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TO: Jay Gallagher

FROM: Elena Ruth Sassower

DATE: September 3, 1993 1:45 p.m.

Per our conversation, faxed herewith is our FIRST DRAFT, which is provided to aid you in preparation of your story today. We expect that the final version will add a few pages relating to the Court's duty to recuse itself because of the appearance of impropriety resulting from the participation of cross-endorsed judges who tainted the panel (see Compendium 86-98, 95, 97). We will also discuss the significance of Justice Levine's concurrence in the denial of leave to appeal to the Court of Appeals (Compendium 103).

Also enclosed is the Table of Contents, which will facilitate your review of pertinent excerpts in the record before the Justice Levine.

FYI, the triple cross-endorsement of Justice Casey is reflected in the Board of Election records (Compendium 53), the quadruple cross-endorsement of Justice Weiss, is also reflected (Compendium 56). Neither of these judges disclosed such fact or disqualified themselves. Instead, they both participated in denying the Castracan v. Colavita case the preference to which it was automatically entitled under the Election Law and the Court's own rules (see Compendium 44-45).

Feel free to call with any questions or comments.

DRAFT

STATEMENT OF DORIS L. SASSOWER

I am here today as Director of the Ninth Judicial Committee, a non-partisan, grass-roots citizens' group. Formed in 1989 in the Ninth Judicial District, comprising the five counties of Westchester, Putnam, Dutchess, Rockland and Orange, our group spearheaded the case of Castracan v. Colavita, decided on appeal by a panel of the Appellate Division, Third Department, including Justice Howard Levine. That decision (Compendium 33-35), as well as a subsequent decision by the same panel on our motion for reargument/renewal/recusal and, alternatively, for

leave to appeal to the Court of Appeals (Compendium 103), gives compelling evidence that Justice Levine's elevation to this state's highest court not only disserves the public interest, but jeopardizes it.

Specifically and by way of overview, Justice Levine's participation in Castracan v. Colavita demonstrates:

(1) his insensitivity to ethical rules requiring recusal of judges whose "impartiality might reasonably be questioned" (Compendium 43-45; 53-56; 86-89; 95-97), as well as ethical rules requiring initiation of appropriate disciplinary measures against judges and lawyers for unprofessional conduct of which this case made him aware (Code of Judicial Conduct, Canon 3B.(3));

(2) his failure to address the lower court's patent disregard for elementary legal standards and its misrepresentation of the factual record (Compendium 66-67; 96-97);

(3) his disregard for basic rules of law which would have permitted the case--dramatically impacting on the public (Compendium 98-99; 101-102; 109)--to be heard on the merits, rather than dismissed on factually and legally inappropriate technicalities (Compendium 66-67; 69-86;

(4) his indifference to the case's profound constitutional and legal issues which--if not to be addressed on the merits by the Appellate Division, Third Department--required that Court to grant leave to appeal to the Court of Appeals

(Compendium 90-91).

No confirmation of this most important nomination should properly proceed unless and until there is a full review of the Castracan v. Colavita files by the members of this Committee and a report thereon is rendered. Such review would support the public perception that what was done by the Appellate Division, Third Department--with the knowledge and consent of Justice Levine--was not only a "cover-up" of judicial misconduct as committed by the lower court, but a deliberate perpetuation of the control of judgeships exerted by the two major political parties.

Indeed, the question the public has a right to have answered--and which this Committee is in a unique position to explore--is whether Justice Levine would be here today for confirmation, had he properly performed his adjudicative duties in the Castracan v. Colavita case. An already cynical public might rightfully perceive that Governor Cuomo's nomination of Justice Levine for a seat on the Court of Appeals is a "pay-back" for his having protected--not the public--but the political powers that controls "judge-making" in both parties.

Before presenting the facts and law in support of these serious charges, I believe it appropriate to set forth my relevant credentials (Compendium 117).

Since my graduation, cum laude, from New York University Law School in 1955, I have devoted most of my professional life to the cause of legal and judicial reform. In

1956, I worked as an assistant to Arthur T. Vanderbilt, then Chief Justice of New Jersey's highest court of the State of New Jersey, who is credited with having led the reform of New Jersey's archaic judicial system into one of the most modern justice systems in the country.

As President of the New York Women's Bar Association from 1968 to 1969, I, likewise, sought to improve the quality of justice and the judiciary. In 1971, I served on one of the first judicial screening panels which was set up in New York County. My article recounting that experience, published on the front page of the New York Law Journal (Compendium 116), led to the renaming of the Judiciary Committee of the New York State Bar Association as the Judicial Selection Committee and to my appointment as the first woman ever to serve on such a committee. In that capacity, from 1972 to 1980, I interviewed and evaluated the qualifications of every judicial candidate during that eight-year period for the Court of Appeals, as well as for the Appellate Division and the Court of Claims.

I myself was nominated as a candidate for the Court of Appeals in 1972 and, indirectly, was responsible for the subsequent legislative change that made Court of Appeals' judgeships appointive, rather than elective.

Throughout my years in my own private practice, I had the hightest rating of "AV" given by Martindale-Hubbell's Law Directory and, in June 1989, I was honored by election to the Fellows of the American Bar Foundation, "an honor reserved for

less than one-third of one percent of the practicing bar in each State".

In September 1990, I became pro bono counsel to the Ninth Judicial Committee and to the Petitioners in the case of Castracan v. Colavita. I served as such counsel from the inception of the case in the Supreme Court of Albany County through the appeal to the Appellate Division, Third Department--in which Justice Levine participated. After the Third Department's decision and following public announcement of my intention to take the case to the Court of Appeals, I was served with an order from the Appellate Division, Second Department, suspending me from the practice of law immediately, indefinitely, and unconditionally. There were no findings contained in the Order setting forth the basis upon which I was being suspended, as required by law nor any statement of reasons therefor, as required by the Appellate Division's own rules. In violation of rudimentary due process, no hearing was afforded me prior thereto--nor has any hearing been held in the more than two years that have elapsed since that time. There is every reason to infer that the suspension of my license was direct retaliation against me for having brought the Castracan v. Colavita case (Compendium 112-113), to discredit, silence, and prevent me from carrying that case forward, and to intimidate other lawyers from speaking out about what was done there.

In addition to the files of Castracan, which have already been provided to the Committee, I have brought with me

today the file relating to my suspension so that this Committee can determine for itself that there is not the slightest factual or legal basis for same. Examination of such file establishes the extent to which ulterior political motivations have, unabashedly, displaced respect for the factual record and rule of law in the courts of this State.

The Castracan case shows a similar, though more subtle, abandonment of settled principles of adjudication in favor of transparent self-serving political goals.

There were two politically-sensitive issues at the heart of Castracan v. Colavita case, raised by the pleaded factual allegations of the Petition: (1) a corrupt judge-trading political deal between the Republican and Democratic party leaders of the Ninth Judicial District of massive proportions, involving the bartering of seven judgeships over a three-year period--1989, 1990, and 1991--using the mechanism of cross-endorsements; and (2) illegally-run judicial nominating conventions at which the deal was implemented.

The pivotal terms of the deal--to which the judicial nominees all consented as a condition to their nomination--included the contracted-for resignation by Albert Emanuelli, elected under the 1989 phase of the deal as a Supreme Court judge with the proviso that eight months after taking office he would step down and be cross-endorsed, under the 1990 phase of the deal, to run for Westchester County Surrogate. Such early resignation would then create a judicial vacancy for another

judicial nominee under the deal. A further term agreed to by the judicial nominees was a pledge to split patronage in accordance with "the recommendations" of the party leaders.

The terms of the deal were indisputable since they were reduced to a written document and, in resolution form, ratified and implemented at the judicial nominating conventions of both parties (Compendium 1-3). A copy of that resolution was annexed to the Petition in Castracan v. Colavita.

Also supporting the Petition were Petitioners' verified Objections and Specifications thereof filed with the New York State Board of Elections, as well as affidavits of three eye-witnesses to the judicial nominating conventions of both parties, attesting to numerous violations of the Election Law at those conventions (Compendium 4-25). Such violations, forming a further basis for the Petition which sought to nullify the judicial nominations under the Deal, included the failure to comply with rudimentary quorum and other procedural requirements at the Democratic Judicial Nominating Conventions of both 1989 and 1990 and at the Republican judicial nominating conventions the fact that Westchester, and former New York State, Republican Party Chairman, Anthony Colavita, was not only the Convenor of the Convention, but presided as its Temporary and Permanent Chairman as well--all proscribed under the Election Law.

The case of Castracan v. Colavita thus raised not only public interest issues of transcending importance affecting the sanctity of the franchise, as well as the integrity and

independence of the judiciary, but presented the prospect of potential disciplinary and criminal liability against prominent lawyers who had signed perjurious certificates of nomination, falsely attesting to compliance with Election Law requirements. This is over and beyond the potential criminal liability on the part of the individual respondents, all lawyers whose culpable conduct, if established, would be subject to severe criminal and disciplinary penalties.

The personal, professional, and political stakes were, therefore, extraordinarily high. Looming beyond that was the larger question as to whether the wide-spread practice of judicial cross-endorsements was a disenfranchisement of constitutionally-guaranteed voting rights (Compendium 31; 34).

To understand what was done and not done by Justice Levine, sitting on the Appellate Division, Third Department panel which heard the appeal and affirmed the lower court's dismissal, without a hearing ever being had to prove the Petitioners' serious charges, I will briefly summarize the lower court's decision (Compendium 28-32).

The lower court took the position that it could not address the legality of the deal once it was ratified at properly-conducted judicial nominating conventions. It then ruled that there was no proof that the conventions were not properly conducted and dismissed the Petition for failure to state a cause of action on which relief could be granted.

Quite apart from the lower court's shocking view that

an illegal contract "wheeling and dealing" in judgeships loses its corruptive taint when it is filtered through the judicial nominating convention process, the lower court's decision was palpably erroneous because: (1) it disregarded the elementary rule--taught in first-year law school--that on a motion to dismiss, all material allegations and reasonable inferences are deemed true and that "proof" is irrelevant to such motion; (2) there was ample proof in the record of Election Law violations at the conventions--the verified Objections and Specifications thereof filed with the Board of Elections and the three eye-witness affidavits (Compendium 4-25)--all of which were unrefuted by Respondents; (3) if proof were to be an issue, Petitioners were entitled to an evidentiary hearing, as a matter of law. No such hearing had been afforded by the lower court.

Thus, at very least, as a threshold matter, the Appellate Division, Third Department was obliged to correct--if not reprimand--the lower court for its blatant departure from law and the factual record. Instead, the Appellate Division--with the concurrence of Justice Levine--accepted those indefensible departures, without comment, taking exception only to the lower court's decision not to address technical objections. The Appellate Division then sustained the lower court's dismissal on the ground of non-joinder of allegedly necessary parties, sua sponte ruling that another basis for dismissal was Petitioners' failure to serve the Attorney-General. It also gratuitously opined, without citation of authority, that

it had "grave doubts about the standing of Petitioners" (Compendium 33-35).

As pointed out by Peititioners' motion for reargument/renewal/recusal, and, alternatively, for leave to appeal to the Court of Appeals, the Appellate Division's post-election decision flew in the face of controlling decisional and statutory law that made the non-joinder objection readily cureable since CPLR 1001(b) specifically empowers the Court to direct an action to proceed even in the absence of a necessary party "when justice requires" and disregarded the seriousness of a situation involving questions of public importance not only likely to arise again, but which were then arising. Indeed, as pointed out by Petitioners' papers, the 1991 phase of the deal was then already being implemented.

Any reading of the Appellate Division's decision--and certainly in the context in the record before it--compels the inference that the Court did not want to reach the merits of the case, but rather to dismiss it on narrow technical grounds. Those grounds were, upon reargument, shown by controlling statutory and decisional law and the factual record, not to be a proper basis for dismissal (Compendium 67-86).

I respectfully refer the Committee to the reargument motion and 30-page memorandum of law (Compendium 61-92), since only such review can give the Committee insight into what Justice Levine permitted to be done, without so much as a dissenting voice.