NINTH JUDICIAL COMMITTEE

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August 24, 1993

Ned Cole, Counsel
Senate Judiciary Committee
Albany, New York

RE: Confirmation Hearings of Justice Howard Levine

Dear Mr. Cole:

This confirms our understanding that time will be reserved for the testimony of Doris L. Sassower to address the Senate Judiciary Committee at the confirmation hearings of Justice Howard Levine for appointment to the Court of Appeals to be held on September 7, 1993.

It is our view, based on his participation in the Appellate Division, Third Department's May 2, 1991 Decision in Castracan v. Colavita, that Justice Levine showed a profound insensitivity to legal and ethical rules relative to recusal and the transcending public interest issues involved in the case and disregarded controlling law.

As discussed, fully indexed and organized copies of the court record of Castracan v. Colavita--including the papers before the Appellate Division, Third Department--were previously transmitted by us to (1) Chairman Koppell of the Assembly Judiciary Committee; (2) Chairman Vitaliano of the Election Law Committee; and (3) Thea Hoeth, Director of the New York State Ethics Commission.

We have already placed a call to Chairman Koppell's office with a request that his copy of the two-volume record be supplied to you.

We would particularly draw your attention to File Folder "F", containing the reargument papers of the Third Department's May 2, 1991 Decision, including Petitioners' Notice of Motion (document "F-1"), Petitioners' supporting Memorandum of Law, (document "F-2"), and the Third Department's October 17, 1991 Decision

(document "F-14"), which denied the Petitioners' motion for reargument, as well as their alternative request for leave to appeal to the Court of Appeals.

We would also draw your attention to File Folder "A", containing three letters of Doris Sassower to Governor Cuomo relative to the Castracan v. Colavita case and its companion case, Sady v. Murphy. You will note that Doris Sassower's October 24, 1991 letter (document "A-1") specifically called upon the Governor to requisition the court records of those cases and appoint a special prosecutor to investigate the clear evidence of the politicization of our judiciary established by those and other cases.

Until you receive the record from Chairman Koppell, we enclose a copy of our Memorandum to the Court of Appeals (document "G-8") summarizing the pertinent issues as presented following the Third Department's May 2, 1991 Decision in Castracan. Said Memorandum was part of Petitioners' submission before the Third Department (Ex. "B" to document "F-9") in support of their request that the Appellate Division at least grant leave to appeal to the Court of Appeals. As shown by the Third Department's October 17, 1991 Decision (document "F-14"), Justice Levine concurred in the denial of said request.

For your further information, a copy of Doris Sassower's listing in Martindale-Hubbell's Law Directory is enclosed. She is a Fellow of the American Bar Foundation and was the first woman ever appointed to serve on the Judicial Selection Committee of the New York State Bar Association--on which she served from 1972-1980, evaluating every candidate for the Appellate Division, Court of Appeals, and Court of Claims during that period.

Yours for a quality judiciary,

Elena Ruth Sassower

ELENA RUTH SASSOWER
Coordinator, Ninth Judicial Committee

Enclosures: 11 pages

cc: Chairman Koppell, Assembly Judiciary Committee
Chairman Vitaliano, Election Law Committee
Thea Hoeth, Director, New York State Ethics Commission

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DORIS L. SASSOWER, born New York, N.Y., September 25, 1932; admitted to bar, 1955, New York; 1961, U.S. Supreme Court, U.S. Claims Court, U.S. Court of Military Appeals and U.S. Court of International Trade. *Education:* Brooklyn College (B.A., summa cum laude, 1954); New York University (J.D., cum laude, 1955). Phi Beta Kappa. Florence Allen Scholar. Law Assistant: U.S. Attorney's Office, Southern District of New York, 1954-1955; Chief Justice Arthur T. Vanderbilt, Supreme Court of New Jersey, 1956-1957. President, Phi Beta Kappa Alumnae in New York, 1970-71. President, New York Women's Bar Association, 1968-69. President, Lawyers' Group of Brooklyn College Alumni Association, 1963-65. Recipient: Distinguished Woman Award, Northwood Institute, Midland, Michigan, 1976. Special Award "for outstanding achievements on behalf of women and children," National Organization for Women—NYS, 1981; New York Women's Sports Association Award "as champion of equal rights," 1981. Distinguished Alumna Award, Brooklyn College, 1973. Named Outstanding Young Woman of America, State of New York, 1969. Nominated as candidate for New York Court of Appeals, 1972. Columnist: ("Feminism and the Law") and Member, Editorial Board, Woman's Life Magazine, 1981. Author: Book Review, *Separation Agreements and Marital Contracts,* Trial Magazine, October, 1987; *Support Handbook, ABA Journal,* October, 1986; Anatomy of a Settlement Agreement Divorce Law Eduction Institute 1982 "Climax of a Custody Case," *Litigation,* Summer, 1982; "Finding a Divorce Lawyer you can Trust," *Scarsdale Inquirer,* May 20, 1982. "Is This Any Way To Run An Election?" *American Bar Association Journal,* August, 1980; "The Disposable Parent: The Case for Joint Custody," Trial Magazine, April, 1980. "Marriages in Turmoil: The Lawyer as Doctor," Journal of Psychiatry and Law, Fall, 1979. "Custody's Last Stand," Trial Magazine, September, 1979; "Sex Discrimination-How to Know It When You See It," *American Bar Association Section of Individual Rights and Responsibilities Newsletter,* Summer, 1976; "Sex Discrimination and The Law," *NY Women's Week,* November 8, 1976; "Women, Power and the Law," *American Bar Association Journal,* May, 1976; "The Chief Justice Wore a Red Dress," *Woman In the Year 2000,* Arbor House, 1974; "Women and the Judiciary: Undoing the Law of the Creator," *Judicature,* February, 1974; "Prostitution Review," *Juris Doctor,* February, 1974; "No-Fault' Divorce and Women's Property Rights," *New York State Bar Journal,* November, 1973; "Marital Bliss: Till Divorce Do Us Part," *Juris Doctor,* April, 1973; "Women's Rights in Higher Education," *Current,* November, 1972; "Women and the Law: The Unfinished Revolution," *Human Rights,* Fall, 1972; "Matrimonial Law Reform: Equal Property Rights for Women," *New York State Bar Journal,* October, 1972, "Judicial Selection Panels: An Exercise in Futility?", *New York Law Journal,* October 22, 1971; "Women in the Law: The Second Hundred Years," *American Bar Association Journal,* April, 1971; "The Role of Lawyers in Women's Liberation," *New York Law Journal,* December 30, 1970; "The Legal Rights of Professional Women," *Contemporary Education,* February, 1972; "Women and the Legal Profession," *Student Lawyer Journal,* November, 1970; "Women in the Professions," *Women's Role in Contemporary Society,* 1972; "The Legal Profession and Women's Rights," *Rutgers Law Review,* Fall, 1970; "What's Wrong With Women Lawyers?", Trial Magazine, October-November, 1968. Address to: The National Conference of Bar Presidents, Congressional Record, Vol. 115, No. 24 E 815-6, February 5, 1969; The New York Womens Bar Association, Congressional Record, Vol. 114, No. E5267-8, June 11, 1968. Director: New York University Law Alumni Association, 1974; International Institute of Women Studies, 1971; Institute on Women's Wrongs, 1973; Executive Woman, 1973. Co-organizer, National Conference of Professional and Academic Women, 1970. Founder and Special Consultant, Professional Women's Caucus, 1970. Trustee, Supreme Court Library, White Plains, New York, by appointment of Governor Carey, 1977-1986 (Chair, 1982-1986). Elected Delegate, White House Conference on Small Business, 1986. Member, Panel of Arbitrators, American Arbitration Association. *Member:* The Association of Trial Lawyers of America; The Association of the Bar of the City of New York; Westchester County, New York State (Member: Judicial Selection Committee; Legislative Committee, Family Law Section), Federal and American (ABA Chair, National Conference of Lawyers and Social Workers, 1973-1974; Member, Sections on: Family Law; Individual Rights and Responsibilities Committee on Rights of Women; 1982; Litigation) Bar Associations; New York State Trial Lawyers Association; American Judicature Society; National Association of Women Lawyers (Official Observer to the U.N., 1969-1970); Consular Law Society; Roscoe Pound-American Trial Lawyers' Foundation; American Association for the International Commission of Jurists; Association of Feminist Consultants; Westchester Association of Women Business Owners; American Womens' Economic Development Corp.; Womens' Forum. Fellow: American Academy of Matrimonial Lawyers; New York Bar Foundation.

"AV" rating
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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 vacancies[1] and a pledge to split patronage after consultation with the political leaders of both parties[2].

(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 justice[3], 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 themselves[4] or even to disclose their own cross-endorsements;

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

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[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 them[5].

(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"

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[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 requirements[6].

(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-endorsed[7]--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

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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 below[8]. 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).

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[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 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.

trading arrangement by party bosses[12] 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.

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[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.