

CENTER for JUDICIAL ACCOUNTABILITY, INC.

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January 26, 2016

TO: Chief Judge Janet DiFiore

RE: The Legislature's February 4, 2016 "Public Protection" Budget Hearing:
Will You Do Your Duty to Apprise the Legislature of its Own Duty?:

(1) to override the judicial salary increases recommended by the Commission on Legislative, Judicial and Executive Compensation's December 24, 2015 Report because they flagrantly violate the commission statute, in addition to being fraudulent and unconstitutional; and

(2) to strike \$33,760,000 of the Judiciary's "reappropriations" because they are uncertified/unapproved by the Chief Judge and Court of Appeals, in violation of Article VII, §1 of the New York State Constitution – and/or to strike \$13,760,000 of this sum because it violates Article VII, §7 and Article III, §16 and State Finance Law §25.

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

At the Senate Judiciary Committee's January 20, 2016 so-called "meeting" on your confirmation, Senate Judiciary Committee Chairman John Bonacic stated and asked (video at 14:33 mins.)¹:

"You know, the budget that has been presented to us by the Judiciary is in excess of our 2% state imposed limit that we do voluntarily. Is this judiciary budget going to be your budget or is it going to be your predecessor's."

You responded:

"Well, I didn't obviously prepare the judiciary budget, but if I am confirmed you can bet that will be one of the first things that's on my agenda to speak with the staff with and we'll go forward from there."

Thereafter, the following exchange ensued between yourself and Senate Judiciary Committee Ranking Member Ruth Hassell-Thompson in response to her statements and questions (video at 29:50 mins.):

¹ The video and all other evidence substantiating this letter are posted on the letter's webpage. The webpage can be reached from CJA's homepage, www.judgewatch.org, via the prominent center link: "NO PAY RAISES FOR NEW YORK'S CORRPT PUBLIC OFFICERS: The Money Belongs to their Victims!" – and from the sidepanel "Searching for Champions-State-NY", linking to your name.

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Hassell-Thompson: “We have put 25 new judges on the Family Court in the last two years. You also heard it alluded to that the budget that has preliminary been submitted is, I think is, 1.4% over. Would you be pushing for more judges for the Family Court, even understanding those considerations and concerns?”

DiFiore: “As I sit here today, I can’t answer that question. What I will do, if I am lucky enough to be confirmed by this body, is take a long hard look at that and make sure that we do have enough in terms of resources, whether they are judicial resources or non-judicial resources. And I will be, if I think and conclude at the end of that review and analysis, that we do need additional staffing in terms of new judgeships, you can bet I will be advocating for that.”

Hassell-Thompson: “...The Commission has just recommended an increase in pay for Supreme Court justices almost to the level paid to federal court, district court judges. How will the court system pay for this increase? And will there be any impact on the operations of the courts?”

DiFiore: “First let me say, I applaud the work of the Commission on Judicial Compensation and I think that it, they did a responsible job, that judges, our hard-working judges across the state, should be reasonably and fairly compensated for the important work that they do. As to your question about the budget, if I am fortunate enough to be confirmed, that is going to be my top priority: to help our staff and work with our partners in government to figure out how we are going to indeed fund that.”

Please be advised that the Family Court has long been in a state of emergency – caused by too few Family Court judgeships and ballooning caseloads exceeding human capacity. This was the subject of a devastating October 30, 2009 report entitled “*Kids and Families Still Can’t Wait: The Urgent Case for New Family Court Judgeships*”, prepared for, and issued by, then Senate Judiciary Committee Chairman John Sampson. It stated:

“...Family Court’s caseload crisis has grown beyond administrative remedies and short-term fixes. With calendars as large as those that many courts now typically experience, only a prompt infusion of new Family Court judgeships – commensurate with dockets – can ensure that New York’s family justice system does not collapse under its own weight.” (at p. 2, underlining in original).

So dire was the situation that notwithstanding the crushing financial crisis facing the country, the state, and the citizenry, the Senate Judiciary Committee’s 2009 report recommended the creation of 39 new Family Court judgeships, 21 of them immediately.

Faced with the choice of funding judicial salary increases and funding new Family Court judgeships, the Judiciary sacrificed children and families. Not until its budget for fiscal year 2014-2015, after the first two phases of judicial salary increases recommended by the August 29, 2011 Report of the

Commission on Judicial Compensation had taken effect and with the third phase to take effect on April 1, 2014, did the Judiciary seek 20 new Family Court judgeships – the funding for which was to be in a supplemental budget.

On February 5, 2014, at the Legislature’s “public protection” budget hearing, then Assemblyman Carl Heastie asked then Chief Administrative Judge Gail Prudenti about the shortage of Family Court judges, referenced in her written testimony wherein she had stated:

“Over the past 30 years, while filings have increased by 90 percent, few new Family Court judgeships have been established. None have been created in New York City since 1990, and only one was created anywhere in the state in the last decade (Orange County in 2005).”

Her response to Assemblyman Heastie’s question: “give us some framework of what the caseloads may be for some of the Family Court judges” (transcript, pp. 25-28; video, at 21:55 mins.) echoed the more detailed and catastrophic findings of the Senate Judiciary Committee’s 2009 report: “*Kids and Families Still Can’t Wait: The Urgent Case for New Family Court Judgeships*”. Ranking Member Hassell-Thompson followed with further questioning, including “If you had the ideal, how many – you’re asking for 20, but what’s the ideal in terms of what we need?”, to which Chief Administrative Judge Prudenti responded:

“Senator, that is a great question. Because really when we ask for 20, as I told everyone, it was to jump-start discussions to see what you thought. You know, many years ago there was a request for 70-something Family Court judges, you know. If you were to ask me what I personally thought, I think we need substantially more than 20 Family Court judges...” (transcript, pp. 30-31; video, at 28:15 mins.).²

The Senate Judiciary Committee’s 2009 report: “*Kids and Families Still Can’t Wait: The Urgent Case for New Family Court Judgeships*” underscores the deceit of the Judiciary’s claim that burgeoning caseloads required raising judicial salaries – when what they required were more judges. This was identified at page 31 of CJA’s October 27, 2011 Opposition Report to the Commission on Judicial Compensation’s August 29, 2011 Report, a full copy of which I hand-delivered for you, on December 31, 2015, with a letter addressed to you entitled “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 and the Public Fisc?”

² The deceit of the Judiciary’s request for 20 new Family Court judges – when what was needed were, at least 39, if not 70 – was set forth at pages 6-8 of my February 21, 2014 letter to the chairs and ranking members of the fiscal committees. The letter is Exhibit K-1 to the March 30, 2014 verified complaint in CJA’s live and unfolding citizen-taxpayer action, *CJA v. Cuomo, et al.* (Albany Co. #1788-2014), a copy of which I handed up to the Commission on Legislative, Judicial and Executive Compensation at its November 30, 2015 hearing in support of my testimony. This verified complaint with exhibits is readily-accessible to you from CJA’s website, including from the links my December 31, 2015 letter to you furnished (at pp. 3, 4).

Where are your findings of fact and conclusions of law with respect to CJA's October 27, 2011 Opposition Report and with respect to the further evidence my December 31, 2015 letter provided you so that you could verify that the December 24, 2015 Report of the Commission on Legislative, Judicial and Executive Compensation is even more statutorily-violative, fraudulent, and unconstitutional than the Commission on Judicial Compensation's August 29, 2011 Report – and that your duty is to take steps to ensure legislative override of its "force of law" recommendations for judicial salary increases, whose first phase will otherwise take effect, automatically, on April 1, 2016. And where are your findings of fact and conclusions of law with respect to my 12-page "Statement of Particulars in Further Support of Legislative Override..." that was an enclosure to my January 15, 2016 letter to Temporary Senate President Flanagan and Assembly Speaker Heastie, entitled "Immediate Oversight Required", a copy of which I furnished you and other legislators.

On February 4, 2016, the Legislature will be holding its "public protection" budget hearing – which is where the Judiciary testifies in support of its budget. Presumably, you will not be testifying personally, but sending Chief Administrative Judge Lawrence Marks as your surrogate.

To prevent Chief Administrative Judge Marks from brazenly lying at the hearing about the judicial salary increases that the Legislature is duty-bound to override – much as he is now brazenly lying by his propaganda-filled article, "In Pursuit of Fair Compensation For New York's Judges", appearing on the front page of this week's New York Law Journal supplement in connection with the New York State Bar Association's annual meeting – he must bring to the hearing your aforesaid findings of fact and conclusions of law – and his own³.

Additionally, Chief Administrative Judge Marks must come to the hearing with your answers to the questions about the Judiciary budget itemized at page 7 of my December 31, 2015 letter to you as follows:

- “(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.”

³ My December 21, 2015 further statement to the Commission on Legislative, Judicial and Executive Compensation – to which Chief Administrative Judge Marks was an indicated recipient – expressly requested that he assist the Commission by making findings of fact and conclusions of law – and a copy was transmitted to you with my December 31, 2015 letter.

Your delay in responding to these questions has already been prejudicial to the People of the State of New York and the public fisc. On January 13, 2016, the Governor embodied the Judiciary's seemingly uncertified/unapproved "single budget bill", *verbatim*, as the judiciary portion of his Legislative/Judiciary Budget Bill #S.6401/A.9001. This includes "reappropriations" totaling \$33,760,000 that are NOT within the Judiciary's two-part budget presentation – at least \$13,760,000 of which flagrantly violate New York State Constitution Article VI, §7 and Article III, §16 and State Finance Law §25. This replicates what the Governor did in previous years, where his Legislative/Judiciary budget bills embodied, *verbatim*, the Judiciary's seemingly uncertified/unapproved "single budget bills", each with tens of millions of dollars in constitutionally and statutorily violative "reappropriations" that were NOT part of the Judiciary's two-part budget presentations.

In fiscal years 2013-2014 and 2014-2015, the Judiciary secreted the funding for the second and third phases of the judicial salary increases recommended by the Commission on Judicial Compensation, in the slush fund created by the "reappropriations". It also funded the first phase in fiscal year 2012-2013 from "reappropriations", but this was identified by its "single budget bill" (at p. 14) and by the Governor's Legislative/Judiciary Budget Bill #S.6251/A.9051 (at pp. 24-25) based thereon, as follows:

"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)".

Assumedly, the Judiciary will now use the "reappropriations" for fiscal year 2016-2017 in Budget Bill #S.6401/A.9001, replicated from its "single budget bill", to fund the first phase of the judicial salary increases recommended by the Commission on Legislative, Judicial and Executive Compensation.

If not, from where will you be drawing the funds for the first phase judicial salary increase, inasmuch as the Governor's January 13, 2016 Executive budget furnishes no additional monies and *expressly* states, by its "Commentary of the Governor on the Judiciary", that the Judiciary must fund the first phase from its already submitted budget request – and that this must be scaled back to within the 2% cap. In pertinent part, the Governor's Commentary states:

"...acknowledging the need to evaluate judicial salaries, the recommendations of the New York State Commission on Legislative, Judicial, and Executive Compensation to provide for judicial salary increases on part with federal judges does not abrogate the Judiciary's responsibility to partner with us to maintain overall spending at 2 percent. I applaud the Judiciary for absorbing the first year of recommended

Commission on Judicial Compensation salary increases in 2012-13, and I expect that they will again absorb the first year of recommended judicial salary increases within an overall spending level of 2 percent in the 2016-17 budget. Indeed, for the past 3 years, Executive agencies have absorbed the cost of salary increases through productivity improvements and efficiency measures. I strongly urge the Legislature and Judiciary to work together to reduce the Judiciary's budget commensurate with the State's spending growth level of 2 percent."

Of course, it is your duty to tell the legislators – much as it was your duty to forthrightly state to them at your confirmation – that, for all the reasons set forth by my December 31, 2015 and January 15, 2016 letters to you and them, they must override the Commission's judicial salary increase recommendations, as a matter of law – not the least reason because the Commission flagrantly violated the commission statute.

Should you, instead, blithely proceed to earmark monies for this larcenous first phase of recommended judicial salary increases from the Judiciary's constitutionally and statutorily violative "reappropriations" and/or from its purported "itemized" appropriations – availing yourself of the interchange/transfer provision in section 2 of Budget Bill #S.6401/A.9001 (at p. 10), taken from the Judiciary's "single budget bill"⁴— do be sure to furnish the precise dollar amounts involved. As stated in the very first section of my 12-page "Statement of Particulars in Further Support of Legislative Override...", enclosed with my January 15, 2016 letter:

"Whereas Senate Rule VIII, §7^{fn} and Assembly Rule III, §1(f)^{fn} would require that a bill to raise judicial salaries be accompanied by a 'fiscal note' or 'fiscal impact statement', the Commission's Report, whose salary recommendations have the 'force of law' absent Legislative override, does not furnish the total cost of the judicial salary increases it is recommending. The Report's only cost figure is mixed into its 'Finding' as to the state's currently 'strong fiscal condition at the present time', wherein it asserts:

'The projected additional cost to the state for the first phase of the Commission's recommendations is approximately \$26.5 million for the next fiscal year....' (at p. 6).

In so-representing, the Report does not identify whose cost projection this is – or clarify whether the projected dollar figure is limited to salary costs or includes the additional costs that result from non-salary benefits, such as to pensions and social security, whose costs to the state are derived from salary..." (underlining in original, at p. 1).

⁴ It reads: "Notwithstanding any provision of law, the amount appropriated for any program within a major purpose within this schedule may be increased or decreased in any amount by interchange with any other program in any other major purpose, or with any appropriation in section three of this action, with the approval of the chief administrator of the courts." Section 3 are the Judiciary's "reappropriations".

In other words, please not only certify that \$26.5 million is the total cost of the first phase of the judicial salary increase for all covered judges – if it is, in fact – but certify the total cost of the salary-based, non-salary benefits that all the covered judges will additionally receive.

Certainly, too, because of the statutory link between district attorney salaries and judicial salaries – to which my December 31, 2015 letter reminded you – the first phase of judicial salary increases will result in salary increases for district attorneys and a consequent bump-up in their salary-based, non-salary benefits. This must be included in the Executive budget and the relevant appropriation bills. Has it been? If not, won't they need to be amended? What about the salaries of county clerks? Aren't they statutorily-linked to judicial salaries – and who pays those – and the county clerk's salary-based, non-salary benefits?

I don't know if there are other public officers and/or employees whose salaries are statutorily-linked to judicial salaries, but surely, consistent with your assurances at your confirmation, it is your duty to your "partners in government", the Legislature and Governor – and to the public – that they are not misled as to the FULL cost of the first phase of judicial salary increases recommended by the December 24, 2015 Report of the Commission on Legislative, Judicial and Executive Compensation.

And, it is also your duty to disclose to the Legislature, the Governor – and the public – the dollar cost of each of the three phases of the judicial salary increase recommendations of the Commission on Judicial Compensation, both salary and salary-based, non-salary benefits – and the cumulative dollar cost of the fully-implemented three-phase judicial salary increase recommendations, including the cumulative dollar cost of their salary-based, non-salary benefits – all such information having not been furnished by the Judiciary in its budgets for the current and three past fiscal years, except ambiguously with respect to fiscal year 2012-2013.

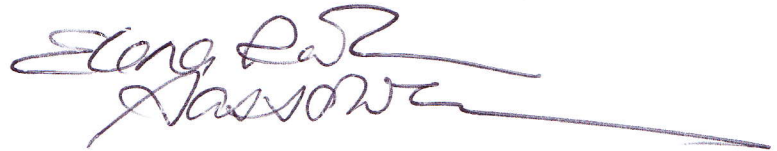
Finally, inasmuch as your response, on January 20, 2016, to Senate Judiciary Committee Chairman Bonacic's question "Do you have a favorite Court of Appeals judge?" was "Stanley Fuld" (video, at 15:05 mins), with no elaboration as to why and no follow-up inquiry by Chairman Bonacic or a single other senator, all should note his powerful dissent in *Hidley v. Rockefeller*, 28 N.Y.2d 439, 447-449 (1971), involving a challenge to the Governor's budget and appropriation bills. In pertinent part, Chief Judge Fuld stated:

“...In my view, the budget and the appropriation bills under consideration are so devoid of essential detail as to fail to comply with article VII of the Constitution of this State. ...

...the provisions which permit the free interchange and transfer of funds are unconstitutional on their face...To sanction a complete freedom of interchange renders any itemization, no matter how detailed, completely meaningless and transforms a schedule of items or of programs into a lump sum appropriation in direct violation of Article VII of the Constitution.

To suggest that the courts are powerless to declare appropriation bills unconstitutional – on the ground that they contain lump sums or insufficiently detailed items – merely because the Legislature did not request more or greater detail

(opn. of Breitel, J., pp. 444-445), is startling and dangerous doctrine. The circumstance that the legislators may choose to accept or act upon budget bills presented, no matter how inadequate, cannot and should not condone or validate what is unconstitutional and impermissible. The constitutional mandate that there be budgetary itemization and detail may not be evaded by the executive or legislative branch of government, whether acting separately or jointly. In the words of this court in the *Tremaine* case (281 NY [1], 11 [1939]), ‘the fundamental law [is] binding on us all, Judiciary, Governor, Legislature.’”

A handwritten signature in black ink, appearing to read "Eric Lipton Nassow". The signature is written in a cursive style with a long horizontal line extending to the right.

cc: Chief Administrative Judge Lawrence Marks
All Recipients of CJA’s January 15, 2016 letter