

CENTER for JUDICIAL ACCOUNTABILITY, INC.*

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December 11, 2013

TO: Governor Andrew M. Cuomo
Temporary Senate President Dean G. Skelos
Temporary Senate President Jeffrey D. Klein
Assembly Speaker Sheldon Silver
Senate Minority Leader Andrea Stewart-Cousins
Assembly Minority Leader Brian M. Kolb
Senate Finance Committee Chair John A. DeFrancisco
Senate Finance Committee Ranking Member Liz Krueger
Assembly Ways & Means Committee Chair Herman D. Farrell, Jr.
Assembly Ways & Means Committee Ranking Member Robert C. Oaks
Senate Judiciary Committee Chair John J. Bonacic
Assembly Judiciary Committee Chair Helene E. Weinstein

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

RE: SAFEGUARDING THE PUBLIC PURSE FROM JUDICIAL FRAUD & LARCENY: Your Constitutional & Statutory Duty to Reject the Entirety of the Judiciary's Proposed Budget for Fiscal Year 2014-2015, Over & Beyond its Concealed, Unitemized Third Phase of the Judicial Salary Increase that Will Otherwise Take Effect, Automatically, on April 1, 2014

Pursuant to Article VII, §1 of the New York State Constitution, "Itemized estimates of the financial needs...of the judiciary, approved by the court of appeals and certified by the chief judge of the court of appeals" were required to be transmitted to the Governor by December 1st "for inclusion in the budget without revision but with such recommendations as the governor may deem proper", with copies "forthwith...transmitted to the appropriate committees of the legislature."

By a November 29, 2013 memorandum addressed to each of you, Chief Administrative Judge A Gail Prudenti purported to furnish "itemized estimates of the annual financial needs of the Judiciary for the Fiscal Year beginning April 1, 2014".

Be advised – and I have so-stated to members of your staff – that these "itemized estimates", constituting the Judiciary's proposed budget for fiscal year 2014-2015, are even more fraudulent and

* **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.

flagrantly unconstitutional than the Judiciary's "itemized estimates" that constituted its proposed budget for fiscal year 2013-2014. Thus, whereas the Judiciary's proposed budget for this fiscal year was completely unitemized as to the dollar amount of the second phase of the judicial salary increase that was to take effect on April 1, 2013, pursuant to the August 29, 2011 Report of the Commission on Judicial Compensation, the Judiciary's latest proposed budget is not only unitemized as to the dollar amount of the third phase of the judicial salary increase, scheduled to take effect on April 1, 2014, pursuant to the August 29, 2011 Report of the Commission on Judicial Compensation, but entirely conceals the existence of this third phase.¹

To be sure, fraudulent concealment is the only word that can describe what the Judiciary has done – and comparison of its proposed budget for fiscal year 2014-2015 with its proposed budgets for fiscal years 2012-2013 and 2013-2014 makes this obvious. As illustrative:

For fiscal year 2012-2013: Year #1 of Judicial Salary Increase

- (1) the Chief Administrative Judge's transmitting memo identified: "...the first judicial salary increase";
- (2) the executive summary identified: "\$27.7 million for the first judicial pay increase" (at p. ii);
- (3) the proposed budget repeatedly identified "the statutorily mandated judicial salary increase effective April 1, 2012" (pp. 6, 19, 22, 26, 30, 34, 37, 46, 87, 91); and
- (4) the proposed budget bill identified (at bill copy 14):

"By chapter 51, section 2, of the laws of 2008, as reappropriated and amended by chapter 51, section 3 of the laws of 2009, and as reappropriated by chapter 51, section 3 of the laws of 2011: For expenses necessary to fund adjustments in the compensation of state-paid judges and justices of the unified court system and housing judges of the New York City civil court, and for such other services and expenses specified in section two of this act." –

Personal service - regular ... 51,006,759 (re. \$31,000,000)"

¹ The judicial salary increases recommended by the Commission on Judicial Compensation's August 29, 2011 Report (at pp. 8-10) were summed up as follows:

"The Commission has determined that all New York State judges shall receive phased-in salary increases over the next three fiscal years, starting on April 1, 2012, with no increase in fiscal year 2015-2016. State Supreme Court Justices will...be paid an annual salary of \$160,000 in fiscal year 2012-2013, \$167,000 in 2013-2014 and \$174,000 in 2014-2015. All other judges will receive proportional salary increases..."

For fiscal year 2013-2014: Year #2 of Judicial Salary Increase

- (1) the Chief Administrative Judge's transmitting memo identified: "the next phase of the judicial salary increase...";
- (2) the executive summary identified "the second phase of the judicial salary increase" (at p. i);
- (3) the proposed budget repeatedly identified "the statutorily mandated judicial salary increase effective April 1, 2013." (at pp. 6, 19, 22, 26, 30, 34, 37, 46, 89, 94).
- (4) the proposed budget bill: NO mention of the second phase of the judicial salary increase

For fiscal year 2014-2015: Year #3 of Judicial Salary Increase

- (1) the Chief Administrative Judge's transmitting memo: NO reference to the third phase of the judicial salary increase;
- (2) the executive summary: NO reference to the third phase of the judicial salary increase;
- (3) the proposed budget: NO reference to the third phase of the judicial salary increase;
- (4) the proposed budget bill: NO reference to the third phase of the judicial salary increase.

Indeed, the executive summary's concealment of the third phase of the judicial salary increase is all the more striking as it identifies (at pp. iii) "a \$17 million increase in funding for the final year of the phase-in of statutorily mandated indigent criminal defense standards, and \$17.5 million for mandated salary increments for represented non-judicial employees". Likewise, its footnote 2 (at p. iii), referencing "the first two years of the judicial salary increase", but not a third year – or that 2014 is that year.²

Can there be any doubt as to why the Judiciary has concealed the third phase of the judicial salary increase from its proposed budget? It is to obscure that such can be eliminated from the state budget, pursuant to Article VII, §4 of the New York State Constitution and Chapter 567 of the Law of 2010 (§2(h)) – the latter reading:

"The commission shall make a report to the governor, the legislature and the chief judge of the state of its findings, conclusions, determinations and recommendations,

² Footnote 2 in the executive summary reads: "The appropriation request associated with the requested increase in cash is \$1.82 billion, which represents a \$63 million, or 3.6 percent, increase. The increase in the appropriation request is slightly higher than the increase in the cash request because of technical reasons that relate to the use of reappropriations to pay for the first two years of the judicial salary increase. The cash increase, rather than the appropriation request, is the true measure of the year-to-year increase sought by the Judiciary."

if any, not later than one hundred fifty days after its establishment. Each recommendation made to implement a determination pursuant to paragraph (ii) of subdivision (a) of this section shall have the force of law, and shall supersede inconsistent provisions of article 7-B of the judiciary law, unless modified or abrogated by statute prior to April first of the year as to which such determination applies." (underlining added).

That each of you are duty-bound to take steps to void this third phase of judicial salary increases is clear from CJA's October 27, 2011 Opposition Report and the verified complaint in our People's lawsuit based thereon, *Center for Judicial Accountability, Inc. v. Cuomo, et al.*,³ establishing that the judicial salary increase recommended by the Commission on Judicial Compensation's August 29, 2011 Report flagrantly violates Chapter 567 of the Laws of 2010, in addition to being fraudulent and unconstitutional. Yet your duty does not end there. It extends to rejecting the Judiciary's "itemized estimates" in their entirety for lack of sufficient and meaningful itemization. Certainly, that the Judiciary's supposed "itemized estimates" enable it to surreptitiously secure monies for the third phase of the judicial salary increase evidences how meaningless its itemizations actually are – and that its proposed budget is, in fact, a slush fund for it to do whatever it wants without notice and accountability to this state's taxpayers.

Nor is there any question that the Judiciary included the third phase of the judicial salary increase in its proposed budget. Thus, the New York Law Journal December 2, 2013 article "*Judiciary Seeks 'Road to Recovery' Budget*" identifies its dollar cost, \$8.4 million, representing a 4.2% increase, albeit not revealing that this information is nowhere found in the Judiciary's budget documents. John Caher, the article's author, refused to disclose the source of his reporting about the third phase of the judicial salary increase, stating he was "not going to engage in this". Nor would he engage in a discussion of such other pertinent portions of his article as the following:

"The \$1.8 billion budget figure highlighted by OCA represents what is known as the 'cash funding' number, or the amount of money the courts propose to spend for the fiscal year.

It differs from the so-called 'appropriation request,' which is the upper limit on available funds and not necessarily representative of what the Judiciary plans to use. The 'appropriation' budget totals \$1.82 billion, representing a \$63 million, or 3.6 percent, increase.

[OCA Executive Director Ronald] Youkins attributed the discrepancy between the cash and appropriation budget to a technical accounting measure resulting from the Judiciary's use of reappropriated funds to pay the first two years of the judicial salary increase."

³ Innumerable "hard" copies of our October 27, 2011 Opposition Report and verified complaint in *CJA v. Cuomo, et al.* are in your possession and/or available to you. As for the copy that I handed up at the February 6, 2013 joint legislative budget hearing on "public protection", I have been informed by Jessica Cherry, counsel to Senator Bonacic, that it was forwarded by the Senate Finance Committee to the Senate Judiciary Committee and is in its files.

All CJA's strenuous objections to the Judiciary's proposed budget for the current fiscal year, to which I testified on February 6, 2013 at the Legislature's joint budget hearing on "public protection" and then followed up with a mountain of further particularizing correspondence, apply with even greater force to the Judiciary's proposed budget for the coming fiscal year.

The video of my February 6, 2013 testimony at the Legislature's joint budget hearing on "public protection" and CJA's relevant correspondence to you from January 30, 2013, culminating in our March 29, 2013 letter to the Governor, is readily accessible. It is posted on our website, www.judgewatch.org, on the webpage created even before I testified, entitled "SECURING LEGISLATIVE OVERSIGHT & OVERRIDE of the 2nd & 3rd phases of the judicial pay raises scheduled to take effect APRIL 1, 2013 & APRIL 1, 2014". Here's the direct link: <http://www.judgewatch.org/web-pages/judicial-compensation/legislative-oversight-judicial-raises.htm>.

Suffice to enclose and incorporate by reference CJA's March 11, 2013 letter to the then Senate Budget Subcommittee on "Public Protection", chaired by Senator Michael Nozzolio – thereafter sent to all of you. This March 11, 2013 letter furnishes facts and law sufficient for mandating your rejection of the unitemized and concealed third phase of the judicial salary increase and the entirety of Judiciary's proposed budget. This is the constitutionally-compelled relief we herein seek.

To enable you to discharge your constitutionally-compelled checks and balances function with respect to the Judiciary's "itemized estimates" and proposed budget bill for the upcoming fiscal year – and to prevent a replay of what occurred with respect to the current fiscal year budget – we request:

- that the Governor, now in receipt of the Judiciary's "itemized estimates", direct his Division of the Budget, by its director, Robert Megna, to undertake appropriate review so that the Governor will be able to make "such recommendations as [he] may deem proper", when he includes them, "without revision" in the state budget, pursuant to Article VII, §1;
- that when the Governor presents the Legislature with the Judiciary's proposed budget bill for the Judiciary, pursuant to Article VII, §3, he not join it in the same bill with the Legislature's proposed budget bill for the Legislature;
- that the Senate and Assembly Judiciary Committees, jointly or individually, hold public oversight hearings of the Judiciary's "itemized estimates", taking testimony from the Judiciary, from constitutional scholars, and from the public and, following a vote of their members, that the Senate and Assembly Judiciary Committees present the Senate Finance Committee and Assembly Ways and Means Committee with their reports containing findings of fact and conclusions of law as to: (1) whether the Judiciary's "itemized estimates" are intelligible, lend themselves to meaningful review, and are consistent with Article VII, §7 that new, continuing, and revived appropriations "shall distinctly specify the sum appropriated, the object or purpose to

which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum”; and (2) whether the third phase of the judicial salary increase must, *as a matter of law*, be voided, based on CJA’s October 27, 2011 Opposition Report;

- that the Senate Finance Committee and Assembly Ways and Means Committee, by public meetings of their members, each discuss and vote on the Senate and Assembly Judiciary Committee reports – and, that any member voting to accept the Judiciary’s “itemized estimates”, including monies for the concealed and unitemized third phase of the judicial salary increase, be required to explain his vote with specifics as to how the Judiciary’s budget meets standards of intelligibility and consistency with Article VII, §7 and conforms to the facts and law presented by CJA’s October 27, 2011 Opposition Report;
- that no hearing be held by the Senate Finance Committee and Assembly Ways and Means Committee on the Judiciary’s “itemized estimates”, if, based on the Senate and Assembly Judiciary Committee reports, a majority of each committee has voted to reject the Judiciary’s “itemized estimates”, in which case the Senate and Assembly majority and minority leaders shall notify the Chief Administrative Judge and Chief Judge to resubmit “itemized estimates” to the Legislature and, if deemed appropriate, to the Governor for such recommendations as he “may deem proper”;
- that, upon such resubmitted “itemized estimates”, the process repeat, with the Senate and Assembly Judiciary Committees, jointly or individually, holding public oversight hearings of the Judiciary’s resubmitted “itemized estimates”, again taking testimony and, following discussion and vote of their members, presenting reports to the Senate Finance Committee and Assembly Ways and Means Committee, to be discussed and voted on by their members at open meetings, with the basis of any dissent from an approving vote memorialized by a written committee report.
- that any joint legislative budget hearings on the Judiciary’s “itemized estimates” under the auspices of the Senate Finance Committee and Assembly Ways and Means Committee be held separate from hearings on Executive branch agencies, so as not to obscure the constitutionally-differentiated nature of the budgeting for this separate branch – and that the committees’ deliberations and votes thereon be at open meetings and embodied in written committee reports.

This suggested course is consistent with Article VII, which three times mentions the Governor’s “recommendations” (§§1, 2, 3) and underscores the role of legislative committees by directing that the Judiciary’s budget be transmitted “to the appropriate committees of the legislature”. These “appropriate committees” are – as reflected by the Judiciary’s own November 29, 2013 transmitting memorandum – the Senate and Assembly Judiciary Committees, the Senate Finance Committee, and

the Assembly Ways and Means Committee.

Certainly, too, the suggested procedures implement key concepts of both the majority and minority reports of the 2009 Temporary Senate Committee on Rules and Administration Reform, three of whose nine members are now Temporary Senate President Klein, now Senate Minority Leader Stewart-Cousins, and now Senate Judiciary Committee Chairman Bonacic.

The Governor also should be greatly supportive of these suggested procedures. After all, his “Special Counsel for Public Integrity and Ethics Reform” is Jeremy Creelan, principal author of the Brennan Center’s 2004 report “*The New York State Legislative Process: An Evaluation and Blueprint for Reform*”, which, with its two updates, gave rise to the Temporary Senate Committee on Rules and Administration Reform⁴. Indeed, Mr. Creelan testified before it at its February 26, 2009 public hearing, as well as answered questions, including about budget reform.⁵

Likewise, great support should be expected from now Senate Finance Committee Ranking Member Krueger, who participated with the Temporary Senate Committee on Rules and Administration Reform, from the dais, at its February 26, 2009 hearing. Senator Krueger is known for her strong advocacy of legislative rules and budget reform, at least rhetorically. Surely she – and Senators Klein, Stewart-Cousins, and Bonacic – will be the first to recognize that the procedures here proposed for the Legislature’s constitutionally-mandated oversight of the Judiciary’s budget could and should be reasonably adapted for its review of the huge Executive budget, accomplished by activating the 70-plus Senate and Assembly Committees to each engage in numbers-crunching,

⁴ The titles of these two Brennan Center updates, “*Unfinished Business: New York State Legislative Reform*” (2006) and “*Still Broken: New York State Legislative Reform*” (2008), reflect how little had changed after the 2004 report.

⁵ The question about budget reform, by the Temporary Senate Committee’s majority co-chair, Senator David Valesky, began with his observation:

“...if we step back for a moment and look at the work that the legislature does. The 11 budget bills, I guess, four appropriations, four language bills, the debt service, the Legislative, Judiciary, and revenue bill. From the perspective of what we do that affects people’s daily lives the most, I think we can all agree, by far, it’s the budget: \$124 billion taxpayer-supported budget...

...So maybe you could advise us at some point in the future as the committee continues to do its work as to ways we might continue to, in the spirit of reform of the legislative process, actually, additionally, reform the budget process. (emphasis added, video at 1:30:48 mins.).

Mr. Creelan’s response opened as follows:

“I’d just like, one comment on that. When we issued the report originally, one of the criticisms of the report was that it didn’t focus enough on the budget process and it was one of the few criticisms that I actually thought was quite fair. Um, not to say that the rest of the report, I thought, it didn’t render it, you know, unhelpful. But, it was an important aspect of it in focusing just on that we didn’t, you know, we didn’t. We included it in the analysis but we didn’t break it out separately and really discuss the unique dynamics of it...”

budget oversight hearings of the agencies and government services within their jurisdiction.

Based on the transcript excerpts quoted by our March 11, 2013 letter, there can be no doubt that decisive action by the Governor and Legislature with respect to the Judiciary budget is long overdue. The Judiciary has contemptuously persisted in submitting opaque, indecipherable budgets, despite year, after year, after year of criticism by legislators on the subject and promises of transparency and accountability by its Chief Administrative Judges. That such budget has evaded the Legislature's comprehension – despite the huge financial and personnel resources of its Senate Finance Committee and Assembly Ways and Means Committee – is highlighted by our March 11, 2013 letter and reinforced by its referred-to subsequent analysis of the Legislature's "White", "Blue", "Yellow", and "Green" Books (at p. 12).

Should you disagree that each of you is duty-bound to take steps to reject the Judiciary budget because it lacks sufficient and intelligible itemization and violates Article VII, §7 – creating a slush fund for the Judiciary to steal monies from the public purse for the third phase of the judicial salary increase which, like the first two phases, are fraudulent, statutorily-violative, and unconstitutional, as demonstrated, resoundingly, by CJA's October 27, 2011 Opposition Report – please furnish the facts and law constituting the basis for your disagreement.

So that the foregoing may be discussed directly, I respectfully request that you schedule a meeting with me, as soon as possible. Meantime, I will be contacting scholars of New York's Constitution and budget, bar associations with committees pertaining to these issues, and so-called "good-government groups" to request that they offer expert opinion. I will also be scheduling meetings with rank-and-file Senators and Assembly members, beginning with CJA's own, Senator George Latimer and Assemblyman David Buchwald – and the chairs and ranking members of the Senate Committee on Investigations and Government Operations and the Assembly Committee on Oversight, Analysis and Investigation – so as to be able to report to you as to whether they are able to meaningfully comprehend and scrutinize the Judiciary's purported "itemized estimates", budget bill, and the concealed, but included, third phase of the judicial salary increase.

As the Commission to Investigate Public Corruption has pledged to "follow the money" and has announced as recently as in its December 2, 2013 interim report that:

"Government watchdogs, the media, and, most of all, members of the public have a right to understand how their tax dollars are spent and by whom, as well as the process used to appropriate state funds" (at p. 25),

this letter is being simultaneously furnished to the Commission with a request that it investigate and render a report to you of the evidence here presented of the Judiciary's latest fraud and attempted grand larceny of taxpayer dollars by its materially unitemized, slush-fund budget and the concealed third phase of the judicial salary increase. So that Chief Administrative Judge Prudenti and Chief Judge Lippman may prepare for the Commission's interrogation – and yours – this letter is also being simultaneously sent to them.

For the convenience of all and to facilitate CJA's upcoming advocacy pertaining to the budget for fiscal year 2014-2015, this letter and all referred-to substantiating evidence, will be posted on a webpage entitled "CJA Leads the Way to NYS Budget Reform, Starting with the Judiciary Budget" and accessible *via* our top panel "Latest News".

Thank you.



Enclosure: CJA's March 11, 2013 letter (14 pages)

cc: Mylan Denerstein, Counsel to the Governor
Jeremy Creelan, Special Counsel for Public Integrity and Ethics Reform
Robert Megna, Director, Division of the Budget
Senate Judiciary Committee Ranking Member Ruth Hassell-Thompson
Assembly Judiciary Committee Ranking Member Tony Jordan
Senator George Latimer (37th Senate District)
Assemblyman David Buchwald (93rd Assembly District)
Senate Committee on Investigations and Government Operations Chair & Ranking Member:
 Senator Carl Marcellino & Senator Brad Hoylman
Assembly Committee on Oversight, Analysis and Investigation Chair & Ranking Member:
 Assemblyman Andrew Hevesi & Assemblyman Michael Montesano
Commission to Investigate Public Corruption
Chief Administrative Judge A. Gail Prudenti
Chief Judge Jonathan Lippman
The Public & The Press