NINTH JUDICIAL COMMITTEE

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FAX COVER SHEET

3/9/92 — DATE

11:15 a.m. — TIME

TO: NYS TEMPORARY COMMISSION ON LOCAL GOVERNMENT ETHICS
Att: Robert L. Nisely, Esq.

FAX NUMBER: 914-683-5387 (tele: 914-683-5375)

This fax consists of a total of 11 pages, including this cover sheet. If you do not receive the indicated number of pages, or if there is a question as to the transmittal, please call (914) 997-8105.

FROM: Elena Ruth Sassower, Coordinator

MESSAGE:

Thank you for your time and attention to this matter. As discussed, we enclose the following:

(1) 3/1/92 Gannett article: "Ethics Panel Loses Steam"

(2) 9/12/90 excerpt from Gannett column: Milt Hoffman

(3) pp. 8-9 of Memorandum in Support of Appeal as of right to NYS Court of Appeals, Castracan v. Colavita.

(4) pp. 16-20, p. 24 of Appellants' Reply Brief to Appellate Division, Third Dept., Castracan v. Colavita.

In view of Mr. Miller's quoted statement: "It's not that I'm praying for a scandal. But as a practical matter, it wouldn't hurt", we ask that you refer the foregoing materials, as well as our correspondence to Governor Cuomo, to the attention of Mr. Miller before forwarding them on to counsel for the NYS Ethics Commission, Barbara Smith.

Metro
COUNTY / REGION / STATE
Gannett Suburban Newspapers/Sunday, March 1, 1992

Ethics panel loses steam

Clean government can be so frustrating. Just ask Henry G. Miller, chairman of the White Plains-based Local Government Ethics Committee.

Miller was in town last week lobbying for the Legislature to pass a bill that streamlines financial-disclosure provisions and broadens the group of local officials covered by the regulations.

Five years ago, when the panel was established, the memory of people like former Borough Presidents Donald Manes of Queens and Stanley Friedman of the Bronx lining their own pockets at public expense was strong.

But now those memories have faded, and it's harder to get the Legislature focused on the ethics problem, Miller said.

"It's not that I'm praying for a scandal. But as a practical matter, it wouldn't hurt," he said, smiling.

Please see inter alia 9/12/90 Gannett column of Mitt Hoffman →

The cross-endorsement of Miller by Democrats was interesting. Rockland Democrats insisted on that cross-endorsement, even though the Republicans weren't endorsing Lefkowitz in return. Rockland Democrats like Miller personally and wanted to make sure the seat remained in Rockland hands. In return, Rockland Republicans agreed to cross-endorse three Democrats for local government posts next year.

Republicans have scheduled their convention next Tuesday at 1 p.m. at the Westchester Marriott in Greenburgh. Democrats will meet Sept. 24, at 7 p.m., at Day's Inn in Elmsford.

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Speaking of Emanuelli, he's full of surprises these days. First, he almost reneged on resigning from the Supreme Court to run for surrogate as part of the aforesaid deal. Now, during four months off the bench, he's joined the law firm of Hall, Dickler, Lawler, Kent and Friedman to act as special consultant on matrimonial affairs.

Milton Hoffman is editorial page editor.

8/1/91 Castracan Colavita
Memorandum in Support of Appeal As of Right

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 Willett[9]--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]

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[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 proceeding[11]. 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-

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

B. Respondents Have Failed to Refute Petitioners' Arguments that the "Three-Year Plan" Contravenes Law and Public Policy, As Reflected in Constitutional and Statutory History and Ethical Rules.

Unaddressed by Respondents is the fact that, unlike Rosenthal, the subject Petition alleges that the uncontested judicial nominations in question were the result of an illegal trading of judgeships, violating penal provisions of the Election Law, as well as ethical rules. Respondents completely ignore Petitioners' arguments and discussion of legal authority in support of their contention that the trading of judgeships represented a corrupt exchange of "valuable consideration" (Sec. 17-158(3), no less foul than if there had been a monetary exchange; see also, People v. Hochberg, 62 AD2d 239 (3rd Dept. 1978, per Mikoll, J.), sustaining the bribery conviction under the predecessor provision to present Election Law provisions, as well as violation of the Public Officers Law, of an Assemblyman running for re-election, who exacted a promise from another potential candidate not to run against him in the primary, in a district where victory would be assured the primary winner in the general election ("the benefit accruing to the public official need not be tangible nor monetary...to be corrupt use of position or authority"(at 246-7). 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.'" (People v. Hochberg, supra, at 247).

The public policy of the State of New York, reflected in the aforesaid decisional law, as well as its statutory

protections against, and penalties for, practices corruptive of the democratic process and constitutionally-guaranteed voting rights, demands that the subject barter agreement, no matter how loftily packaged, be recognized for precisely what it is -- a corrupt pact, which must be set aside.

It was early recognized that corrupt bargaining and trading of political offices was an evil to be remedied by election law statutes, thereafter enacted to protect the franchise. As noted in Petitioners' main Brief (at pages 11-12), legislative concern "with the corruptions which had been witnessed under the present (Supreme Court) system" is a subject long pre-dating the Election Laws. Debates in the New York State Convention, 1846, at p. 585-594. Legislator Kirkland, who was outvoted on the issue of popular election of Supreme Court judges, disfavored by him, gave as his reason for supporting the amendment permitting election of such judges by judicial, rather than senatorial, districts:

> "I supported this amendment because in my judgment it will diminish in some degree the danger of corrupt intrigues and selfish bargains and combinations at nominating conventions; it will enable the elector to know better the character and qualification of the candidate thus more intelligently and more safely to cast his vote; it will create on the part of the elector a deeper sense of responsibility." Debates, supra, at 586 (see Appendix hereto)

In time, the ever-present and infinite ingenuity of politicians and ambitious judicial aspirants betrayed those 1846 legislative high hopes. Continuing party abuses in connection

with judicial nominating conventions required remedial action. People v. Willett, 213 N.Y. 368, 107 N.E. 707 (1915) provides an illuminating discussion of the historical background giving rise to the penal provisions of the present Election Law in the context of Supreme Court judgeships. In Willett, our highest Court sustained the felony conviction of one of three judicial candidates who was nominated to the Supreme Court bench at the Democratic Judicial Convention in 1911, based on Penal Law provisions identical to those now found in Sec. 17-158 of the Election Law. Noting that

> "The indictment does not allege that the defendant directly or indirectly paid or offered to pay money or other valuable thing to a person to induce any voter to vote for him at the convention except as it incidentally avers that a delegate did vote for the defendant in return for the valuable consideration promised and paid to the Party Chairman and the delegate to procure such nomination for the defendant",

the Court of Appeals, nonetheless, concluded that

> "the statute should be construed to include a promise to procure, or cause by influence or otherwise, a nomination to public office by a political convention." at 380.

Justice Kahn's apparent belief that the "Three-Year Plan" lost its corruptive taint because it was filtered through the convention process ignored this essential rule of construction, more in accord with the political realities of such nominating conventions, judicial or otherwise. In People v. Cunningham, 88 Misc. 2d 1064 (Bx.Co., 1976), Justice Sandler, notwithstanding his dismissal of felony indictments against the

party leader and his judicial nominee, specifically rejected the defendants' argument that party leaders could not "procure or cause" a nomination, within the meaning of the Election Law. Indeed, Justice Sandler considered that issue disposed of by the leading case of People v. Willett, supra, as applied to a nomination in a judicial convention. Indeed, Justice Sandler extended the principle of the Willett case to primary elections, even while recognizing that:

> "the power of any individual, however influential, to deliver a nomination in a contested primary is significantly less than the power that might be exercised at a judicial convention" (at 1073),

stating that:

> "to accept the interpretation urged by the defendants would leave so wide a gap in the intended statutory protection against corrupt practices in nominations for public office that it could be adopted only if there were no reasonable alternative." (at 1074-5)

The fact that the Election Law addresses this area both in terms of rules which would facilitate the delegate's exercise of independent judgment (Sec. 6-126) and which punish those who impinge on it (Sec. 17.158(3)) shows that these rules, intended to prevent the historical efforts of party bosses' to control the judicial nomination process by "wheeling and dealing" in judgeships, are not self-executing.

As noted, Rosenthal did not involve a cross-endorsements agreement between leaders of the two major political parties to trade on a wholesale basis seven (7) judgeships, over a three year period. Such a blatant political deal must be held

within the bar of People v. Willett, supra, and Election Law 17-158(3). And, further, Rosenthal did not involve a pleading alleging that those conventions were convened and conducted in violation of mandatory Election Law safeguards.

3. It should be pointed out that Respondents Colavita and Parisi (doubtless, because of their long-term direct political involvement -- Colavita as Republican Party Chairman and Parisi as counsel to the Republican Party) themselves recognize that Rosenthal is not dispositive of the issues raised herein by not even referring to the case at all. Indeed, they fail to cite any legal authority to sustain their argument under Point V in their Opposing Brief that the Petition fails to state a cause of action. (Colavita and Parisi Opp. Br. pp. 14 et seq.), which should be viewed as a concession by default.

4. Grasping at the proverbial "straw", Colavita and Parisi argue that the deal is not illegal because Petitioners could have run for the offices in question. (id., at p. 15.) Clearly, the legality of the cross-endorsements contract does not hinge on any such irrelevancy. Petitioners are not lawyers, and would be disqualified to run for judicial office, even had they the slightest inclination to do so.

Such argument purposefully distorts the basis for this lawsuit, which was brought, not for Petitioners' private advantage, since they neither desired nor qualified to run for judicial office -- but, wholly to protect the public interest and preserve the integrity of our elective and judicial process.

and shockingly compromised. In recognizing "the leadership the court must provide if the courts are to become less politicized than they have been", the Rosenthal Court explicitly stated:

> "It is one thing for the law to leave to one the option of whether to behave morally or ethically, it is quite another for our court to close its eyes to the exertion of pressure by a public or quasi-public body, such as a political organization subject to and operating within the framework of the Election Law, to an unethical act. Such inaction could be tantamount to the law's lending its sanction to a practice in violation of public policy." 323 N.E. 2d, at 182.

The unambiguous and compelling reasoning of Rosenthal requires rejection of the spurious argument by Respondents Emanuelli and Miller that Rosenthal is dispositive of the cross-endorsements issue in their favor. It should be noted that such contention is not even asserted by any other Respondent, including Respondent Nicolai.

Upon proper analysis, Rosenthal is dispositive of the issue in Petitioners' favor. Rosenthal categorically rejects as impermissible manipulation a political party's pre-election restraint on a judicial candidate's right "to make his own judgment" as to whether or not to accept nomination by another party. The Court found offensive a practice, which "would compel [the nominee] to take a partisan position", and thereby violate the specific proscription of the Code of Judicial Conduct. Hence, this Court's ruling in Petitioners' favor would represent a logical extension of our High Court's thinking.

Just as it is improper for a candidate for judicial

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