CENTER for JUDICIAL ACCOUNTABILITY, INC.*

Post Office Box 8101
White Plains, New York 10602

Tel. (646) 220-7987

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

BY E-MAIL: c/o strell@sunshinesachs.com

July 9, 2012

Benjamin J. Kallos, Esq., Executive Director
Citizens' Committee for an Effective Constitution
600 Lexington Avenue, 10th Floor
New York, New York 10022

RE: Actualizing the Name, Purpose, and Methodology of the Citizens' Committee for an Effective Constitution

Dear Executive Director Kallos:

I am most disappointed not to have heard back from you.

My initial voice mail messages on June 14th and June 20th about the Citizens' Committee for an Effective Constitution were not returned. On June 25th, when I called you a third time, we briefly spoke and you asked me to call you back at 2 p.m. Yet, when I did, I again got your voice mail. On June 27th, I also got your voice mail – and left a message for you asking whether we might continue our conversation in person, as I was going to be in midtown Manhattan later that day and could stop by, if that was convenient. I received no return call.

I expect to be in Manhattan on Wednesday afternoon, July 11th. Would you be available for a meeting? If not, what other day would work for you?

On June 15th, I travelled to SUNY-New Paltz to meet with Professor Gerald Benjamin, as he is identified by the Citizens' Committee website, www.effectiveny.org, as not only a founder of the Committee with Bill Samuels and Assembly Minority Leader Brian Kolb, but as providing it with research and scholarship.

In response to my observation that it appeared from the Committee's website that there are no citizens on the Citizens' Committee for an Effective Constitution, Professor Benjamin acknowledged that the concept of a Citizens' Committee has yet to be actualized. I stated to him – and ten days later to you in our brief phone conversation – that I would like to be one such citizen and that I could furnish names of other citizens, like myself, who, over many decades, have labored "in the trenches" for an effective constitution and could meaningfully contribute to the Committee's objectives.

---

* **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.

As I told both Professor Benjamin and you, I was privileged to participate with citizen activist Bob Schulz, fifteen years ago, in his patriotic effort to educate citizens about the importance of voting YES on the 1997 ballot question as to whether New York should convene a constitutional convention and had thereafter served as a board member of his We The People Foundation for Constitutional Education. Bob, who has brought a great many lawsuits against the state on constitutional grounds and is endeavoring to build a "Constitution Lobby" to "institute citizen vigilance", http://www.givemeliberty.org/constitutionlobby/, is an example of a citizen who can powerfully inform discussion about the state constitution, *as written and as applied.*

Likewise, James Ostrowski, Esq., who brought the *Bordeleau v. State of New York* case, to which Professor Benjamin refers in his article "*The State Constitution Doesn't Always Mean What It Says; Perhaps It Should*", posted on the Committee's webpage on the issue of "Constitutional Change" and containing a link to the oral argument of the case at the Court of Appeals from Jim's website, http://politicalclassdismissed.com/?p=12591.

Common to all three of us is that we can each attest from direct, first-hand experience that irrespective of the plain language of our state's constitution and black-letter adjudicative and ethical principles, our state courts are eviscerating the constitution to protect a corrupt *status quo* against meritorious citizen challenge.[1] Indeed, when I met with Professor Benjamin I noted to him the

---

[1] See, *inter alia*, Jim Ostrowski's extensive January 23, 2012 motion for reargument of the Court of Appeals' decision in *Bordeleau v. State of New York*, accessible *via* a search on his politicalclassdismissed.com website. Its introduction reads:

> "This motion for reargument is the last plausible means by which to salvage 137 years of herculean effort by the People of the State through their Constitution to ban 'legal robbery' of their money by greedy business firms working in alliance with corrupt politicians. [Quote from Mayor Opdyke cited in Plaintiff's brief at 19] If this motion fails, the mind boggles while pondering what options remain to end this evil practice.
>
> The reason for the constitutional amendment initially was that the Legislature was giving away the people's money to special interest groups. However corrupt and unresponsive the Legislature was in 1874, the reality in 2011 is that it would be impossible for average citizens to persuade today's Legislature to abolish corporate welfare. Corporate welfare is in many ways how they finance their campaigns and maintain power.
>
> The notion of voting them out is naïve. Their re-election rate is absurdly high. Every intelligent observer knows that the political system in New York is rigged to protect and re-elect incumbents. In fact, there is evidence in the complaint in this case that legislators received legalized 'kick-backs' from corporate grantees in the form of campaign donations. [Record at 36-37] How can citizens defeat legislators who violate the Constitution and thereby get a kick-back to buy the critical TV ads that guarantee their re-election?
>
> The notion that citizens should respond to this Court's decision by amending the Constitution, is preposterous. The People already amended the Constitution to ban corporate grants. Any further attempt to ban corporate grants using plain language could be overridden by court decision as the present effort was on November 21st. And, obviously, having lost in the State's highest court on a pure issue of state law, the courts would be foreclosed to us if this motion is denied."

paragraph on the "About" page of the Committee's website:

> "Constitutional change in New York may be achieved both by formal proposal for action by the voters – either through amendments passed by successive sessions of the legislature or by holding a state constitutional convention – or by court interpretation." (underlining added).

As I stated to Professor Benjamin, there must be scholarly analysis of "court interpretation" of constitutional questions. To illustrate this, I discussed with him the Court of Appeals' February 23, 2010 decision in the three judicial pay raise lawsuits brought by state judges and the Unified Court System against the Legislature and Governor for their alleged separation of powers constitutional violation in linking judicial salaries with legislative salaries and other considerations.

The ONLY analysis of that important February 23, 2010 Court of Appeals decision is by me, a non-lawyer, as Director of the nonpartisan, nonprofit citizens' organization, Center for Judicial Accountability, Inc. (CJA). Embodied in a July 19, 2011 letter to Attorney General Schneiderman, it details the decision's fraudulence and states:

> "Tellingly…although New York boasts more than 160,000 lawyers – more than any other state[fn] – and 15 law schools, including some of our nation's most prestigious, they have not generated even one law review article or analytic critique of the February 23, 2010 Court of Appeals decision – at least none that we have found.[fn]" (at p. 8).

As I told Professor Benjamin, neither Attorney General Schneiderman nor any other recipient of this July 19, 2011 letter-analysis have denied or disputed its accuracy – or that such fraudulent February 23, 2010 decision emboldened state judges to seek hundreds of millions of dollars in damages against the state for a bogus separation of powers constitutional violation and intimidated then-Governor Paterson to introduce, and the Legislature to pass, Chapter 567 of the Law of 2010, creating a Special Commission on Judicial Compensation, whose judicial pay raise recommendations would require no further action by the Legislative and Executive branches to become law.

Here, too, this state's 160,000+ lawyers and 15 law schools have not generated any law review articles or analytic critiques as to the constitutionality of Chapter 567 of the Laws of 2010, *as written or as applied.* And once again, I, as CJA's Director, filled the breach. By a October 27, 2011 Opposition Report, I chronicled the unconstitutionality, statutory violations, and fraud of the Special Commission's August 27, 2011 Final Report, recommending 27% judicial pay raises, so that the highest constitutional officers of our three government branches, Governor Cuomo, Temporary Senate President Skelos, Assembly Speaker Silver, and Chief Judge Lippman, could take appropriate action, beginning with a legislative override to prevent the recommendations from becoming law on April 1, 2012. Thereafter, upon the non-response of these constitutional officers and the comparable

nonfeasance of two other highest constitutional officers, Attorney General Schneiderman and Comptroller DiNapoli, I filled the breach yet again. This time, by a public interest lawsuit on behalf of the People of New York, commenced on March 30, 2012, seeking a declaratory judgment as to the unconstitutionality of Chapter 567 of the Laws of 2010, *as written and as applied*, and charging the constitutional officers of our three government branches with eviscerating separation of powers by colluding with each other against the People of the state, motivated by their desire to secure their own pay raises.

The lawsuit is currently pending in Supreme Court/Bronx County before Justice Mary Ann Brigantti-Hughes, who, ironically, in 1993 and 1994, was a member of the Temporary State Commission on Constitutional Revision, to which Professor Benjamin was Research Director.[2]

Although the March 30, 2012 verified complaint and its exhibits, including the underlying July 19, 2011 letter-analysis of the Court of Appeals' February 23, 2010 decision and the October 27, 2011 Opposition Report, are all posted on CJA's website, www.judgewatch.org, accessible *via* the top panel "Latest News"[3], I provided hard copies to Professor Benjamin to enable him to more conveniently evaluate the serious and substantial constitutional issues presented, warranting examination and discussion by experts of our state constitution and political science scholars[4] – consistent with the Committee's articulated methodology, reiterated throughout its website, of "engender[ing] informed discussion, debate, and action regarding changes to the New York State Constitution that will produce more democratic, responsive, and EFFECTIVE state and local government." ("About" webpage, capitalization in the original, underlining added).

Indeed, as I stated to Professor Benjamin, the March 30, 2012 verified complaint warrants scholarship for a further reason: it offers an unparalleled opportunity to critically examine, in one fell swoop, what became of the three constitutional amendments approved by New York voters in 1977: (1) "merit selection" appointment of Court of Appeals judges; (2) the Commission on Judicial Conduct; and (3) the Unified Court System – as to which, 35 years later, there has been NO scholarship.

Upon my follow-up phone message for Professor Benjamin on June 25th, I received a prompt return call the next morning from his assistant that the Professor was away, but that he would get back to

---

[2] Justice Brigantti-Hughes, who was then with the New York State Department of Law, is listed as a member of the Temporary State Commission on Constitutional Revision in its 1994 Briefing Book on the New York State Constitution – though not in its 1995 Final Report: Effective Government Now for the New Century.

[3] The July 19, 2011 letter, analyzing the Court of Appeals' February 23, 2010 decision, is Exhibit E-1 to CJA's October 27, 2011 Opposition Report. It is also Exhibit J to CJA's March 30, 2012 verified complaint. Nonetheless, because of its significance, a copy is enclosed.

[4] I also furnished Professor Benjamin with an executive summary of the Opposition Report and a press release of the lawsuit. Though also posted on our website, copies are enclosed, for your convenience.

me within the next two weeks. Meantime, I advised her that links to the Professor and his Center for Research, Regional Education, and Outreach (CRREO) on the Committee's website were broken and that I had begun to independently contact constitutional scholars and other experts of New York state government, so as to alert them to the constitutional issues presented by the unfolding lawsuit, for which scholarship is exigent.

Thus far, the scholars with whom I have spoken include Thomas Gais, Director of the Rockefeller Institute of Government (at SUNY-Albany), who collaborated with Professor Benjamin on articles relating to constitutional conventions and amending constitutions, and Seymour Lachman, Director of the Hugh Carey Institute for Government Reform (at Wagner College), who, prior to his serving in the State Senate for nine years, had been a professor of government theory at CUNY Graduate Center and Baruch College. Both promptly called me back upon my leaving phone messages for them and each allowed me to make extensive presentations, as to which they expressed great interest and appreciation of the importance of what I was saying. Memorably, Director Gais asked me "what do you suggest?" and ended our conversation by graciously remarking "I've learned a lot from you". Likewise, expressing great interest and appreciation was E.J. McMahon, Senior Fellow of the Manhattan Institute and founder of its Empire Center for Public Policy, whose 2010 article "*New York's Exploding Pension Costs*" is cited at footnote 45 of Assembly Minority Leader Kolb's 2011 article "*New York's Last, Best Hope for Real Reform: The Case for Convening a Constitutional Convention*", Albany Government Law Review, Volume 4, pp. 601-624, accessible from the Committee's webpage, http://effectiveny.org/issue-summary/Convention. Indeed, while I was speaking with Mr. McMahon, he accessed Chapter 567 of the Laws of 2010, posted on CJA's website, so as to verify what I was saying: that the statute expressly required the Special Commission on Judicial Compensation to examine "compensation and non-salary benefits" – as, for instance, pensions, medical insurance, and other perks – which the Commission had NOT done in making its recommendation to raise judicial salaries 27% over three years – with such statutory violation evident from the face of the Commission's paltry August 29, 2011 Final Report, also posted on our website. Mr. McMahon told me that busy as he was, this greatly interested and concerned him and he asked me for my contact information, stating he was entering it into his computer contacts. Robert Polner, a former Newsday reporter, who co-authored with Professor Lachman the books Three Men in a Room: The Inside Story of Power and Betrayal in an American Statehouse, and The Man Who Saved New York: Hugh Carey and the Great Fiscal Crisis of 1975 – and who I directly reached by phone – also expressed interest, as well as recognition that CJA's October 27, 2011 Opposition Report and lawsuit was a powerful news story whose electoral potential could knock out two of the "three men in the room", up for re-election in the fall – Temporary Senate President Skelos and Assembly Speaker Silver – a boon for reform.

Until now, I have deferred contacting Bill Samuels, whose financial largesse presumably pays the expenses of the Citizens' Committee for an Effective Constitution – a project of the New Roosevelt Foundation, which he founded and presumably underwrites. I did, however, phone Assembly Minority Leader Kolb's Albany office, so as to ascertain his knowledge of the October 27, 2011 Opposition Report, underlying the lawsuit in which he, as a member of the Assembly, is a defendant. Based on my telephone conversations with staff of the Assembly Ways and Means Committee who

work with Assembly Minority Leader Kolb and who, until my calls, were unaware of both the October 27, 2011 Opposition Report and March 30, 2012 verified complaint, it would appear that in keeping with the dysfunctional "three men in a room" manner in which our state government operates, Assembly Speaker Silver and Temporary Senate President Skelos withheld these documents from him – which, if so, would be a further basis to unseat them in this year's elections.

In any event, Assembly Minority Leader Kolb NOW knows of the October 27, 2011 Opposition Report and March 30, 2012 verified complaint based thereon. What actions will he take, consistent with his reform advocacy for responsible, responsive government and an effective constitution? Will he publicly call upon the named defendants in the suit – Governor Cuomo, Attorney General Schneiderman, Comptroller DiNapoli, Temporary Senate President Skelos, Assembly Speaker Silver, and Chief Judge Lippman – to account for why they did not respond to the Opposition Report and disgorge their findings of fact and conclusions of law with respect to the constitutional and statutory violations and fraud therein particularized? Will he come forward with his own findings of fact and conclusions of law? And what is his response to the verified complaint? Does he deny or dispute the correctness of its causes of action and, if not – because he cannot – what will he do to prevent further imposition on the public purse by judicial pay raises shown to be unconstitutional, statutorily violative, and fraudulent?

Ironically, at the conclusion of his article "*New York's Last, Best Hope for Real Reform: The Case for Convening a Constitutional Convention*", Assembly Minority Leader Kolb wrote:

> "State government's dysfunction, corruption, and fiscal irresponsibility are still the ultimate trump card that can mobilize public opinion and serve as an urgent call to action." (at p. 623).

The March 30, 2012 verified complaint, seeking to safeguard checks and balances and with it, millions, and ultimately, billions, of taxpayer dollars, is that "trump card", chronicling "dysfunction, corruption, and fiscal irresponsibility" of such unconstitutional and criminal dimension as to be capable of galvanizing the public to oust the culpable public officers and force sweeping reforms in defense of its pocket book, the rule of law, and our existing constitution. Certainly, it is a touchstone by which those true to honest, accountable, constitutional governance may be judged.

I look forward to hearing from you soon. Meantime, to underscore the difference between rhetoric and reality and to further highlight the leadership role played by citizens in the 1997 struggle for a constitutional convention, I enclose my September 9, 1997 letter to former gubernatorial candidate B. Thomas Golisano, who had appeared before Bob Schulz' We The People Congress – to which neither I nor Bob received any response.

Yours for a quality judiciary
& a People's constitutional convention,

ELENA RUTH SASSOWER, Director
Center for Judicial Accountability, Inc. (CJA)

Enclosures: (1) CJA's July 19, 2011 letter to Attorney General Schneiderman, analyzing the Court of Appeals' February 23, 2010 decision in the judges' judicial pay raise lawsuits
(2) Executive Summary to CJA's October 27, 2011 Opposition Report
(3) Press Release of CJA's March 30, 2011 lawsuit vs the three government branches
(4) my September 9, 1997 letter to B. Thomas Golisano, with its attached transcript excerpt from the July 7, 1997 meeting of We the People Congress

cc: Gerald Benjamin, Research Director/Founder, Citizens' Committee for an Effective Constitution
Bill Samuels, Founder, Citizens' Committee for an Effective Constitution
Assembly Minority Leader Brian Kolb, Founder, Citizens' Committee for an Effective Constitution
Robert L. Schulz, Citizen Activist
James Ostrowski, Esq., Citizen Activist
Thomas Gais, Director, Rockefeller Institute of Government (SUNY-Albany)
Seymour Lachman, Director, Carey Center for Government Reform (Wagner College)
Edmund J. McMahon, Senior Fellow, Manhattan Institute/Empire Center for NYS Policy
Robert Polner, Author/Journalist
B. Thomas Golisano, Billionaire

CENTER for JUDICIAL ACCOUNTABILITY, INC.

Post Office Box 3002
Southampton, New York 11969

Tel. (631) 377-3583

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

Elena Sassower, Director

BY FAX: 212-416-8026 (10 pages)
BY E-MAIL: eric.schneiderman@ag.ny.gov

July 19, 2011

Eric T. Schneiderman, New York State Attorney General
120 Broadway
New York, New York 10271

RE: (1) Vindicating the Public's Rights against Judicial Fraud: The Court of Appeals' February 23, 2010 Decision Underlying BOTH the Creation of the Commission on Judicial Compensation & the Perpetuation of the Judicial Compensation Lawsuits;
(2) FOIL & Project Sunlight Requests: Posting of the Record of the Judicial Compensation Lawsuits on the Attorney General's Website – &/or Providing the Record to the Center for Judicial Accountability for Posting on its Website

Dear Attorney General Schneiderman:

As you know from your years as a member of the New York State Senate Judiciary Committee, present at its hearings to confirm New York Court of Appeals judges, the Center for Judicial Accountability, Inc. (CJA) is a national, non-partisan, non-profit citizens' organization with a 20-year track record documenting systemic judicial corruption involving fraudulent judicial decisions. This includes by our 1999 public interest lawsuit suing the New York State Commission on Judicial Conduct for corruption and for complicity in the corruption of "merit selection" to the Court of Appeals – which the Commission survived, as did a corrupted "merit selection" process, by fraudulent judicial decisions, obliterating the rule of law. These stretch from Supreme Court/New York County (1999-2000), through the Appellate Division, First Department (2001-2002), to the Court of Appeals, Chief Judge Judith Kaye presiding (2002).

The record of that groundbreaking case, *Elena Ruth Sassower, Coordinator of the Center for Judicial Accountability, Inc., acting pro bono publico v. Commission on Judicial Conduct of the State of New York*, physically incorporates the record of two other lawsuits brought in Supreme Court/New York County, suing the Commission for corruption, *Doris L. Sassower v. Commission on Judicial Conduct of the State of New York* (1995) and *Michael Mantell v New York State Commission on Judicial Conduct* (1999-2001) – both of which the Commission

survived because it was protected by fraudulent judicial decisions.

We repeatedly placed this powerful evidentiary record before the Senate Judiciary Committee by our opposition to Senate confirmation of Victoria Graffeo (2000), Susan Read (2003), Eugene Pigott (2006), Chief Judge Kaye (2007), and Jonathan Lippman to be Chief Judge (2009) – and it is a perfect "paper trail" of judicial and governmental corruption embracing New York's legislative and executive branches. The record is posted on CJA's website, www.judgewatch.org, accessible *via* the left sidebar panel "Test Cases-State (*Commission*)".[1] It is directly relevant to the judicial compensation lawsuits brought by New York judges beginning in 2007 – and particularly to the judicial compensation lawsuit brought by Chief Judge Kaye and the OCA in 2008, culminating in the Court of Appeals' February 23, 2010 decision, from which Chief Judge Lippman, having been substituted for Chief Judge Kaye in her lawsuit, "took no part".

Judge Pigott authored the Court's February 23, 2010 decision, with the concurrence of four other judges. Two of these judges had corrupted justice and violated their mandatory ethical duties in the *Commission* case: Judge Carmen Ciparick, formerly a member of the Commission on Judicial Conduct, whose 1993 confirmation to the Court of Appeals we had opposed, *inter alia*, on that ground, and Judge Graffeo.[2]

The Attorney General's Office, under your predecessor, Andrew Cuomo, apparently did not handle the defense of the judicial compensation cases at the Court of Appeals. It was there handled, on behalf of the Legislature, Governor, and Comptroller, by outside counsel, Schlam,

---

[1] The final two motions in the *Commission* case concisely summarize the fraudulence of the judicial decisions of which the Commission was the beneficiary. These are my October 15, 2002 motion for reargument, vacatur for fraud, lack of jurisdiction, disclosure, & other relief, demonstrating the fraudulence of the Court of Appeals' two September 12, 2002 decisions; and my October 24, 2002 motion for leave to appeal, demonstrating the fraudulence of the five lower court decisions in the three separate lawsuits against the Commission, for which review by the Court of Appeals was sought. Among these, the fraudulent September 30, 1999 decision of Supreme Court Justice Ed Lehner in *Mantell v. Commission* – affirmed, on appeal, by the Appellate Division, First Department by an even more fraudulent November 16, 2000 decision of five justices: Williams, J.P., Mazzarelli, Lerner, Buckley, and Friedman – and, additionally, the Appellate Division, First Department's fraudulent December 18, 2001 decision in my *Commission* case, also by five justices: Nardelli, J.P, Mazzarelli, Andrias, Ellerin, and Rubin.

[2] The documentary record of CJA's opposition to Senate confirmation of all of these judges, as likewise to Judge Robert Smith – the only dissenter from the February 23, 2010 decision – and of their Senate confirmation is posted on our website, accessible *via* the sidebar panel "Judicial Selection-NY". See, in particular, my March 6, 2007 opposition statement to Chief Judge Kaye's confirmation, reciting her corruption – and that of her fellow Court of Appeals judges – in the *Commission* case – and summarizing (at pp. 10-14) the October 15, 2002 and October 24, 2002 motions.

Stone & Dolan, LLP.

On Thursday, July 7th, I spoke with Joel Graber, an Assistant Attorney General under Attorney General Cuomo and now under you, who has had primary responsibility for defending the Legislature and Governor in the judicial compensation lawsuits. I have been unable to speak with Schlam, Stone & Dolan attorneys – and, specifically, Richard Dolan, Esq., for whom I left several phone messages, as yet unreturned.

As I stated to Mr. Graber, despite spending considerable time scouring the internet, I located surprisingly few documents from the record of the judicial compensation lawsuits. Reviewing these fragments, however, makes evident that a "legal autopsy"[3] of the Court of Appeals' February 23, 2010 decision is needed by examination of the full lawsuit record.

My preliminary assessment of the February 23, 2010 decision is that it is materially fraudulent in purporting that the Legislature and Governor violated separation of powers by "linking" judicial salaries to legislative salaries or "unrelated policy initiatives" (at p. 34) – a violation which required the Court to repetitively purport, without record references, that all parties had "agreed" that the judiciary was entitled to a pay raise.[4] As to this separation of powers violation, the decision is notably skimpy, concealing that the appropriate comparison of the salaries of New York State judges is NOT to salaries in the private sector, or to salaries of state (civil service) government employees, or to salaries of judges elsewhere. Rather, because New York State judges are the "constitutional officers" of New York's judicial branch, the appropriate comparison is to the salaries of the "constitutional officers" of New York's other two branches – the Governor, Lieutenant Governor, Attorney General, and Comptroller, who are the "constitutional officers" of the executive branch, and the 62 senators and 150 assembly members who are the "constitutional officers" of the

---

[3] See the law review article "*Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*", 73 Albany Law Review 1 (2009), by Gerald Caplan; "assessment is not possible without access to the record" (at p. 3); "Performance assessment cannot occur without close examination of the trial briefs, oral argument and the like…" (at p. 53).

[4] "**All parties to this litigation agree** that Article VI justices and judges have earned and deserve a salary increase. That is what makes this litigation unique." (at p 5); "…**all the parties acknowledge** that the Judiciary is entitled to an increase in compensation…" (at p. 23); "**All parties agree** that a salary increase is justified" (at p. 29); "**All of the State defendants have conceded**, at one point or another, that judicial compensation must be increased." (at p. 32); "…this Court has been called upon to adjudicate constitutional issues relative to an underlying matter upon which **all have agreed**; namely, that the Judiciary is entitled to a compensation adjustment." (at p. 34).

Cf. Dolan firm's November 23, 2009 brief (at pp. 7-8): "…the Constitution endows only one form of 'agreement' between the Governor and the Legislature with legal significance on any proposal to increase judicial salaries: the passage of a bill qualifying as an 'appropriation by law.'"

legislative branch. Such appropriate comparison makes plain that NONE of New York's "constitutional officers" have had a pay increase since 1999[5] – and that there is NO BASIS for the pretense that because judges have not had a pay raise since then, allegedly due to "linkage", the legislative and executive branches have subjugated the judiciary and not treated it as "co-equal" – the predicate for the purported separation of powers violation. The opposite is true. New York's judicial "constitutional officers" are better than "co-equals" to the "constitutional officers" of our legislative and executive branches: they enjoy incomparably superior job tenure, and comparable, if not superior, pay.

The decision conceals the extraordinary tenure enjoyed by New York State judges – 14 years, 10 years, 9 years – as opposed to the 2 years that our Legislators serve and the 4 years of the Governor, Lieutenant Governor, Attorney General, and Comptroller. Likewise, with respect to judges' pay. Court of Appeals judges earn $151,200, with the Chief Judge getting $156,000 – which compares favorably to the $151,500 salaries of our Lieutenant Governor, Attorney General, and Comptroller and not inappropriately against the Governor's salary of $179,000. As for our Legislators, their base salary is $79,500 – a figure the decision not only conceals, but seeks to justify by purporting, without any record or other reference, that they are "part-time" (at p. 28) – which they are not, and asserting that they "may supplement their income through committee assignments, leadership positions and other outside employment" (at p. 28) – without giving any elaborative facts as to even one Legislator, let alone the 212 Legislators.

Plainly, too, our legislative and executive "constitutional officers" – whose own salaries are also a fraction of what they might earn in the private sector or by comparison to other state (civil service) government employees – have also suffered diminution of their compensation due to inflation.[6]

---

[5] The closest the decision comes to revealing this, in the section devoted to the "Discrimination" claim, infers that judges are "state employees":

> "...although other state employees have received adjustments to account for inflation, judges are not the only state employees where salaries have not been adjusted; the Governor, Lieutenant Governor, members of the Legislature and other constitutional officers have also not received salary increases since 1999." (at p. 22, underlining added).

[6] *Cf.* the Dolan firm's November 23, 2009 brief (at pp. 48-49):

> "...the factors cited by the Appellate Division [First Department] that warrant a judicial pay increase apply equally to the other Branches – a pay increase for all of New York's constitutional and senior executive officers would be justified on the same grounds. For example, the court below noted that the 'sheer complexity of much of New York's litigation, and its often crushing caseloads, require a fully operational, efficient and well-informed third branch of government.' *Id.*, 65 A.D. 3d at 77, 880 N.Y.S.2d at 259. We think it beyond dispute that the same 'complexity' in addressing issues such as the State's current fiscal crisis

The Court of Appeals' decision further conceals that the judges' supposedly inadequate salary is supplemented by generous "pension, medical and other benefits", is "many times the multiples of the annual income earned by most New Yorkers", and that:

> "most New Yorkers [do not] enjoy a constitutional guarantee that their job cannot be eliminated or their annual compensation reduced, a guarantee that is especially significant in an economy where many citizens (and lawyers) are concerned about having any employment or income at all."[7]

Indeed, the decision also omits any information about New York's median household income: $45,343[8] – or even the average or mean salary of this state's approximately 160,000 lawyers. This permits Judge Pigott and his confreres to purport that there is a "judicial pay crisis" (at p. 2) – and that current salaries:

> "negatively impact[] the diversity of the Judiciary and discriminate[e] against those who are well qualified and interested in serving, but nonetheless unable to aspire to a career in the judiciary because of the financial hardship that results from stagnant compensation over the years." (at pp. 33-34).

In fact, only a privileged upper tier would consider current judicial compensations as "financial hardship".

The scant portions of the judicial compensation lawsuit records that I found on the internet, including the January 12, 2010 oral argument before the Court of Appeals, have been downloaded and posted on CJA's website on a judicial compensation webpage accessible *via* our website's top panel "Latest News" and *via* our newly-created sidepanel "Judicial Compensation-NY". Based on such record fragments, it appears that the Court of Appeals' determination of a separation of powers violation was achieved by essentially ignoring ALL the particularized facts, law, and legal argument presented by the Dolan firm on the separation of powers issue.[9] As illustrative, the decision

---

> requires 'fully operational, efficient and well-informed' Legislative and Executive Branches as well. Yet no such State officer has received a raise since 1999."

[7] *See* the Dolan firm's December 22, 2009 reply brief, at p. 3.

[8] Statistic from New York Times – "General Information About New York", http://topics.nytimes.com/top/news/national/usstatesterritoriesandpossessions/newyork/index.html?scp=1&sq=New%20York%20State%20info&st=cse; citing "Ny.gov".

[9] Nor did the February 23, 2010 decision necessarily address the facts, law, and legal argument as to other issues. As illustrative, its footnote 5, baldly asserting as "without merit" "the State defendants' contention that the Chief Judge plaintiffs' appeal from Supreme Court should be dismissed for lack of

completely ignores the express proscription of Article XIII, §7 of New York's Constitution:

> "Each of the state officers named in this constitution shall, during his continuance in office, receive a compensation, to be fixed by law, which shall not be increased or diminished during the term for which he shall have been elected or appointed".

This, although Mr. Dolan had highlighted the significance of this constitutional provision in his November 23, 2009 brief (at pp. 29-36)[10], in his December 22, 2009 reply brief (at pp. 5-6), and in his stunning colloquy with the Court at the January 12, 2010 oral argument[11], where the judges' shocking disrespect for the Constitution and legal boundaries was demonstrated by the flagrantly hostile and ridiculing Judge Pigott, in particular:

As illustrative -- at 00:55:18

Judge Pigott: "it is striking to me that you think that this Constitution of the State of New York allows that.

Counsel Dolan: "Well, Judge, I think that because that's what the Constitution says"

Judge Pigott: "Well, you keep saying that. That's not much of an argument to say it's the law because that's what the law says..."

-- and at 01:09:09

Judge Pigott: You keep saying that the Constitution doesn't do it. Usually when people make arguments, they make arguments more than the law does not provide for it, the law doesn't say it. The Constitution doesn't do it."

The decision also conceals (at pp. 30-31, 35) the egregiousness of what Mr. Dolan had shown as to the procedurally aberrant decisions of Justice Lehner granting summary judgment to the

---

jurisdiction". This is false – and the "merit" of the State defendants' jurisdictional arguments is immediately obvious from the Dolan firm's November 23, 2009 brief (at pp. 7, 15-20) based, *inter alia*, on the express wording of CPLR §5601(b)(2).

[10] Under the heading "Article XIII, Section 7", the Dolan firm's November 23, 2009 brief stated:

> "This Court has never decided whether the provision of Article XIII, §7, banning salary increases during a State officer's term of office, applies to judges. This Court need not reach that issue to reject the First Department's 'linkage' holding. However, it seems unlikely that this Court could uphold the order below, to the extent it was adverse to Defendants, or grant relief to Plaintiffs on their appeal, without addressing Article XIII, §7." (at p. , underlining added).

[11] Mr. Dolan's colloquy with the Court spans the duration of his oral argument (at 00:50:42 - 1:46:00). Discussion of Article VIII, §7 of the New York Constitution is at 1:16:30 – 1:18:57 and 1:29-30 – 1:30-02.

judicial compensation plaintiffs for a procedural separation of powers violation based on "linkage" and then, instead of a procedural direction that the Legislature and Governor consider the judicial pay issue without "linkage", his direction that they:

> "within 90 days...adjust the compensation payable to members of the judiciary to reflect the increase in the cost of living since such pay was last adjusted in 1998, with an appropriate provision for retroactivity"[12]

– affirmed by decisions of Appellate Division, First Department Justices Tom, J.P., Gonzalez, Nardelli, Moskowitz, and Renwick[13].

---

12 *See* the Dolan firm's November 23, 2009 brief:

"Initially, Justice Lehner recognized that a court lacked power to order the Legislature and the Governor to adopt or approve a bill increasing judicial compensation...

Yet, when the same court decided the summary judgment motion, those limitations on judicial authority were brushed aside without comment. Justice Lehner 'direct[ed] that defendants, within 90 days...adjust the compensation payable to members of the judiciary to reflect the increase in the cost of living since such pay was last adjusted in 1998, with an appropriate provision for retroactivity.' *Larabee v. Governor*, 20 Misc. 3d 860, 878, 860 N.Y.S.2d 886, 894 (Sup. Ct. N.Y. Co. 2008), aff'd, 65 A.D.3d 74, 880 N.Y.S.2d 256 (1st Dep't 2009). At least one commentator has noted the 'strang[e] contradiction between the Supreme Court's decisions on that point. *See* Teff, 72 Albany L. Rev. at 227.

Far from correcting the separation of powers violation created by the Supreme Court's usurpation of the legislative function, the Appellate Division affirmed the trial court's remedial order directing Defendants to 'proceed in good faith to adjust judicial compensation to reflect the increase in the cost of living since 1998, with leave to apply for consideration of other remedies should the remaining defendants fail to act within 90 days.' 65 A.D.3d at 100, 880 N.Y.S.2d at 275." (brief, at pp. 74-75);

"...since the 'linkage' principle is focused on process and not substance, any remedy for a violation of the 'linkage' principle should have been similarly limited. Assuming *arguendo* that 'linkage' is a valid constitutional constraint enforceable against the Legislature and Governor, the lower courts' finding of a 'linkage' violation should have resulted, at most, in a direction to the political branches to consider the proposal to increase judicial compensation without engaging in 'linkage.'". (brief, at p. 5).

Also, the Dolan firm's December 22, 2009 reply brief:

"A procedural violation should have resulted, at most, in a procedural remedy. Instead the courts below awarded a substantive remedy by ordering the Legislature and the Governor to 'adjust' judicial compensation, which under the Constitution can only be accomplished by enacting a law." (reply brief, at p. 26).

13 As to the prior fraudulent judicial decisions of Justices Lehner and Nardelli in the *Commission* cases –

A non-responsive decision is, in and of itself, illegitimate – and all the more so when rendered by judges with a financial interest in its outcome[14]. At bar, the financial interests of the Court of Appeals judges were HUGE, as were their personal and professional conflicts, especially with respect to the lawsuit of Chief Judge Kaye and the OCA.

Tellingly, neither the OCA, the other judicial parties to the judicial compensation lawsuits, the judicial associations, the bar associations, nor any other advocate of judicial pay increases has posted the record of the judicial compensation lawsuits on a publicly-accessible website so that the public – and scholars – might independently evaluate the course of those proceedings and the legitimacy of the decisions.

Tellingly, too, although New York boasts more than 160,000 lawyers – more than any other state[15] – and 15 law schools, including some of our nation's most prestigious, they have not generated even one law review article or analytic critique of the February 23, 2010 Court of Appeals decision – at least none that we have found.[16]

To rectify this – and to determine whether the public interest was adequately represented in the judicial compensation lawsuits, as, for instance, by the inexplicable failure of the Attorney General's Office and the Dolan firm to have moved to reargue the palpably deficient February 23, 2010 decision before the Court of Appeals and/or to have filed a petition for a writ of certiorari with the U.S. Supreme Court, where the consequences were so violative of the New York Constitution and so potentially catastrophic to New York taxpayers – and where the dissent of Judge Smith would have dismissed all claims – we request that you post the record of the

---

protected by the Court of Appeals – see fn. 1, *supra*.

[14] See, in particular, the masterful law review article "*Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*", 53 University of Kansas Law Review, 531 (2005), by Amanda Frost, especially its section entitled "Procedure as a Source of Judicial Legitimacy" (at pp. 552-556), whose subsections are "A. Litigants Initiate and Frame Disputes"; "B. Adversarial Presentation of Disputes"; "C. Reasoned Decisionmaking"; "D. Reference to Governing Body of Law"; and "E. Impartial Decisionmaker".

[15] See American Bar Association's "National Lawyer Population by State" for 2011 based on information provided by "individual state bar associations or licensing agencies" as to "the number of resident, active attorneys".

[16] As for the lower court decisions, the only law review article we have found is the Albany Law Review article by Justin S. Teff, Esq. – cited in the Dolan firm's November 23, 2009 brief (see fn. 11, *supra*) – which was written before the Appellate Division, First Department had, without comment, put its *imprimatur* on Justice Lehner's inconsistent summary judgment decisions. Indeed, the article stated "How the appellate division will deal with these issues remains to be seen." (at p. 226, underlining added). In other words, there has been no law review or other comment about the fraudulence of what the Appellate Division, First Department did.

judicial compensation lawsuits on your Attorney General's website or, alternatively, that you provide us with the record, in pdf format, so that we may post it on ours.

To secure such access, we hereby invoke the Freedom of Information Law [F.O.I.L.: Public Officers Law, Article VI], as well as your Project Sunlight initiative of your Public Integrity Unit, whose goal – according to your website – is:

> "to promote [the people's] right to know and to monitor governmental decision-making....to increase the government's transparency and accountability to [the people]. As James Madison, the Founding Father of the Bill of Rights observed, "Knowledge will forever govern ignorance; and people who mean to be their own governors must arm themselves with the power which knowledge gives." (http://www.sunlightny.com/snl1/app/index.jsp).

Obviously, if independent, scholarly analysis determines that the Court of Appeals' February 23, 2010 decision is a judicial fraud – manifesting the actual bias of the Court of Appeals judges born of their pecuniary and other interests – you would have grounds to vacate it under CPLR §5015(a)(4) for lack of lack of jurisdiction.[17] The "rule of necessity" would not act as a barrier to vacatur on such ground.

The salutary result of vacatur of the February 23, 2010 decision is that it would put an end to the judges' frivolous legal proceedings and subsequent lawsuits based on that decision. This includes the Court of Claims action, filed in early January 2011, wherein the judges – on behalf of the State's other judges and justices – are suing the State of New York for 780 million dollars plus interest as money damages on the concocted separation of power violation, on top of which they also seek 130 million dollars, plus interest, for each year until judgment.

Additionally, if independent, scholarly assessment determines that the public has been compromised or inadequately represented by the defense of the Legislature and Governor provided by the Attorney General and Dolan firm, such would be grounds for a motion in the current proceedings for separate representation of the public's interests. Certainly, CJA would seek to intervene to protect the public's rights – and Mr. Graber and I discussed this in connection with proceedings in Supreme Court/New York County scheduled for an October 20, 2011 oral argument.

Finally, independent, scholarly assessment of the February 23, 2010 Court of Appeals decision

---

17 "In this state the statutory disqualification of a judge deprives him of jurisdiction", *Wilcox v. Royal Arcanum*, 210 NY 370, 377 (1914), citing *Oakley v. Aspinwall*, 3 NY 547 (1850), "the first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality."

would enable Governor Cuomo and this Legislature to reconsider the legislation creating the Judicial Compensation Commission – enacted, in haste, by lame-duck Governor David Paterson and a lame-duck Legislature in November 2010, within days of a reargument motion made at the Court of Appeals by judges in the judicial compensation lawsuits for relief based upon the Legislature's purported non-compliance with the February 23, 2010 decision – a decision the judges further twist to coerce judicial compensation to which they have no constitutional entitlement.

So that the members of the Judicial Compensation Commission may be informed of the foregoing facts bearing upon the Commission's legitimacy and get a glimpse of the fraudulent judicial decisions of New York's judges – for which removal, not pay raises, is in order – copies of this letter are being furnished to them.[18]

Pursuant to FOIL [Public Officers Law §89.3(a)], your response is required "within five business days" of your receipt of this request. To expedite our receipt of same, kindly e-mail me at elena@judgewatch.org.

Thank you.

Yours for a quality judiciary,

ELENA SASSOWER, Director
Center for Judicial Accountability, Inc. (CJA)

cc: Joel Graber, Assistant Attorney General
Joshua Pepper, Records Access Officer
Richard Dolan, Esq.
New York Commission on Judicial Compensation
William C. Thompson, Jr., Chairman
Richard Cotton
William Mulrow
Robert Fiske, Jr.
Kathryn S. Wylde
James Tallon, Jr.
Mark Mulholland

---

[18] Our previous correspondence with the Judicial Compensation Commission is posted on the "Latest News" and "Judicial Compensation" webpages of our website. This includes our June 23rd letter to the Commission, requesting that it establish its own website and post "the FULL record of the judiciary's lawsuits underlying the Court of Appeals' self-serving, constitution-repudiating February 23, 2010 decision" (capitalization in the original).