CENTER for JUDICIAL ACCOUNTABILITY, INC.*

Post Office Box 8101
White Plains, New York 10602

Tel. (914)455-4373

E-Mail: cja@judgewatch.org
Website: www.judgewatch.org

June 25, 2013

TO: Governor Andrew M. Cuomo

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

RE: Your Duty to Disapprove A.246 (establishing a special commission on compensation of managerial and confidential state employees) and to Use its Return to the Legislature, Pursuant to Article IV, §7 of the New York State Constitution, to Advance the Non-Partisan, Good-Government Legislative Rules Reforms of the 2004, 2006, and 2008 Brennan Center Reports

This follows up my phone call yesterday at 4:45 p.m., leaving a message for your counsel, Mylan Denerstein, with Lauren McCabe.

The purpose of the call was to alert you that you must NOT sign A.246, establishing a quadrennial special commission on compensation for managerial and confidential state employees. Rather, you must disapprove it and return it to the Legislature. This, because A.246 is the product of a dysfunctional legislative process and is modeled, *verbatim*, on Chapter 567 of the Laws of 2010, establishing a quadrennial special commission on judicial compensation, as to which there has been NO LEGISLATIVE OVERSIGHT. The consequence is that A.246 replicates the constitutional and statutory infirmities of Chapter 567 of the Laws of 2010, itself the product of a dysfunctional legislative process.

This is chronicled by our correspondence with the Legislature, spanning from April 20, 2013 to June 20, 2013. It is posted on our website, www.judgewatch.org, on a webpage entitled: "Fighting Off Progeny of the Judicial Compensation Statute (S-2953; A-246) & Securing a Functioning Legislative Process", accessible *via* the top panel "Latest News". Here's the direct link: http://www.judgewatch.org/web-pages/judicial-compensation/judicial-compensation-progeny.htm.

The most important of this correspondence are the three memoranda we furnished all Senators and Assembly Members, particularizing the absence of cognizable committee process in both the Senate and Assembly with respect to identical bills S.2953 and A.246, as well as the constitutional, statutory, and other infirmities of those bills. These memoranda are:

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* **Center for Judicial Accountability, Inc.** (CJA) is a national, non-partisan, non-profit citizens' organization, working to ensure that the processes of judicial selection and discipline are effective and meaningful.

(1) CJA's April 20, 2013 memorandum to all members of the Assembly Committee on Governmental Employees;

(2) CJA's April 26, 2013 memorandum to all members of the Assembly Ways and Means Committee; and

(3) CJA's April 26, 2013 memorandum to all Senators.

For your convenience, they are enclosed.

Notwithstanding these memoranda are dispositive of the duty of each Senator and Assembly Member to have voted against S.2953 and A.246, the Assembly voted in favor of A.246, without discussion or debate, early in the evening on June 20th – the official tally being 141-for, 1-against (Assemblyman Nojay)[1]. The Senate followed five hours later, substituting A.246 for S.2953, and, without discussion or debate, voting, as then announced, 62-for, 1-against (Senator Ball)[2], with Senate sponsor John DeFrancisco identifying, in explaining his vote, that it was a "very important bill…just like the judicial commission".

Pursuant to Article IV, §7 of the New York State Constitution, you may disapprove A.246 and return it to the Legislature, with your objections. This is precisely what you must do – unless you are able to address the facts, law, and legal argument presented by our enclosed three memoranda and subsequent June 19th -20th e-mails to the legislators based thereon, establishing that little has changed in the nine years since the Brennan Center's landmark 2004 report "*The New York State Legislative Process: An Evaluation and Blueprint for Reform*", which identified that a dysfunctional legislative process produces flawed legislation.[3] The result, now before you, is a bill not even supported by a sufficient sponsor's memo and whose constitutional and statutory infirmities, as embodied by Chapter 567 of the Laws of 2010, have already been proven – resoundingly.

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1 This official tally differs from what was announced on the Assembly floor at the time of the vote, which was 93-for, 2-against – a 95 vote tally consistent with what the Assembly video shows: a chamber no more than 2/3 full.

2 This is a 100% vote of the 63-member Senate chamber.

3 This important report and the Brennan Center's two subsequent reports: in 2006 "*Unfinished Business: New York State Legislative Reform*", and in 2008 "*Still Broken: New York State Legislative Reform*", as well as the 1997 article "*Albany's Travesty of Democracy*" by Professor Eric Lane that was their genesis, are posted on the "Rules Reform Resource Page" of our website, accessible *via* our "Latest News" top panel. Go to hyperlink for "CJA's championing of appropriate rules and leadership for the New York State Legislature".

Inasmuch as your special counsel for public integrity and ethics reform, Jeremy Creelan, was an author of the 2004 Brennan Center report and testified at the February 26, 2009 public hearing of the Senate's defunct Temporary Committee on Rules and Administration Reform, whose membership included Senators Jeffrey Klein and Andrea Stewart-Cousins, he should be assisting you in using your return of A.246 to the Legislature as an opportunity to champion the legislative rules reforms proposed by the 2004 Brennan Center report and reiterated by its 2006 and 2008 updates. It is these non-partisan, good-government rules reforms – NOT the substantive "progressive" bills you have crafted behind-closed-doors and pushed the Legislature, through its "leadership", to pass, without public hearings and with no committee process, including your "Public Trust Act" – that are the *sine qua non* for a properly functioning Legislature and, through it, the proper functioning of our two other government branches.

Absent such legislative rules reforms, there is no basis for public trust in our state government and for your repeated declarations: "government is working and is working for you"[4], which, as recently as two weeks ago Mr. Creelan publicly repeated: "the government is working for the People".[5]

Thank you.

Enclosures: CJA's 3 memoranda: April 20th, April 26th, and April 26th.

cc: Mylan Denerstein, Counsel
Jeremy M. Creelan, Special Counsel for Public Integrity and Ethics Reform
Senator Greg Ball & All Senators
Assemblyman Bill Nojay & All Assembly Members
The Public & The Press

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[4] Your March 29, 2013 video message about "the newly enacted and on-time 2013-2014 budget" – www.youtube.com/watch?v=5uw7PfHnUv4 (at 00:57 min; 2:10 mins).

[5] Your June 11, 2013 press conference on public integrity and public trust, posted on your website: www.livestream.com/newyorkstateofficeofthegovernor/video?clipId=pla_6b8ba9db-7b27-4255-87ec-f1d4a3c4a2c9 (at 13:06 min.). This – and your March 29, 2013 video message on passage of the budget – will be posted on our website, beneath this letter, on our webpage for "Fighting Off Progeny of the Judicial Compensation Statute (S-2954; A-246) & Securing a Functioning Legislative Process".

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April 20, 2013

TO: Assembly Committee on Governmental Employees:
Chair – Peter Abbate, Jr.
Members – Jeffrion Aubry, Alec Brook-Krasny, William Colton, Michael Cusick, Michael DenDekker, Phillip Goldfeder, Al Graf, Mark Johns, Nicole Malliotakis, Joseph Saladino, Angelo Santabarbara, Michaelle Solages, Kenneth Zebrowski

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

RE: (1) Constitutional, statutory, & other infirmities of A.246 establishing "a special commission on compensation for state employees designated managerial or confidential, and providing for its powers and duties";
(2) Request that the Assembly Committee on Governmental Employees hold a hearing on A.246 as to its purported "Justification", as set forth in its sponsor memo, and to secure expert testimony on its constitutionality

This follows my brief phone conversation on Wednesday morning, April 17, 2013 with Chairman Abbate's legislative director, Joe Brady, alerting him to constitutional, statutory, and other infirmities of A.246 establishing "a special commission on compensation for state employees designated as managerial or confidential, and providing for its powers and duties". I sufficed to outline for Mr. Brady only a portion of what is set forth below as Mr. Brady told me he would have to call me back. However, I received no subsequent call from him. Nor was I notified that A.246 was being calendared for the agenda of the Committee's meeting on Tuesday morning, April 23, 2013.

I learned of such calendaring on Friday morning, April 19, 2013, when – having received no return call from Mr. Brady – I telephoned Chairman Abbate's office. Upon being told that Mr. Brady was not then in, I asked when the Committee's next meeting was and whether A.246 was on the agenda. I was told, only tentatively, that it was. This was confirmed for me, thereafter, by various staff of Committee members with whom I spoke late Friday afternoon, upon calling to obtain e-mail addresses of the members' legislative directors and/or chiefs of staff for purposes of furnishing them with the below presentation.

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Constitutional, Statutory, & Other Infirmities of A.246

A.246, sponsored by Assembly Ways and Means Committee Chairman Herman Farrell, Jr. and Assemblyman J. Gary Pretlow, was "prefiled" on January 9, 2013, and referred to the Assembly Committee on Governmental Employees.

The identical Senate version S.2953, sponsored by Senate Finance Committee Chairman John DeFrancisco and introduced on January 25, 2013, was referred to the Senate Finance Committee, from which it was voted out on Tuesday, April 16, 2013 with such carelessness that none of the Senators questioned how, pursuant to §1(a), the first special commission could be established on "April 1, 2013", and, especially, as §§1(h) and (i) required that it be dissolved "not later than one hundred fifty days" thereafter. Although the official record of the Senate Finance Committee vote is 29 ayes, 6 ayes without recommendation, and 1 Senator excused, the number of Senators actually present at the Committee's 11-minute, 22-second meeting, as seen in its video, appears to be no more than 11.[1] The total time spent on A.246 was less than two minutes – a substantial portion of which was given over to "facetious" comment about how it would be "horrible", "a very bad thing", and "probably corrupt" to use the special commission format to address legislative pay.[2]

A.246/S.2953 is modeled on – and is largely *verbatim* identical to – Chapter 567 of the Laws of 2010, establishing a special commission on judicial compensation. Reflecting this is the memo accompanying A.246/S.2953. In a section entitled "Existing Law", it states, in pertinent part:

> "Similar legislation to the measure proposed here has been passed and/or enacted for the Judiciary and State Legislature in 2008 and 2011."

The referred-to "similar legislation" relating to the judiciary is Chapter 567 of the Laws of 2010, whose first special commission on judicial compensation was statutorily-required to be established on April 1, 2011.

As should already be known by all members of the Assembly and Senate, Chapter 567 of the Laws of 2010 is the subject of a serious and substantial legal challenge:

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[1] The 29 Senators voting recorded as voting "aye" are Senators DeFrancisco, Bonacic, Farley, Flanagan, Fuschillo, Golden, Grisanti, Lanza, Larkin, Little Marcellino, Nozzolio, O'Mara, Ranzenhofer, Robach, Savino, Seward, Young, Krueger, Diaz, Dilan, Rivera, Breslin, Montgomery, Parker, Perkins, Stavisky, Espaillat, Sampson. The 6 ayes (without recommendation) are recorded as Senators Griffo, LaValle, Gianaris, Peralta, Squadron, and Kennedy. And the 1 senator that was excused was Senator Hanon.

[2] The Senate Finance Committee's video of its April 16, 2013 meeting is on its website: http://www.nysenate.gov/committee/finance . A transcription of the less than two minutes devoted to A.246 appears at pp. 9-10, *infra*.

CENTER FOR JUDICIAL ACCOUNTABILITY, INC. and ELENA RUTH SASSOWER, individually and as Director of the Center for Judicial Accountability, Inc, acting on their own behalf and on behalf of the People of the State of New York & the Public Interest,

-against-

ANDREW M. CUOMO, in his official capacity as Governor of the State of New York, ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, THOMAS DiNAPOLI, in his official capacity as Comptroller of the State of New York, DEAN SKELOS, in his official capacity as Temporary President of the New York State Senate, THE NEW YORK STATE SENATE, SHELDON SILVER, in his official capacity as Speaker of the New York State Assembly, THE NEW YORK STATE ASSEMBLY, JONATHAN LIPPMAN, in his official capacity as Chief Judge of the State of New York, the UNIFIED COURT SYSTEM, and THE STATE OF NEW YORK.

Four copies of the verified complaint were served on the Legislature on April 5, 2012 – one copy for Assembly Speaker Silver, one copy for Temporary Senate President Skelos, one copy for the Assembly, and one copy for the Senate, each named defendants. On February 6, 2013, a fifth copy was furnished to the Legislature, indeed, directly to Senate Finance Committee Chairman DeFrancisco, who was presiding at the joint Senate and Assembly budget hearing on "public protection", at which I testified about the significance of the verified complaint in establishing the Legislature's duty to override the judicial salary increases recommended by the first Special Commission on Judicial Compensation. As I had been relegated to testifying last by the Senate Finance Committee which organized the hearing, Assembly Ways and Means Chairman Farrell was not present for my testimony – 7-1/2 hours after the hearing began. Nevertheless, he and all other Assembly members and Senators were, thereafter, repeatedly given notice that the video of my testimony was posted on CJA's website, www.judgewatch.org, accessible *via* the top panel "Latest News", on a webpage entitled "Securing Legislative Oversight & Override of the 2nd and 3rd phases of the judicial pay raises scheduled to take effect April 1, 2013 and April 1, 2014" – and that also posted on that webpage was the substantiating documentation I had handed up at the February 6, 2013 budget hearing: the *CJA v. Cuomo* verified complaint and all its exhibits thereto, including its most important: CJA's October 27, 2011 Opposition Report to the Special Commission on Judicial Compensation's August 27, 2011 "Final Report".

The facts recited by the verified complaint's second cause of action (at ¶¶145-154) as to the unconstitutionality of provisions of Chapter 567 of the Laws of 2010, *as written*, are dispositive of the unconstitutionality of the same or comparable provisions and features of A.246/S.2953, *as written*.

Similarly, the facts recited by the verified complaint's third and fourth causes of action (¶¶155-166; ¶¶167-172) as to the first Special Commission on Judicial Compensation's flagrant violation of the most basic ethical, evidentiary, and legal standards, and of express preconditions specified by Chapter 567 of the Laws of 2010 for salary increase recommendations, are dispositive of the ease with which a special commission established under A.246/S.2953 can, with impunity, recommend whatever pay raises its self-interested and actually biased commissioners might choose – with no oversight by our highest constitutional officers and no protection of the public purse – a state of affairs further underscoring the unconstitutionality of A.246/S.2953, *as written*.

The express basis of ¶¶145-154 of the verified complaint's second cause of action, appearing beneath the title heading "Chapter 567 of the Laws of 2010 Unconstitutionally Delegates Legislative Power Without Safeguarding Provisions and Guidance", is the 2007 decision of Bronx Supreme Court Justice Mary Ann Brigantti-Hughes in *Mary McKinney, et al. v. Commissioner of the New York State Department of Health, et al.*, 15 Misc.3d 743 (2007).[3] At issue in *McKinney* was a statute which allowed recommendations of a special commission to become law, without affirmative legislative action. Judge Brigantti-Hughes upheld the statute – Chapter 63 (Part E) of the Laws of 2005 – only because it contained safeguarding provisions. Such safeguarding provisions, however, are absent from Chapter 567 of the Laws of 2010 and from A.246/S.2953 – each also allowing commission recommendations to become law, without affirmative legislative action.

That Chapter 63 (Part E) of the Laws of 2005 should have been stricken as unconstitutional may be seen from the *amicus curiae* brief that the New York City Bar Association filed with the Court of Appeals, in support of the motion of the *McKinney* plaintiffs for leave to appeal.[4] The *amicus* brief described the statute delegating legislative power to a commission, without requiring the legislature to affirmatively vote on its recommendations before they would become law, as:

> "a process of lawmaking never before seen in the State of New York" (at p. 24);
>
> a "novel form of legislation…in direct conflict with representative democracy [that] cannot stand constitutional scrutiny (at p. 24)";
>
> a "gross violation of the State Constitution's separation-of-powers and…the centuries-old constitutional mandate that the Legislature, and no other entity, make New York State's laws" (at p. 25);
>
> "most unusual [in its]…self-executing mechanism by which recommendations

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[3] Justice Brigantti-Hughes' decision, the subsequent Appellate Division and Court of Appeals decisions, as well as such parts of the record as we could locate are posted on a webpage of CJA's website pertaining to the *McKinney* case, accessible from the *CJA v. Cuomo* webpage. Here's the direct link: http://www.judgewatch.org/web-pages/judicial-compensation/mckinney-etc.htm.

[4] The City Bar's *amicus* brief in *McKinney* is posted on the *McKinney* webpage of our website – whose direct link is in footnote 3, *supra*.

> formulated by an unelected commission automatically become law...without any legislative action" (at p. 28);
>
> unlike "any other known law" (at p. 29);
>
> "a dangerous precedent" (at p. 11) that
>
> "will set the stage for the arbitrary handling of public resources under the guise of future temporary commissions that are not subject to any public scrutiny or accountability" (at p. 36).

Indeed, Appellate Division, Fourth Department Justice Eugene Fahey deemed the statute unconstitutional, violating due process, the presentment clause, and separation of powers, in his dissenting opinion in *St. Joseph Hospital, et al. v. Novello*, 43 A.D.3d 139 (2007) – another case challenging Chapter 63 (Part E) of the Laws of 2005, which came up to the Court of Appeals in the same period as *McKinney*.

The Court of Appeals' response to these two important cases, simultaneously before it, was in keeping with its corrupt, politicized conduct chronicled by the *CJA v. Cuomo* verified complaint. It dismissed both the *McKinney* and *St. Joseph Hospital* appeals of right, "*sua sponte*", on its standard boilerplate, "no substantial constitutional question is directly involved", thereafter denying leave to appeal without reasons.

These were not the only challenges generated by Chapter 63 (Part E) of the Laws of 2005. There are five others identified by the New York City Bar Association's May 2007 report "*Supporting Legislative Rules Reform: The Fundamentals*" (at pp. 9-10), whose discussion of the statute was in the context of describing it as the product of New York's dysfunctional Legislature, whose rules vest disproportionate power in the leadership, leaving committees, which should be the locus for developing legislation and discharging oversight responsibilities, as nothing more than shells.[5]

A functioning legislature, with functioning committees, should have been made aware of the constitutional challenges to Chapter 63 (Part E) of the Laws of 2005 – and to the constitutional challenge to Chapter 567 of the Laws of 2010, presented by the *CJA v. Cuomo* verified complaint. Certainly, we did everything in our power to ensure this would happen. In the month preceding the January 9, 2013 start of the legislative session, we took steps to alert all Senate and Assembly members to the *CJA v. Cuomo* verified complaint because of its relevance to their responsibilities to vote on new leadership and new legislative rules. We sent virtually every Senate and Assembly member e-mails on the subject in the weeks leading up to the opening session on January 9, 2013[6] –

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[5] The City Bar's report "*Supporting Legislative Rules Reform: The Fundamentals*" is posted on the *McKinney* webpage of our website – whose direct link is in footnote 3, *supra*.

[6] This correspondence to Senate and Assembly members in the month preceding January 9, 2013 is posted on our website, on our webpage entitled "CJA's Championing of Appropriate Rules and Leadership for

the day on which, according to A.246, Assemblyman Farrell "prefiled" it.

The next day, January 10, 2013 – even before the dates of the Senate and Assembly budget hearings were publicly announced – I was directly phoning Assemblyman Farrell's office and Senator DeFrancisco's office, requesting to testify against the Judiciary's request for funding for the second phase of the judicial salary increases, recommended by the first Commission on Judicial Compensation. In so doing, I requested that the Senate Finance Committee and Assembly Ways and Means Committee, as likewise the Senate and Assembly Judiciary Committees, each review, in advance of the February 6, 2013 budget hearing on "public protection", the *CJA v. Cuomo* verified complaint – and its most important exhibit CJA's October 27, 2011 Opposition Report. Unbeknownst to me, Senator DeFrancisco would be introducing S.2953 on January 25, 2013.

That Assemblyman Farrell and Senator DeFrancisco introduced A.246/S.2953 modeled on Chapter 567 of the Law of 2010 imposed upon them a duty to examine and alert their fellow legislators as to the constitutional and statutory challenge presented by *CJA v. Cuomo*. Instead, they not only ignored the verified complaint and the testimony I presented at the February 6, 2013 hearing based thereon, but Senator DeFrancisco apparently sought to clandestinely secure passage of his S.2953 by importing its text into appropriations bill S.2605, as "Part X".

We noted this "Part X" in our March 24, 2013 letter to all Senators entitled "Why You Must Reject S.2601: The Appropriations Bill for the Judiciary" and in our essentially identical March 26, 2013 letter to all Assembly Members entitled "Why You Must Reject A.3001: The Appropriations Bill for the Judiciary" as underscoring the necessity that legislators examine the *CJA v. Cuomo* verified complaint. Each letter stated:

> "Particularly <u>essential</u> is examination of ¶¶145-154 of the complaint's second cause of action, challenging the constitutionality of Chapter 567 of the Laws of 2010, *as written*, based on its <u>delegation</u> of 'Legislative Power Without Safeguarding Provisions and Guidance'. This is because budget bill S.2605-C contained legislation 'necessary to implement the public protection-general government budget for the 2013-2014 state fiscal year' in a Part X creating 'a commission on managerial or confidential state employee compensation to examine, evaluate and make recommendations with respect to adequate levels of compensation and non-salary benefits for managerial or confidential state employees'. Its material language and provisions were *verbatim* <u>identical</u> to the constitutionally-infirm language and provisions of Chapter 567 of the Laws of 2010. This Part X appears to have been removed from what is now S.2605-D, but whether it has been imported to some other Senate or Assembly bill is unknown." (at page 10, underlining in the originals).

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the New York State Legislature", accessible *via* the top panel "Latest News". Our January 3, 2013 letter to all Assembly members (excepting the incoming freshmen) was entitled "Transforming the Assembly on Day 1 of its 236th Legislative Session by Appropriate Rules & Leadership".

"Part X" was removed from S-2605-C because it was not acceptable to Assembly leadership. In the words of Senate Finance Committee Chairman DeFrancisco at the Committee's April 16, 2013 meeting on S.2954: "We had this in our one-house budget bill and the Assembly would not go along." This, however, is not reflected by the sponsor memos, which should have been updated. The sponsor memo to A.246 simply identifies the "Legislative History as "A.9776 of 2012", with the sponsor memo for S.2953 more expansively identifying "S.6568/ A.9776 of 2012".[7]

Request for Committee Hearing on A.246

In the event you are unaware that properly functioning legislatures solicit expert and public opinion through committee hearings so that members can be properly informed as to both facts and law and enabled to appropriately revise and amend proposed bills, we ask that you read the landmark 2004, 2006, and 2008 reports of the Brennan Center for Justice on New York State legislative reform, which, together with the New York City Bar Association's 2007 report "*Supporting Legislative Rules Reform: The Fundamentals*", are posted on our website as part of a "Rules Reform Resource Page", also accessible *via* our top panel "Latest News".

For immediate purposes, here's a quote from the Brennan Center's 2008 report entitled "*Still Broken: New York State Legislative Reform*", which under the heading "Dysfunctional Standing Committees", states:

> "In many state legislatures and in the United States Congress, committees function as the locus of legislative activity.[fn10] In New York, they do not. The Speaker of the Assembly and Senate Majority Leader maintain complete control over the committee process, rendering committees unable to fulfill a primary legislative purpose.
>
> In truth, most standing committees exist only as a formality; they serve merely as a place to introduce legislation, not as a place to *consider, debate, and remake* legislation. The leadership prevents legislation with which they do not agree from ever achieving momentum through exploration in committee, limiting the need to apply the breaks (sic) on legislation that has gained force later in the process.
>
> Ideally, committees should work as follows: a lawmaker identifies an issue and writes legislation in response. Once introduced, the draft bill (is) subject to public hearings and debate in committee. Before legislation reaches the floor, lawmakers explore its merits and shortcomings by hearing expert criticism from committee

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[7] A.9776 of 2012 was also Assemblyman Farrell's bill, introduced on April 2, 2012. It, too, was referred to the Assembly Committee on Governmental Employees, which apparently took no action upon it. The identical Senate bill was S.6568 of 2012, introduced by Senator DeFrancisco on February 28, 2012 and referred to the Senate Finance Committee. No votes are indicated by the legislative information website: http://public.leginfo.state.ny.us. Instead, the following subsequent events are identified: "05/15/12 1st report cal. 808; 05/16/12 2nd report cal; 05/21/12 advanced to third reading; and 06/21/12 committed to rules". The accompanying sponsor memos to the 2012 bills are essentially the sponsor memos used for the 2013 bills, except that under "Legislative History" are the words "New bill."

> members and the public and make any necessary revisions.[fn.11] In many state legislatures and in Congress, the full chamber can vote to override a bill's referral to a particular committee; in many state legislatures, committees are required or must honor requests to hold a hearing on every bill.[fn.12] This is not the case in Albany – almost all aspects of this ideal process are inadequate or lacking in the New York State Legislature." (at p. 4, italics in the original).

We respectfully request that you schedule a hearing on A.246 – and on the purported "Justification" for such legislation. That "Justification", set forth in the sponsor memo for A.246 – identically to the sponsor memo for S.2953 and repeating the "Justification" of the sponsor memos for last year's bills – makes no sense without specificity, altogether lacking. For instance,

> (1) why were "[s]alary increases, pursuant to Chapter 10 of the Law of 2008, for managerial or confidential employees of the state...administratively withheld in 2009 and 2010"?;
>
> (2) what are the specifics of the unnamed "legal challenges" and their outcomes?;
>
> (3) is the "pay structure established in Article 8 of the civil service law" appropriate?
>
> (4) what are the particulars of the "non-negotiated pay schedules contained in the 2011-2016 PayBill, enacted at the end of the 2011 Legislative Session"?

Indeed, inasmuch as the "Existing Law" section of the A.246 sponsor memo starts out by saying: "Salary increases for managerial or confidential employees of the state are contained in 'pay bills' enacted by the Legislature", it would appear that the easiest solution to the problem resulting from the 2009 and 2010 administratively-withheld, but legislatively-approved, salary increases would be for the Legislature to enact a "pay bill" this year.

Certainly, the sponsor memo is incorrect in identifying as "Existing Law" "[s]imilar legislation…passed and/or enacted for the Judiciary and the State Legislature in 2008 and 2011" – implying that such could serve as precedent. This is false. There is no legal basis for treating compensation for "managerial and confidential employees" in the same way as for judges and legislators – as judges and legislators are not "employees", but constitutional officers of two separate government branches. Certainly, too, this "[s]imilar legislation" should be more particularly identified. What similar statute was "passed and/or enacted" except for Chapter 567of the Laws of 2010, which did not pertain to the Legislature?

Suffice to note Senator DeFrancisco's remarks about legislative pay in discussing S.2953 at the Senate Finance Committee's April 16, 2013 meeting:

[Senate video, at 08:48 – 10:38]

"Senate Bill 2953 by Senator DeFrancisco. An act in relation to establishing a special commission on compensation for state employees designated managerial or confidential, and providing for its powers and duties.

DeFrancisco: Questions? Senator Stavisky.

Stavisky: Is this because there's no collective bargaining unit?

DeFrancisco: Uh, this, uh, they are not covered by the collective bargaining negotiations. So, you can have, you end up having individuals who are supervising individuals who are making more money. Or people being acting commissioners because if they become commissioner they will be making less money. And it's just, it's sort of like legislators, you know. They haven't gotten a pay raise in about 13 years, but I wouldn't even think of, I wouldn't even think of, putting in a commission for legislators because that's horrible, it's a very bad thing. But we shouldn't penalize the managerial and confidential people that aren't able to get raises to make them be paid what they should be paid. We had this in our one-house budget bill and the Assembly would not go along. So, we want to keep trying.

Little: You're saying this does not include the legislators?

DeFrancisco: No. No. It does not. No, that would be horrible, horrible. It would probably be corrupt. Probably be corrupt. I don't want to do that.

Little: Is that your opinion, or –?

DeFrancisco: No, I'm just kidding. I'm being totally facetious. Totally facetious. Total facetious. Senator Fuschillo would like to move it to stop me talking about it.

Fuschillo: Yes.

Little: Seconded.

DeFrancisco: Seconded by Senator Little. All in favor. (Aye)

DeFrancisco: Opposed. (silence).

DeFrancisco: The bill is reported out."

S.2953 may now be headed for a Senate floor vote as early as this week, having been placed on a "first report" "floor calendar" for Wednesday, April 17, 2013 and on a "second report" "floor calendar" for Monday, April 22, 2013.

cc: Sponsors, Co-Sponsors, & Multi-Sponsors of A.246:
Sponsor: Assemblyman Farrell
Co-Sponsors: Assemblymen Pretlow & Steck
Multi-Sponsors: Assembly Members Cusick, Fahy, McDonald, & Stirpe

Sponsors & Co-Sponsors of S.2953:
Sponsor: Senator DeFrancisco
Co-Sponsors: Senators Maziarz & Ritchie
All Senators

The People & The Press

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Post Office Box 8101
White Plains, New York 10602

Tel. (914)455-4373

E-Mail: cja@judgewatch.org
Website: www.judgewatch.org

April 26, 2013

TO: Assembly Ways and Means Committee:
Chair – Herman Farrell, Jr.; Ranking Member – Robert Oaks
Members – Jeffrion Aubry, William Barclay, Michael Benedetto, Kevin Cahill, William Colton, Vivian Cook, Jane Corwin, Clifford Crouch, Michael Cusick, Janet Duprey, Michael Fitzpatrick, David Gantt, Deborah Glick, Stephen Hawley, Carl Heastie, Earlene Hooper, Rhoda Jacobs, Joseph Lentol, Nicole Malliotakis, Margaret Markey, Joan Millman, Catherine Nolan, Felix Ortiz, N. Nick Perry, J. Gary Pretlow, Joseph Saladino, William Scarborough, Robin Schimminger, Fred Thiele, Jr., Raymond Walter, Helene Weinstein, Keith L.T. Wright

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

RE: (1) Constitutional, statutory, & other infirmities of A.246 establishing "a special commission on compensation for state employees designated managerial or confidential, and providing for its powers and duties";
(2) Request that the Assembly Ways and Means Committee hold a hearing on A.246 as to its purported "Justification", as set forth in its sponsor memo, and to secure expert testimony on its constitutionality

The follows my phone calls to your offices beginning on April 24th, advising that A.246 had been referred to the Assembly Ways and Means Committee on Tuesday, April 23rd, after having been voted out of the Assembly Committee on Governmental Employees at its April 23rd meeting.

As you are each members of the 34-member Ways and Means Committee, I stated that I would be sending each of you an analysis of the constitutional, statutory, and other infirmities of A.246, together with a request for a hearing by the Ways and Means Committee thereon. To ensure your receipt and appropriate review, I obtained, where possible, the e-mail addresses for your chiefs of staff, legislative directors, and such other personnel in your offices as assist you in these matters.

The promised analysis is enclosed. It is the same as was e-mailed on April 20th to the 14 members of the Committee on Governmental Employees, sent not only to the members' generic e-mail addresses, but to the e-mail addresses of their chiefs of staff, legislative directors, etc.

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As five members of the Committee on Governmental Employees are also members of this Committee – Aubry, Colton, Cusick, Malliotakis, and Saladino – we request that the four who were present at its April 23rd meeting (Malliotakis, its ranking member, having been absent) explain their votes. Certainly, based on our analysis, whose receipt by their offices, prior to the April 23rd meeting, I confirmed with their respective chiefs of staff and legislative personnel, including those bearing the titles of legislative directors, there is no seeming justification for their favorable votes on A.246.

Inasmuch as the Assembly – unlike the Senate – does not video its committee meetings, nor record them stenographically, there is no video or stenographic transcript of the April 23rd meeting of the Committee on Governmental Employees. We, therefore, request that Assembly Members Aubry, Colton, Cusick, and Saladino confirm what took place at the April 23rd meeting: seven bills on the agenda, all voted out, without discussion, by 13-0 votes, at a meeting that ended within 15-20 minutes – a state of affairs reinforcing how little has changed since the 2004, 2006, and 2008 Brennan Center reports on New York's Legislature, deemed the most dysfunctional in the nation.[1] Indeed, yesterday, when I tried to get confirmation of what had occurred from Chairman Farrell's legislative director, Clinton Freeman, who stated to me that he had been present, he hung up the phone on me.

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[1] Based on my conversations with legislative staff, it appears that most have limited, if any, familiarity with these important Brennan Center reports, the first of which identified "Problem #1 – Dysfunctional Legislative Committees", stating:

> "In most modern legislatures, committees 'are the locus of most legislative activity.'[fn1] Committees have two principal functions: first, to enable legislators to develop, examine, solicit public and expert feedback upon, and improve bills in a specific area of expertise and to convey the results of their work to the full chamber; and second, to oversee certain administrative agencies to ensure that they fulfill their statutory mandates. New York's committee system generally does not serve either of these functions:
>
> Few Committee Hearings…
> Few Committee Reports…
> Proxy Voting…
> Central Control of Committee Staff…
> Too Many Committee Assignments…
>
> With such a weak committee system, the Legislature cannot develop legislation that fully reflects collaborative policy expertise, improve it through public hearings and reports, or provide the legislators and members of the public with opportunities to address and debate the strengths and weaknesses of a proposed bill." ("*The New York State Legislative Process: An Evaluation and Blueprint for Reform*", Executive Summary, pp. 1-2).

The Brennan Center Reports are posted on the "Rules Reform Resource Page" of our website, www.judgewatch.org, accessible *via* our "Latest News" top panel.

Your constituents and the People of the State of New York, whose interests you also serve, have a right to know the basis and process by which you are voting on legislation that affects them – including as taxpayers – and to hold you accountable for those votes.

We, therefore, make the following request of each Ways and Means Committee member – beginning with Chairman Farrell, the sponsor of A.246: if, after reviewing our enclosed analysis and the substantiating evidence to which it refers, you believe you can properly vote in favor of A.246 without holding a committee hearing to secure expert testimony thereon, that you respond to the facts, law, and legal argument presented by the analysis. This would include furnishing the specificity lacking in the "Justification" section of the sponsor's memo for A.246, identified at page 8 of our analysis as follows:

> (1) why were "[s]alary increases, pursuant to Chapter 10 of the Law of 2008, for managerial or confidential employees of the state...administratively withheld in 2009 and 2010"?;
>
> (2) what are the specifics of the unnamed "legal challenges" and their outcomes?;
>
> (3) is the "pay structure established in Article 8 of the civil service law" appropriate?;
>
> (4) what are the particulars of the "non-negotiated pay schedules contained in the 2011-2016 PayBill, enacted at the end of the 2011 Legislative Session"?;
>
> (5) why the easiest solution to the problem resulting from the 2009 and 2010 administratively-withheld, but legislatively-approved, salary increases would not be for the Legislature to enact a "PayBill" for managerial and confidential employees this session?

Any member voting for A.246 should also clarify the "Existing Law" section of the sponsor's memo, with its reference to "[s]imilar legislation" to A.246. What other similar statute was "passed and/or enacted" except for Chapter 567of the Laws of 2010, which did not pertain to the Legislature?

Certainly, Chairman Farrell can easily have his legislative director, Mr. Freeman, provide such information in a supplement to his sponsor's memo. Such would aid not only Committee members, but the Assembly, as a whole, in assessing the bill. Needless to say, in the event the bill is voted out to Committee, it should be accompanied by a substantive committee report. For those unfamiliar with what the Brennan Center said about the importance of committee reports, it included the following:

> "Legislatures and courts in other states often rely upon committee reports to set forth the purposes of the bill, the proposed changes to existing law, section-by-section analysis, its procedural history, committee or subcommittee votes, and any individual members' comments on the bill.[fn.64] Committee reports similarly play an important

> role in the U.S. Congress, where in the case of nearly all bills they provide senators and representatives, as well as the courts and the public, with information on committee votes, amendments, the impact of the bill on existing law, cost and regulatory impact assessments, and the views of the executive, as well as in some cases minority views.[fn65] Beyond these valuable uses, the requirement of producing a committee report also encourages, if not guarantees, that the committee in question will in fact analyze, debate, and fully consider a bill.
>
> With few exceptions, New York State's legislative committees do not produce committee reports on the bills they consider…The absence of committee reports in New York both reflects and reinforces the marginal role played by committees in developing final legislation. It also leaves New York State's courts without a key source from which to determine the legislative intent behind a statute.
>
> Nor do the sponsor's 'bill memo' or the Committee Bill Memo ('CBM') satisfy any of the purposes served by committee reports in other legislatures. The sponsor's bill memo summarizes the bill's provisions and its purpose according to its sponsor, usually in just a few paragraphs. By definition, it includes no contributions from other committee members, no committee analysis of the bill or its impact, no evidence or testimony gathered via hearings or other means, and no committee debate or deliberations. The CMB, produced by the Central or Program & Council staff and attached to all bills that are placed on a committee's agenda, usually mirrors the sponsor's bill memo in its main text, and then may include brief arguments in favor of or in opposition to the bill. While more enlightening than the sponsor's bill memo, CBM's thus include none of the analysis, testimony, debate, or other evidence of committee deliberations that fill committee reports in other legislatures.[fn69]" ("*New York State Legislative Process: An Evaluation and Blueprint for Reform*", p. 11, underlining added).

Finally, inasmuch as A.246 has been referred to the Ways and Means Committee because of its fiscal implications, we note that the "Fiscal Implications" section of the sponsor's memo states:

> "The cost to the State from the operation of the Commission would be minimal. To the extent the Commission recommends a salary increase for employees, such increase would have a fiscal impact on the state."

This materially replicates, *verbatim*, the "Fiscal Implications" section of the sponsor's memo for Chapter 567 of the Laws of 2010.

Certainly, a further deficiency of A.246 is that it does not require that a fiscal impact statement be included in the commission's report of recommendations. The consequence of this identical deficiency in Chapter 567 of the Laws of 2010 may be seen from the August 29, 2011 "Final" Report of its first Commission on Judicial Compensation, which furnished no information as to the fiscal

cost to the state of any of the three phases of judicial salary increases it was recommending, as well as the Judiciary's subsequent two budgets and appropriations bills, forwarded by the Governor to the Legislature, neither supplying any fiscal note for the judicial salary increases– with the Judiciary budget and appropriations bill for fiscal year 2013-2014 altogether omitting the dollar cost of the second phase of the judicial pay raise being funded.[2]

Indeed, neither the members of the Legislature – nor the public – know the cost to the state of the Commission on Judicial Compensation's three-phase judicial salary increase – and of its related expenses, which the Commission's "Final" Report nowhere even mentions. Roughly calculated the cumulative cost for the first two fiscal years would appear to be about $70 million, with the total to reach more than $100 million by the end of the third fiscal year. Because of the non-diminution clause of the New York State Constitution, Article VI, §25a, the annual recurring cost, in perpetuity, to New York taxpayers, of the Commission's August 29, 2011 force-of-law recommendations will probably be on the order of $50 million yearly, unless voided by a court.

Is this the kind of scenario that the Legislature should be repeating in enacting A.246?

Enclosure: CJA's April 20, 2013 memorandum-analysis

cc: All members of the Assembly Committee on Governmental Employees
All Senators
The People & The Press

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[2] This was the subject of CJA's advocacy before the Legislature in opposition to the Judiciary budget and judiciary appropriations bill, including when I testified at the February 6, 2013 budget hearing on "public protection – at which two members of this Committee were present: Ranking Member Oaks and Assemblywoman Weinstein, Chair of the Assembly Judiciary Committee. *See* CJA's webpage "Securing Legislative Oversight & Override of the 2nd and 3rd phases of the judicial pay raises…", accessible *via* the "Latest News" top panel, which posts the hearing video.

CENTER for JUDICIAL ACCOUNTABILITY, INC.*

Post Office Box 8101
White Plains, New York 10602

Tel. (914)455-4373

E-Mail: cja@judgewatch.org
Website: www.judgewatch.org

April 26, 2013

TO: All New York State Senators

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

RE: WHY YOU MUST VOTE AGAINST S.2953 establishing "a special commission on compensation for state employees designated managerial or confidential, and providing for its powers and duties";

Among the myriad of bills on the Senate's third reading calendar for this Monday, April 29th, is a bill unlike any other: S.2953 (calendar #308). It creates a special commission whose recommendations will become law without requiring any affirmative action by the Legislature.

This is unconstitutional and demonstrably dangerous – and such is set forth by the Center for Judicial Accountability's enclosed transmitting memorandum of today's date to the Assembly Ways and Means Committee, attaching our elaborating April 20th memorandum to the Assembly Committee on Governmental Employees. These analyze the identical Assembly bill, A.246, setting forth its constitutional, statutory, and other infirmities, as well as the identical sponsor's memo, showing its deficient and misleading nature.

Should S.2953 come before you for a vote on the Senate floor, we respectfully request that you call upon the bill's sponsor, Senator DeFrancisco, to respond to the facts, law, and legal argument presented by these memoranda. This would include furnishing the specificity lacking in the "Justification" section of his sponsor's memo, identified at page 8 of our April 20th memorandum as follows:

> (1) why were "[s]alary increases, pursuant to Chapter 10 of the Law of 2008, for managerial or confidential employees of the state...administratively withheld in 2009 and 2010"?;
>
> (2) what are the specifics of the unnamed "legal challenges" and their outcomes?;
>
> (3) is the "pay structure established in Article 8 of the civil service law" appropriate?;

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* **Center for Judicial Accountability, Inc.** (CJA) is a national, non-partisan, non-profit citizens' organization, working to ensure that the processes of judicial selection and discipline are effective and meaningful.

(4) what are the particulars of the "non-negotiated pay schedules contained in the 2011-2016 PayBill, enacted at the end of the 2011 Legislative Session"?;

(5) why the easiest solution to the problem resulting from the 2009 and 2010 administratively-withheld, but legislatively-approved, salary increases would not be for the Legislature to enact a "PayBill" for managerial and confidential employees this session?

Additionally, Senator DeFrancisco should be called upon to clarify the "Existing Law" section of his sponsor's memo, with its reference to "[s]imilar legislation" to S.2953. What other similar statute was "passed and/or enacted" except for Chapter 567of the Laws of 2010, which did not pertain to the Legislature?

Absent your taking steps to secure Senator DeFrancisco's answers, we respectfully request that you furnish your own answers and address the facts, law, and legal argument of our two memoranda, publicly and on the Senate floor – so that your constituents and the People of the State of New York may hold you accountable for your vote.

Finally, for those unfamiliar with – or who may have forgotten – the "process" that is supposed to lead up to a floor vote on bills such as S.2953/A.246 – including the importance of substantive debate – the Brennan Center reports on the New York State Legislature and rules reform, from 2004, 2006, and 2008, are a "must-read". They are posted on our website, www.judgewatch.org, on a "Rules Reform Resource Page", accessible *via* our top panel "Latest News" – beneath where this memo will be posted.

Thank you.

Enclosure: CJA's April 26, 2013 and April 20, 2013 memoranda

cc: Assembly Ways & Means Committee
Assembly Committee on Governmental Employees
The People & The Press