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BY HAND

December 31, 2015

TO: NY Court of Appeals Chief Judge Nominee/
Westchester County District Attorney Janet DiFiore

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

RE: So, You Want to Be New York's Chief Judge? – Here's Your Test:
Will You Safeguard the People of the State of New York – & the Public Fisc?
(1) The Commission on Judicial Compensation's August 29, 2011 Report;
(2) The Commission on Legislative, Judicial and Executive Compensation's
December 24, 2015 Report;
(3) The Judiciary budgets – including for fiscal year 2016-2017

Our nonpartisan, nonprofit citizens' organization, Center for Judicial Accountability, Inc. (CJA), congratulates you on your nomination as Chief Judge of the New York Court of Appeals and of the New York court system. We consider it most fortunate that Governor Cuomo has selected a district attorney as it means our new top judge will have an expertise in New York's penal law, including such felonies as "offering a false instrument for filing in the first degree" (§175.35), "grand larceny in the first degree" (§155.42), "scheme to defraud in the first degree" (§190.65), "defrauding the government" (§195.20), and the class A misdemeanor "official misconduct" (§195).

Then, too, there is the "Public Trust Act", whose passage, as part of Governor Cuomo's behind-closed-doors, three-men-in-a-room budget deal in March 2014 with then Temporary Senate President Skelos and then Assembly Speaker Silver, was the pretext for his shut-down of the Commission to Investigate Public Corruption. It created the felony crime "Corrupting the Government" – Penal Law §496 – especially relevant to the judicial salary increases recommended by the August 29, 2011 Report of the Commission on Judicial Compensation and the further judicial salary increases recommended by the December 24, 2015 Report of the Commission on Legislative, Judicial and Executive Compensation, and to the Judiciary budget – all subjects of this letter.

* **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.

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Because district attorney salaries are statutorily-linked to judicial salaries (Judiciary Law §168-a), you have been a beneficiary of the judicial salary increases recommended by the Commission on Judicial Compensation's August 29, 2011 Report. That is why, in 2012, your \$136,700 salary was increased to \$160,000 and then, in 2013, increased to \$167,000 and then, in 2014, increased again to \$174,000. It is also why, upon becoming Chief Judge, you again will be a beneficiary of the August 29, 2011 Report: your salary as Chief Judge will be \$198,600, not the \$156,000 it was in 2011.

In the event you are unaware, the judicial salary increases recommended by the Commission on Judicial Compensation's August 29, 2011 Report – and all the related costs, including the increases in district attorney salaries – are “‘ill-gotten gains’, stolen from the taxpayers”. And proving this, resoundingly, is CJA's October 27, 2011 Opposition Report, detailing the fraudulence, statutory-violations, and unconstitutionality of the August 29, 2011 Report. Addressed to the Commission's four appointing authorities – Governor Cuomo, then Temporary Senate President Skelos, then Assembly Speaker Silver, and Chief Judge Lippman – the Opposition Report expressly called upon them to take the following four steps to protect the public:

- (1) legislation voiding the Commission's judicial pay raise recommendations;
- (2) repeal of the statute creating the Commission;
- (3) referral of the Commissioners to criminal authorities for prosecution;
- (4) appointment of a special prosecutor, task force, and/or inspector general to investigate the documentary and testimonial evidence of systemic judicial corruption, infesting supervisory and appellate levels and the Commission on Judicial Conduct – which the Commission on Judicial Compensation unlawfully and unconstitutionally ignored, without findings, in recommending judicial pay raises.

Yet they took no steps. Indeed, they did not even respond – and their inaction and the collusion therein of Attorney General Schneiderman and Comptroller DiNapoli, “motivated by a scheme to also raise legislative and executive salaries”¹, gave rise to a declaratory judgment action against all of them, *CJA v. Cuomo, et al.*, which we commenced in March 2012, on behalf of the People of the State of New York and the public interest.

What became of that lawsuit? For the past three years it has been in limbo, sitting on a shelf in the Clerk's Office in Supreme Court/New York County after the original verified complaint and all exhibits – including the October 27, 2011 Opposition Report – went missing upon being fraudulently transferred from Supreme Court/Bronx County (#302951-12). The particulars are recited by the March 2014 verified complaint² in a citizen-taxpayer action, also *CJA v. Cuomo, et al.*, which we commenced in Supreme Court/Albany County (#1788-2014), also on behalf of the

¹ ¶1 of the March 2012 verified complaint. See also ¶¶122, 138.

² ¶5(c), (d), (e) of the March 2014 verified complaint.

People of the State of New York and the public interest. It challenges the slush-fund Judiciary budget for fiscal year 2014-2015 in which the judicial salary increases are embedded and, by a March 2015 supplemental complaint, additionally challenges the slush-fund Judiciary budget for fiscal year 2015-2016 and its embedded judicial salary increases. This citizen-taxpayer action is live and unfolding on a record entitling us to summary judgment, *as a matter of law* – and not only with respect to the judicial salary increases recommended by the Commission on Judicial Compensation’s August 29, 2011 Report, but as to the Judiciary budgets for fiscal years 2014-2015 and 2015-2016, whose constitutional and statutory infirmities, enabling fraud, are replicated in the Judiciary’s budget for fiscal year 2016-2017.

On November 30, 2015 – the day before the Governor announced your nomination – I testified before the Commission on Legislative, Judicial and Executive Compensation at its public hearing in Manhattan. That commission emerged from the March 2015 behind-closed-doors, three-men-in-a-room budget deal-making by Governor Cuomo, then Temporary Senate President Skelos, and Assembly Speaker Heastie, wherein – following rubber-stamping by the Legislature – the statute that created the Commission on Judicial Compensation was repealed and, in its place, a materially-identical statute creating the Commission on Legislative, Judicial and Executive Compensation was substituted. In advance of my testimony, I created a webpage for the Commission on CJA’s website, www.judgewatch.org, accessible *via* the prominent homepage link “NO PAY RAISES FOR NEW YORK’S CORRUPT PUBLIC OFFICERS: The Money Belongs to Their Victims!” It is there that I posted the evidence supporting my testimony, beyond what I handed up at the hearing.

The focus of my testimony was CJA’s October 27, 2011 Opposition Report, the declaratory judgment action and citizen taxpayer action based thereon – as well as a third litigation, in April 2014, in which we sought to intervene in the Legislature’s declaratory judgment action against the Commission to Investigate Public Corruption (*NYS Senate, NYS Assembly v. Rice, et al.*, NY Co. #160941/2013), also on behalf of the People of the State of New York and the public interest. I stated that “But for the evisceration of any cognizable judicial process in ALL three of these litigations – resulting from the double-whammy of Attorney General Schneiderman’s litigation fraud, rewarded by fraudulent judicial decisions – judicial salaries would rightfully be what they were in 2011 and the 2010 statute that created the Commission on Judicial Compensation which, in 2015, became the template for the statute creating [the Commission on Legislative, Judicial and Executive Compensation], would have been declared unconstitutional, long, long ago.” (at p. 2, capitalization in original).

Indeed, I stated that the ONLY recommendation the Commission could properly make, based on CJA’s October 27, 2011 Report, was “for the nullification/voiding of the [Commission on Judicial Compensation’s August 29, 2011 Report AND a ‘claw-back’ of the \$150-million-plus dollars that the judges unlawfully received pursuant thereto” – and that the “only way” the Commission could “get away with doing anything else” in its own report, statutorily-required by December 31, 2015, would be by “obliterating the existence of our Opposition Report, the record of our three litigations based thereon – and all findings of fact and conclusions of law that [were its] duty to make with respect thereto.”

This, of course, is exactly what the Commission did by its December 24, 2015 “Final Report”. It materially replicated the fraud, statutory violations, and unconstitutionality of the Commission on Judicial Compensation’s August 29, 2011 Report – which also had been denominated a “Final Report”. Thus, identical to the August 29, 2011 Report, the December 24, 2015 Report:

- willfully concealed, as if it did not exist, the threshold issue of the Commissioners’ disqualifying interest and actual bias that had been raised, most formidably by CJA – because it was dispositive; and
- willfully concealed, as if it did not exist, the opposition to judicial salary increases that had been raised, most formidably by CJA – because it was dispositive.

This enabled it to then flagrantly and identically violate the Commission statute:

- by making no finding that current “pay levels and non-salary benefits” of New York State judges are inadequate, required by the statute;
- by examining only judicial salary, not “compensation and non-salary benefits”, required by the statute ;
- by not considering “all appropriate factors”, required by the statute – and making no claim that it had;
- by making no findings as to “appropriate factors” that CJA had identified as disintitling New York’s judges to any pay raises. Among these:
 - (a) evidence of systemic judicial corruption, infesting appellate and supervisory levels and the Commission on Judicial Conduct – demonstrated as a constitutional bar to raising judicial pay; and
 - (b) the fraudulent claims of judicial pay raise advocates in support of judicial pay raises.

All the foregoing is readily-verifiable from the Commission on Legislative, Judicial and Executive Compensation’s website and from CJA’s own webpage for the Commission. Links for both are posted on the webpage I’ve created for this letter on CJA’s website, www.judgewatch.org. You can reach it easily *via* the top panel “Latest News”, which will bring you to a link bearing the title of this letter: “So, You Want to be New York’s Chief Judge? – Here’s Your Test: Will You Safeguard the People of the State of New York – & the Public Fisc?”³

³ The letter is also accessible *via* the left sidebar panel “Judicial Selection-State-NY”, which leads to a menu page containing a link for “Merit Selection” to the New York Court of Appeals.

The Judiciary has, at least, three copies of CJA's October 27, 2011 Opposition Report: the one I originally delivered for Chief Judge Lippman on October 27, 2011 at the Office of Court Administration in Manhattan, and the two full copies that accompanied the two copies of the verified complaint in the *CJA v. Cuomo, et al.* declaratory judgment action that I delivered in Albany on April 5, 2012 to the Clerk of the Court of Appeals, who accepted service for Chief Judge Lippman and the Unified Court System, each named defendants therein. Nevertheless, because the October 27, 2011 Opposition Report is so dispositive, I am herewith furnishing you with your own full copy – by which I mean the included October 15, 2002 and October 24, 2002 two final motions that were before the Court of Appeals in CJA's monumental 3-in-1 lawsuit against the Commission on Judicial Conduct, about which I testified on July 20, 2011 before the Commission on Judicial Compensation, handing up a copy of each motion to substantiate my words, publicly-stated:

“...you can verify that the Commission was the beneficiary of a succession of fraudulent judicial decisions without which it would not have survived, including four of the Court of Appeals...the Commission has been the beneficiary of fraudulent judicial decisions. The *modus operandi* in this state, fraudulent judicial decisions. The judiciary of this state is corrupt, pervasively, systemically corrupt.”⁴

I am also furnishing you with my written submissions to the Commission on Legislative, Judicial and Executive Compensation:

- my November 30, 2015 written testimony, with its attached exhibits;
- my December 2, 2015 supplemental statement; and
- my December 21, 2015 further statement.

From these, you can speedily verify the fraudulence, statutory violations, and unconstitutionality of BOTH the Commission on Judicial Compensation's August 29, 2011 Report and the Commission on Legislative, Judicial and Executive Compensation's December 24, 2015 Report – each the product of tribunals disqualified for interest and actual bias – and that your duty is to take steps to protect the People of the State of New York, be it as the district attorney you currently are or the chief judge you aspire to be.

⁴ See transcription of my July 20, 2011 testimony, annexed as part of Exhibit I to CJA's October 27, 2011 Opposition Report – and, additionally, the further substantiating documents I handed up to the Commission on Judicial Compensation on July 20, 2011: Exhibit F-1 (hand-out: “No Pay Raises for NYS Judges who Corrupt Justice: The Money Belongs to the Victims”); Exhibit F-2 (CJA's draft statement for the Senate Judiciary Committee's aborted December 16, 2009 hearing on the Commission on Judicial Conduct and the court-controlled attorney disciplinary system); Exhibits F-3 and F-4 (written statements for the Senate Judiciary Committee's March 6, 2007 hearing in opposition to confirmation of Chief Judge Kaye to the Court of Appeals).

Indeed, your disregard of that duty would make you an accessory and criminally liable⁵ for the felony crimes here at issue: “offering a false instrument for filing in the first degree” (Penal Law §175.35), “grand larceny in the first degree” (Penal Law §155.42), “scheme to defraud in the first degree” (Penal Law §190.65), “defrauding the government” (Penal Law §195.20), “corrupting the government in the first degree” (Penal Law §496.05), “public corruption” (Penal Law §496.06), and, of course, the misdemeanor of “official misconduct” (Penal Law §195)?

The People of New York cannot suffer yet another constitutional officer compromised by pecuniary and other interests and relationships, who corrupts his public office as a result. Will you do what is right and what the law and ethics require, notwithstanding you are a beneficiary of the judicial salary increases and have personal, professional, and political relationships with those involved in the felonies now before you and who are responsible for your Court of Appeals nomination and control your confirmation?

On the subject of conflicts of interest – and because, in December 2011, Governor Cuomo appointed you to chair the then-newly created Joint Commission on Public Ethics,⁶ whose jurisdiction includes conflict of interest complaints against him and other constitutional officers of the executive and legislative branches – I am enclosing the June 27, 2013 conflict-of-interest ethics complaint that we filed with JCOPE, two months after you resigned as chair – and which JCOPE has been sitting on ever since. It is against Governor Cuomo, Attorney General Schneiderman, Comptroller DiNapoli, legislators and their culpable staff and is based on their conflicts of interest that are the ONLY explanation for their knowing and deliberate failure to protect the public from the Commission on Judicial Compensation’s fraudulent, statutorily-violative and unconstitutional August 29, 2011 Report.⁷

⁵ As illustrative, Penal Law §105.15 “conspiracy in the second degree”.

⁶ In the words of the Governor’s December 12, 2012 press release: “‘The Joint Commission on Public Ethics is an independent monitor that will aggressively investigate corruption and help maintain integrity in state government,’ Governor Cuomo said. ‘I am confident that under the leadership of Chair DiFiore and the other board members, the Commission will be the toughest ethics enforcer in our state’s history.’” <http://www.governor.ny.gov/news/governor-cuomo-and-legislative-leaders-appoint-members-joint-commission-public-ethics>.

⁷ At the November 30, 2015 hearing, I furnished this June 27, 2013 conflict-of-interest ethics complaint – and CJA’s related December 11, 2014 conflict-of-interest ethics complaint that JCOPE has also been sitting, also against the Governor, *et al.* – to Commissioner Mitra Hormozi, one of the Governor’s three appointees to the Commission on Legislative, Judicial and Executive Compensation and his appointed chair of the Commission on Public Integrity, when JCOPE replaced it, under your chairmanship. CJA’s webpage for my November 30, 2015 testimony posts this additional December 11, 2014 complaint. The direct link is: <http://www.judgewatch.org/web-pages/judicial-compensation/2015/testimony.htm>. CJA’s subsequent correspondence pertaining to the JCOPE/LEC Review Commission – and my October 14, 2015 testimony before the JCOPE/LEC Review Commission about the conflicts of interest of executive and legislative constitutional officers with respect to the judicial pay raises and the Commission on Judicial Compensation’s August 29, 2011 Report is posted here: <http://www.judgewatch.org/web-pages/searching-nys/commission-to->

As I greatly prefer to testify in support of your nomination at the Senate Judiciary Committee's upcoming hearing on your confirmation, rather than in opposition, please confirm, as soon as possible, that based on your findings of fact and conclusions of law with respect to the foregoing, you will be taking steps, as Chief Judge, to:

- (1) void the judicial pay raise recommendations;
- (2) repeal the commission statute;
- (3) refer the commissioners to criminal authorities for prosecution; and
- (4) investigate the systemic judicial corruption, infesting supervisory and appellate levels and the Commission on Judicial Conduct – which the Commission on Legislative, Judicial and Executive Compensation – like the Commission on Judicial Compensation before it – unlawfully and unconstitutionally ignored, without findings, in recommending judicial pay raises.

Further, please advise, with respect to the Judiciary's budget for fiscal year 2016-2017, transmitted to Governor Cuomo and legislative leadership, including Senate Judiciary Committee Chairman Bonacic, on the day you were nominated, December 1, 2015:

- (1) whether the Judiciary's "single budget bill" is encompassed within the certification of the Chief Judge and the approval of the Court of Appeals;
- (2) the cumulative dollar total of the Judiciary's budget request in its two-part budget presentation;
- (3) the cumulative dollar total of the appropriations and reappropriations in the Judiciary's "single budget bill";
- (4) whether the reappropriations in the "single budget bill" are consistent with Article VII, §7 and Article III, §16 of the New York State Constitution and State Finance Law §25.

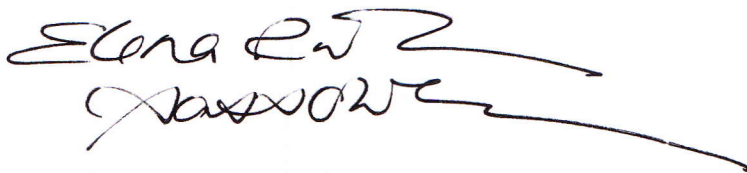
Insofar as the Executive Summary to the Judiciary's budget for fiscal year 2016-2017 states (at fn. 4) that the Judiciary's budget does not include the Commission on Legislative, Judicial and Executive Compensation salary recommendations – as they were not then made – but that "If necessary, the Judiciary will submit a supplemental budget request to cover the cost of the April 2016 salary adjustment", do you not agree that any such supplemental budget request would be – like the Commission's December 24, 2015 Report – fraudulent, statutorily-violative, and unconstitutional.

I would welcome your invitation to meet together in advance of your Senate Judiciary Committee confirmation hearing so that we may discuss these and other issues germane to the top leadership position to which you have been nominated. This would include CJA's constitutional analysis, drawn from the Court of Appeals' February 23, 2010 decision in the judges' judicial compensation lawsuits and from Article VI of the New York State Constitution – highlighted by my November 30, 2015 testimony before the Commission on Legislative, Judicial and Executive Compensation (at p. 2) and annexed as its Exhibit 3 – that:

“The appellate, administrative, disciplinary, and removal provisions of Article VI are safeguards whose integrity – or lack thereof – are not just ‘appropriate factors’, but constitutional ones. Absent findings that these integrity safeguards are functioning and not corrupted, the Commission cannot constitutionally recommend raising judicial pay.^{fn4}” (CJA’s October 27, 2011 Opposition Report, prefatory quote & page 12, underlining in the original).

May I hear from you soon – and may the New Year be the beginning of respect for law, evidence, and honesty, under your leadership.

Thank you.

A handwritten signature in black ink, appearing to read "Elena R. DiFiore". The signature is written in a cursive, flowing style with a long horizontal stroke extending to the right.

Enclosures