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## **WHY YOU MUST REJECT S.2601** **THE APPROPRIATIONS BILL FOR THE JUDICIARY**

Dear Senator:

Today you have an historic opportunity to uphold the public's rights, the New York State Constitution, and the statutory protections afforded by Chapter 567 of the Laws of 2010, creating the Special Commission on Judicial Compensation. You can – and must – do this by voting AGAINST the appropriations bill for the Judiciary, S.2601, which is the same appropriations bill as for the Legislature.

The facts and law, including as to your power and duty to reject a budget that is insufficiently itemized and which you cannot intelligently review, are set forth in correspondence that our non-partisan, non-profit citizens' organization, Center for Judicial Accountability, Inc. (CJA), e-mailed to all Senators. It began with a March 15<sup>th</sup> e-mail "ALERT", whose subject line read "Is the Judiciary Budget a Slush Fund? What is its dollar cost – and that of the appropriations bill?" It ended with a March 22<sup>nd</sup> e-mail entitled "Your Power & Duty to Reject the Budget: S.2601/A.3001 - Judiciary Appropriations Bill", attaching a letter highlighting the Legislature's violations of cognizable "process" and its own rules in connection with the Judiciary budget. This correspondence and the documentary proof substantiating it, including the video of the February 6, 2013 budget hearing on "public protection", are posted on our website, [www.judgewatch.org](http://www.judgewatch.org), on a webpage entitled "Securing Legislative Oversight & Override of the 2<sup>nd</sup> and 3<sup>rd</sup> phases of the judicial pay raises, scheduled to take effect April 1, 2013 and April 1, 2014". It is accessible *via* the top panel "Latest News".

To assist you, below are four questions for you to ask and discuss on the Senate floor so as to inform your vote and that of your fellow Senators.

QUESTION #1: What is the cumulative dollar amount of the appropriations for the Judiciary budget in S2601/A3001?

QUESTION #2: Is the Judiciary Budget – and Appropriations Bill S.2601/A.3001 – sufficiently itemized to permit intelligent review and oversight by the Legislature?

QUESTION #3: Does Appropriations Bill S.2601/A.3001 violate Article VII, §7 of the New York State Constitution?

QUESTION #4: Could Appropriations Bill S.2601/A.3001 be amended to include a line-item for the judicial salary increase that the Legislature could then approve?



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\* **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.

**QUESTION #1: What is the cumulative dollar amount of the appropriations for the Judiciary budget in S.2601/A.3001?**

According to Senate Resolution 818, introduced and passed on March 11<sup>th</sup>, “The Senate concurs with the Executive recommendation of \$1.75 billion”.<sup>1</sup> This figure is incorrect.

The Governor’s “Commentary” on the Judiciary, accompanying his appropriations bill to the Legislature, gave two figures – neither of which was “\$1.75 billion”. It stated:

“The Judiciary has requested appropriations of \$1.97 billion for court operations, exclusive of the cost of employee benefits. Inclusive of employee benefits, the budget for the Judiciary is requested at \$2.6 billion.”

Thus, the Governor’s “Commentary” identified the cost at \$2.6 billion. This, however, is a rounded figure, able to conceal tens of millions of dollars.

What is the precise dollar figure?

The Judiciary did not identify a cumulative total in its two-part budget, which it furnished to the Governor and Legislature on November 30, 2012. Nor did it identify a cumulative total in its “single budget bill”, which it may or may not have furnished on that date. Nor was any cumulative figure identified by Chief Administrative Judge Prudenti when she testified in support of the Judiciary’s budget request at the February 6, 2013 budget hearing on “public protection”.

The Senate and Assembly have no agreed-upon figure. Apart from the incorrect \$1.75 billion purported by Senate Resolution 818, are the Legislature’s “White”, “Blue”, and “Yellow” Books, all giving different figures – with the “Green” Book giving no figure at all:

- according to the Senate’s “White Book” of its Finance Committee’s Majority Coalition (at p. 75), the total figure is \$2,662,000,000;
- according to the Senate’s “Blue Book” of its Finance Committee’s Democratic Minority (at p. 232), the total figure is \$2,660,128,900 – \$1,871,000 less than the “White Book” figure.
- according to the Assembly’s “Yellow Book” of its Ways and Means Committee (at Judiciary 73-1), the total figure is \$1,973,235,869;
- the Assembly’s “Green Book” of its Ways and Means Committee’s Republican Minority gives no figure.

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<sup>1</sup> See the resolution’s appended & incorporated “Report on the Amended Executive Budget”.



So what is the figure? If you add the two untallied figures of the Judiciary's two-part budget: its "Operating" budget, which its budget (1<sup>st</sup> part) identifies as \$1,973,235,869, and its "General State Charges", which its budget (2<sup>nd</sup> part) identifies as \$660,660,607, that simple addition gives a total of \$2,633,896,476.

This means that:

- the total in the Senate's "White Book" is \$28,103,254 more than what a straight add of the Judiciary's "Operating" budget and "General State Charges" equals – and the basis for such huge excess should be investigated;
- the total in the Senate's "Blue Book" is \$26,232,154 more than what a straight add of the Judiciary's "Operating" budget and "General State Charges" equals – and the basis for such huge excess sum should be investigated;
- the total in the Assembly's "White Book" is \$660,660,607 less than what a straight add of the Judiciary's "Operating" budget and "General State Charges" equals – because it failed to add the "General State Charges", which is that amount.

But does adding the numbers from the Judiciary's two-part budget presentation give the dollar amount of the appropriations for the Judiciary in S.2601/A.3001?

The bill furnishes no cumulative total – just as none was furnished by the Judiciary's "single budget bill" from which it is taken. Nor does any single page of S.2601/A.3001 furnish the relevant numbers that, upon being added, yield the total. Instead, those numbers are scattered in the bill. Thus, on page 10 appears what the first part of the Judiciary's two-part budget submission had identified as its "Operating" budget: \$1,973,235,869. On page 21 of the bill appears what the second-part of the Judiciary's two-part budget identifies as its "General State Charges": \$660,660,607. The simple add of these two is the \$2,633,896,476 of the Judiciary's two-budget presentation not tallied by it.

However, S.2601/A.3001 shows other monies being appropriated. Page 10 of the bill also lists "Reappropriations", whose total is given as \$50,095,000. This is money that is overage from past years – and, logically, should be returned to the state – or deducted from the amount required for the upcoming fiscal year. Apparently, it is not – as was verified by two legislative offices: that of Senator Latimer and that of Assemblyman Buchwald. Instead, it is rolled over and becomes an add-on to the \$2,633,896,476 – giving a total figure of \$2,683,991,476. In other words, the Governor's rounded figure of \$2.6 million should have been \$2.7 million.

On top of this, there are two other categories of appropriations in S.2601/A.3001 – and neither Senator Latimer's office, nor Assemblyman Buchwald's office has been able to confirm – after more than a week's time – whether they are additionally added. Thus, on page 20, there is \$15,000,000 for "New Appropriations (Supplemental)". If this is added on then the total

dollar amount of S.2601/A.3001 is \$2,698,991,476. There is, additionally, on page 26, “Capital Projects-Reappropriations” whose total is \$51,000,000. If this is added on, then the cumulative dollar amount appropriated to the Judiciary in S.2601/A.3001 is \$2,749,991,476. This is approximately \$1 billion dollars more than what Senate Resolution 818 represents as the Governor’s recommendation.

So what are the numbers? Do the members of the Senate and Assembly voting on the bill know?



**QUESTION #2: Is the Judiciary Budget – and Appropriations Bill S.2601/A.3001 – sufficiently itemized to permit intelligent review and oversight by the Legislature?**

The answer is a resounding no. The most dramatic evidence of this is the unidentified, unitemized funding of the second phase of the judicial salary increase recommended by the Commission on Judicial Compensation's August 29, 2011 Report. S.2601/A.3001 includes this funding. However, the bill does not identify such fact or provide any line-item as to its dollar amount. It, thereby, conceals the Legislature's power to strike this second phase of the judicial salary increase, pursuant to Chapter 567 of the Laws of 2010 (§1h) – the statute that created the Commission and defined the prerequisites for such salary recommendation as it might make.

Pursuant to Chapter 567 of the Laws of 2010 (§1a), the Commission was directed to “examine, evaluate and make recommendations with respect to... compensation and non-salary benefits for judges and justices of the state-paid courts of the unified court system”. Compensation is more than salary. It includes such things as “pension contributions, Social Security, health, dental vision and life insurance”—the items the Judiciary's budget refers to as “fringe benefits” and classifies as “General State Charges”. The Judiciary “General State Charges” budget does not separate out the “fringe benefits” of judges and justices from the “fringe benefits” of its non-judicial personnel. They are combined together rather than separately itemized. Similarly, S.2601/A.3001 provides no separate figures of these “fringe benefits” (at pp. 21-22), making it impossible to assess their cost, as to judges and justices, as opposed to everyone else on the Judiciary payroll.

Likewise, with respect to the salaries of judges and justices. The Judiciary's “Operating” budget combines them with the salaries of non-judicial personnel, rather than separately itemizing them. So, too, S.2601/A.3001 (at pp. 10-19). That this is improper may be seen from comparison with the Legislature's requested budget – contained in the same bill S.2601/A.3001, which separately itemizes the salaries of legislators from staff (at pp. 2-3).<sup>2</sup> Such comparison additionally reveals that whereas the Legislature identifies the number of senators and Assembly members (at pp. 2-3), no such itemization is given by the Judiciary as

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<sup>2</sup> No comparison can be made as to whether the “fringe benefits” of legislators is also separately itemized from that of legislative staff. The budget that Temporary President Skelos and Assembly Speaker Silver submitted to the Governor for the Legislature under a November 30, 2012 coverletter contained no “General State Charges” – and the appropriations for the Legislature in S.2601/A.3001, replicating the leadership's budget submission, contains none.

In response to our request, the Secretary of the Senate purported that the leadership's budget submission is “not available pursuant to Senate Rules”. The Assembly's Public Information Office furnished the budget submission, but without “General State Charges”, thereafter stating that it has “no records that are responsive”. The correspondence is posted on our website.

As legislators and legislative staff do receive “fringe benefits” – pension contributions, Social Security, health, dental vision and life insurance”, etc. – the absence in S.2601/A.3001 of “General State Charges” for the Legislature renders the bill materially incomplete and constitutes a further ground to reject it, over and beyond its deficiencies pertaining to the Judiciary.

to the number of its state-paid judges and justices, either cumulatively or by type of court (at pp. 10-19).

Thus, to sum up, the respects in which the Judiciary's budget and S.2601/A.3001 are insufficient to allow meaningful review include:

- their failure to identify and/or itemize the dollar cost of the judicial salary increase;
- their failure to identify and/or itemize the dollar cost of judicial salaries, which are combined with salaries of nonjudicial personnel;
- their failure to identify and/or itemize the dollar cost of "judicial compensation and non-salary benefits", excluding salary – these being "fringe benefits" – combining them with the "fringe benefits" of nonjudicial personnel;
- their failure to identify and/or itemize the number of judges and non-judges on the Judiciary payroll – or, for that matter, nonjudicial personal.

Two years ago, at the February 9, 2011 hearing on "public protection", Senate Finance Committee Chairman DeFrancisco objected that it was impossible from the Judiciary's budget to figure out and assess the actual cost of the Judicial Institute at Pace Law School. The same is true today – and the Judicial Institute is not even identified in S.2601/A.3001, let alone with a line item. Likewise, as to any number of offices, programs, commissions, and other entities within the Judiciary.



**QUESTION #3: Does Appropriations Bill S.2601/A.3001 violate Article VII, §7 of the New York State Constitution?**

The answer is a resounding yes.

Article VII, §7 of the New York State Constitution states:

“No money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law...and every such law making a new appropriation or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object or purpose to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum.”  
(underlining added).

On what page and line does S.2601/A.3001 “distinctly specify the sum appropriated” for “the object or purpose” of funding the second phase of the judicial salary increase? It does not appear anywhere. It is a flagrant violation of Article VII, §7 to appropriate an unspecified sum for the unidentified “object or purpose” of increasing judicial salaries, as S.2601/A3001 does.

How, too, do the 15 line-items of “Reappropriations” on pages 23-25 of S.2601/A.3001, totaling \$30,095,000, remotely comply with the constitutional directive of specifying “the object or purpose to which it is to be applied” and the explicit proscription that “it shall not be sufficient...to refer to any other law to fix such sum”? Each of these 15 line-items refers to “Chapter 51. section 2” of laws going back to 2005, followed by references to “Chapter 51. section 3” of laws going back to 2009, thereupon identically reading:

“For services and expenses including travel outside the state and the payment of liabilities incurred prior to April 1...”

Only the year of April 1 varies – and, of course the sums appropriated/reappropriated.

Where is the “object or purpose to which [this \$30,095,000] is to be applied”? Is there a single legislator who would be willing to publicly state that such generic, boilerplate “For services and expenses...” has any meaning and complies with either the letter or spirit of Article VII, §7?

**QUESTION #4: Could Appropriations Bill S.2601/A.3001 be amended to include a line-item for the judicial salary increase that the Legislature could then approve?**

The answer is a resounding no.

Article VII, §4 of the New York State Constitution states:

“The legislature may not alter an appropriation bill submitted by the governor except to strikeout or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items in the bill and refer each to a single object or purpose. None of the restrictions of this section, however, shall apply to appropriations for the legislature or judiciary.

Such an appropriation bill shall when passed by both houses be a law immediately without further action by the governor, except that appropriations for the legislature and the judiciary and separate items added to the governor’s bills by the legislature shall be subject to approval of the governor as provided in section 7 of article IV.” (underlining added).

This would appear to mean that the Senate and Assembly may freely amend appropriations bills for the Judiciary and Legislature. Unlike the Governor’s other appropriations bills, which originated with the Governor and whose provisions, upon approval by the Legislature, become law automatically, the Governor’s appropriations bill for the Judiciary and Legislature are the “itemized estimates” of the heads of the judicial and legislative branches, which the Governor was required to submit to the Legislature “without revision” (Article VII, §1). His opportunity to veto or object as to items (Article IV, §7) is after the Legislature has made its revisions to their “itemized estimates” – because the whole bill for judiciary and legislative appropriations, in its entirety, will be returned to him.

Nevertheless, even were the Legislature to secure from the Judiciary the dollar amount of the second phase of the judicial salary increase recommended by the Commission on Judicial Compensation – a figure that would have to be “approved by the court of appeals and certified by the chief judge”, pursuant to Article VII, §1 – such funding could not be lawfully approved by the Legislature. The reason is because the Commission on Judicial Compensation’s August 29, 2011 Report – which is the sole basis for the judicial salary increase – is flagrantly violative of Chapter 567 of the Laws of 2010 which created the Commission, in addition to being fraudulent and unconstitutional.

The proof of this is the Center for Judicial Accountability’s October 27, 2011 Opposition Report to the Commission’s August 29, 2011 Report, written by its director, Elena Sassower, who testified about it at the February 6, 2013 budget hearing on “public protection”, handing up a copy, along with a copy of CJA’s March 30, 2012 verified complaint in its public interest lawsuit based thereon, suing New York’s highest constitutional officers and three government branches for collusion against the People on the judicial pay raise issue.



CJA requests that if you have not already viewed the video of Ms. Sassower’s ten-minute testimony at the February 6<sup>th</sup> budget hearing that you immediately do so – and that the substantiating documentation she handed up at the hearing be brought to the floor of the Senate for inspection by the Senators.

Examine the Opposition Report, whose Executive Summary, also handed up, identifies the following statutory violations, particularized by the Opposition Report:

- (1) ***In violation of the Commission statute***, the Commission’s judicial pay raise recommendations are unsupported by any finding that current “pay levels and non-salary benefits” of New York State judges are inadequate (at pp. 1, 16, 31);
- (2) ***In violation of the Commission statute***, the Commission examines only judicial salary, not “compensation and non-salary benefits” (at pp. 18-21, 25-31);
- (3) ***In violation of the Commission statute***, the Commission does not consider “all appropriate factors” – a violation it attempts to conceal by transmogrifying the statutory language “all appropriate factors” to “a variety of factors” (at pp. 4-5, 21);
- (4) ***In violation of the Commission statute***, the Commission makes no findings as to five of the six statutorily-listed “appropriate factors” it is required to consider (at pp. 21, 23-24);
- (5) ***In violation of the Commission statute***, the Commission does not consider and makes no findings as to “appropriate factors” presented by [the Center’s] citizen opposition as disintitling New York’s judges from any pay raise – whose appropriateness is uncontested by the Commission and judicial pay raise advocates. Among these:
  - (a) evidence of systemic judicial corruption, infesting appellate and supervisory levels and the Commission on Judicial Conduct – demonstrated as a constitutional bar to raising judicial pay (at pp. 10-13); and
  - (b) the fraudulence of claims put forward to support judicial pay raises by judicial pay advocates (at pp. 13-15), including their concealment of pertinent facts, *inter alia*:
    - (i) that New York’s state-paid judges are not civil-service government employees, but “constitutional officers” of New York’s judicial branch;
    - (ii) that the salaries of all New York’s “constitutional officers” have remained unchanged since 1999 – the Governor,

Lieutenant Governor, Attorney General, and Comptroller, who are the “constitutional officers” of our executive branch – and the [now] 63 Senators and 150 Assembly members who are the “constitutional officers” of our legislative branch;

- (iii) that the compensation of New York’s judicial “constitutional officers” is comparable, if not superior, to the compensation of New York’s executive and legislative “constitutional officers”, with the judges enjoying incomparably superior job security;
- (iv) that New York’s executive and legislative “constitutional officers” have also suffered the ravages of inflation, could also be earning exponentially more in the private sector; and also are earning less than some of their government-paid staff and the government employees reporting to them;
- (v) that as a co-equal branch, the same standards should attach to pay increases for judges as increases for legislators and executive branch officials – *to wit*, deficiencies in their job performance and governance do not merit pay raises;
- (vi) that outside the metropolitan New York City area, salaries drop, often markedly – as reflected by the county-by-county statistics of what New York lawyers earn – and there is no basis for judges in most of New York’s 62 counties to be complaining as if they have suffered metropolitan New York City cost-of-living increases, when they have not, or to receive higher salaries, as if they have;
- (vii) that New York judges enjoy significant “non-salary benefits”;
- (viii) that throughout the 12 years of “stagnant” pay, New York judges have overwhelmingly sought re-election and re-appointment upon expiration of their terms – and there is no shortage of qualified lawyers eager to fill vacancies;
- (ix) that the median household income of New York’s 19+ million people is \$45,343 – less than one-third the salary of New York Supreme Court justices.



Examine, too, the verified complaint based on the Opposition Report, whose second, third and fourth causes of action detail the unconstitutionality, statutory violations, and fraud of the Commission on Judicial Compensation's Report.<sup>3</sup>

Any Senator who would be heard in support of the judicial salary increase must be required to respond to the particularized facts and law presented by CJA's Opposition Report and the verified complaint based thereon, as they are devastating and dispositive. Indeed, it is each Senator's duty to personally review the Opposition Report and verified complaint so as to confirm for himself that funding the judicial salary increases recommended by the Commission on Judicial Compensation is "nothing short of grand larceny of the public fisc". This is how Ms. Sassower described it in a March 11, 2013 letter (at p. 3), summarizing and expanding upon her testimony at the February 6<sup>th</sup> hearing – a letter sent to every member of the General Budget Conference Committee and its Subcommittee on "Public Protection", Criminal Justice, and Judiciary on March 13<sup>th</sup>.

Consistent therewith, this Legislature must, as Ms. Sassower stated at the February 6<sup>th</sup> hearing, override the second phase of the judicial salary increase which will otherwise take effect automatically on April 1, 2013 – as well as the third phase, which will otherwise take effect automatically on April 1, 2014. In support thereof, and to secure the voiding of the first phase that took effect on April 1, 2012 and to recover the more than \$27.7 million dollars of public monies expended on the first phase, which, unless voided, will be an annually recurring expense, in perpetuity, findings of fact and conclusions of law must be made with respect to CJA's October 27, 2011 Opposition Report. This must be done forthwith by the Senate and Assembly Judiciary Committees in belated discharge of their oversight function pursuant to Senate Rule VIII, §4(c)<sup>4</sup> and Assembly Rule IV, §1(d)<sup>5</sup>.

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<sup>3</sup> Particularly essential is examination of ¶¶145-154 of the complaint's second cause of action, challenging the constitutionality of Chapter 567 of the Laws of 2010, *as written*, based on its delegation of "Legislative Power Without Safeguarding Provisions and Guidance". This is because budget bill S.2605-C contained legislation "necessary to implement the public protection-general government budget for the 2013-2014 state fiscal year" in a Part X creating "a commission on managerial or confidential state employee compensation to examine, evaluate and make recommendations with respect to adequate levels of compensation and non-salary benefits for managerial or confidential state employees". Its material language and provisions were *verbatim identical* to the constitutionally-infirm language and provisions of Chapter 567 of the Laws of 2010. This Part X appears to have been removed from what is now S.2605-D, but whether it has been imported to some other Senate or Assembly bill is unknown.

<sup>4</sup> Senate Rule VIII, §4(c) states:

"Committee oversight function. Each standing committee is required to conduct oversight of the administration of laws and programs by agencies within its jurisdiction."

<sup>5</sup> Assembly Rule IV, §1(d) states:

Suffice to say that in the nearly 19 months since the Commission's August 29, 2011 Report, neither the Senate nor Assembly Judiciary Committees have held any hearings on the Report or otherwise purported to review it to determine whether – as §1(h) of Chapter 567 of the Laws of 2010 explicitly provides – its judicial salary increase determinations should be “modified or abrogated by statute prior to April first of the year as to which their determination applies.”

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and administration of programs, of departments, agencies, divisions, authorities, boards, commissions, public benefit corporations and other entities within its jurisdiction.”