Submission of Stephen Kruger to the 2015
Commission on Legislative, Judicial and Executive Compensation*

I. INTRODUCTION

Part E of Chapter 60 of the Laws of 2015 was based on Chapter 567 of the Laws of 2010. Legal faults of the 2015 Commission on Legislative, Judicial and Executive Compensation are replications of legal faults of the 2011 Special Commission on Judicial Compensation.

The essay from which this submission was excerpted is Stephen Kruger, "New York Judicial Compensation: 2015" (2015). URL: http://ssrn.com/abstract=2591311.

II. THE 2015 COMMISSION IS NOT A PART OF THE NEW YORK GOVERNMENT

There is no specification, in Part E, that the 2015 Commission is a part of the New York government. The bare legislative command is:

On the first of June of every fourth year, commencing June 1, 2015, there shall be established a commission on legislative, judicial and executive compensation to examine, evaluate and make recommendations with respect to adequate levels of compensation and non-salary benefits for members of the legislature, judges and justices of the state-paid courts of the unified court system, statewide elected officials, and those state officers referred to in section 169 of the executive law.[1]

[1] L. 2015, ch. 60, Part E, § 2(1).

The three-branches structure of the New York government is obligatory.[2] Consequently, every unit of the New York government has to be in one of the three branches. When the Legislature creates a unit of the New York government, the Legislature must place the unit in one of the three branches.

The 2015 Commission is not within one of the three branches, so the commission is not a part of the New York government. It was impermissible for the Legislature to authorize the non-governmental 2015 Commission to exercise governmental-agency functions, such as holding hearings and setting salaries.[3]

III. A LEGISLATIVE DETERMINATION MAY NOT BE DELEGATED TO THE 2015 COMMISSION

Although the Legislature may authorize an Executive agency to fill in details of general legislation, the Legislature may not authorize an Executive agency to make a legislative determination.[4]

The setting of the amounts payable as salaries and non-salary benefits to senators, assemblymen, executive officers, executive officials, judges, and justices is a quintessential legislative determination. Authorizations of payments to officers and employees are an aspect of the power of the purse, reserved to the Legislature.[5]

There may not be a giving away by the Legislature of the power of the purse, in whole or in part, to the Executive or to the Judiciary. "[T]he powers belonging to one department ought not be directly and completely administered by either of the other departments; and, as a corollary, that, in reference to each other, neither of them ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers."[6]

A fortiori, the Legislature may not give away, in whole or in part, the power of the purse to the 2015 Commission, which is not a part of the New York government.

Therefore, the commission is not permitted to set salaries and non-salary benefits.

IV. A RECOMMENDATION OF THE 2015 COMMISSION IS NOT A LAW

Part E provides:

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[2] N.Y. Const. art. III (Legislature), art. IV (Executive), art. VI (Judiciary); Matter of Maron v. Silver, 14 N.Y.3d 230, 258 (2010); Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y.2d 344, 355-56 (1985); People v. Tremaine, 252 N.Y. 27, 44, 51 (1929); Montesquieu, The Spirit of the Laws, Book XI, Chapter 6 (1748).

[3] Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

[4] Marshall Field & Co. v. Clark, 143 U.S. 649, 693-94 (1892); Loving v. United States, 517 U.S. 748, 771 (1996).

[5] N.Y. Const. art. VII, § 7.

[6] Joseph Story, 1 Commentaries on the Constitution of the United States § 530 (p. 371) (footnote omitted) (3rd ed. 1858).

> Each recommendation made to implement a determination pursuant to section two of this act shall have the force of law, and shall supersede, where appropriate, inconsistent provisions of article 7-B of the judiciary law, section 169 of the executive law, and sections 5 and 5-a of the legislative law, ...[7]

A law comes into being from the filing of a bill by a senator or by an assemblyman, enactment of a filed bill by both houses of the Legislature, presentment of an enacted bill to the governor, and approval by the governor of an enacted bill.

[7] L. 2015, ch. 60, Part E, § 3(7)

Otherwise, an enacted bill becomes law, after presentment, when there is a legislative override of a veto, or when the governor does not sign a bill within the prescribed period.[8]

A recommendation of the 2015 Commission will not be a filed bill or an enacted bill or a presented bill or an approved bill. There will not be an overridden veto or a gubernatorial delay.

Prior to enactment by the Senate or the Assembly, a bill "shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage[.]" A message of necessity from the governor obviates the three-day requirement, not the final-form requirement.[9]

A recommendation of the 2015 Commission will not meet the final-form requirement, and will not meet the three-day requirement, and cannot be the subject of a message of necessity from the governor.

It is preposterous to transform a recommendation of the 2015 Commission into a something (there is no word for it) which "shall have the force of law." Only a law may amend or repeal (*not* "supersede") existing law (here, Judiciary Law art. 7-B, Executive Law § 169, and Legislative Law §§ 5 and 5-a), "and no law shall be enacted except by bill."[10]

The recommendations of the commission will not be a law.

V. JUDICIAL SALARIES AND NON-SALARY BENEFITS SHOULD NOT BE INCREASED

A. 2011 Commission

According to the majority of the members of the 2011 Commission:

[8] N.Y. Const. art. III, §§ 12, 13, 14, art. IV, § 7.

[9] *Id.*, at art. III, § 14.

[10] N.Y. Const. art. III, § 13; INS v. Chadha, 462 U.S. 919, 946-48 (Congress may not legislate in disregard of presentment), 948-51 (Congress may not legislate in disregard of bicameralism) (1983).

The Commission has determined that the appropriate benchmark at this time for the New York State judiciary is the compensation level of the Federal judiciary. The Commission recognizes the importance of the New York State judiciary as a co-equal branch of government and recognizes the importance of establishing pay levels that make clear that the judiciary is [1] valued and respected. The Federal judiciary [2, 3] sets a benchmark of both quality and compensation – New York State should seek to place its judiciary on par. That is where New York State judicial compensation was in the late 1990's [*sic* (should be "1990s")] and our recommendation is to re-establish this benchmark with a phase-in period that takes account of the State's current financial challenges.[11]

[11] State of New York, Special Commission on Judicial Compensation, Final Report of the Special Commission on Judicial Compensation 8 (2011), available at http://www.judicialcompensation.ny.gov/assets/FinalReportSpecialCommissionJD.pdf (accessed 2/11/2015).

[1] *Valued and respected:* The Judiciary should not be "valued and respected." Judges and justices are pudd'nheads, rewarded by an entrenched system of political patronage.[12] No Kent or Cardozo is among them.

[2] *Benchmark of quality:* For the Judiciary, the United States courts do not set "a benchmark of . . . quality[.]" United States justices and judges should be disinterested interpreters of the United States Constitution. It is to be applied by them as written and understood by the Framers, and as understood and accepted by the ratifying states.

That is never done. Rather, United States justices and judges caused the United States Constitution to be inoperative. In its place are political, economic, and sociological diktats. Egregious opinions of the United States Supreme Court include *Texas v. Johnson*.[13] Burning the United States flag may not be criminalized. Compare *United States v. O'Brien*:[14] Burning a draft card may be criminalized. It is perverse to value a card issued by a governmental agency (the Selective Service System) above the United States flag.

[3] *Benchmark of compensation:* For the Judiciary, the United States courts do not set "a benchmark of . . . compensation[.]" Spendthrift United States budgets, and irresponsible overpayment of United States employees,[15] set an unattainable compensation target, not a compensation benchmark.

B. Associates

An unsupportable contention for judicial salary increases is that associates at large New York law firms earn more than judges and justices.

Currently, the salary range for a first-year associate at a large New York City law firm is $140,000 to $160,000 a year.[16] Experienced associates make more than that.

Superior earnings are reflective of superior achievements. Every associate did exceedingly-well academically in college; did exceedingly-well academically in law school; and was a senior editor of a law review, or won a national moot-court competition.

Superior earnings reflect also high productivity. In a large law firm, associates put in up to ten billable hours a day. Arrival time is early. Going-home time is when all needed work is done, not a specific hour.

Compare the Judiciary, wherein judges and justices of academic distinction are rare. Productivity is limited. In a court room, working hours of judges and justices are simply hours. The difference between billable hours and not-billable hours is unknown. Arrival times at court houses, and departure times from court houses, are regular. Judicial work which is not done one day is put off to the next day.

C. Partners

Another unsupportable contention for judicial salary increases is that top-drawer lawyers are repelled by low judicial salaries, and are attracted by high judicial salaries.

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[12] Brian J. Nickerson, "New York's Courts," in Robert F. Pecorella and Jeffrey M. Stonecash, Governing New York State 171, 174, 191-93, 196-97 (6th ed. 2012).

[13] 491 U.S. 397 (1989).

[14] 391 U.S. 367 (1968).

[15] Chris Edwards, "Overpaid Federal Workers" (2013) (Cato Institute, "Downsizing the Federal Government"), available at http://www.downsizinggovernment.org/overpaid-federal-workers (accessed 2/15/2015).

[16] Jonathan Birenbaum, "Biglaw Associate Comp in the Big Apple" (Above the Law, 11/14/2014), available at http://www.abovethelaw.com/2014/11/biglaw-associate-comp-in-the-big-apple (accessed 2/24/2015).

In New York City, an apex top-drawer lawyer who is a non-equity partner has an income of $5.5 million a year. An apex top-drawer lawyer who is an equity partner has an income of $8 million a year. Their colleagues who work upstate have lesser, but still wonderful, incomes.

The income of an average top-drawer lawyer who is a non-equity partner is $500,000 a year. The income of an average top-drawer lawyer who is an equity partner is $1.3 million a year.[17]

No apex top-drawer lawyer is swayed by a judicial salary, when the pros and cons of judicial office are considered by him. Whatever the judicial salary, it cannot ameliorate the precipitous reduction in income which acceptance of a judicial office necessitates.

For an average top-drawer lawyer, neither a judicial salary of $140,000 a year nor a judicial salary of $175,000 a year nor a judicial salary of $210,00 a year answers the existential question of whether to stay at or leave a law firm.

Not even a judicial salary of $245,000 a year is a clear indicator, to an average top-drawer lawyer, that he should leave a law firm for a judicial office. That judicial salary would mean a 51% drop in income from $500,000 a year, and an 81% drop in income from $1.3 million a year.

D. No support

Neither theory nor evidence supports the asserted underpayment of judges and justices:

[17] MP McQueen, "The Big Boys Make $10 Million — How About You?" (The American Lawyer, 1/5/2015), available at http://www.americanlawyer.com/id=1202713086372/The-Big-Boys-Make-$10-MillionmdashHow-About-You (accessed 2/23/2015).

> The public debate over the need to raise judicial salaries has been one-sided. Sentiment appears to be that judges are underpaid. But neither theory nor evidence provides much support for this view. The primary argument being made in favor of a pay increase is that it will raise the quality of judging. Theory suggests that increasing judicial salaries will improve judicial performance only if judges can be sanctioned for performing inadequately or if the appointments process reliably screens out low-ability candidates. However, federal judges and many state judges [1] cannot be sanctioned, and [2] the reliability of screening processes is open to question. An empirical study of the high court judges of the fifty states provides little evidence that raising salaries would improve judicial performance.[18]

[1] *Cannot be sanctioned:* There is no efficacious mechanism to sanction judges and justices.

The Commission on Judicial Conduct is of some effectiveness as to low-rank judges and justices, and is of limited effectiveness as to high-rank judges and justices.

[18] Stephen J. Choi, G. Mitu Gulati and Eric A. Posner, "Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate," 1 J. Legal Analysis 47 (2009) (abstract), available at http://ssrn.com/abstract=1349458 (accessed 2/13/2015).

Statistics of the Commission on Judicial Conduct show that, since 1978, 788 adverse determinations. There were 551 against low-rank justices, and 237 against high-rank judges and justices.[19]

The number of low-rank justices found by the Commission on Judicial Conduct to be responsible for substandard conduct is 2.3 times greater than is the number of high-rank judges and justices who were found responsible by the commission. The skewed numbers arise from the Commission on Judicial Conduct having made its primary interest the substandard conduct by low-rank justices (*i.e.*, Town Court justices and Village Court justices), and having made its secondary interest the substandard conduct by high-rank judges and justices (particularly Supreme Court justices, Surrogate's Court judges, and Family Court judges).[20] Public knowledge of substandard conduct by high-rank judges and justices[21] is ignored by the commission. The upshot is that the number of high-rank judges and justices who are unwilling to commit to upright conduct is significantly higher than is indicated by the number of adverse determinations, by the commission, against high-rank judges and justices

Supreme Court justices, Appellate Division justices, and Court of Appeals judges may be removed by a two-thirds vote of both the Senate and the Assembly.[22] Other judges and justices may be removed by the two-thirds vote of the Senate upon the recommendation of the governor.[23] Any judge or justice may be impeached by the majority vote of the Assembly, and may be removed by the two-thirds vote of the Court for the Trial of Impeachments.[24] Statistics are unavailable, but it seems that each of these methods is little used.

[2] *Unreliable screening:* Neither appointment nor election screens would-be judges and justices reliably. Politics dominates, and politics gives a leg up to low-ability candidates.[25]

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[19] State of New York, Commission on Judicial Conduct, "Commission Decisions" (2015) available at http://www.scjc.state.ny.us/Determinations/all_decisions.htm (accessed 4/5/2015).

[20] David Howard King, "Who Judges the Judges?" (Gotham Gazette, 11/15/2011), available at http://www.gothamgazette.com/index.php/public-safety/863-who-judges-the-judges- (accessed 2/8/2015).

[21] *E.g.*, Sandra Peddie and Will Van Sant, "The Insiders" (Newsday, 2014) (investigative series) (accessed 2/12/2015): http://data.newsday.com/projects/long-island/melius-receivership, http://www.newsday.com/long-island/suffolk/breaking/huntington-councilman-mark-cuthbertson-didn-t-disclose-ties-to-gary-melius-1.9463858, http://www.newsday.com/long-island/politics/judge-rescinds-approval-of-payment-to-nassau-party-leader-1.9608689, http://www.newsday.com/long-island/in-melius-and-associates-court-awards-state-probes-newsday-report-that-justices-violated-rules-say-sources-1.9615498, http://www.newsday.com/long-island/suffolk/breaking/the-insiders-newsday-findings-show-2002-reforms-failed-to-eliminate-cronyism-and-increase-transparency-in-court-appointment-system-1.9760902, http://www.newsday.com/long-island/judge-democratic-counsel-with-ties-to-gary-melius-move-out-of-key-roles-1.9804222, http://www.newsday.com/long-island/feds-investigate-melius-after-report-on-over-900-000-in-court-fees-1.9842190.

[22] N.Y. Const. art. VI, § 23(a).

[23] *Id.*, at § 23(b).

[24] *Id.*, at § 24.

[25] Wayne Barrett, "Wayne Barrett: How Shelly Silver Made His Pal Chief Judge" (The Village Voice, 2/10/2009), available at http://www.blogs.villagevoice.com/runninscared/2009/02/wayne_barrett_h.php (accessed 2/22/2015); Alice Brennan, "How a Brooklyn Democratic functionary becomes a Brooklyn judge" (The New York World, 9/28/2011), available at http://www.thenewyorkworld.com/2011/09/28/how-a-brooklyn-democratic-functionary-becomes-a (accessed 2/20/2015); Brian T. Fitzpatrick, "The Politics of Merit Selection," 74 Missouri L. Rev. 675 (2009); Kenneth Lovett, "Gov. Cuomo packs judicial screening committees with cronies, big-time campaign donors" (New York Post, 6/13/2011), available at http://www.nydailynews.com/new-york/gov-cuomo-packs-judicial-screening-committees-cronies-big-time-campaign-donors-article-1.131810 (accessed 2/20/2015); Aaron Short, "Judging Brooklyn's Judges" (New York Post, 2/10/2010), available at

E. Judicial attitude-problem

The demand in submissions to the 2011 Commission, by judges, justices, associations of judges, and associations of justices, was, "Gimme money!"

In reward of what? Certainly not in reward of the long-term deficiencies among judges and justices: 20-hour work weeks. Incompetence. Corruption. Politics-motivated opinions. Ideology-motivated opinions. Not keeping up with the law. Irascibility. Arbitrary rulings.

Long-term deficiencies among judges and justices must be repaired, before judicial salaries and non-salary benefits are addressed. Payment of more and more money to judges and justices will not cure their deficiencies.

A chorus of voices complained, in the submissions, that judicial salaries were increased last in 1999. Inflation since then, the chorus continued, reduced significantly the purchasing power of the 1999-level judicial salaries.

There was not one voice of complaint, in the submissions, that New York jurors generally are paid $40.00 a day[26] (assuming an eight-hour day, that is $5.00 an hour, clearly less than the wage for a minimum-wage mcjob); that New York juror fees were increased last in 1997; and that inflation eroded the purchasing power of the 1997-level juror fees.

To judges and justices, "citizens" are no more than bondmen and bondwomen of the courts. Whether they are properly paid or ill paid is, to judges and justices, beneath notice.

Financial mistreatment of jurors must be repaired, before judicial salaries and non-salary benefits are addressed. The juror fee should be increased to $200 a day for each juror, for each day of that a juror is present in a court house. That payment, annualized, approximates the employment-market salary ($50,000 a year) of a middle-level employee in the private sector.

$200 a day is $1,000 a week for a 5-day week. A judge or justice makes +/- $200,000 a year, which is about $4,000 a week. A second-drawer lawyer makes +/- $400,000 a year, which is about $8,000 a week. Paying $1,000 a week to a juror is reasonable.

The increased juror fee has a societal value in addition to respectful treatment of jurors. Unlike the below-employment-market jury fee of $40 a day per juror, $200 a day per juror does not encourage needless jury trials.

Structural inadequacies of the Judiciary must be repaired, before judicial salaries and non-salary benefits are addressed. Two of them:

• A Rube Goldberg arrangement of courts, which is in dire need of systemization, but which should be systemized *if*, and *only if*, systemization respects the history and the names of the New York courts.[27]

• Creaky judicial machinery and sclerotic judicial bureaucracy.

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http://nypost.com/2010/02/10/judging /brooklyns/judges (accessed 2/20/2015); Clifford Taylor, "Without Merit: Why 'Merit' Selection Is the Wrong Way for States to Choose Judges" (Heritage Foundation, 2010), available at http://www.heritage.org/research/lecture/without-merit-why-merit-selection-is-the-wrong-way-for-states-to-choose-judges (accessed 2/20/2015).

[26] N.Y. Jud. L. §§ 521, 521-a (2014).

[27] Stephen Kruger, "New Judiciary Article for the New York Constitution" (2013), available at http://ssrn.com/abstract=1455502 (accessed 2/14/2015).

Judicial employment is voluntary. Tangible and intangible rewards of judicial office are reasonable. If those rewards are deemed by a judge or justice to be unsatisfactory, the remedy is to his hand. He may resign. He can hang out a shingle, resume being a practicing lawyer, and work for a living as the rest of us do.

Voluntary leaving would make way for law-subservient judges and justices. They can be found among young (40s+) men and women. They are capable of true public service. They are not beset, as are incumbent judges and justices generally, by a deficit of humility and by ingratitude for high office.

VI. CONCLUSION

On the law: Part E is unconstitutional. The existence of the 2015 Commission is unlawful. Any recommendation, by the 2015 Commission, to increase salaries and non-salary benefits will be *ultra vires*. Any payment of increases to senators, assemblymen, executive officers, executive officials, judges, and justices will be unlawful. Those payments will constitute waste in the legal sense.

On the merits: Judicial salaries and non-salary benefits should not be increased in 2015.