

Ex "B" to the Affirmation of Eli Vigliano, Esq.
to the Appellate Division, Third Department,
dated August 15, 1991 F-9

APPELLANTS' MEMORANDUM
IN SUPPORT OF SUBJECT MATTER JURISDICTION AS OF RIGHT

TO: New York State Court of Appeals
RE: Castracan v. Colavita
DATE: August 1, 1991

At the outset, it must be noted that this case was denied its rightful preference by the Appellate Division, Third Department. That preference should have been granted under the Election Law, as well as under the Appellate Division's own rules ("Appeals in election cases shall be given preference", Rules of the Third Department, Sec. 800.16). The explicit statutory direction is that Election Law proceedings:

"...shall have preference over all other causes in all courts". (Election Law, Sec. 16.116) (emphasis added)

Appellants, therefore, invoke such mandated right of preference to obtain an expedited review by this Court. Expedited review is particularly critical in light of the fact that the third phase of the subject three-year cross-endorsements barter contract is being implemented in the November 1991 elections.

Appellants will contend on their proposed appeal that denial of the mandated preference by the Appellate Division was manifest error, representing an unwarranted frustration of the legislative will and impermissible infringement of constitutional voting rights, which the aforesaid provision of the Election Law was specifically intended to protect.

The proposed appeal involves questions which are novel, of public importance, and which require interpretation of prior decisions of this Court and of the Appellate Division in other cases.

Appellants' Petition (R. 16-17, 22-23) specifically alleges that under the New York State Constitution, the People are given the right to elect their Supreme Court judges, and that a certain cross-endorsements contract entered into between party leaders and their judicial nominees was in contravention of that constitutional mandate and of the state's Election Law designed to safeguard it.

The pivotal, profound and far-reaching issues requiring adjudication by the Court of Appeals are, inter alia:

(1) whether the major party cross-endorsements bartering contract at issue violates the state and federal Constitutions and the Election Law by guaranteeing uncontested elections of Supreme Court judges and a Surrogate judge. Appellants contend that such contract, expressed in resolution form (R. 52-54), effectively destroyed the electorate's right to choose their judges by a meaningful vote between competing candidates and that it further unlawfully impinged upon the constitutionally-mandated independence of the judiciary by requiring acceptance of cross-endorsement as the price of nomination. Also at issue is the constitutional validity of a contracted-for commitment by the judicial nominees for

early resignations to create new judicial vacancies¹ and a pledge to split patronage after consultation with the political leaders of both parties².

(2) whether the Appellate Division's failure to address these critical issues gives rise to "an appearance of impropriety" in that three members of the appellate panel which rendered the Decision, including the presiding justice³, were, themselves products of cross-endorsement arrangements. Such "appearance of impropriety" is magnified by:

(a) the failure of the three cross-endorsed members of the appellate panel to disqualify themselves⁴ or even to disclose their own cross-endorsements;

(b) the Appellate Division's rendition of a dismissal on procedural

¹ See, inter alia, Appellants' Reply Brief, Exhibits "A-1", "A-2" thereto:

² Such commitment and pledge by Respondent judicial nominees, including sitting judges, runs afoul of the Code of Judicial Conduct, Canon 7, 1.B.(c) "A candidate, including an incumbent judge, for a judicial office" should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office...", as well as of the Rules of the Chief Administrator of the Court, Secs. 100.1; 100.2; 100.3(b)(4).

³ Presiding Justice Mahoney was triple cross-endorsed by the Republican, Democratic, and Conservative parties.

⁴ Disqualification is called for under paragraph C(1) of the Code of Judicial Conduct "in a proceeding in which his impartiality might reasonably be questioned"

grounds, not jurisdictional, not preserved for appellate review, and readily curable. Such dismissal by the Appellate Division was based on an approach, diametrically opposite to the approach taken by Justice Kahn and consented to by the parties. Moreover, it failed to afford Appellants the opportunity to supplement the record to establish that such procedural objections were without merit and that Respondents were without standing to assert them⁵.

(c) the Appellate Division's failure to address the patently erroneous factual and legal finding of the Supreme Court that the constitutionality of the cross-endorsements contract could not be reviewed because there was "no proof"

⁵ Appellants have made these objections the subject of a motion for reargument in the Appellate Division, which also includes, alternatively, a request for leave to the Court of Appeals. That motion was expressly made "without prejudice to Appellants' contention that their appeal lies as a matter of right to the Court of Appeals because of the substantial constitutional issues involved..." If the Court of Appeals accepts Appellants' appeal as of right, they will withdraw the aforesaid motion.

that the judicial nominating conventions did not conform to Election Law requirements⁶.

(d) the Appellate Division's denial of Appellants' preference entitlement on two separate occasions: On October 18, 1990, when Appellants were denied the automatic preference to which they were entitled as a matter of right under the Election Law and the Appellate Division's own rules; and again on October 31, 1990, when Appellants' formal application by Order to Show Cause was denied by written order of the Court. All five justices deciding that later motion were themselves cross-endorsed⁷--including two justices who ran uncontested races with "quadruple" endorsement by the Republican, Democratic, Conservative and Liberal parties.

In view of the apparently wide-spread cross-endorsement of judges on the Appellate Division level, it is

⁶ See Appellants' Reply Brief, pp. 1-4; pp. 27-29.

⁷ This fact was also undisclosed.

respectfully submitted that such fact furnishes an added reason why this appeal should be heard by the Court of Appeals, whose judges are appointed, rather than elected.

Appellants on their appeal from the Appellate Division Order, as well as from the Order of the Supreme Court, contend that the dismissal of the Petition constitutes a dangerous precedent destructive of the democratic process and constitutionally protected voting rights--and gives a green light to the major parties for cross-endorsement bartering of judgeships as an accepted modus operandi.

As noted in the Record, the subject 1989 cross-endorsement agreement spawned another cross-endorsement arrangement in furtherance thereof in 1990 as to Respondent Miller. Moreover, according to a news article handed up, with the Court's permission, in connection with the oral argument before the Appellate Division, Respondent Miller acquired his seat as a result of a trade by the Republicans of three (3) non-judicial government posts in exchange for the (1) Supreme Court judgeship to be filled by a Republican (see, Document #25).

As a result of the lower courts' failure to take the corrective action prescribed by the New York State Constitution and the Election Law by invalidating the nominations in question, the 1991 phase of the subject three year cross-endorsement contract will be implemented as scheduled in this year's general elections--unless forestalled before Election Day by an unequivocal decision by the Court of Appeals that such contracts

are violative of the Constitution and otherwise illegal, unethical and against public policy.

This case gives the Court of Appeals an essential opportunity to update several of its prior decisions. There is a need for clarification of its Decision in Rosenthal v. Harwood, 35 N.Y.2d 469, cited and incorrectly relied on by several Respondents in the court below⁸. Rosenthal was not a case involving cross-endorsements with an articulated quid pro quo, but only the endorsement of a major party judicial candidate by a minor party. In that case, the Court of Appeals said the party could not prohibit the candidate from accepting such minor party endorsement because such restriction--even though in the form of a party's internal by-law--would compromise the independence of the judicial candidate in exercising his own judgement. The Court of Appeals has not yet ruled on the constitutionality of major party cross-endorsements under a contract between the party leaders, expressed in written form by resolutions adopted by the Executive Committees of both parties, ratified by the candidates at judicial nominating conventions, requiring the judicial nominees to accept the contracted-for cross-endorsements, as well as other bargained-for and agreed conditions, i.e., early resignations and a pledge to split patronage after consultation with party bosses (R. 52-54).

⁸ For fuller discussion, see, inter alia, Appellants' Reply Brief, Point I (pp. 14-26)

There is also a need to update and reaffirm People v. Willett, 213 N.Y. 369 (1915) involving the predecessor section to present Election Law, Sec. 17-158, making specified corrupt practices a felony. Willett involved a monetary contribution to the party Chairman to procure a nomination at the judicial nominating convention for a Supreme Court judgeship. This Court therein expressly recognized, as a matter of law, what Justice Kahn chose to disregard: that the corrupt practices provisions of the applicable statute (then entitled "Crimes against the Elective Franchise") "should be construed to include...a nomination coming out of a political convention", irrespective of whether or not such convention conformed to procedural requirements of the Election Law. Castracan v. Colavita is today's pernicious counterpart to Willett⁹--a barter exchange of judgeships for judgeships, which has already metastasized into a trade for other non-judicial governmental offices as well.

Unfortunately, the more recent case of People v. Hochberg, 62 AD2d 239, did not reach the Court of Appeals, which would have permitted a ruling by our highest Court that an agreement assuring a candidate of guaranteed victory is a "sufficiently direct benefit...to be included within the term 'thing of value or personal advantage.'"¹⁰

⁹ For fuller discussion, see Appellants' Reply Brief, Point I(B), p. 18 et seq.

¹⁰ For fuller discussion, see Appellants' Reply Brief, Point I(B), p. 16 et seq.

A favorable decision to Appellants in Castracan v. Colavita would represent a logical and necessary progression of thought essential to deal with modern subterfuge by politicians ready to eliminate the voters from meaningful participation in the electoral process. The public interest requires this Court's intervention and an unequivocal ruling that bartering judgeships is just as bad as buying them. It is an historic opportunity.

The public importance of this case transcends the parties to this proceeding¹¹. Not only are the issues of major significance likely to arise again, but over and beyond the direct effect of this case in restraining the encroachment of politicians on the judiciary, a decision for Appellants would open the way for judicial selection based on merit rather than party labels and loyalties, which traditionally have excluded as candidates for office those outside the political power structure--minorities, women, independent and unregistered voters--no matter how meritorious.

Decisive adjudication on the merits of the issue as to whether or not the subject cross-endorsements violates constitutionally protected voting rights is an imperative--affecting, as it does, the lives, liberty, and property interests of one and a half million residents in the Ninth Judicial District. The practical effect of the musical-chair judge-

¹¹ See Appellants' Reply Brief, Point III, pp. 30-31.

trading arrangement by party bosses¹² was to create a crisis situation in the already backlogged motion and trial calendars of the Court--resulting in severe, incalculable, and irreversible injury not only to litigants and their families, but to the public at large.

¹² The Deal required Republican Respondent Emanuelli to resign his fourteen-year Supreme Court judgeship after only seven months in office so as to create a vacancy for Democratic Respondent County Court Judge Nicolai to fill in January 1991. The contracted-for resignation by Justice Emanuelli was timed so that Governor Cuomo could not fill it by interim appointment.

Supreme Court—Appellate Division
Third Judicial Department

F-14

October 17, 1991

62134 - In the Matter of MARIO
M. CASTRACAN et al.,
Appellants,

v

ANTHONY J. COLAVITA, as
Chairman of the Westchester
Republican County Committee,
et al., Respondents.

Motion for reargument and renewal and for further relief or, in the alternative, for permission to appeal to the Court of Appeals denied, without costs.

Cross motions for the imposition of sanctions and for further relief denied, without costs.

MAHONEY, P.J., MIKOLL, LEVINE, CREW III and HARVEY, JJ., concur.