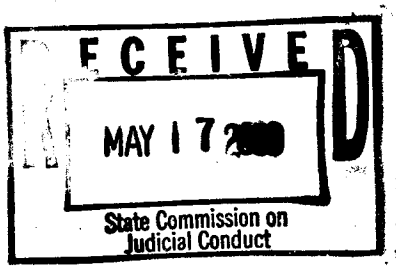
CENTER *for* JUDICIAL ACCOUNTABILITY, INC.

P.O. Box 69, Gedney Station
White Plains, New York 10605-0069

Tel. (914) 421-1200
Fax (914) 428-4994

E-Mail: judgewatch@aol.com
Web site: www.judgewatch.org

Elena Ruth Sassower, Coordinator



BY HAND

May 17, 2000

New York State Commission on Judicial Conduct
801 Second Avenue
New York, New York 10017

ATT: Gerald Stern, Administrator and Counsel

RE: (1) Request for a probative statement from Chairman Salisbury as to the basis for the Commission's purported dismissal, *without* investigation, of CJA's March 3, 2000 judicial misconduct complaint, the number of Commissioners voting, their identities, and the availability of review by Article 78, etc.; (pp. 1-8)

(2) Request that the Commission cancel the 1994 authorization it received from the State Archives and Records Administration to destroy its files of judicial misconduct complaints dismissed, *without* investigation, after a five-year retention, and that it immediately cease such destruction, etc. (pp. 8-11)

Dear Mr. Stern:

This replies to your April 27, 2000 letter (Exhibit "A"), which responded not only to CJA's April 24th letter to you (Exhibit "B"), but to CJA's separate April 24th letter to the Commission's Clerk, Albert Lawrence (Exhibit "C").

As to CJA's April 24th letter to Mr. Lawrence (Exhibit "C"), requesting information pertaining to his April 6th letter-notification of the Commission's purported dismissal of CJA's March 3rd judicial misconduct complaint, you give no explanation as to why Mr. Lawrence is not responding. As you know, it is Mr. Lawrence – *not you* – who is present at the meetings at which Commission members vote on the disposition of judicial misconduct complaints. For this reason, he, *not you*, signs the Commission's notification letters to complainants.

Inasmuch as you were *not* present at the March 30th meeting at which you allege CJA's complaint was dismissed, you have *no* personal knowledge that the purported dismissal was based on the Commission's having determined that the complaint, on its face, lacks merit. Had the Commission actually made such insupportable determination and had it believed, as you pretend, that it was without authority to review "decisions of trial courts", Mr. Lawrence's April 6th dismissal letter would have said as much. Mr. Lawrence could have easily repeated the boilerplate of such other dismissal letters as his September 28, 1999 letter to Kamau Bey[1] that:

> "the Commission concluded that there was no indication of judicial misconduct upon which to base an investigation. The Commission is not a court of law and does not have appellate authority to review the merits of matters within a judge's discretion, such as the rulings and decision in a particular case."

Since Mr. Lawrence has personal knowledge of the true facts, his failure to include this boilerplate wording in his April 6th dismissal letter leads to the inference that the Commission did not base its dismissal on any conclusion that CJA's March 3rd complaint presented "no indication of judicial misconduct" or was somehow mistaking the Commission with a "court of law" having "appellate authority" over discretionary rulings and decisions.

Consequently, by copy of this letter to the Commission's new chairman, Judge Eugene W. Salisbury, CJA requests that he state whether the Commission, in dismissing CJA's March 3rd complaint, ever determined that the complaint's document-supported allegations, as particularized at pages 6-29 of CJA's February 23rd letter to Governor Pataki, lacked facial merit in that they did not meet the standards for disciplinary review articulated in your own law review article, "*Is Judicial Discipline in New York State a Threat to Judicial Independence?*" (Pace Law Review, Vol. 7, No. 2, winter 1987, pp. 291-388), especially the standards set forth under the heading, "*Disciplining Judges for On-Bench Conduct: Can 'Legal Error' Constitute Misconduct?*" (pp. 303-344).

Nothing prevents Chairman Salisbury from making a probative statement as to whether the Commission determined that the complaint lacked facial merit – much

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[1] *See* Exhibit "J-8" to CJA's February 23, 2000 letter to Governor Pataki.

as nothing prevented you from making your non-probative claims in your April 27th letter. Indeed, your letter effectively demonstrates the truth of CJA's contention that Judiciary Law §45 does not bar the Commission from providing complainants with basic information substantiating the purported dismissals of their judicial misconduct complaints. Thus, you have responded to virtually all the questions posed by CJA's April 24th letter to Mr. Lawrence – with the possible exception of CJA's request for the number and names of those Commissioners who participated in the vote to dismiss the March 3rd complaint. As to this, it is not clear whether your position is that such information is not disclosable or whether, by your statement that "all eleven members were present at the meeting; all had received your letters of complaint; and all considered the complaint", you mean that all eleven members voted on the complaint, in which case their number and identity are obvious.

To dispel the ambiguity, CJA requests that Chairman Salisbury clarify the Commission's position as to whether complainants are entitled to know the number and identities of Commissioners voting on their complaints – information particularly vital since, as highlighted in the Fourth Claim for Relief in the Article 78 proceeding *Elena Ruth Sassower v. Commission* (NY Co. #99-108551), Judiciary Law §43.1 permits disposition of complaints by three-member panels. Certainly, the inference from your April 27th letter is that the full Commission participated in the vote to dismiss CJA's March 3rd complaint and not such a panel. Is that the case and did all eleven members also determine that their clear self-interest in the complaint's dismissal did not require them to take steps to secure its review by an independent investigative body, as the complaint expressly requested (at pp. 3-4)?

Chairman Salisbury should also examine our past exchange of correspondence, since your April 27th letter makes several self-serving references to it and what you have allegedly told me previously, as well as "indicated many times". Copies are annexed to CJA's fact-specific March 11, 1999 letter to you – to which you never responded. Indeed, your non-response resulted in *Elena Ruth Sassower v. Commission* – the verified petition of which annexes the letter as Exhibit "G".

CJA's *unresponded-to* March 11, 1999 letter exposes the falsity of your claim that "[CJA] would interpret the Judiciary Law to give the Commission much more authority to review the official actions of judges than the Commission and the

courts have determined is appropriate". As may be seen from the copies of CJA's prior correspondence attached to the March 11, 1999 letter[2], the ONLY interpretation CJA has offered for the Commission's disciplinary jurisdiction is that which you yourself set forth in your 1986 law review article under the subheading, "*Determining Generally When 'Error' is Misconduct?*" (pp. 303-305). The pertinent text of that section, a copy of which is annexed to CJA's March 11, 1999 letter[3], includes the following:

> "... legal error and judicial misconduct are not mutually exclusive; a judge is not immune from being disciplined merely because the judge's conduct also constitutes legal error. From earliest times it has been recognized that 'errors' are subject to discipline when the conduct reflects bias, malice or an intentional disregard of the law. These standards have been refined in recent years to remove from office or otherwise discipline judges who abuse their power and disregard fundamental rights. Clearly, no sound argument can be made that a judge should be immune from discipline for conduct demonstrating lack of fitness solely because the conduct also happens to constitute legal error.
>
> Determining whether legal error constitutes misconduct often depends on the procedures and resources made available for investigations. Only a comprehensive investigation can reveal whether the misconduct was an isolated event or part of a pattern...
>
> Over the past few years, a major contribution by the Commission on Judicial Conduct and the Court of Appeals has been the development of a body of case law condemning tyrannical conduct by judges. Providing the right to appellate review for egregious violations of rights was simply an inadequate deterrent. Moreover, the right to

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[2] *See, inter alia*, CJA's September 14, 1995 and January 9, 1996 letters to you, annexed as Exhibits "D-1" and "D-4" to CJA's March 11, 1999 letter to you, as well as CJA's February 1, 1996 letter to Commissioner Lawrence Goldman (at p. 3), annexed as Exhibit "D-8" thereto.

[3] *See* Exhibit "B-1" thereto. Also *see* "B-2": pertinent pages from your "Post-Hearing Memorandum" to the Commissioners in the disciplinary proceeding against Acting Supreme Court Justice Joseph Slavin, setting forth the Commission's jurisdiction to impose discipline for "legal error" which is egregious, fundamental, and/or repeated.

> appeal does not address the possible misconduct of the trial court and does not grant the appellate court the power to discipline the judge. Judicial 'independence' encompasses making mistakes and committing 'error', but was not intended to afford protection to judges who ignore the law or otherwise pose a threat to the administration of justice."

As reflected by your response to that prior correspondence[4], you have consistently refused to address your law review's discussion of what is properly disciplinary jurisdiction, while, simultaneously, mischaracterizing CJA's complaints as seeking review of "error of law" and "wrong" decisions, rather than, as the complaints particularize, egregious and lawless conduct by biased and self-interested judges who have knowingly obliterated fundamental adjudicative standards and anything resembling the rule of law to advance personal, political, and retaliatory goals.

Your April 27th letter also follows this pattern. Notwithstanding CJA's April 24th letter to Mr. Lawrence cited your law review article (Exhibit "C": at p. 3), you do not address its discussion of disciplinary jurisdiction, except to misrepresent the Commission's jurisdiction, without reference to the article, as well as CJA's March 3rd complaint which falls within it. Thus you falsely state:

> "... the fact that you add that a decision was 'thrown' or that a judge is 'corrupt' does not elevate a complaint that lacks merit to one that has merit on its face."

As the Commission's Administrator and Counsel who provides the Commissioners with recommendations as to the disposition of complaints[5], it is your duty to know that allegations that a judge is "corrupt" and has "thrown" a decision are "facially meritorious" because, if true, they constitute judicial misconduct. In fact, they constitute the most serious of all on-the-bench judicial misconduct, as may be seen from the 1973 Report, ... And Justice for All, by the Temporary Commission on the

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[4] *See* your September 26, 1995 and January 17, 1996 letters, annexed as Exhibits "D-2" and "D-5" to CJA's March 11, 1999 letter to you.

[5] *See* your February 1, 1996 letter, annexed as Exhibit "D-7" to CJA's March 11, 1999 letter to you.

New York State Court System, whose recommendations led to the creation of the Commission on Judicial Conduct[6]. Presumably for this reason, you try to diminish these facially-meritorious allegations by referring to them as having been "add[ed]" -- the implication being that they are some quick afterthought to CJA's March 3rd complaint. In fact, they, along with allegations of judicial bias and self-interest, are the complaint's gravamen, substantiated, as to Acting Supreme Court Justice William Wetzel, by the factual specificity and record-proof detailed at pages 15-29 of CJA's accompanying February 23rd letter to the Governor, and as to Administrative Judge Stephen Crane, by the recitation at pages 6-14 therein.

As to your false assertion that:

> "...the Commission has no authority to investigate how and why a case was assigned to a particular judge or court part."

That is certainly not true where a judicial misconduct complaint alleges that case assignment has been manipulated to advance corrupt and self-interested goals. CJA's March 3rd complaint alleges, with specificity[7], that Administrative Judge Crane, who has a bias and self-interest in *Elena Ruth Sassower v. Commission*, *twice* interfered with random selection rules, *without* explanation, *without* notice, and *without* any apparent legal authority[8], the second time "steering" the case to Justice Wetzel, whose own self-interest and actual bias, if not then known to Administrative Judge Crane, were thereafter made known to him to no avail. That violating random selection rules to "steer" cases constitutes judicial misconduct may be seen from the fact that U.S. District Judge Norma Holloway Johnson is presently facing both a federal disciplinary investigation and congressional inquiry for

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[6] *See* annexed copy of page 60 of Part II of the 1973 Report, ...And Justice For All, listing as the two most serious types of on-the-bench misconduct: "allowing personal considerations to influence judicial decisions – such as, favoring friends or making decisions which would indirectly favor self or friends" and "corruption in office – such as, agreeing to decide a case to favor a party in exchange for money" (Exhibit "D").

[7] *See* pp. 6-14 of CJA's February 23rd letter to the Governor.

[8] This lack of legal authority may be seen not only from Administrative Judge Crane's refusal to provide same, upon request – as particularized at pp. 6-7 and 14 of CJA's February 23rd letter to the Governor – but by the failure of OCA Counsel, Michael Colodner to provide such authority, as expressly requested at footnote 10 (p. 6) of CJA's April 18, 2000 letter to Chief Judge Kaye. A copy of such letter was hand-delivered to the OCA for him on that date.

overriding random selection procedures and specially assigning cases involving friends of the president to judges appointed by him[9].

Although your April 27th letter pretends that you have "indicated numerous times in the past" that "the Commission's legal authority to consider and dismiss complaints is Section §44 of the Judiciary Law, which permits the Commission to dismiss a complaint "if it determines that the complaint on its face lacks merit'", the record of our correspondence[10] shows that you did not do so indicate until *after* commencement of the Article 78 proceeding *Doris L. Sassower v. Commission* (NY Co. #95-109141), whose April 10, 1995 verified petition focused on the dispositive significance of Judiciary Law §44 in requiring the Commission to investigate complaints not determined to be facially lacking in merit.

As the record of our correspondence also shows, you have heretofore refused to expressly identify that Article 78 is an available remedy for review of the Commission's dismissals of judicial misconduct complaints[11]. However, from your April 27th letter, it now appears that you do, in fact, recognize that Article 78 furnishes a "review by law" to complainants aggrieved by the dismissals of their judicial misconduct complaints. Since the Commission's position, articulated by the State Attorney General both in *Elena Ruth Sassower v. Commission* and in the Article 78 proceeding *Michael Mantell v. Commission* (NY Co. #99-108655), was that Article 78 was not available to aggrieved complainants[12], CJA requests that

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9 *See* annexed news articles: "*D.C. Judge Probed on 'Steered' Cases*" (5/3/00, The Star Ledger (Newark, N.J); "*Chief Judge Hires Lawyer In Inquiry Into Assignments*" (5/7/00, The New York Times) (Exhibit "E").

10 *See, inter alia*, your April 12, 1995 letter, annexed as Exhibit "C-7" to CJA's March 11, 1999 letter to you.

11 *See, inter alia*, CJA's April 6, 1995 and April 10, 1995 letters and your April 12, 1995 letter, annexed as Exhibits "C-5", "C-6", and "C-7" to CJA's March 11, 1999 letter to you; CJA's February 3, 1999 letter to you (at p. 4), annexed as Exhibit "F-6" to CJA's March 11, 1999 letter; CJA's March 11, 1999 letter itself (at p. 5). *See*, also, ¶¶THIRTY-THIRD – THIRTY-FIFTH, THIRTY-NINTH, FORTY-FIFTH, FORTY-SIXTH of the Verified Petition in *Elena Ruth Sassower v. Commission.*

12 ***See Elena Ruth Sassower v. Commission***: Respondent's May 24, 1999 Memorandum in Support of a Motion to Dismiss, p. 21; [with petitioner's response thereto in her Memorandum of Law, pp. 72-3: fn. 45]; *Michael Mantell v. Commission*: Respondent's June 3, 1999 Memorandum of Law in Support of the Cross-Motion to Dismiss the Petition, pp. 9-10;

Chairman Salisbury confirm the Commission's position as to the availability of this – and any other – review.

Turning now to CJA's April 24th letter to you (Exhibit "B"), which requested the legal authority authorizing the Commission to discard the files of judicial misconduct complaints. Conspicuously, your April 27th letter (Exhibit "A", p. 2) does *not* provide that legal authority. Instead, you rest on a bald assertion that "the Commission's actions with respect to discarding old complaints are consistent with State law", which you identify only as "governed by the State Archives and Records Administration"[13].

It seems plain that the reason you did not supply the requested legal authority is because it would have exposed that your justification as to why the Commission "discards old complaints that had not resulted in investigations" is a deceit. Your letter purports that it was

> "made necessary by the limitations of office space. When the State required us to move into smaller office space several years ago, we were compelled to seek alternatives to our records-retention policy".

As you assuredly know, the law pertaining to governmental records is §57.05 of the Arts and Cultural Affairs Law, which provides for a state archives within the Department of Education. This is implemented by 8 NYCRR *et seq.*, entitled State Government Archives and Records Management. Such statutory and rule provisions make plain that space considerations do NOT govern the retention of official records. Rather, official records are retained because they possess "value to warrant their continued preservation by the state" (§57.05(1)). To that end, the State Archives and Records Administration (SARA), which administers the State and Local Government and Records Management programs, maintains records center facilities "to provide for the secure, cost-effective storage of inactive records". It also offers guidance in converting paper records to other forms to reduce their volume for storage.

Respondent's June 23, 1999 Memorandum of Law in Support of the Cross-Motion to Dismiss the Amended Petition, pp. 12.

[13] You arrogantly add: "I trust that you will not ask me to convince you that our policies are consistent with law, since I would not be inclined to pursue this discussion further." (at p. 2).

You are presumably well familiar with all this since, pursuant to 8 NYCRR §188.21(a)(5), the Commission pays a $2,000 annual fee to the State Education Department "to support education and training, disposition analysis and review, technical assistance, and other records advisory services provided by SARA".

Indeed, in 1994, when the Commission sought permission from SARA to limit its retention to five years of complaints which it identified as having been dismissed with "no investigation", the very form the Commission was required to complete, contained various options for retention of such inactive files, other than retention in "PROGRAM OFFICE SPACE", which the Commission indicated. These included "AGENCY STORAGE SPACE", "STATE RECORDS CENTER", and "REFORMAT[ting]". Likewise, as a "FINAL DISPOSITION" of these *uninvestigated*, dismissed complaints, the form specified more than the option of "DESTROY", which the Commission was requesting. Also available were options of "TRANSFER TO STATE ARCHIVES" and "OTHER". A copy of the completed form is annexed (Exhibit "F").

As the Commission's completed form reflects (at p. 3), the Commission then had an accumulation of 19 years of judicial misconduct complaints, dismissed *without* investigation. None of these were in microfiche, microfilm, or in computer form. They consisted entirely of paper records, which the Commission was retaining in its office. The Commission assessed the volume of these records as 208 cubic feet, with an estimated estimated annual growth of 14 cubic feet.

Based on the fee set forth at 8 NYCRR §188.21(b) of $2.20 per cubic foot for storage of paper records at a records center facility, it would have cost the Commission the grand total of $457.60 in 1994 to store these inactive records at such a facility, with an increase of $30.80 each year. Such sum represented .0278% of the Commission's $1,645,000 budget for 1993-1994 (1/40th of one percent)[14] and an even lesser percentage of its $1,778,400 budget for 1994-1995. Moreover, 8 NYCRR §188.21(c) even provides for a waiver of the annual fee, where "extenuating circumstances exist that would make it unduly burdensome for an agency to pay such fee".

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[14] Storage costs for subsequent years would have been likewise infinitesimal. As reflected by the Commission's most recent Annual Report for 1999, except for a dip to $1,584,100 in the Commission's 1995-1996 budget, there has been an increase in the Commission's budgets since 1993-1994. The 1998-1999 budget is $1,875,900.

The authorization granted by the State Archives and Records Administration was predicated on the mistaken premise that the "correspondence and staff recommendation to Commission pertaining to complaints against judges that were dismissed after initial review and never investigated", which the Commission was proposing to have destroyed, had no value. Yet, the Commission was apparently *not* required to so certify. Indeed, on its 1994 authorization form (Exhibit "F", p. 3), the Commission dodged the issue of the value of these complaint files in responding to the question as to its "REASONS FOR PROPOSED RETENTION AND DISPOSITION". Its response, "For reference purposes", plainly relates only to the proposed retention, not to the proposed ultimate disposition of destruction after five years. As to the requested destruction, the Commission gave no reason – not even "limitations of office space", claimed by your April 27th letter (Exhibit "A"). Presumably, had the Commission used the pretext of "office space", the State Archives and Records Administration would have withheld authorization.

Pursuant to 8 NYCRR §188.9, an authorization may be revised, cancelled, or suspended. CJA has already notified the State Archives and Records Administration that the authorization permitting the Commission to destroy its files of *uninvestigated* dismissed complaints, after five years, must be withdrawn and that CJA will make a formal presentation in support of thereof. Such presentation will demonstrate the continuing probative value of the complaints that the Commission has been dismissing, *without* investigation, both as to the unfitness of judges and judicial candidates who continue to sit on the bench and seek higher judicial office, as well as to the unlawfulness of Commission's dismissals of these complaints in the first instance, in violation of Judiciary Law §44.1. Indeed, CJA will show that the Commission had a self-interest in securing the 1994 authorization because it could thereby "cover its tracks" by obliterating the *prima facie* proof of its long-standing pattern and practice of protecting unfit judges and judicial candidates – proof which might one day have been obtained by an investigative or prosecutorial body, if not by subpoena then by legislative emendation of Judiciary Law §45.

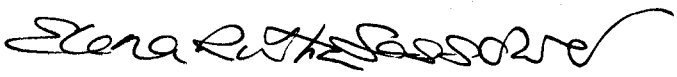
Under 8 NYCRR §188.9(a), an agency may cancel or suspend any authorization for records disposition that it has received from the State Archives and Records Administration upon notice to its director. By this letter, CJA requests that the Commission notify the director that it has cancelled the 1994 authorization and that it *immediately* cease destroying its files of *uninvestigated*, dismissed judicial misconduct complaints.

Absent this, CJA requests that Chairman Salisbury provide a statement as to why the Commission is continuing to destroy the files of these valuable judicial misconduct complaints instead of maintaining them at a state records center at nominal storage cost. In the event the Commission disputes the value of these complaints, Chairman Salisbury should so state. He should also specify whether among the already-destroyed files of *uninvestigated*, dismissed complaints are the eight *facially-meritorious* complaints against high-ranking, politically-connected judges which were the subject of the verified petition in *Doris L. Sassower v. Commission* and, prior thereto, of CJA's March 22, 1995 ethics complaint against the Commission, filed with the New York State Ethics Commission.

Finally, CJA requests that you identify whether, in seeking authorization in 1994 from the State Archives and Records Administration to destroy *uninvestigated*, dismissed complaints over five years old, the Commission ever notified the Legislature. As you know, the Legislature held two public hearings on the Commission in 1981 and 1987, following which it did not legislate any statute of limitations for investigation of judicial misconduct complaints or authorize expungement of judicial misconduct complaints from the Commission's files, notwithstanding these issues were presented to it by spokesmen for judicial self-interest[15].

CJA will await your response – and that of Chairman Salisbury – before making its presentation to the State Archives and Records Administration.

Yours for a quality judiciary,



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

cc: *See next page*

[15] *See, inter alia*, transcript of the December 18, 1981 public hearing on the Commission on Judicial Conduct before the NYS Senate and Assembly Judiciary Committees: pp. 72, 76-79, 84-5; 90-92, 94-96, 99-101, 111-112, 163, 199-200, 201-202; and the transcript of the September 22, 1987 public hearing before the NYS Assembly Judiciary Committee: pp. 102, 157-8, 264, 266.

cc: *Immediate Recipients:*
Eugene W. Salisbury, Chairman
NYS Commission on Judicial Conduct
[Certified Mail/RRR: 7099-3400-0001-2791-8646]
Albert Lawrence, Clerk
NYS Commission on Judicial Conduct

Eventual Recipients:
Robert W. McDonnell, Associate Archivist
State Archives and Records Administration
Governor George Pataki
Chief Judge Judith Kaye
New York State Attorney General Eliot Spitzer
Robert M. Morgenthau, District Attorney, New York County
Mary Jo White, U.S. Attorney, Southern District of New York
New York State Ethics Commission
Loretta E. Lynch, U.S. Attorney, Eastern District of New York
Sherrill R. Spatz, Special Inspector General for Fiduciary Appointments
NYS Assembly and Senate Judiciary Committees
Association of the Bar of the City of New York
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