnish; did not answer how many Commissioners were

required to agree to a given objection or recommendation in a comment before it would be embodied in the post-comment proposed rules; and admitted that there were no meetings at which the Commissioners discussed all comments – as opposed to meetings at which the Commissioners discussed and voted on post-comment rule revisions, the drafters of which Mr. Kee did not identify.

Neither the Commission's current rules nor proposed revised rules identify the Commission's procedures for amending its rules, except as to the vote approving amendments or revocations. According to the Commission's current Rule 7100.9, entitled "Amendment or waiver of rules", the Commission may amend or revoke its rules by a "vote of a majority of a quorum present at a duly constituted meeting" – presumably meaning at least six members of a ten-member quorum. That number is increased to eight members by the Commission's proposed Rule 7100.10, identically-titled "Amendment or waiver of rules".[5] Mr. Kee's January 21, 2010 letter implies that the Commission

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[5] CJA's September 21, 2009 comment erroneously stated (at p. 15) that the Commission's proposed Rule 7100.10 "essentially replicat[ed]" current Rule 7100.9. That is incorrect, as there is a substantive difference – and one retained by the Commission's post-comment proposed Rule 7100.10. Thus, the Commission's post-comment proposed Rule 7100.10 states:

> "Consistent with applicable law, any rule adopted by the commission may be amended, revoked, or waived in a specific instance by the commission by the affirmative vote of eight commissioners present at a duly constituted meeting."

By contrast, the text of current Rule 7100.9 distinguishes between a commission rule that is "amended or revoked" – which can be accomplished by as few as six of ten members present at a meeting – and a rule "waived…in a specific instance", requiring the assent of eight members at a meeting:

> "Any rule adopted by the commission may be amended or revoked by the commission, or by the vote of a majority of a quorum present at a duly constituted meeting. Any rule of the commission may be waived by the commission, in a specific instance, by the affirmative vote of eight members of the commission present at a duly constituted meeting."

Obviously, where the Commission amends or revokes a rule, such is necessarily reflected by its filing of same with the secretary of state and clerk of the Court of Appeals and by publication in the official compilation of codes, rules and regulations of the state, as required by Judiciary Law §65.2. Not so with respect to a rule "waived…in a specific instance" – and our September 21, 2009 comment objected on that ground:

> "There is no point in publicly-promulgated rules if the Commission is able to dispose of them 'in a specific instance' by a majority vote of eight Commissioners at a duly constituted meeting – and without notice to anyone outside the Commission. At very least, any amendment or waiver of the rules by the Commission 'in a specific instance' should be accompanied by notice to the Governor, Senate, and the public – and a provision to that effect must be inserted if the rule is to be retained." (at p. 15).

Presented with this objection, the Commission's only post-comment change to its originally proposed Rule 7100.10 is stylistic: substituting the single word "commissioners" for the four words "members of the commission".

has conformed therewith by its vote. However, this has nothing to do with the Commission's procedures leading up to the amendment vote, such as the manner in which it evaluates public comments to its proposed revised rules and incorporates or excludes their recommendations and objections from the redrafting thereof. To the extent these are embraced by the Commission's current Rule 7100.1 entitled "Chairperson" or by its current Rule 7100.2 entitled "Counsel", they lack transparency – and such lack of transparency is replicated by the Commission's proposed revisions of those rules, both pre- and post-comment.

Thus, the Commission's current and proposed Rule 7100.1 designate the Commission's chair as having such "other functions and duties as may be assigned by the commission, or are customary for the office" – without specifying them. These may reasonably include drafting revisions to the Commission's rules and evaluating public comments with respect thereto, which, if not deemed "customary for the office", the commissioners are empowered to assign to the chair. Similarly, the Commission's current and proposed Rule 7100.2 allows the Commission to prescribe the counsel's "powers and duties", with both the commissioners and chair empowered to delegate "such other duties" – without specifying them. These, too, may reasonably include drafting revisions to the Commission's rules and evaluating public comments, whether prescribed or delegated.

Consequently, Mr. Kee's euphemistic and essentially non-responsive reference to "input from the Commissioners" may conceal that the commissioners did no more than affirm or delegate duties to Chairwoman Kaye and/or Mr. Younger to evaluate the comment, on their behalf, and to draft rule revisions consistent therewith, subject to discussion of the drafted rules and vote thereon by the commissioners. Mr. Kee's reluctance to reveal this may be borne of his knowledge that, irrespective of the absence of impartiality/conflict-of-interest provisions in the Commission's current rules, and their inapplicability in the Commission's proposed revised rules[6], both Chairwoman Kaye and Mr. Younger were duty-bound to have disqualified themselves from any role in the Commission's evaluation of CJA's comment by reason of their participation and complicity in the Commission's corruption, outlined by the comment.[7]

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[6] The Commission's proposed Rule 7100.8(a) – both pre- and post-comment – provides for "Commissioner impartiality", but does so only in the context of "Consideration of candidates". Additionally, and as pointed out by CJA's September 21, 2009 comment (at p. 7), such provision is "not matched by a counterpart provision governing counsel impartiality" – and it still is not in the Commission's post-comment proposed rules.

[7] Chairwoman Kaye's disqualifying self-interest arises from her knowledge of, and complicity in, the Commission's corruption, both in her administrative and judicial capacities, when she was Chief Judge of the Court of Appeals. In addition to my testimony as to Judge Kaye's facilitating role in the Commission's corruption at the Senate Judiciary Committee's June 5, 2009 hearing – the transcript of which (if not video) Mr. Kee is presumed to have reviewed (pp. 82-83, 114) – it is reflected by footnotes 5, 6, and 8 of CJA's September 21, 2009 comment.

Mr. Younger's disqualifying self-interest is also two-fold. It arises from his role in the Commission's corruption, going back to 1998 when he was the Commission's assistant counsel – and, additionally, from his position as president-elect of the New York State Bar Association, which, from 1998 to the present, has covered up and facilitated the Commission's corruption. This includes by its skimpy, conclusory, and non-sequitur-filled comment to the Commission's original revised rules, which it transmitted by a September 17,

In any event, Mr. Kee's failure to provide full and unambiguous responses to the Commission's procedures for evaluating comments exposes how illusory the Commission's new claims of transparency are. This too is manifested in Mr. Kee's elusive reply to CJA's November 24, 2009 letter requesting the Commission post on its website all the comments it had received (Exhibit F-1) and his non-response to CJA's January 20, 2010 letter for clarification (Exhibit H).

Our November 24, 2009 letter, like our November 27, 2009 letter, was entitled "The Commission's 'Transparency' – & Compliance with F.O.I.L. and 22 N.Y.C.R.R. §7101" and addressed to Mr. Younger as Counsel and Records Access Officer. It asked:

> "that the Commission post, on its website, all written comments received by the Commission to its first draft of proposed revised rules. This includes, most importantly, the written comments the Commission did not 'carefully consider[]' and/or 'incorporate' in its second draft[fn]." (Exhibit F-1, underlining in the original).

Alternatively, it requested that if all comments were not posted that we be given access "to inspect same at the Commission's office, pursuant to F.O.I.L. and the Commission's Part 7101 'Rules for Public Access to Records'."

Here, too, Mr. Younger did not respond, but Mr. Kee, whose December 23, 2009 letter (Exhibit G-1) – the same as replied to our November 27, 2009 letter – stated:

> "At this time, there are no plans to post the comments on our website. The Commission will make the comments available to you for inspection, subject to potential redactions necessary to prevent the inadvertent release of sensitive or confidential information..."

The apparent rejection of CJA's request that the Commission post comments on its website is all the more striking as Mr. Kee thereafter was perfectly agreeable to sending us a copy of the

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2009 coverletter of State Bar President Michael Getnick and its superficial, conclusory, and non-sequitur-filled "Report on the Process of Selecting Judges for the Court of Appeals", approved by the State Bar's Executive Committee on June 19, 2009 – to which both President Getnick's coverletter and the State Bar's comment refer. The inadequacies of the State Bar's comment and Executive Committee-approved report are facially apparent – and all the more shocking when compared with CJA's September 21, 2009 comment. Yet it is the State Bar Association's comment and those of the City Bar Association, the New York County Lawyers' Association, and The Fund for Modern Courts which the Commission's November 18, 2009 notice acknowledges, not CJA's – replicating the comparable deceit of the Commission's July 20, 2009 notice, highlighted by CJA's September 21, 2009 comment (at pp. 1-2).

As Mr. Younger is presumed to know from correspondence we provided the Commission (Exhibits J-1, J-2), neither the State Bar, the City Bar, the New York County Lawyers, or The Fund have seen fit to respond to CJA's comment, although expressly invited to do so and furnished copies – reflective of the fact that such would expose the constitutional and evidentiary deficiencies of their comment.

comments, only minimally redacted (Exhibit G-2) – thereby enabling us to post the comments on CJA's website. Our January 20, 2010 letter to Mr. Kee, with a copy to Mr. Younger, therefore, sought clarification as to the Commission's procedures for its website:

> "According to the Commission's proposed Rule 7100.11: 'The website will be maintained by commission staff at the direction of the chairperson.' Is this already the procedure? – and was it Chairwoman Kaye alone who rejected my request that the Commission's website post all comments received by the Commission to its proposed rule revisions? If so, what review is available by Commission members? – as none is set forth by 7100.11." (Exhibit H)

That Mr. Kee's January 21, 2010 letter (Exhibit I) completely ignored these three straight-forward questions supports an inference that it was Mr. Younger and/or Chairwoman Kaye who unilaterally – and without consultation of Commission members – determined not to post the comments on the Commission's website. Review of the comments discloses no reason for Mr. Younger and/or Chairwoman Kaye to have failed to post them except that they would have had to post CJA's comment, thereby readily exposing to public view the unconstitutional, inadequate, and evidentiarily-unsupported nature of the Commission's proposed revised rules, both original and post-comment – and, with it, the evidence of the Commission's corruption that it is endeavoring to cover up.

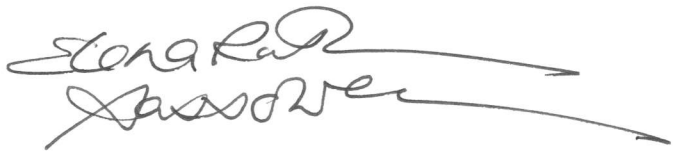

TABLE OF EXHIBITS