NINTH JUDICIAL COMMITTEE

Box 69, Gedney Station
White Plains, New York 10605-0069
Tel: (914) 997-8105 / Fax: (914) 684-6554

TABLE OF CONTENTS

Focal Documents from the file of Castracan v. Colavita, Appellate Division, 3rd Dept., to be referred to in the testimony of Doris L. Sassower before the Senate Judiciary Committee on Tuesday, September 7, 1993, in opposition to the nomination of Hon. Howard Levine to the New York State Court of Appeals

ADDENDUM

In furtherance of a mutual interest to promote a non-partisan judiciary populated by lawyers with universally acclaimed litigation skills, unblemished reputations for character and judicial temperament and distinguished civic careers, and to enable sitting judges of universally acclaimed merit to attain re-election to their judicial office without the need to participate in a partisan contest, the Westchester County (Republican) (Democratic) Committee joins with the Westchester County (Republican) (Democratic) Committee to Resolve:

That for the General Election of 1989, we hereby pledge our support, endorse and nominate Supreme Court Justice Joseph Jiudice, Supreme Court Justice Samuel G. Fredman and Albert J. Emanuelli, Esq. of White Plains, New York for election to the Supreme Court of the State of New York, Ninth Judicial District, and to call upon and obtain from our counterparts in Rockland, Orange, Dutchess and Putnam Counties similar resolutions; and

For the general election of 1990, assuming that the then Justice Albert J. Emanuelli will resign from the Supreme Court Bench to run for Surrogate of Westchester County and thereby create a vacancy in the Supreme Court, Ninth Judicial District to be filled in the 1990 general election, we hereby pledge our support, endorse and nominate County Court Judge Francis A. Nicolai as our candidate for the Supreme Court vacancy created by Judge Emanuelli's resignation, and to call upon and obtain

EXHIBIT G

000 52

from our counterparts in Rockland, Orange, Dutchess and Putnam counties resolutions and commitments to support Judge Francis A. Nicolai as their candidate to fill the vacancy created by the resignation of Judge Emanuelli; and we hereby pledge our support, endorse and nominate Albert J. Emanuelli as our candidate for Westchester County Surrogate in the 1990 general election.

For the general election of 1991, we hereby pledge our support, endorse and nominate Judge J. Emmet Murphy, Administrative Judge of the City Court of Yonkers, for election to the County Court of Westchester County to fill the vacancy anticipated to be created by the election of Judge Francis A. Nicolai to the Supreme Court and Judge Adrienne Hofmann Scancarelli, Administrative Judge of the Family Court, Westchester County, for re-election to the Family Court, Westchester County; and

To require each of the above-named persons to pledge that, once nominated for the stated judicial office by both of the major political parties, he or she will refrain from partisan political endorsements during the ensuing election campaign and, thereafter, will provide equal access and consideration, if any, to the recommendations of the leaders of each major political party in connection with proposed judicial appointments.

We are resolved and agreed that the foregoing Resolution and pledges are intended to and shall be binding upon the respective Committees of the two major political parties during the years 1989, 1990 and 1991 and shall not be affected by any action or proposed action or court merger or court unification.

SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
MARIO M. CASTRACAN and VINCENT F. BONELLI,
acting Pro Bono Publico,

Petitioners,

Index No. 6056/90

for an Order, pursuant to Sections
16-100, 16-102, 16-104, 16-106 and
16-116 of the Election Law,

Affidavit

-vs-

ANTHONY J. COLAVITA, Esq., Chairman,
WESTCHESTER REPUBLICAN COUNTY COMMITTEE,
GUY T. PARISI, Esq., DENNIS MEHIEL, Esq.,
Chairman, WESTCHESTER DEMOCRATIC COUNTY
COMMITTEE, RICHARD L. WEINGARTEN, Esq.,
LOUIS A. BREVETTI, Esq., Hon. FRANCIS A.
NICOLAI, HOWARD MILLER, Esq., ALBERT J.
EMANUELLI, Esq., R. WELLS STOUT,
HELENA DONAHUE, EVELYN AQUILA, Commissioners
constituting the NEW YORK STATE BOARD
OF ELECTIONS, ANTONIA R. D'APICE,
MARION B. OLDI, Commissioners constituting
the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondents,

for an Order declaring invalid the Certificates
purporting to designate Respondents Hon. FRANCIS A.
NICOLAI and HOWARD MILLER, Esq. as candidates for
the office of Justice of the Supreme Court of the
State of New York, Ninth Judicial District, and
the Petitions purporting to designate ALBERT J.
EMANUELLI, Esq. a candidate for the office of
Surrogate of Westchester County to be held in
the general election of November 6, 1990.

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

VINCENT F. BONELLI, being duly sworn, deposes and says:

1. I am one of the Petitioners in the above-entitled matter and submit this Affidavit in support of the relief requested in my Petition and Order to Show Cause instituting the above-entitled special proceeding, dated September 26, 1990.

2. I am a full-time professor of history at Bronx Community College of the City University of New York and an adjunct professor of history and government at the Westchester Community College in Valhalla, New York, with a doctorate in history and political science. I have been so employed for twenty (20) years.

3. On Monday evening, September 24, 1990, I, together with Eli Vigliano, Esq., Doris L. Sassower, Esq., and Filomena Vigliano, went to the Days' Inn located on White Plains Road in Greenburgh, New York, where the Democratic Judicial Nominating Convention was scheduled to take place at 7:00 p.m. We arrived at the Days' Inn at that hour.

4. When we went into the lobby, we were directed to Meeting Rooms A and B, where we were told the Convention would take place. We proceeded to the entrance of said Meeting Rooms, where an attendance sheet on a table was available to sign. A woman seated at the table stated that one did not have to be a Delegate or an Alternate Delegate in order to sign the attendance sheet. Mr. Vigliano signed the sheet, the rest of us did not.

5. We then entered the meeting room, which had a movable partition, separating rooms A and B, which was recessed into a slot in the wall. There were approximately 25-30 people seated at the time. The chairs were arranged in rows of five on one side, with a middle aisle separating four chairs on the other side. There were a total of eight rows on each side. A count showed 32 chairs on one side, 37 on the other, totaling 69 seats. We occupied four of the 69 seats. There was also a dais with four chairs and side tables set up with refreshments.

6. At about 7:40 p.m., a man identified himself as DENNIS MEHIEL, Chairman of the Westchester Democratic County Committee. He called the meeting to order. He said he was reading a letter sent to him by Hon. JOHN MARINO, Chairman of the Democratic State Committee, which stated that he had been designated as the person to convene the Convention and to call the Convention to order.

7. Not all the seat were occupied at that time. There were about 10-15 people milling about in the rear of the room, and 8-10 people milling about at the side of the room where a table had been set up with sodas, coffee, and pastries.

8. When Mr. MEHIEL concluded reading the aforesaid letter from Mr. MARINO, he stated he would call the Roll. A

motion was thereupon made that the calling of the Roll be dispensed with. Mr. MEHIEL then turned to a man later identified as J. HASHMALL, Esq. and requested a ruling as to the legality of dispensing with the Roll Call. Mr. HASHMALL responded that, in the opinion of counsel to the County Committee, if a resolution dispensing with the calling of the Roll was adopted unanimously, the Convention could legally be organized and proceed with conducting its business.

9. Mr. MEHIEL thereupon accepted the motion, which was seconded. He called for a vote. A number of people raised their hands and said "Aye". Mr. MEHIEL asked if there were any "Nays"; none were expressed. The Chairman made no inquiry as to the identity or credentials of the persons voting, nor did he attempt to establish the presence of a quorum. Nevertheless, he announced that by the unanimous adoption of the motion to dispense with the Roll, it was legal and valid for the Convention to proceed with its business.

10. Mr. MEHIEL thereupon accepted a motion to elect a Temporary Chairman to the Convention. An individual nominated Jay B. HASHMALL, Esq. The motion was seconded. A voice vote was taken and Mr. HASHMALL was unanimously elected Temporary Chairman. Thereupon, Mr. MEHIEL turned the meeting over to Mr. HASHMALL.

11. Thereupon, Mr. HASHMALL called for a nomination for the election of a Temporary Secretary, and a MARC OXMAN was nominated. The nomination was seconded. Nominations were closed. A voice vote was taken and Mr. OXMAN was elected Temporary Secretary.

12. Mr. HASHMALL then said that the business of the Convention was to nominate three (3) candidates to fill the three (3) vacancies in the office of Justice of the Supreme Court of the State of New York for the Ninth Judicial District and that nominations would be in order. He then recognized THOMAS ABINANTI, Esq., who nominated JOAN LEFKOWITZ as a candidate for one of the three vacancies. The nomination was seconded. Thereupon Mr. KENNETH P. ZEBROSKI was recognized, who nominated FRANCIS A. NICOLAI for the second vacancy, and the nomination was seconded. Mr. HASHMALL then recognized Mr. WILLIAM FRANK, who nominated HOWARD MILLER, Esq., for the third vacancy. The nomination was, likewise, seconded. Mr. HASHMALL then asked whether there were any other nominations. There being none, a motion to close nominations was made, seconded, and carried by a voice vote.

13. Thereupon Mr. HASHMALL asked for a motion that the Secretary cast one ballot for the adoption of the resolution nominating JOAN LEFKOWITZ, FRANCIS A. NICOLAI, and HOWARD MILLER as the candidates of the Democratic Party to fill the three vacancies for Supreme Court Justices. Such motion was made,

seconded, and a voice vote taken. All "Ayes" were heard, and there being no "Nays", the one ballot was cast for said nominations.

14. Mr. HASHMALL then recognized DIANA JUETTNER, Esq., who made a motion naming certain individuals to constitute the Committee on Vacancies, which motion was seconded and adopted by voice vote.

15. Acceptance speeches by each of the Candidates were then given.

16. Thereupon, Mr. HASHMALL entertained a motion to adjourn the meeting, which was seconded, a vote taken thereon, and the resolution was adopted at approximately 8:10 p.m. The Convention then adjourned.

17. At that point, Mr. Vigliano and I left the room and went into the lobby. Mr. Vigliano spoke to some man I did not know. Ms. Sassower, who had previously left the meeting room, was speaking to various individuals milling about in the lobby.

18. I can state unequivocally that no Roll Call was ever taken during the proceedings I attended, which purported to be a Democratic Judicial Nominating Convention. Moreover, I have

since learned that there were 129 Judicial Delegates and 129 Alternate Delegates elected in 1990. However, I am informed that Meeting Rooms A and B could not physically provide seating capacity for 258 Delegates and Alternates. The rooms were only set up with a total seating to accommodate no more than 75 persons.

19. It is clear that a quorum of the Delegates was not present, which would have required at least 65 Delegates and/or Alternates to be in attendance. In addition to the four of us, who were not Delegates or Alternate Delegates, it appeared that there were many other people in the room, who were likewise not Delegates or Alternates. This became apparent when acceptance speeches were made by the three nominees, at which time their various relatives and friends were identified.

20. There was no way provided to verify how many people sitting in the chairs in the Meeting Room on that night were, in fact, duly-elected Delegates or Alternates to the Convention. Delegates and Alternates were not provided with any badge or other indicia of their status. There was no inquiry or interest by those in charge into the status of anyone sitting in the room--or their right to be counted in a quorum or their right to vote. Indeed, on several occasions, Mr. Vigliano's mother, Filomena Vigliano, in the spirit of cooperation, said "Aye", without challenge, to a number of motions being voted upon.

21. Based on what I saw and heard that night, there is not a shred of doubt (and it should be undisputed) that the judicial nominees for the Supreme Court of the Ninth Judicial District, named on the Certificate filed with the New York State Board of Elections, were not duly nominated at a duly constituted Convention, at which a majority of Delegates or Alternates entitled to vote were present to constitute a legal quorum, as required by applicable provisions of the Election Law. The most elemental requirement of duly-electing nominees and adopting resolutions at a Convention is the fundamental determination as to whether a quorum of the duly-elected Delegates and Alternates are present and voting. The vote to dispense with calling the Roll, without first ascertaining that there was a legal quorum present and entitled to vote thereon, plainly rendered all resulting votes meaningless. It should be declared void by this Court.

WHEREFORE, it is respectfully prayed that the aforesaid judicial nominations of Hon. FRANCIS A. NICOLAI and HOWARD MILLER, Esq. be invalidated, and that the additional relief requested in my Petition and Order to Show Cause be granted in its entirety.

S/
VINCENT F. BONELLI

Sworn to before me this
14 day of October, 1990

DORIS B. SASSOWER
Notary Public, State of New York
No. 60-4857772
Qualified in Westchester County
Term Expires March 30, 1991

SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

----------X

In the Matter of the Application of
MARIO M. CASTRACAN and VINCENT F. BONELLI,
acting Pro Bono Publico,

Petitioners,

Index No. 6056/90

for an Order, pursuant to Sections
16-100, 16-102, 16-104, 16-106 and
16-116 of the Election Law,

Affidavit

-vs-

ANTHONY J. COLAVITA, Esq., Chairman,
WESTCHESTER REPUBLICAN COUNTY COMMITTEE,
GUY T. PARISI, Esq., DENNIS MEHIEL, Esq.,
Chairman, WESTCHESTER DEMOCRATIC COUNTY
COMMITTEE, RICHARD L. WEINGARTEN, Esq.,
LOUIS A. BREVETTI, Esq., Hon. FRANCIS A.
NICOLAI, HOWARD MILLER, Esq., ALBERT J.
EMANUELLI, Esq., R. WELLS STOUT,
HELENA DONAHUE, EVELYN AQUILA, Commissioners
constituting the NEW YORK STATE BOARD
OF ELECTIONS, ANTONIA R. D'APICE,
MARION B. OLDI, Commissioners constituting
the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondents,

for an Order declaring invalid the Certificates
purporting to designate Respondents Hon. FRANCIS A.
NICOLAI and HOWARD MILLER, Esq. as candidates for
the office of Justice of the Supreme Court of the
State of New York, Ninth Judicial District, and
the Petitions purporting to designate ALBERT J.
EMANUELLI, Esq. a candidate for the office of
Surrogate of Westchester County to be held in
the general election of November 6, 1990.

----------X

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

ELI VIGLIANO, being duly sworn, deposes and says:

1. I am an attorney licensed to practise law in the State of New York since 1950. I am currently Chairman of the Ninth Judicial Committee, a group organized in Westchester County in 1989, comprised of lawyers and non-lawyers working to assure that the most qualified judges are chosen, that politics and politicians are removed as far as possible from the judicial arena and, in particular, to assure that the election of Judges in the Ninth Judicial District is accomplished in accordance with the legal requirements of the Election Law and Constitution of the State of New York.

2. The origin of this group came out of my observation of the manner in which the Judicial Nominating Conventions in the Ninth Judicial District are run and their failure to conform to the most fundamental procedural requirements of the Election Law of the State of New York.

3. On August 23, 1989, I attended a meeting of the Executive Committee of the Westchester County Democratic Party, at its former offices at 203 Main Street, White Plains, New York. I arrived at the meeting at about 8:00 p.m. There were approximately 30 individuals in attendance, who were, I was told, members of the Westchester Democratic County Executive Committee. RICHARD L. WEINGARTEN, Esq., the then Chairman of the WESTCHESTER DEMOCRATIC COUNTY COMMITTEE was presiding. Mr. WEINGARTEN called the meeting to order and explained in detail

the terms of an agreement that had been arrived at with the WESTCHESTER REPUBLICAN COUNTY COMMITTEE, providing for the election of Supreme Court Judges in Westchester County for the next three years, i.e., 1989, 1990, and 1991 (the "Three Year Plan").

4. Mr. WEINGARTEN outlined the benefits accruing by WESTCHESTER DEMOCRATIC COUNTY COMMITTEE becoming a party to this agreement--that by cross-endorsing the two Republican nominees, ALBERT J. EMANUELLI, Esq. and Hon. JOSEPH JIUDICE for two of the three Supreme Court vacancies in 1989, the election of SAMUEL G. FREDMAN, a Democrat, to the third vacancy would be assured. Mr. WEINGARTEN further stated that Mr. EMANUELLI would resign in 1990, eight months after his induction into office, so that he could become the cross-endorsed candidate for the office of Surrogate of Westchester County. This was necessary to satisfy Mr. COLAVITA that the Republicans would keep the Surrogate office. The Supreme Court vacancy created by Mr. EMANUELLI's resignation would then be filled by a Democratic County Court Judge, FRANCIS A. NICOLAI. In 1991, the vacancy created in the County Court by the elevation of FRANCIS A. NICOLAI to the Supreme Court would be filled by T. EMMET MURPHY, a Democratic City Court Judge, with ADRIENNE H. SCANCARELLI, a Republican, cross-endorsed for re-election to the office of Family Court Judge, Westchester County. All judicial nominees, including Mr. EMANUELLI, would pledge that after their election, they would

give out their patronage on an equal basis, according to the recommendations of the two party leaders.

5. Some discussion ensued, primarily by Mr. M. PAUL REDD, who I believe was a member of the Executive Committee, complaining beause the agreement did not include a Democratic African American Judge. It was explained to him that, although there had been some consideration given to including an African American, it was not feasible or practical to do so at that point in time.

6. Mr. WEINGARTEN stated that the agreement had been put in written form as a Resolution. Thereupon, Mr. WEINGARTEN asked for a vote to adopt the Resolution, annexed hereto (which is also Exhibit "G" to the Petition filed herein). Mr. WEINGARTEN stated that the Resolution was expressly conditioned on its being similiarly adopted by the WESTCHESTER REPUBLICAN COUNTY COMMITTEE at its Executive Committee meeting the next night. It was adopted by a voice vote, with two abstentions. Thereupon, a member moved that adoption of the Resolution be made unanimous. The motion was seconded. Upon an overwhelming affirmative vote, one of the members who had abstained, withdrew the abstention. The other individual who had abstained, refused to withdraw it. Hence, the motion to adopt the Resolution unanimously failed to carry.

7. I then asked to say a few words and recounted my having been active many years ago in an effort to reform the Bronx Democratic Party. I noted my surprise that "deals" for judicial office, formerly made in the "smoke-filled backroom", behind closed doors by political leaders were now being discussed out in the open, and most incredibly, that a writing memorializing such "deals" was even put in resolution form at a public meeting. Mr. WEINGARTEN interrupted to ask me if I was a member of the Executive Committee. When I replied that I was not, he said that I was out of order that although Democrats were permitted to attend Executive Committee meetings, they could not participate therein. I thereupon remained silent for the rest of the meeting, which adjourned shortly after.

8. The next day, I planned to attend the scheduled meeting of the Executive Committee of the WESTCHESTER REPUBLICAN COUNTY COMMITTEE, but was informed that it was not open to the public, nor for that matter to enrolled Republicans. Executive Committee meetings were open only to its members, party officials, and invited guests. Hence, I did not attend said meeting and do not know what occurred at that meeting.

9. On September 19, 1989, I attended the Democratic Judicial Nominating Convention called for the Ninth Judicial District at the Tarrytown Hilton on the Albany Post Road, Tarrytown, New York. The meeting was held in a small meeting

room in the lower level. A cash bar was set up in the rear. I arrived at about 7:00 p.m. Some people were milling about in the hall. There was a photographer from the local newspaper, The Reporter Dispatch. At about 7:30 p.m., DORIS L. SASSOWER, Esq. arrived with a companion.

10. At about 8:00 p.m., the Convenor, LOUIS BREVETTI, Esq., called the Convention to order, and announced that he had been designated as the person to convene the Convention. Without any Roll Call of the Delegates present, he announced that since he could observe that a quorum was present, the Convention would proceed to transact its business. Whereupon, he asked for a motion that he be elected Temporary Chairman, which motion was adopted. He proceeded to ask for a motion to have two Temporary Secretaries elected, which was adopted. He asked for a motion to have himself elected as Permanent Chairman, which was adopted. He then asked for a motion to have GWENDOLYN B. LYNCH and MIMI P. SCHNALL elected as the Permanent Secretaries, which was likewise adopted. None of these motions electing the individuals to said respective offices were adopted by any Roll Call vote.

11. Indeed, at no time was a Roll Call vote ever taken, not even to ascertain the presence of a quorum. There were no badges or other identification as to who were, in fact, duly elected Delegates and Alternate Delegates to the Convention. At no point was there any count taken to ascertain that a

sufficient number of Delegates and Alternates were present so that it could, in fact, be determined that there was a quorum of legally elected Delegates and/or Alternate Delegates present. There was no demarcation in the seating arrangements of any area reserved for Delegates and/or Alternates. There were clearly a number of people seated in the room who were not Delegates or Alternates, and there were many empty chairs.

12. I learned thereafter that although 125 Delegates and 125 Alternate Delegates were elected, only about 100 chairs were provided in the room. Thus, clearly, there was not sufficient seating provided to accommodate the 250 Delegates and Alternate Delegates, as required. In fact, the total number of people in the room was no more than 65, of whom many were not Delegates and/or Alternates. It would appear that because Mr. Weingarten realized there definitely was no quorum, he decided to dispense with any roll call which would have plainly established the absence thereof.

13. Among those who were seated who were not Delegates or Alternates were myself, Doris L. Sassower, Esq., and her companion. Others included MILTON HOFFMAN, the Political Editor for the Westchester-Rockland Newspapers, who was covering the Convention. In addition, all of the judicial candidates were seated, with friends and relatives. These included Hon. SAMUEL G. FREDMAN, then a sitting Supreme Court Justice, with a companion,

ALBERT J. EMANUELLI, a practicing lawyer who had been named in the Resolution adopted by both the WESTCHESTER DEMOCRATIC EXECUTIVE COMMITTEE and the WESTCHESTER REPUBLICAN EXECUTIVE COMMITTEE, and Hon. JOSEPH JIUDICE, Justice of the Supreme Court. Also present was GUY T. PARISI, Esq., counsel to the WESTCHESTER REPUBLICAN COUNTY COMMITTEE.

14. Mr. WEINGARTEN was then given the floor by Mr. BREVETTI, who stated that the purpose of the Convention was to nominate three Democratic candidates for the three vacancies that would be voted for at the 1989 General Election for office of Justice of the Supreme Court, State of New York, Ninth Judicial District. He then talked proudly about the "historic" agreement that had been made between him and Mr. COLAVITA, and described in detail the Resolution adopting it by the Executive Committees of the County Committees in all five counties comprising the Ninth Judicial District. Mr. WEINGARTEN recited his backgroung as an enrolled Democrat and his involvement in politics spanning 35 years. He remarked sardonically that he never thought he would see the day that he would be a party to an agreement to nominate Republican candidates, or that he would ever see two Republican candidates on the Democratic line, without opposition, for Justice of the Supreme Court in the Ninth Judicial District.

15. Mr. WEINGARTEN then nominated Mr. ALBERT J. EMANUELLI as the first nominee. Mr. STANLEY GOODMAN was then

given the floor. He nominated Mr. SAMUEL G. FREDMAN. Mr. BERNARD KESSLER took the floor and nominated JOSEPH JIUDICE. All of the nominations were seconded, and voice votes were taken separately adopting each nomination unanimously. The three candidates then were asked to address the Convention in acceptance of their nominations and to sign the acceptance Certificates, and the meeting was then adjourned.

16. At the conclusion of the meeting Mr. EMANUELLI went to Mr. BREVETTI and complimented him on the fine way he had conducted the meeting. They joked about the fact that in the course of conducting the meeting, Mr. BREVETTI had lapsed and referred to conducting the meeting in accordance with a "script". Mr. EMANUELLI suggested that since he did such a fine job in running the Democratic Convention, he should conduct the Republican Convention scheduled for later that week. GUY T. PARISI interjected that Mr. COLAVITA ran the nominating judicial conventions himself personally, and would not permit anyone else to conduct such important business. Everyone understood that the work of the Republican Judicial Convention was to rubber stamp the deal which Mr. COLAVITA had made with Mr. WEINGARTEN.

17. The next day, Wednesday, I telephoned the WESTCHESTER COUNTY REPUBLICAN headquarters to inquire whether an enrolled Republican would be permitted to attend and observe the Republican Convention for the Ninth Judicial District scheduled

for the coming Friday, September 22. I was told unequivocally, that the Republican nominating judicial Convention was open only to Delegates, Alternate Delegates, and party officials, and no others were permitted to attend.

18. I have read the accompanying Affidavit of Professor VINCENT F. BONELLI describing his observations concerning attendance at and his observations of the proceedings conducted at the Democratic Judicial Convention held on September 14, 1990. I confirm, adopt, and ratify, as true correct and accurate, his recital of the facts therein stated, most especially his statements relative to the failure to call the Roll at any time, even to establish the presence of a quorum, the fact that there was no quorum, and the clear inadequacy of the room size and seating accommodations, in violation of Election Law requirements.

S/
ELI VIGLIANO

Sworn to before me this
14th day of October, 1990

S/
Notary Public

SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

----------x

In the Matter of the Application of
MARIO M. CASTRACAN and VINCENT F. BONELLI,
acting Pro Bono Publico,

Petitioners,

Index No.

for an Order, pursuant to Sections
16-100, 16-102, 16-104, 16-106 and
16-116 of the Election Law,

-vs-

ANTHONY J. COLAVITA, Esq., Chairman,
WESTCHESTER REPUBLICAN COUNTY COMMITTEE,
GUY T. PARISI, Esq., DENNIS MEHIEL, Esq.,
Chairman, WESTCHESTER DEMOCRATIC COUNTY
COMMITTEE, RICHARD L. WEINGARTEN, Esq.,
LOUIS A. BREVETTI, Esq., Hon. FRANCIS A.
NICOLAI, HOWARD MILLER, Esq., ALBERT J.
EMANUELLI, Esq., R. WELLS STOUT,
HELENA DONAHUE, EVELYN AQUILA, Commissioners
constituting the NEW YORK STATE BOARD
OF ELECTIONS, ANTONIA R. D'APICE,
MARION B. OLDI, Commissioners constituting
the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondents,

for an Order declaring invalid the Certificates purporting to designate Respondents Hon. FRANCIS A. NICOLAI and HOWARD MILLER, Esq. as candidates for the office of Justice of the Supreme Court of the State of New York, Ninth Judicial District, and the Petitions purporting to designate ALBERT J. EMANUELLI, Esq. a candidate for the office of Surrogate of Westchester County to be held in the general election of November 6, 1990.

----------x

DAVID B. COHEN, an attorney duly licensed to practice law in the Courts of the State of New York, affirms the following to be true under penalty of perjury:

1. On September 18, 1990, I accompanied Eli Vigliano,

Esq. to the Westchester Marriott Hotel in Tarrytown, New York. We arrived there at approximately 1:00 P.M. We inquired at the front desk as to the location of the Republican Party's Ninth District Judicial Convention, and were referred to Ballroom "D".

2. When Mr. Vigliano and I arrived at Ballroom "D", we observed a number of people milling around, including Judge Nicolai, Richard Ross, Sanford Dranoff and Lawrence Glynn.

3. At approximately 1:20 P.M., we went into the Ballroom and found our seats. At approximately 1:30 P.M., Anthony Colavita called the meeting to order, and asked Peter Manos to call the roll. Mr. Manos thereupon called the names of all Delegates and Alternates. Those in attendance indicated their presence after their respective names were called. At the conclusion of the roll call, Mr. Manos announced that eighty-one (81) Delegates and/or Alternates were present, and that they constituted a quorum.

4. At the conclusion of the calling of the roll, Mr. Colavita accepted the nomination of Temporary Chairman of the Convention. His nomination was seconded. There were no other nominations. A voice vote was then taken and Mr. Colavita was unanimously elected as Temporary Chairman.

5. Mr. Colavita thereupon requested a nomination for the office of Temporary Secretary of the Convention. Mr. Manos was then nominated as Temporary Secretary, the nomination was seconded in the absence of other nominations and, after a voice vote, the motion was unanimously adopted.

6. Mr. Colavita then asked for a motion that the Temporary Chairman and the Temporary Secretary be elected as Permanent Chairman and Permanent Secretary, respectively, of the Convention. A motion was made to that effect, it was seconded and unanimously adopted. Thereupon, Messrs. Colavito and Manos were sworn in to those respective offices.

7. Mr. Colavita then announced that the purpose of the Convention was to nominate three candidates for the office of Justice of the Supreme Court. He recommended that certain rules be adopted respecting these nominations, such as, for instance, that each office be voted upon separately, that the length of nominating and seconding speeches be limited to five minutes and to one minute, respectively, etc. Thereupon a motion was made that such rules be adopted. The motion was seconded and then unanimously adopted.

8. After adoption of the aforesaid rules, Mr. Colavita designated Guy Parisi as Parliamentarian of the Convention, and two tellers from each of the five counties comprising the Ninth Judicial District.

9. Mr. Colavita then announced that nominations were in order for the first position of Justice of the Supreme Court. George Roberts was nominated for this position, and the nomination was seconded. There were no further nominations. A motion to close the nomination was then made, seconded, voted upon by voice vote and passed. A voice vote was then held on the nomination itself, and Mr. Roberts' nomination was unanimously

passed.

10. At this juncture, Mr. Colavita stated that he had overlooked the recital of the Pledge of Allegiance, which he said should have taken place immediately after the call of the roll. He asked everyone to join him in making the Pledge.

11. Soon after the Pledge of Allegiance had been recited, Mr. Vigliano and I left the Ballroom. It was approximately 2:15 P.M.

Dated: White Plains, New York
October 5, 1990

DAVID B. COHEN

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

ELI VIGLIANO, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at White Plains, New York.

On October 15, 1990, deponent served the within: Affidavits of Vincent F. Bonelli and Eli Vigliano and an Affirmation of David B. Cohen, Esq.

upon:

Thomas J. Abinanti, Esq.
Attorney for Respondent Nicolai
Six Chester Avenue
White Plains, New York 10601

Marilyn J. Slaatten, Esq.
County Attorney
Attorney for D'Apice & Oldi
148 Martine Avenue
White Plains, New York 10601

Hall, Dickler, Lawler, Kent & Friedman
Sam Yasgur, Esq.
Attorneys for Emanuelli
11 Martine Avenue
White Plains, New York 10606

Aldo V. Vitagliano, P.C.
Guy T. Parisi, Esq., Of Counsel
Attorneys for Colavita
150 Purchase Street
Rye, New York 10580

Hashmall, Sheer, Bank & Geist
Attorneys for Mehiel, Westchester Democratic County Committee & Weingarten
235 Mamaroneck Avenue
White Plains, New York 10605

Sanford S. Dranoff, Esq.
Attorney for Miller
One Blue Hill Plaza
P.O. Box 1629
Pearl River, New York 10965-8629

John Ciampoli, Esq.
Attorney for N.Y. State Board of Elections
One Commerce Plaza
P.O. Box 4
Albany, N.Y. 12260

by furnishing true copies thereof to them at the Courthouse on October 15, 1990 and thereafter, on October 16, 1990, mailing true copies thereof to the respective addresses indicated above.

ELI VIGLIANO

Sworn to before me this
16th day of October, 1990

Notary Public

DORIS E. SASSOWER
Notary Public, State of New York
No. 60-3457772
Qualified in Westchester County
Term Expires March 30, 1991

76B

27

6/14 ~~-9471671~~
684-6554

STATE OF NEW YORK COUNTY OF ALBANY

SUPREME COURT

In the Matter of the Application of MARIO M. CASTRACAN and VINCENT F. BONELLI, acting Pro Bono Publico,

Petitioners,

for an order pursuant to Sections 16-100, 16-102, 16-104, 16-106 and 16-116 of the Election Law,

-against-

ANTHONY M. COLAVITA, Esq., Chairman, WESTCHESTER REPUBLICAN COUNTY COMMITTEE; GUY T. PARISI, Esq., DENNIS MEHIEL, Esq., Chairman, WESTCHESTER DEMOCRATIC COUNTY COMMITTEE; RICHARD L. WEINGARTEN, Esq., LOUIS A. BREVETTI, Esq., HON. FRANCIS A. NICOLAI, HOWARD MILLER, Esq., ALBERT J. EMANUELLI, Esq., R. WELLS STOUT, HELENA DONAHUE, EVELYN AQUILA, Commissioners constituting the NEW YORK STATE BOARD OF ELECTIONS, ANTONIA R. D'APICE, MARION B. OLDI, Commissioners constituting the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondents,

for an order declaring invalid the Certificates purporting to designate Respondents HON. FRANCIS A. NICOLAI and HOWARD MILLER, Esq., as candidates for the office of Justice of the Supreme Court of the State of New York, Ninth Judicial District, and the Petitioners purporting to designate ALBERT J. EMANUELLI, Esq. a candidate for the office of Surrogate of Westchester County to be held in the general election of November 6, 1990.

Supreme Court - Request for Judicial Intervention

October 12, 1990-Special Term RJI 0190 ST2747 Index No. 6056-90

JUSTICE LAWRENCE E. KAHN, Presiding

APPEARANCES:

Doris L. Sassower, P.C.
Attorney for petitioners
283 Soundview Avenue
White Plains, New York 10606
(914) 997-1677

APPEARANCES: (Continued)

Thomas J. Abinanti, Esq.
Attorney for NICOLAI
Six Chester Avenue
White Plains, New York 10601
(914) 328-9000

Marilyn J. Slaatten, Esq.
County Attorney
Attorney for D'APICE & OLDI
Michaelian Office Building
148 Martine Avenue
White Plains, New York 10601
(914) 285-2696

Scolari, Brevetti, Goldsmith & Weiss, P.C.
Attorneys for BREVETTI
230 Park Avenue
New York, New York 10169
(212) 370-1000

Guy T. Parisi, Esq.
112 Woods End Road
Chappaqua, New York 10514
(914) 238-5048

Hall, Dickler, Lawler, Kent & Friedman
Sam Yasgur, Esq.
Attorneys for EMANUELLI
11 Martine Avenue
White Plains, New York 10606
(914) 428-3232

Aldo V. Vitagliano, P.C.
150 Purchase Street
Rye, New York 10580
(914) 921-0333

Hashmall, Sheer, Bank & Geist
Attorneys for MEHIEL, WESTCHESTER DEMOCRATIC COUNTY COMMITTEE & WEINGARTEN
235 Mamaroneck Avenue
White Plains, New York 10605
(914) 761-9111

Sanford S. Dranoff, Esq.
Attorney for HOWARD MILLER
One Blue Hill Plaza
P.O. Box 1629
Pearl River, New York 10965-8629
(914) 735-6200

KAHN, J.

This proceeding seeks to review the nomination of three candidates for election to the office of Justice of the Supreme Court for the Ninth Judicial District of the State of New York. Specific reference is made to the September 18, 1990 Republican Judicial Convention and the September 24, 1990 Democratic Judicial Convention. The actions taken at the aforesaid conventions purport to be in furtherance of a written resolution of the Westchester County Republican and Democratic Committees, which adopted a three-year plan for the cross-endorsement of various judges for County Court, Family Court, Surrogate Court and Supreme Court. In this regard, there is no dispute that the resolution exists or that it even goes so far as to provide that once nominated, each individual will pledge to "provide equal access and consideration, if any, to the recommendations of the leaders of each major political party in conjunction with proposed judicial appointments." Thus, the agreement appears to even extend to the hiring of staff personnel.

Various defendants have moved to dismiss upon considerations of jurisdiction, failure to state cause of action, latches, statute of limitations, etc. Petitioners have also sought a directive from the court that certain respondents are in default for having failed to timely serve pleadings or defectively verified pleadings. However, in the

interests of judicial economy and with an acknowledgment that this decision must be rendered in an exceedingly expeditious manner, the court shall directly address the merits of the petition itself, in order that the inevitable appeal process may be commenced in a timely fashion.

Cross-endorsement of judicial candidates by the major political parties has long been the subject of substantial concern among various segments of the voting public. It has been the focus of study by the Commission on Government Integrity, The Fund for Modern Courts, and even the Chief Judge of the Court of Appeals. However, and most importantly in the context of this judicial proceeding, the practice of cross-endorsement of judicial candidates is not presently prohibited by the Election Law. Further, while the enforceability of the purported resolution would appear to be exceedingly questionable, the reality is that it does not result in the nomination or designation of a candidate for Supreme Court Justice. Only the delegates to a properly convened Judicial District convention can take such action (Election Law, section 6-106).

The Court of Appeals has reiterated that the Legislature of this State has "manifested an intent of general non-interference with the internal affairs of political parties." (**Bloom v Nataro**, 67 NY2d 1048, 1049). "[J]udicial intervention should only be undertaken as a last resort." (**Matter of Bachmann v Coyne**, 99 AD2d 742.) Certainly, any

rule of the Westchester County Republican or Democratic Committee which purports to select candidates for the office of Supreme Court Justice must be considered inconsistent with the Election Law, which leaves that selection to the delegates to a judicial convention. However, once having convened a proper convention, and having followed the mandates of the Election Law, any relief premised upon the invalidity of the so-called "Three Year Plan" is precluded. In the case at bar, there is no proof that the judicial conventions at issue were not legally organized, with a quorum present, and that a majority of that quorum duly voted for the candidates named as respondents hereto. As such, the petition does not state grounds upon which relief may be granted (**Matter of Hobson v Lomenzo**, 30 AD2d 981).

The scenario, as presented by the submissions presently before the court, no doubt will continue to fuel the debate concerning the manner in which candidates for judicial office are selected. However, the proper forum must be the Legislature of the State of New York, which has the sole power to amend the process by which judicial candidates are chosen.

The motion of respondent Parisi for a judgment dismissing the proceeding upon the ground that the petition fails to state a cause of action shall be granted. As aforesaid, dismissal of the petition on the merits, renders moot questions of service, timely submission of pleadings and other procedural issues.

So Ordered / 32

DATED: October 16, 1990

Albany, New York

10/17/90

Supreme Court—Appellate Division
Third Judicial Department

May 2, 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.

PER CURIAM.

Appeal from an order of the Supreme Court (Kahn, J.), entered October 17, 1990 in Albany County, which dismissed petitioners' application, in a proceeding pursuant to Election Law § 16-102, to, inter alia, declare invalid the certificates of nomination naming various respondents as candidates for the offices of Justice of the Supreme Court and Surrogate for the Ninth Judicial District in the November 6, 1990 general election.

Petitioners commenced this proceeding challenging the nominations of various candidates for judicial offices in the Ninth Judicial District who had been cross-endorsed by both the Republican and Democratic parties. According to petitioners, the cross endorsement of the judicial candidates violated the NY Constitution and Election Law in that it served to disenfranchise the voters of the Ninth Judicial District. In their petition, petitioners sought to void what they claimed to be an illegal three-year plan engineered by various Republican and Democratic Executive Committees of the counties in the Ninth Judicial District whereby it was apparently agreed upon in advance that certain candidates would be cross-endorsed by the political parties involved. Aside from requesting that the plan be declared void, petitioners also requested that the nominations and nominating certificates of certain of the involved candidates be voided and the judicial conventions be ordered reconvened.

In answering, respondents alleged various defenses, including lack of jurisdiction and standing, failure to join necessary parties and failure to state a cause of action. Two of the respondents moved to dismiss the petition. Supreme Court specifically decided not to address any procedural issues and chose to dismiss the petition on the merits. The court found that the cross endorsement of judicial candidates was not prohibited by the Election Law and, since the challenged candidates were properly nominated by the conventions, no relief could be granted. This appeal by petitioners followed.

"A"

While petitioners undoubtedly raise several interesting issues relating to the propriety and appropriateness of the practice of judicial cross endorsements, we cannot simply ignore the legitimate procedural objections raised by respondents[1] as did Supreme Court in order to more expeditiously explore the merits. Accordingly, a brief discussion of the pertinent points follows.

Initially, we must agree with respondents that petitioners have failed to join necessary parties in this proceeding. Notably, petitioners named as parties only three of the judicial candidates named on the challenged certificates of nomination and nominated at the 1990 conventions even though petitioners object in terms which indicate that they are challenging the certificates in their entirety and are requesting new judicial conventions. This court has said in the past that when a certificate of nomination that covered a number of candidates is challenged in a proceeding that sought to invalidate the certificate and require a new party caucus, all the nominees on the certificate must be joined since, if the petition is granted, they would all be disqualified as candidates and would run the risk of not being nominated at the new caucus (see, Matter of Sahler v Callahan, 92 AD2d 976, 977). Here, the rights of all the candidates nominated for Supreme Court Justice, and not just those specifically cross-endorsed, are "inextricably interwoven" and, therefore, they were necessary parties (see, Matter of McGoey v Black, 100 AD2d 635, 636; cf., Matter of Greenspan v O'Rourke, 27 NY2d 846).[2]

It should also be noted that, even though petitioners contend that the entire cross endorsement plan was allegedly agreed to by the executive committees of both parties in each county in the Ninth Judicial District, they did not name these committees as parties. Further, officers elected in the conventions that are requested to be

---

[1] Petitioners incorrectly state that respondents' procedural arguments should not be addressed since those parties did not file notices of appeal from Supreme Court's decision. Since respondents were not aggrieved by Supreme Court's decision in their favor, it was not necessary for them to appeal (see, Lonstein, P.C. v Seeman, 112 AD2d 566).

[2] Since petitioners challenge all aspects of the cross endorsement plan and request that it be declared void in its entirety, it should also be noted that 1989 candidates named in the cross endorsement plan were also not joined by petitioners in the proceeding nor is there any indication that objections against their nominations were timely filed.

voided and reconvened would also have had to be joined, since they might not be appointed at the requested reconvened conventions (cf., Matter of Sahler v Callahan, supra). In addition, to the extent that petitioners seek to prohibit certain nominees from running for office in the Ninth Judicial District, the Boards of Election of each county in the district are also apparently necessary parties since these Boards are responsible for the conduct of elections in those counties (see, Election Law § 3-506). The law is clear that failure to join necessary parties in a proceeding pursuant to the Election Law prior to the time prescribed for initiating such a proceeding requires dismissal of the petition (see, Matter of Marin v Board of Elections of State of N.Y., 67 NY2d 634). Since petitioners' failure to join necessary parties in this proceeding is apparent,[3] this proceeding is fatally defective.

Although we also have grave doubts about the standing of petitioners, it is unnecessary to explore this and other issues raised by the parties due to our resolution of the foregoing issue.

Order affirmed, without costs.

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

---

[3] Another basis for dismissal of this proceeding is petitioners' failure to serve the Attorney-General (see, 2A Weinstein-Korn-Miller, NY Civ Prac ¶ 2214.05). The State Board of Elections, named in the petition, is undoubtedly a State body (see, Election Law § 3-100). CPLR 2214 requires that an order to show cause served upon a State body or officer must also be served on the Attorney-General (CPLR 2214 [d]).

F-1

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

In the Matter of the Application of
MARIO M. CASTRACAN and VINCENT F. BONELLI,
acting Pro Bono Publico,

NOTICE OF MOTION

Petitioners-Appellants,

Albany County Clerk's
Index No. 6056/90

for an Order, pursuant to Sections
16-100, 16-102, 16-104, 16-106 and
16-116 of the Election Law,

Appeal No. 62134

-vs-

(Oral Argument
Requested)

ANTHONY J. COLAVITA, Esq., Chairman,
WESTCHESTER REPUBLICAN COUNTY COMMITTEE,
GUY T. PARISI, Esq., DENNIS MEHIEL, Esq.,
Chairman, WESTCHESTER DEMOCRATIC COUNTY
COMMITTEE, RICHARD L. WEINGARTEN, Esq.,
LOUIS A. BREVETTI, Esq., Hon. FRANCIS A.
NICOLAI, HOWARD MILLER, Esq., ALBERT J.
EMANUELLI, Esq., R. WELLS STOUT,
HELENA DONAHUE, EVELYN AQUILA, Commissioners
constituting the NEW YORK STATE BOARD
OF ELECTIONS, ANTONIA R. D'APICE,
MARION B. OLDI, Commissioners constituting
the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondents-Respondents,

S I R S :

PLEASE TAKE NOTICE that upon the annexed Affidavit of Doris L. Sassower, sworn to on the 25th day of July 1991, and the exhibits thereto, and the Memorandum of Law, dated July 25, 1991, Petitioners-Appellants will move this Court, pursuant to CPLR 2221 on August 19, 1991 at the Courthouse located at the Justice Building, South Mall, Albany, New York for an order granting leave to: (1) reargue and renew Petitioners-Appellants' appeal

in the above-captioned action from the Decision/Order of the Supreme Court entered October 17, 1990, which order the Appellate Division, Third Department affirmed by Decision dated May 2, 1991 [Exhibit "A"] and Order thereon entered May 15, 1991 [Exhibit "B"]; and (2) in the event leave is granted, that the motion to reargue and renew then and there proceed and that upon such reargument and renewal, the Order of this Court, dated May 2, 1991 be vacated and that the Decision of Justice Kahn, entered October 17, 1991, be reversed; and (3) that all panel members who have been cross-endorsed themselves recuse themselves from these proceedings; or (4) alternatively, for permission for leave to appeal to the Court of Appeals; and (5) such other, further, and different relief as this Court deems just, proper, and equitable.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 2214(b) answering Affidavits, if any, are required to be served upon the undersigned at least seven days before the return date of the motion.

Dated: Yonkers, New York
July 25, 1991

ELI VIGLIANO, Esq.
Attorney for Petitioners-
Appellants
1250 Central Park Avenue
P.O. Box 310
Yonkers, New York 10704
(914) 423-0732

TO:

John Ciampoli, Esq.
Attorney for N.Y. State Board of Elections
One Commerce Plaza
P.O. Box 4
Albany, New York 12260

Marilyn J. Slaatten, Esq.
County Attorney
Attorney for D'Apice & Oldi
148 Martine Avenue
White Plains, New York 10601

Scolari, Brevetti, Goldsmith & Weiss, P.C.
Attorneys for Brevetti
230 Park Avenue
New York, New York 10169

Thomas J. Abinanti, Esq.
Attorney for Respondent Nicolai
Six Chester Avenue
White Plains, New York 10601

Hall, Dickler, Lawler, Kent & Friedman
Attorneys for Emanuelli
11 Martine Avenue
White Plains, New York 10606

Aldo V. Vitagliano, P.C.
Guy T. Parisi, Esq., Of Counsel
150 Purchase Street
Rye, New York 10580

Hashmall, Sheer, Bank & Geist
Attorneys for Mehiel, Westchester Democratic
County Committee & Weingarten
235 Mamaroneck Avenue
White Plains, New York 10605

Sanford S. Dranoff, Esq.
Attorney for Miller
One Blue Hill Plaza
P.O. Box 1629
Pearl River, New York 10965-8629

Robert Abrams, Esq.
Attorney General
Department of Law
120 Broadway
New York, New York 10271

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

----------x

In the Matter of the Application of
MARIO M. CASTRACAN and VINCENT F. BONELLI,
acting Pro Bono Publico,

SUPPORTING AFFIDAVIT

Petitioners-Appellants,

Albany County Clerk's
Index No. 6056/90

for an Order, pursuant to Sections
16-100, 16-102, 16-104, 16-106 and
16-116 of the Election Law,

Appeal No. 62134

-vs-

ANTHONY J. COLAVITA, Esq., Chairman,
WESTCHESTER REPUBLICAN COUNTY COMMITTEE,
GUY T. PARISI, Esq., DENNIS MEHIEL, Esq.,
Chairman, WESTCHESTER DEMOCRATIC COUNTY
COMMITTEE, RICHARD L. WEINGARTEN, Esq.,
LOUIS A. BREVETTI, Esq., Hon. FRANCIS A.
NICOLAI, HOWARD MILLER, Esq., ALBERT J.
EMANUELLI, Esq., R. WELLS STOUT,
HELENA DONAHUE, EVELYN AQUILA, Commissioners
constituting the NEW YORK STATE BOARD
OF ELECTIONS, ANTONIA R. D'APICE,
MARION B. OLDI, Commissioners constituting
the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondents-Respondents,

----------x

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

DORIS L. SASSOWER, being duly sworn, deposes and says:

1. I was acting on behalf of Doris L. Sassower, P.C., until June 19, 1991 as pro bono counsel to Petitioners-Appellants in this proceeding from its inception through and including the Decision of the Court dated May 2, 1991 (Exhibit "A") and the Order dated May 15, 1991 (Exhibit "B").

2. On June 19, 1991, I was served with an Order of the

39

Appellate Division, Second Department, dated June 14, 1991, suspending me from the practice of law, without any statement of reasons or findings, as required by law and without any evidentiary hearing having been had. Such suspension Order was issued five (5) days after it was announced in the New York Times that my firm would seek to take the case up to the Court of Appeals. I have reason to believe my aforesaid suspension was a direct retaliation for my representation of Appellants in these proceedings and to thwart any further appellate review of this matter seeking to challenge cross-endorsements as a way of electing judicial candidates generally and, in particular, under the Three-Year Deal in question.

3. As a result of the suspension Order, I am no longer acting as counsel to Appellants. Moreover, my firm has signed a Consent to Substitution of attorney so that it is no longer attorney of record.

4. I, therefore, submit this Affidavit not as attorney of record but as an individual with personal knowledge of material facts, in support of Appellants' motion for reargument and renewal of the appeal herein, and for recusal, or, alternatively, for leave to appeal to the Court of Appeals.

5. At the outset, it must be stated that that Respondents did not give Appellants' notice either by Notice of Appeal or Cross-Appeal or in their "Questions Presented" that they were not accepting Justice Kahn's approach that the technical objections of both sides would not be considered by

this Court. Nor were Appellants given an opportunity by the Court to supplement the Record with pertinent facts, when it decided this appeal on Respondents' procedural objections. All of the individual Respondents were in default in the lower court by virtue of their untimely and/or unverified responding papers to Appellants' Order to Show Cause and had no standing to raise their procedural objections until relieved of their default.

6. Concerning the non-joinder objection adopted by the Court, it should be noted that before this proceeding was commenced, I spoke on several occasions with Thomas Solezzi, Esq., counsel to the New York State Board of Elections, as well as to John Ciampoli, Esq., his Deputy Counsel. They advised me that there was no need to serve the Attorney-General, since it was his standard and customary practice to defer his jurisdiction to the public agency involved when it has its own counsel, such as the New York State Board of Elections does. He promised that I would receive a letter confirming such waiver of service by the Attorney General's Office, and further that he would not raise any objection to the omission of service on the Attorney-General.

7. When I thereafter served papers on the Attorney-General in connection with the preference application, since I had not yet received Mr. Ciampoli's promised confirmation, I finally did receive a letter from him dated October 31, 1990, with copies to all counsel, confirming that service upon the Attorney-General was waived and that no further service of papers on the Attorney-General should be made (Exhibit "C").

Additionally, in accordance with our understanding, Mr. Ciampoli never raised any objection based on failure to serve the Attorney-General as a ground of dismissal, either by motion to dismiss or in its filed Answer (R. 127). Under those circumstances, there is no prejudice to Respondents. Nor is it fair or just that this Court should dismiss the proceeding as against all the Respondents, when the public agency for whose protection that objection was created, does not object and the Attorney-General himself expressly waived service upon him.

8. On October 15, 1990, I orally argued in support of the Petition herein. Although I had requested a hearing, and was told previous thereto by Justice Kahn's Law Secretary that the judge had cleared his calendar to permit a hearing after argument was had, His Honor did not inform us until after the argument that he had to take a criminal matter at 12 noon, and would not hold the hearing that day. My recollection is that after arguments were presented by all counsel, Justice Kahn further announced that he would not get into a procedural hassle, nor would he rule on my objection that the individual Respondents were in default nor the Respondents' technical objections, including non-joinder of necessary parties, but that since the case was headed for the Court of Appeals, he would try to accomodate Respondents' urgent demand for a speedy decision by getting to "the heart of the matter" promptly.

9. As aforementioned, Respondents did not appeal the propriety of Justice Kahn's specifically deciding <u>not</u> to rule on

Appellants' objection that Respondents' default precluded their raising their procedural objections.

10. With respect to the omitted contested candidates, Joan Lefkowitz and George Roberts, I am annexing hereto a copy of the Affidavit of Service showing service upon both of them of the Specifications of Objections (Exhibit "D"), thereby affording them do and timely notice.

11. In view of the fact that this proceeding was publicized from the outset, there can be no question as to their actual knowledge and awareness thereof--affording them the opportunity to intervene had they felt they would be inequitably affected by this proceeding.

12. Moreover, as to Respondents, I specifically stated on numerous occasions that I would make no objection to intervention by anyone or their impleading any omitted parties they deemed necessary. No intervention or impleader was ever sought by anyone.

13. As to the instant recusal request based on bias, the record should reflect the fact that on Friday afternoon, March 22, 1991, I telephoned Michael Novak, Clerk of the Court for the Appellate Division, Third Department. I specifically asked him whether any of the members of the bench assigned to hear the appeal on Monday, March 25, 1991 were themselves cross-endorsed. He stated he did not know the answer to that question. Because of my desire to avoid public embarassment to members of the panel at the time of my argument, I asked him if he would

ascertain that information for me in advance thereof. He stated he would convey my concern to the Presiding Justice, and I asked him to let me know if the answer was in the affirmative.

14. I did not hear further from Mr. Novak prior to the oral argument on Monday, March 25, 1991, and proceeded to argue the appeal herein, without knowledge of the fact--discovered the day following the May 2, 1991 Decision came down from this Court--that three out of the five members of the panel hearing argument on the legality of cross-endorsements were themselves cross-endorsed. Indeed, the Presiding Judge had been triple cross-endorsed--by the Republican, Democratic and Conservative Parties. Annexed as Exhibit "E" to these motion papers are copies of the official records of the New York State Board of Elections reflecting the cross-endorsements of the various judges who were involved in this appeal, as well as the denial of Appellants' formal motion for the preference to which they were entitled under the Election Law and the Court's own rules.

15. There was no disclosure by any member of the bench hearing such appeal of such information, notwithstanding that, under Canon 3(C)(1) of the Code of Judicial Conduct, "a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned".

16. As shown by the annexed letters from and to the Clerk of this Court (Exhibits "F" and "G"), it was Presiding Justice Mahoney who decided that the case would not be given the normal and required preference for Election Law cases, and that a

formal application for the preference had to be made to the Court.

17. Prior thereto, following Mr. Novack's telephone notification on October 18, 1990, that the oral argument of the appeal scheduled for the next day had been cancelled, without explanation, I had spoken to Justice Casey, the judge on duty that day, to inquire whether he would sign an Order to Show Cause so that the case could be heard before Election Day.

18. Justice Casey stated he would not sign my Order to Show Cause, that a formal motion was not necessary, and that furthermore, I was wasting the Court's time because it was "written in stone" that "no preference" would be granted to this proceeding.

19. Justice Casey also sat as a member of the panel which denied the preference application. The records of the New York State Board of Elections showing that of the five judges who denied Appellants' formal preference application, all were themselves cross-endorsed are annexed as "Exhibit "E". Justices Kane and Weiss had been quadruple cross-endorsed by the Republican, Democratic, Conservative, Liberal parties; Justice Casey had been triple cross-endorsed by the Republican, Democratic, Conservative parties; Justice Mikoll had been triple cross-endorsed: Democratic, Liberal, and Conservative parties. Justice Mercure had been double cross-endorsed by the Republican and Conservative parties.

20. Appellants' preference application, extensively detailing and documenting the foregoing, is part of the Court's records herein, incorporated herein by reference. It is respectfully submitted that the same should be carefully reviewed in connection with the instant application for recusal.

DORIS L. SASSOWER

Sworn to before me this
25th day of July 1991

Notary Public

ELI VIGLIANO
Notary Public, State of New York
No. 4997383
Qualified in Westchester County
Commission Expires June 4, 1992

EXHIBIT "A" TO DORIS SASSOWER'S AFFIDAVIT IN SUPPORT OF REARGUMENT/RENEWAL/RECUSAL IS THE MAY 2, 1991 DECISION OF THE APPELLATE DIVISION, THIRD DEPARTMENT.

SAID DECISION CAN BE FOUND AT PAGES 33-36 HEREIN.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building, in the City of Albany, New York, commencing on the 18th day of March, 1991.

PRESENT:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. ANN T. MIKOLL,
HON. HOWARD A. LEVINE
HON. D. BRUCE CREW III,
HON. NORMAN L. HARVEY,
Associate Justices.

In the Matter of the Application of MARIO M. CASTRACAN AND VINCENT F. BONELLI, Acting *Pro Bono Publico*,

Petitioners-Appellants,

- against -

ANTHONY J. COLAVITA, ESQ., Chairman, WESTCHESTER REPUBLICAN COUNTY COMMITTEE, GUY T. PARISI, ESQ., DENNIS MEHIEL, ESQ., Chairman, WESTCHESTER DEMOCRATIC COUNTY COMMITTEE, RICHARD L. WEINGARTEN, ESQ., LOUIS A. BREVETTI, ESQ., Hon. FRANCIS A. NICOLAI, HOWARD MILLER, ESQ., ALBERT J. EMANUELLI, ESQ., R. WELLS STOUT, HELENA DONAHUE, EVELYN AQUILLA, Commissioners constituting the NEW YORK STATE BOARD OF ELECTIONS, ANTONIA R. D'APICE, MARION B. OLDI, Commissioners constituting the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondents-Respondents,

COUNTY CLERK'S INDEX NO. 6056/90
(Albany County)

"B"

48

MARIO M. CASTRACAN and VINCENT F. BONELLI, appellants, having appealed from an order of the Supreme Court of Albany County, entered on the 17th day of October, 1990, in the office of the clerk of Albany County, and said appeal having been presented during the above-stated term of this court, and having been argued by Doris L. Sassower, P.C., of counsel for appellants, and by Sanford S. Dranoff, Esq., of counsel, for respondent Howard Miller, and by Hall, Dickler, Lawler, Kent & Friedman/ David Geis, Esq., of counsel for respondent Albert J. Emanuelli, and by Guy T. Parisi, Esq., of counsel for respondent Colavita, and by Hashmall, Sheer, Bank & Geist, Esqs./ Alan D. Scheinkman, Esq., of counsel for respondents Dennis Mehiel and Richard L. Weingarten, and by Thomas J. Abinanti, Esq., of counsel for respondent Francis A. Nicolai, and by Scolari, Brevetti, Goldsmith & Weiss, P.C., of counsel for respondent Louis A. Brevetti, and, after due deliberation, the court having rendered a decision on the 2nd day of May, 1991, it is hereby submitted

ORDERED that the order so appealed from be and is hereby affirmed, without costs.

/s/ Michael J. Novack

Clerk

DATED AND ENTERED: MAY 15 1991

A TRUE COPY

Michael J. Novack

STATE OF NEW YORK

STATE BOARD OF ELECTIONS

P.O. BOX 4
ONE COMMERCE PLAZA
ALBANY, NY 12260 0004

October 31, 1990

Doris L. Sassower, P.C.
283 Soundview Avenue
White Plains, NY 10606

Thomas J. Abinanti, Esq.
6 Chester Avenue
White Plains, NY 10601

Sanford S. Dranoff, Esq.
P.O. Box 1629
Suite 900, One Blue Hill Plaza
Pearl River, NY 10965

Aldo V. Vitagliano, Esq.
150 Purchase Street
Rye, NY 10580

Hashmal, Sheer, Bank & Geist, Esqs.
235 Mamaroneck Avenue
White Plains, NY 10605

Hall, Dickler, Lawler, Kent & Friedman, Esqs.
Attorney: Sam Yasgur, Esq.
11 Martine Avenue
White Plains, NY 10606

Marilyn J. Slaaten, Esq.
Westchester County Department of Law
600 Michaelian Office Building
148 Martine Avenue
White Plains, NY 10601

Scolari, Brevetti, Goldsmith & Weiss, P.C.
230 Park Avenue
New York, NY 10169

Re: Castracan et. al. v. Colavita, et. al.

Sirs:

Please take notice that the Attorney General has notified this office that he will not be defending the State Board of Elections in the above-captioned matter. Accordingly, it is no longer necessary to serve the Attorney General with papers during the remaining proceedings.

Thank you for your consideration.

Very truly yours,

John Ciampoli
Deputy Counsel

JC:ab

"C"

49

50

AFFIRMATION OF SERVICE

ELI VIGLIANO, an attorney admitted to practice in the Courts of the State of New York, affirms the following to be true, under the penalty of perjury:

That on the 29th day of September, 1990

Affirmant served the within:

SPECIFICATIONS OF OBJECTIONS

upon George H. Roberts, Esq., East Ridge Road, Waccabuc, N.Y., 10597; Hon. Francis A. Nicolai, 1101 Charlmont Drive, Pleasantville, N.Y. 10570; Howard Miller, Esq., 14 Liberty Road, Tappan, N.Y. 10983,

by depositing a true copy of same in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office within the State of New York directed to said candidates at the respective addresses set forth in the Certificate of Nomination filed with the New York State Board of Elections on September 19, 1990.

Dated: White Plains, New York

September 29, 1990

ELI VIGLIANO

50

"D"

51

AFFIRMATION OF SERVICE

ELI VIGLIANO, an attorney admitted to practice in the Courts of the State of New York, affirms the following to be true, under the penalty of perjury:

That on the 8th day of October, 1990

Affirmant served the within:

SPECIFICATIONS OF OBJECTIONS

upon: HON. JOAN LEFKOWITZ

at: 21 Elmridge Drive, Scarsdale, New York 10583

upon: HON. FRANCIS A. NICOLAI

at: 1101 Charlmont Drive, Pleasantville, New York 10570

upon: HOWARD MILLER, Esq.

at: 14 Liberty Road, Tappan, New York 10983

in this action by depositing true copies of same in post-paid properly addressed wrappers in an official depository under the exclusive care and custody of the United States Post Office within the State of New York directed to said candidates at the respective addresses set forth in the Certificate of Nomination filed with the New York State Board of Elections on September 27, 1990.

Dated: White Plains, New York
October 8, 1990

/s/

ELI VIGLIANO

ELI VIGLIANO
Notary Public, State of New York
No. 4967385
Qualified in Westchester County
Commission Expires June 1, 1992

State Board of Elections
99 Washington Avenue
Albany, New York 12210
October 6, 1982

CANDIDATES
JUSTICE OF SUPREME COURT

3rd Judicial District
(Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan and Ulster)

Dem.	John G. Connor	Pleasant View Drive, RD 1, Hudson, NY 12534
Dem.	George L. Cobb	60 Suburban Way, Catskill, NY 12414
✱ Dem.	John T. Casey	Smith Hill Road, Troy, NY 12180
☐ Dem.	A. Franklin Mahoney	1519 Bouton Road, Troy, NY 12180
✱ Rep.	John T. Casey	Box 1998, RD 1, Troy, NY 12180
Rep.	George L. Cobb	60 Suburban Way, Catskill, NY 12414
☐ Rep.	A. Franklin Mahoney	1519 Boutin Road, Troy, NY 12180
Rep.	John G. Connor	Pleasant View Drive, RD 1, Hudson, NY 12534
Cons.	John G. Connor	RD 1, Hudson, NY 12534
☐ Cons.	A. Franklin Mahoney	1519 Bouton Road, Troy, NY 12180
✱ Cons.	John T. Casey	Smith Hill Road, Troy, NY 12180
Cons.	George L. Cobb	60 Suburban Way, Catskill, NY 12414

4th Judicial District
(Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, St. Lawrence, Saratoga, Schenectady, Warren and Washington)

Dem.	Earl F. Matte	Ten Windy Hill Road, Glens Falls, NY 12801
Rep.	Guy A. Graves	22 North Church Street, Schenectady, NY 12305
Cons.	Guy A. Graves	22 North Church Street, Schenectady, NY 12305
Lib.	Earl F. Matte	10 Windy Hill Road, Glens Falls, NY 12801

5th Judicial District
(Herkimer, Jefferson, Lewis, Oneida, Onondaga and Oswego)

Dem.	John T. McKennan	15 Foxcroft Road, New Hartford, NY 13413
Dem.	George H. Van Lengen	3998 Griffin Road, Syracuse, NY 13215
Dem.	William Baker	402 Forest Drive, North Syracuse, NY 13212
Dem.	Harold T. Limpert	101 Thornton Court, Camillus, NY 13031
Rep.	James P. O'Donnell, Jr.	814 West German Street, Herkimer, NY 13350
Rep.	John R. Tenney	15 Slayton Bush Lane, Utica, NY 13501
Rep.	John W. Grow	911 Turin Street, Rome, NY 13440
Rep.	John F. Lawton	300 Summit Avenue, Syracuse, NY 13207
Cons.	John W. Grow	911 Turin Street, Rome, NY 13440
Cons.	John R. Tenney	15 Slaytonbush Lane, Utica, NY 13501
Cons.	James P. O'Donnell	814 West German Street, Herkimer, NY 13350
Cons.	George H. Van Lengen	3998 Griffin Road, Syracuse, NY 13215
RTL.	John T. McKennan	15 Fox Croft Road, New Hartford, NY 13413
Lib.	William Baker	402 Forest Drive, North Syracuse, NY 13212
Lib.	George Van Lengen	3998 Griffin Road, Syracuse, NY 13215
Lib.	Harold T. Limpert	10 Thorton Court, Camillus, NY 13031
Lib.	John R. Tenney	15 Slaytonbush Lane, Utica, NY 13501

52

"E"

1985

*WAYNE, AND TRICS

DEM	WILLIAM H BRISTOL			
REP	RAYMOND E CORNELIUS	197 ROSLYN STREET	ROCHESTER	14619
CON	RAYMOND E CORNELIUS	12 FELLVIEW DRIVE	PITTSFORD	14534
		12 FELLVIEW DRIVE	PITTSFORD	14534

CANDIDATES FROM THE EIGHTH JUDICIAL DISTRICT
*ALLEGANY, CHAUTAUQUA, CHATAUGUA, ERIE, GENESEE,
*NIAGARA, ORLEANS, AND WYOMING

▲ DEM	ANN T MIKOLL	38 BURKE DRIVE		
DEM	FRANK A SEDITA	29 CHATHAM AVENUE	BUFFALO	14215
REP	PENNY WOLFGANG	126 MEADOW ROAD	BUFFALO	14216
REP	MARIO J ROSSETTI	11 W. CARRIAGE HILL	BUFFALO	14216
CON	MARIO J ROSSETTI	11 W. CARRIAGE HILL	BUFFALO	14221
▲ CON	ANN T MIKOLL	38 BURKE DRIVE	AMHERST	14221
LIB	ANN T MIKOLL	38 BURKE DRIVE	BUFFALO	14215
RTL	MARIO J ROSSETTI	11 W. CARRIAGE HILL	BUFFALO	14215
		11 W. CARRIAGE HILL	AMHERST	14221
			WILLIAMSVILLE	14221

CANDIDATES FROM THE NINTH JUDICIAL DISTRICT
*DUTCHESS, ORANGE, PUTNAM, ROCKLAND AND WESTCHESTER

DEM	PETER C PATSALOS	63 VALLEY DRIVE		
WOR	S. BARRETT HICKMAN	N. LAKE BOULEVARD	NEWBURGH	12550
REP	PETER C PATSALOS	63 VALLEY AVENUE		
CON	S. BARRETT HICKMAN	N. LAKE BOULEVARD	NEWBURGH	12550
CON	PETER C PATSALOS	63 VALLEY AVENUE	MAHOPAC	10541
RTL	PETER C PATSALOS	63 VALLEY AVENUE	MAHOPAC	10541
RTL	S. BARRETT HICKMAN	N. LAKE BOULEVARD	NEWBURGH	12550
			MAHOPAC	10541

CANDIDATES FROM THE TENTH JUDICIAL DISTRICT
*NASSAU AND SUFFOLK

DEM	ALFRED F SAMENGA	696 LORENTZ STREET		
DEM	JEFFREY G STARK	92 SIXTH STREET	ELMONT	11003
DEM	MYRON N STEINBERG	50 ORANGE DRIVE	GARDEN CITY	11530
DEM	HAROLD FERTIG	2156 IRONWOOD ROAD	JERICHO	11753
REP	CARL B COHEN	57 BIARRITZ STREET	SYOSSET	11791
REP	BERNARD F MCCAFFREY	104 GROHMANS LANE	LIDO BEACH	11561
REP	JOSEPH GOLDSTEIN	533 LARCH LANE	PLAINVIEW	11803
REP	JOSEPH J SALADINO	250 BAY DRIVE	EAST MEADOW	11554
REP	RALPH YACHNIN	742 CAROLIN AVENUE	MASSAPEQUA	11758
REP	EDWARD MC CABE	82 EVANS STREET	ELMONT	11003
CON	RALPH YACHNIN	742 CAROLINE AVENUE	NEW HYDE PARK	11040
CON	JOSEPH J SALADINO	250 BAY DRIVE	ELMONT	11003
CON	EDWARD G MC CABE	82 EVANS STREET	MASSAPEQUA	11758
CON	JOSEPH GOLDSTEIN	533 LARCH LANE	NEW HYDE PARK	11040
LIB	EDWARD G MCCABE	82 EVANS STREET	EAST MEADOW	11554
LIB	ALFREDO F SAMENGA	696 LORENTZ STREET	NEW HYDE PARK	11040
LIB	BERNARD F MCCAFFREY	104 GROHMANS LANE	ELMONT	11003
LIB	MYRON N STEINBERG	50 ORANGE DRIVE	PLAINVIEW	11303
LIB	HAROLD FERTIG	2156 IRONWOOD ROAD	JERICHO	11753
RTL	BERNARD F MCCAFFREY	104 GROHMANS LANE	SYOSSET	11791
RTL	EDWARD J MCCABE	82 EVANS STREET	PLAINVIEW	11803
RTL	JOHN L MCCARTHY	279 OVERLOOK DRIVE	NEW HYDE PARK	11040
RTL	JOHN J KENNELLY	DEEP HOLE DRIVE	EAST ISLIP	11730
			MATTITUCK	11952

CANDIDATES FROM THE ELEVENTH JUDICIAL DISTRICT
*QUEENS

DEM	PEARLE APPELMAN	123-02 ROCKAWAY BEACH BLVD.	QUEENS	11694
DEM	THOMAS A DEMAKOS	21-34 80TH STREET	QUEENS	11370
DEM	DANIEL M JOY	144-38 168TH STREET	QUEENS	11434
DEM	SIDNEY LEVISS	73-61 168TH STREET	QUEENS	11366
DEM	JOSEPH J KUNZEMAN	77-10 170TH STREET	QUEENS	11415
DEM	ALFREDO D LERNER	83-57 118TH STREET	QUEENS	11357
DEM	WILLIAM G GIACCIO	11-20 MALBA DRIVE	QUEENS	11370
REP	PEARLE APPELMAN	123-02 ROCKAWAY BEACH BLVD.	QUEENS	11434
REP	THOMAS A DEMAKOS	21-34 80TH STREET	QUEENS	11366
REP	DANIEL M JOY	144-38 168TH STREET	QUEENS	11415
REP	SIDNEY LEVISS	73-61 168TH STREET	QUEENS	11357
REP	JOSEPH J KUNZEMAN	77-10 170TH STREET	QUEENS	11694
REP	ALFREDO D LERNER	83-57 118TH STREET	QUEENS	11370
REP	WILLIAM G GIACCIO	11-20 MALBA DRIVE	QUEENS	11434
CON	PAUL J HANOPHY	123-02 ROCKAWAY BEACH BLVD.	QUEENS	11366
CON	THOMAS A DEMAKOS	21-34 80TH STREET	QUEENS	11415
CON	THOMAS V OGNIBENE	73-22 157TH STREET	QUEENS	11357
CON	SIDNEY LEVISS	83-57 76TH AVENUE	QUEENS	11370
CON	JOSEPH J KUNZEMAN	73-61 168TH STREET	QUEENS	11434
CON	ALFREDO D LERNER	77-10 170TH STREET	QUEENS	11366
CON	WILLIAM G GIACCIO	83-57 118TH STREET	QUEENS	11415
LIB	PEARLE APPELMAN	11-20 MALBA DRIVE	QUEENS	11357
LIB	THOMAS A DEMAKOS	123-02 ROCKAWAY BEACH BLVD.	QUEENS	11694
LIB	DANIEL M JOY	21-34 80TH STREET	QUEENS	11370
LIB	SIDNEY LEVISS	144-38 168TH STREET	QUEENS	11434
LIB	JOSEPH J KUNZEMAN	73-61 168TH STREET	QUEENS	11366
LIB	ALFREDO D LERNER	77-10 170TH STREET	QUEENS	11415
LIB	WILLIAM G GIACCIO	83-57 118TH STREET	QUEENS	11357
		11-20 MALBA DRIVE	QUEENS	11357

193

53

54

1981

JUDICIAL CANDIDATES LIST

TO BE VOTED FOR IN THE GENERAL ELECTION, NOVEMBER 3, 1981

THIRD JUDICIAL DISTRICT (2 vacancies)

(Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan and Ulster Counties)

1. Dem.	Vincent G. Bradley	215 Manor Avenue, Kingston, NY 12401
2. Dem.	Joseph P. Torraca	41 Hummel Road, New Paltz, NY 12561
2. Rep.	Joseph P. Torraca	41 Hummel Road, New Paltz, NY 12561
1. Rep.	Vincent G. Bradley	215 Manor Avenue, Kingston, NY 12401
1. Cons.	Rosemary F. Byron	1 Bridge Street, Catskill, NY 12414

FOURTH JUDICIAL DISTRICT (2 vacancies)

(Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, St. Lawrence, Saratoga, Schenectady, Warren and Washington Counties)

✓1. Dem.	Norman L. Harvey	5 Cumberland Place, Plattsburgh, NY 12901
2. Dem.	William P. Willig	194 Westside Drive, Ballston Lake, NY 12019
✓1. Rep.	Norman L. Harvey	5 Cumberland Place, Plattsburgh, NY 12901
O2. Rep.	Thomas E. Mercure	3 Clark Street, Hudson Falls, NY 12839
O2. Cons.	Thomas E. Mercure	3 Clark Street, Hudson Falls, NY 12839
✓1. Cons.	Norman L. Harvey	5 Cumberland Place, Plattsburgh, NY 12901

FIFTH JUDICIAL DISTRICT (1 vacancy)

(Herkimer, Jefferson, Lewis, Oneida, Onondaga and Oswego Counties)

Dem.	Louis H. Mariani	
Rep.	Eugene F. Sullivan, Jr.	259 Brattle Road, Syracuse, NY 13203
Lib.	Louis H. Mariani	Maple Avenue, RFD#5, Fulton, NY 13069
		259 Brattle Road, Syracuse, NY 13203

SIXTH JUDICIAL DISTRICT (1 vacancy)

(Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga and Tompkins Counties)

Dem.		
Rep.	William N. Ellison	515 Division Street, Watkins Glen, NY 14891

NINTH JUDICIAL DISTRICT (3 vacancies)

(Dutchess, Orange, Putnam, Rockland and Westchester Counties)

1. Dem.	Joseph F. Hawkins	20C Bridge Park Apts., Poughkeepsie, NY 12601
2. Dem.	Thomas J. O'Toole	65 Rodman Oval, New Rochelle, NY 10805
3. Dem.	Sondra M. Miller	1 Douglas Lane, Larchmont, NY 10538
1. Rep.	Albert M. Rosenblatt	Freedom Plains Road, Pleasant Valley, NY 12569
2. Rep.	Lucille P. Buell	7 Rockledge Road, Bronxville, NY 10708
3. Rep.	Russell R. Leggett	532 Pleasantville Road, Briarcliff Manor, NY 10510
1. Cons.	Albert M. Rosenblatt	Freedom Plains Road, Pleasant Valley, NY 12569
2. Cons.	Lucille P. Buell	7 Rockledge Road, Bronxville, NY 10708
3. Cons.	Russell R. Leggett	532 Pleasantville Road, Briarcliff Manor, NY 10510
1. Lib.	Joseph F. Hawkins	Bridge Park Apts. 20C, Poughkeepsie, NY 12601
3. Lib.	Sondra M. Miller	One Douglas Lane, Larchmont, NY 10538
2. Lib.	Thomas J. O'Toole	65 Rodman Oval, New Rochelle, NY 10805

TENTH JUDICIAL DISTRICT (5 vacancies)

(Nassau and Suffolk Counties)

1. Dem.	Stanley Harwood	711 Birchwood Drive, Westbury, NY 11598
2. Dem.	M. Hallsted Christ	Remsen Lane, Oyster Bay, NY 11771
3. Dem.	Leo F. McGinity	1427 Dartmouth Street, Baldwin, NY 11510
4. Dem.	Allan L. Winick	898 Clubhouse Drive, Woodmere, NY 11598
5. Dem.	Alfred M. Lama	138 Shore Road, Oakdale, NY 11769
3. Rep.	Leo F. McGinity	1427 Dartmouth Street, Baldwin, NY 11510
4. Rep.	Henderson W. Morrison	14 Cedar Place, Garden City, NY 11530
5. Rep.	Robert W. Doyle	1 Milleridge Lane, Smithtown, NY 11787
2. Rep.	M. Hallsted Christ	Remsen Lane, Oyster Bay, NY 11771
1. Rep.	Stanley Harwood	711 Birchwood Drive, Westbury, NY 11590
5. Cons.	Robert W. Doyle	1 Milleridge Lane, Smithtown, NY 11787
4. Cons.	Henderson W. Morrison	14 Cedar Place, Garden City, NY 11530
1. Cons.	Joseph P. Altman, Jr.	578 Lakeview Avenue, Rockville Centre, NY 11570
2. Cons.	M. Hallsted Christ	Remsens Lane, Oyster Bay, NY 11771
3. Cons.	Leo F. McGinity	1427 Dartmouth Street, Baldwin, NY 11510

State of New York, ss:

Statement of the whole number of votes cast for all the candidates for the office of Justice of the Supreme Court

at a general election held in the said State, on the 7th day of November, in the year 1978, wherein the several counties in which the said votes were given are distinguished.

3rd Judicial DISTRICT

COUNTIES		Albany	Columbia	Greene	Rensselaer	Schoharie	Sullivan	Ulster	Their Number of Votes
Dem.	Weiss	64181	6867	5447	20933	3555	9410	18146	128538
Dem.	Kane	62752	6835	5441	22494	3839	9202	17932	128495
Rep.	Weiss	40297	10218	8191	25404	5246	2922	22561	120839
Rep.	Kane	40960	10067	8125	24692	5468	8863	22542	119717
Con.	Weiss	3134	1032	802	2382	357	1113	3058	11782
Con.	Kane	2186	1048	791	2427	401	1096	3045	11794
Lib.	Weiss	2197	339	195	920	119	333	978	5392
Lib.	Kane	2178	341	190	924	125	325	986	5369
Blank, Void and Scattering		29197	6227	4443	20687	2980	7426	16533	87598
TOTAL		247582	42974	33630	120884	22090	46690	105780	619630

DATED AT ALBANY, NEW YORK the fifteenth day of December, 1978.

Attorney General

State Senator

LAW OFFICES
DORIS L. SASSOWER, P.C.

283 SOUNDVIEW AVENUE • WHITE PLAINS, N.Y. 10606 • 914/997-1677 • FAX: 914/684-6554

By Fax and Regular Mail

October 19, 1990

Clerk of the Court
Appellate Division
Third Department
Justice Building
Albany, New York

ATT: Michael J. Novack, Esq.
Clerk of the Court

RE: Castracan v. Colovita
Index No. 6056/90

Dear Mr. Novack:

Confirming our telephone conversation a few minutes ago, following my discussion with Hon. Ann T. Mikoll, and the suggestion made by Her Honor, I am willing to waive oral argument of the above appeal and submit on the papers, in order to facilitate the promptest possible decision by the Court on this most significant case brought pursuant to Sections 16-100, 102, 104, 106, and 116 of the Election Law. Her Honor further suggested that a date be fixed for the Respondents' briefs to be served and filed without delay so that the appeal can be decided prior to the November 6, 1990 election. I served and filed my Briefs and Record on Appeal on Wednesday, October 17th--within 24 hours of Justice Kahn's Decision/Order. I would certainly expect that Respondents could do likewise.

This would serve to satisfy the mandated requirement under your own Court rules that entitles these Petitioners to an immediate preference. See Supreme Court Rules, Third Department, Article 3, Part 300, Section 800.16, providing a preference as a matter of right:

> "Appeals in proceedings brought pursuant to any provision of the election law [as is true in the case at bar]...shall be given preference..." (emphasis added)

This is particularly appropriate, in view of the above Court rule mandating such preference, and the transcendent state-wide public interest involved in the issues raised in this appeal, recognized in the Lower Court's own So-Ordered Decision, in which Justice Kahn expressly acknowledged that because: "...this decision must

"F"

be rendered in an exceedingly expeditious matter, the Court shall directly address the merits of the Petition itself, in order that the inevitable appeal process may be commenced in a timely fashion." (emphasis added).

It is respectfully submitted that it would serve the public interest if the issues could be heard and determined on the merits by the Appellate Division before the November 6, 1990 election.

Very truly yours,

DORIS L. SASSOWER

DLS/hd

cc: By Fax and Regular Mail:

John Ciampoli, Esq.
Thomas J. Abinanti, Esq.
Marilyn J. Slaatten, Esq.
Scolari, Brevetti, Goldsmith & Weiss, P.C.
Hall, Dickler, Lawler, Kent & Friedman, Sam Yasgur, Esq.
Aldo V. Vitagliano, Esq., Guy T. Parisi, Esq.
Hashmall, Sheer, Bank & Geist, P.C.
Sanford S. Dranoff, Esq.

57

NEW YORK SUPREME COURT
APPELLATE DIVISION, THIRD DEPARTMENT
BOX 7288, CAPITOL STATION
ALBANY, N.Y. 12224

MICHAEL J. NOVACK
CLERK

518-474-3609

October 19, 1990

Doris L. Sassower, P.C.
283 Soundview Avenue
White Plains, New York 10606

Re: Castracan v Colovita

Dear Ms. Sassower:

Your FAX letter of October 19, 1990 has been reviewed by Presiding Justice Mahoney and he has directed me to advise you as follows:

1) This matter will not be accepted as a submitted case for the purpose of having it decided prior to the November 6, 1990 election for the reasons, inter alia, that the court is now in recess, the judges have left Albany, the several respondents have yet to file briefs, and it would be wholly inappropriate to attempt to render a reasoned decision in this case under such circumstances and time constraints.

2) Your appeal will be scheduled in the normal course (ie. at the January or February term) unless you obtain a preference from the Court, upon proper application, directing that the appeal be heard at an earlier term.

3) Any application for a preference, or for any other relief with respect to this matter, must be made by formal motion upon the required notice to all parties.

I fully understand and appreciate that the above directions from the Presiding Justice will not be satisfactory to you. However, with regard to any further requests by you for relief from the undersigned, I am sure you know that I have no authority to change or modify these directions in any respect.

Very truly yours,

Michael J. Novack

Michael J. Novack, Clerk

MJN:tbf

59

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,
ELI VIGLIANO

Attorney for

Office and Post Office Address
1250 Central Park Avenue — P.O. Box 310
YONKERS, NEW YORK 10704

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on 19

at M.

Dated,

Yours, etc.,
ELI VIGLIANO

Attorney for

Office and Post Office Address
1250 Central Park Avenue — P.O. Box 310
YONKERS, NEW YORK 10704

To

Attorney(s) for

Index No. Year 19

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

60

In the Matter of the Application of
MARIO M. CASTRACAN and VINCENT F. BONELLI,
acting Pro Bono Publico,

Petitioners-Appellants,

for an Order, pursuant to Sections 16-100, 16-102, 16-104, 16-106 and 16-116 of the Election Law,

-vs-

ANTHONY J. COLAVITA, Esq. Chairman,
WESTCHESTER REPUBLICAN COUNTY COMMITTEE,
GUY T. PARISI, Esq., DENNIS MEHIEL, Esq.,
Chairman, WESTCHESTER DEMOCRATIC COUNTY COMMITTEE,
et al,

Respondents-Respondents.

NOTICE OF MOTION, SUPPORTING AFFIDAVIT, AND EXHIBITS

ELI VIGLIANO

Attorney for
Petitioners
Office and Post Office Address, Telephone
1250 Central Park Avenue — P.O. Box 310
YONKERS, NEW YORK 10704
(914) 423-0732

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

5

F-2

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

In the Matter of the Application of
MARIO M. CASTRACAN and VINCENT F. BONELLI,
acting Pro Bono Publico,

Petitioners-Appellants,

Albany County Clerk's
Index No. 6056/90

for an Order, pursuant to Sections
16-100, 16-102, 16-104, 16-106 and
16-116 of the Election Law,

Appeal No. 62134

-vs-

ANTHONY J. COLAVITA, Esq., Chairman,
WESTCHESTER REPUBLICAN COUNTY COMMITTEE,
GUY T. PARISI, Esq., DENNIS MEHIEL, Esq.,
Chairman, WESTCHESTER DEMOCRATIC COUNTY
COMMITTEE, RICHARD L. WEINGARTEN, Esq.,
LOUIS A. BREVETTI, Esq., Hon. FRANCIS A.
NICOLAI, HOWARD MILLER, Esq., ALBERT J.
EMANUELLI, Esq., R. WELLS STOUT,
HELENA DONAHUE, EVELYN AQUILA, Commissioners
constituting the NEW YORK STATE BOARD
OF ELECTIONS, ANTONIA R. D'APICE,
MARION B. OLDI, Commissioners constituting
the WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondents-Respondents.

MEMORANDUM OF LAW OF PETITIONERS-APPELLANTS IN SUPPORT OF THEIR MOTION TO REARGUE OR, ALTERNATIVELY, FOR PERMISSION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

ELI VIGLIANO, Esq.
1250 Central Park Avenue
P.O. Box 310
Yonkers, New York 10704
(914) 423-0732

PRELIMINARY STATEMENT

By reason of the serious and substantial errors of this Court, Petitioners-Appellants ("Appellants") herein move for an order: (1) granting leave to reargue and renew their appeal from the lower court's Decision/Order entered October 17, 1990, affirmed by the Appellate Division, Third Department, on other grounds, by Decision dated May 2, 1991 ("Decision") [Exhibit "A"[1]] and Order entered May 15, 1991 ("Order") (Exhibit "B"); (2) for leave to join absent parties, if deemed necessary by this Court, and to amend their Petition accordingly; (3) for recusal, or, alternatively, for leave to appeal to the Court of Appeals[2]; and (4) for such other and further relief as the Court may deem just and proper.

Appellants, citizen objectors acting pro bono publico, seek to undo an offense against the public trust, the New York State and Federal Constitutions, and the Election Law of the State of New York.

This case arose as an Election Law proceeding--entitled to be heard before Election Day 1990. Due solely to this Court's

---

[1] All Exhibits referred to herein are annexed to the Supporting Affidavit of Doris L. Sassower, sworn to July 25, 1991.

[2] Petitioners submit this motion without prejudice to their contention that their appeal lies as a matter of right to the Court of Appeals because of the substantial constitutional issues involved relative to the people's right to elect their Supreme Court, and Surrogate Judges--as provided in the New York State Constitution. Petitioners have already duly filed their Notice of Appeal and Jurisdictional Statement with the Court of Appeals.

denial of the preference to which the matter was entitled[3], it came before the Court for adjudication after the election. Accordingly, pre-election exigencies do not bar such joinder, interpleader, or intervention as may be thought necessary by the Court or justify dismissal of the Petition for any curable technical defects. Time pressures concomitant to obtaining resolution on the merits before Election Day no longer preclude amendment of the Petition to name additional parties or to modify the relief to accommodate the changed post-election circumstances, including possibility of severance or of converting this special proceeding into an action, which the Court may do "at any time" (CPLR 407)[4].

The lower court itself readily recognized that the transcendent public interest issues involved in the practice of cross-endorsements are "of substantial concern among various segments of the voting public" (R. 5). This case offers more than an opportunity to address overriding issues in the abstract. Rather, it is an imperative to decisive adjudication on the merits since the issues affect the lives, liberty, and property interests of one million and a half residents in the Ninth

---

[3] Election Law, Sec. 16-116, "The proceedings shall have preference over all other causes in all courts"; the Rules of the Appellate Division, Third Dept. Sec. 800.16, "Appeals in election cases...shall be given preference".

[4] See also, CPLR 103(c) "...a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form..."); see also, CPLR 104 "the civil practice law and rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every civil judicial proceeding."

Judicial District. In view of the continuing long-term injury to all such persons individually, as well as the public interest in preserving the sanctity of the franchise--and the integrity and independence of the judiciary--this Court should promptly correct the injustice represented by the unwarranted and drastic dismissal of this proceeding.

STATEMENT OF FACTS

In 1989, the executive committees of the Republican and Democratic County Committees for the five counties comprising the Ninth Judicial District put in writing an agreement arrived at between party leaders, adopted in resolution form, whereby both major parties agreed to a bartering of seven (7) judgeships, by nomination of identical candidates over a three-year period, covering the 1989, 1990, and 1991 elections ["cross-bartering contract"]. The two major parties and their hand-picked judicial nominees (specifically named in the resolution (R. 52-53)) agreed that, in exchange for "cross-endorsements" guaranteeing their uncontested election, the judicial nominees would consent to certain terms and conditions, including, inter alia, early resignations to create additional vacancies, as well as a pledge to split judicial patronage, as recommended by "the leaders of each major political party." (R. 53)

In 1990, Respondent Albert J. Emanuelli ["Emanuelli"], a Republican, then sitting on the Supreme Court bench, as a result of the 1989 cross-endorsement agreement (R-52-53), resigned his fourteen (14) year term after seven (7) months in

office, to run, as scheduled, with the endorsement of both major parties, for the Westchester County Surrogate judgeship. In return, Respondent Francis A. Nicolai ["Nicolai"], a Democratic County Court judge, pursuant to the 1989 agreement, was cross-endorsed by the two major parties, for the Supreme Court seat vacated by Justice Emanuelli.

This proceeding concerns the 1990 nomination of Respondents Emanuelli and Nicolai, both now sitting judges by implementation of the second phase of the three-year cross-bartering contract, as well as the nomination of Respondent Howard Miller, also now sitting as a Supreme Court judge under a further cross-endorsement bartering deal implemented at the same 1990 judicial nominating convention.

In addition to the foregoing written cross-bartering contract which Appellants, representing the public interest, contend should be declared illegal, unethical and against public policy, the Record on Appeal contains unrefuted evidence of Election Law violations at the conventions at which the cross-endorsed judicial candidates in the 1990 election were nominated (R. 55-76)--totally ignored by this, as well as the lower court.

Indeed, despite the uncontroverted existence of an agreement contravening the people's right to "elect" their Supreme Court and Surrogate judges, and the unrefuted documentary evidence of fraud and other Election Law violations at the 1990 judicial nominating conventions, this Court affirmed the lower court's dismissal--although not its reasoning.

The lower court had cast aside all technical and procedural objections--raised by both sides--stating it was granting "Respondent Parisi's motion to dismiss the Petition for failure to state a cause of action" (R. 7). Although a dismissal motion relates solely to the legal sufficiency of the pleaded allegations, Justice Kahn, instead, expressly based it on a finding that "there is no proof that the judicial conventions at issue were not legally organized, with a quorum present, and that a majority of that quorum duly voted for the candidates named as respondents hereto" (emphasis added) (R. 7). Since Justice Kahn had not afforded Petitioners an evidentiary hearing, and the Record before him contained uncontradicted Affidavits of three (3) eyewitnesses at the conventions attesting to the contrary (R. 55-76), the only way to explain Justice Kahn's ruling is that he treated Respondent Parisi's motion to dismiss as a motion for summary judgment. It is settled law that such action, without adequate notice to the parties, would have been impermissible. CPLR 3211(c); See also, Mihlovan v. Grozavu, 72 N.Y.2d 506 (1988).

Although characterized by this Court's Decision as a dismissal "on the merits", Justice Kahn's decision did not address the broad issue of the perniciousness of major party cross-endorsement agreements in general, or of the particular cross-bartering contract in question, or of the fraud and other Election Law abuses which took place at the judicial nominating conventions.

This Court's Decision is completely silent as to the lower court's aforesaid unsupported and incomprehensible finding on which it premised its dismissal, and equally silent as to the lower court's failure to apply the proper standard on motions to dismiss--one not dependent upon "proof", but on acceptance of the truth of the pleaded allegations and all inferences flowing therefrom, giving them "their most favorable intendment" Mihlovan v. Grozaru, supra.

This case was orally argued on March 25, 1991 and decided on May 2, 1991. In affirming Justice Kahn's dismissal, albeit on procedural grounds, this Court gave two reasons: (1) that Appellants had failed to join necessary parties; and (2) that Appellants had failed to serve the Attorney General. As shown hereinbelow, neither ground supports dismissal of the Petition.

Although this Court's Decision expressly acknowledges that only "[t]wo of the respondents moved to dismiss the petition", only one--Defendant Miller--moved on the ground of non-joinder, presumably under CPLR 3211(10). Nonetheless, this Court affirmed the lower court's dismissal of the case as against all Respondents.

For reasons set forth hereinbelow, Appellants respectfully ask this Court (a) to grant reargument on the ground that it overlooked material facts and applicable law requiring it to vacate the dismissal as against all Respondents, other than Respondent Miller, since they did not move for dismissal on the

ground of non-joinder of necessary parties; and to vacate the dismissal as against Respondent Miller, since he, like the other individual co-Respondents, had no standing to raise any technical defenses or make motions until they were relieved of their default[5]; (b) to vacate the dismissal on the ground that it misapplied the law of joinder (Point II); (c) to grant renewal relative to the claimed ground of lack of service on the Attorney General because the Court was unaware of certain material facts as to such service, i.e., that the Attorney General had expressly waived service (Exhibit "C")--and the New York State Board of Elections expressly stated it would not raise such objection--and, in fact, it did not do so either by motion or in its answer.

As applicable law and the interests of justice require, this Court should grant Petitioners leave to reargue and renew their appeal, and on such reargument and renewal grant the relief in accordance with the arguments herein. Alternatively, leave should be granted to appeal to the Court of Appeals.

Additionally, because this case involves a politically sensitive issue revolving around the legality of cross-endorsement of judicial candidates, Appellants respectfully submit that those members of the panel which rendered the Decision and Order--and any other Justices of this Court who were themselves cross-endorsed in their own election campaigns--should avoid even "the appearance of impropriety" and recuse themselves

---

[5] The Answers and motion papers of the individual co-Defendants were not served in accordance with the Order to Show Cause initiating the proceeding.

from any further consideration of this sensitive issue (Point V) (Exhibit "E").

Further particulars as to the facts underlying this proceeding are set forth in the Statement of Facts found at pp. 4-9 of Petitioners' Brief on Appeal, incorporated herein by reference, as well as in the accompanying Affidavit of Doris L. Sassower, sworn to July 25, 1991.

ARGUMENT

POINT I

APPELLANTS SHOULD HAVE BEEN GIVEN NOTICE AND AN OPPORTUNITY TO SUPPLEMENT THE RECORD IF RESPONDENTS' TECHNICAL OBJECTIONS WERE TO BE CONSIDERED

This Court, while acknowledging that Justice Kahn had "specifically decided not to address any procedural issues and chose instead to dismiss the petition", completely disregarded critical facts. Indeed, before this Court could address "the legitimate procedural objections" raised by Respondent Miller's motion, it is respectfully submitted that Appellants were entitled to notice of such intention and an opportunity to supplement the Record, as, for example, by procuring the transcript of the oral argument before Justice Kahn.

This Court plainly overlooked the fact that before Respondents' procedural objections could be entertained, Appellants were entitled to a decision on the threshold question raised by their procedural objection that these Respondents had no standing to raise objections since they were in default,

inter alia, by failing to comply with time requirements of the Order to Show Cause initiating this proceeding. Since Justice Kahn had deliberately not ruled on that issue to accomodate Respondents' urgent demands for expediency, Appellants were entitled, at very least, to a remand to Justice Kahn so that he could make a determination of that issue.

It should be emphasized that Respondents are represented by eight seasoned lawyers and law firms. By failing to file any Cross-Notice of Appeal from Justice Kahn's Decision, explicitly rejecting technical objections raised by both sides as a ground for decision, or a Jurisdictional Statement expressly raising the issue as to the propriety of his doing so, or even including that issue as one of their "Questions Presented" on appeal in their Briefs, Respondents must be deemed to have waived their technical objections and to have accepted not only Justice Kahn's Decision, but the means by which he arrived at it. Appellants had a right to rely on such waiver. Parties to a litigation had a right to chart their own course, and once they do so, the Appellate Division is not free to alter it, without notice. Cf. Mihlovan v. Grozavu, supra.

Appellants' position on this point is further set forth in their Reply Brief (pp. 9-11).

For this Court to say that "[R]espondents were not aggrieved by Supreme Court's decision in their favor, [and] it

was not necessary for them to appeal"[6] overlooks the prejudice done by this Court's adoption, without notice to Appellants, of a position completely at odds with Justice Kahn's approach and ratio decidendi. By failing to give "adequate notice to the parties...which, in this case, should have been expressly given by the court...it deprived plaintiff of the opportunity to make an appropriate record", Mihlovan v. Grozavu, 72 NY2d 506.

It is respectfully submitted that if this Court viewed Justice Kahn as required to rule on Respondents' procedural objections as to, inter alia, non-joinder of necessary parties, then Respondents clearly were aggrieved by his failure to do so. Indeed, Respondents, without filing a Cross-Notice of Appeal, have clearly gained the benefit of a decision reversing Justice Kahn on that point, which plainly aggrieves Appellants.

At minimum, Appellants representing the public interest should have been given adequate notice to supplement the Record so as to establish the facts as to Respondents' default and consequent lack of standing to raise their procedural objections.

---

[6] It is respectfully submitted that this Court improperly relies on Lonstein v. Seeman, 112 AD2d 566 for the position that Respondents were not "aggrieved" by Justice Kahn's Decision, and, therefore, did not have to file a Notice of Appeal of their own. In Lonstein, supra, the facts do not indicate any possible basis upon which defendants could be aggrieved "inasmuch as the deficiency judgment, which was not vacated, [was] solely against defendant Norman Seeman and does not adversely affect these defendants."

POINT II

ALL NECESSARY PARTIES HAVE BEEN JOINED OR COULD EASILY BE ADDED.

The Decision/Order of this Court held that failure to join necessary parties warranted dismissal of the Petition. Such holding rests on a misapplication of the law of joinder. Under applicable law, the drastic remedy of dismissal is contrary to the clear legislative intent of CPLR 1001.

Under CPLR 1001(a), parties are "necessary" and should be joined as parties when either "complete relief" cannot be accorded in their absence, or when they "might be inequitably affected by a judgment in the action."

Respondents in this proceeding comprise all parties necessary to its full adjudication. Respondents have not shown how the unnamed parties would be "inequitably affected" within the meaning of CPLR 1001(a). By the foregoing statutory definition, such omitted parties were not necessary parties. See, In the Matter of Patrick L. Lucariello v. Commissioner of the Chataqua County Board of Elections, 148 A.D.2d 1012, 324 N.Y.S.2d 850 (4th Dept. 1989).

Appellants did not seek any relief under the Election Law against any omitted parties and joined only those parties against whom relief was requested. Indeed, as to the 1989 judicial candidates whom the Court in its footnote 2 suggests were also "necessary", the Court apparently overlooked the fact that such persons are jurisdictionally beyond the purview of a 1990 Election Law proceeding (see, Election Law, Sec. 16-102).

Appellants neither could, nor did they, ask any relief from this Court against the nominating certificates of the 1989 judicial nominees. By that test, the candidates named therein were not "necessary" parties.

This Court further failed to recognize that the Petition set forth two separate causes of action: (1) based on illegal cross-endorsement agreements, implemented at the 1990 nominating conventions; and (2) based on the illegal and fraudulent manner in which the 1990 conventions were conducted--irrespective of any agreement. Clearly, the 1989 judicial nominees were not necessary parties for an adjudication relative to the improperly-run 1990 conventions. At very least, a motion to dismiss addressed to the Petition as a whole had to be denied for that reason alone, as a matter of law. O'Reilly v. Executone of Albany, Inc., 121 App.Div.2d 772 (3rd Dept. 1986).

Moreover, Respondents did not show how they were prejudiced by the omission of the 1989 cross-endorsed judicial nominees.

Appellants will address the relevance of the other non-joined parties--also found by this Court to be "necessary".

A. The Non-Cross Endorsed Judicial Candidates On The Nominating Certificates

Due to an unexpected judicial vacancy in 1990, each of the parties to the 1989 cross-endorsement barter agreement nominated one candidate that year who was not nominated by the other party. The Democrats nominated Joan Lefkowitz for Justice of the Supreme Court. She won a contested election against

George Roberts, the Republican nominee. By contrast, Respondents Howard Miller and Francis Nicolai were nominated and elected in uncontested races in 1990 as part of a cross-endorsements deal.

Their nominations are under direct challenge--not those of Justice Lefkowitz and Mr. Roberts. See, Matter of Farley v. Mahoney, 130 Misc.2d 455, ___, 496 N.Y.S.2d 607, 611 (Sup. Ct., Erie Co., 1985) ("...a candidate whose designation or nomination is at issue, is a necessary party.")

Nonetheless, this Court's Decision states that all judicial nominees should have been joined, including those who ran contested races. This result obtains from the conclusion that "petitioners object in terms which indicate that they are challenging the certificates in their entirety". This incorrect view is contradicted by "the WHEREFORE clause" of the Petition (R. 23-4) showing that only the nomination and election of Respondents Emanuelli, Nicolai, and Miller are under direct challenge--not those of Justice Lefkowitz and Mr. Roberts, against whom no relief is requested.

Appellants do not seek to set aside the entirety of the nominating certificates, but only such portion thereof as relates to the challenged nominations. Were the Court to grant the relief requested based on the illegality of the cross-endorsement agreement implemented at the 1990 conventions, it could declare the certificates of nomination void only as to nominees who were parties to this lawsuit and whose nominations are "at issue".

Even assuming, arguendo, that Justice Lefkowitz and Mr.

Roberts were necessary parties, like any other allegedly necessary parties mentioned by the Court, they are each subject to the Court's jurisdiction and could easily have been added. Under CPLR 1013, they could also have easily intervened at any point--without objection from Petitioners. Indeed, they each received notice of Appellants' Specifications of Objections to the nominating certificates and conventions (Exhibit "D"). Nonetheless, neither sought to intervene or to take any other action to protect their respective interests, if they needed protection.

Moreover, the Decision contradicts this Court's reasoning in its recent decision in Matter of Michaels v. New York State Board of Elections, 154 App. Div.2d 873, 546 N.Y.S.2d 736 (3d Dept. 1989). In that case, this Court, although it found the nominating procedures of the political party defective, held that it was not a necessary party to a proceeding to nullify the certificates of nomination because it was not "inequitably affected by [a] judgment" nullifying the certificates. In this case, the interests of the candidates in a contested election, like the political party in Matter of Michaels, supra, are not "inequitably affected" by a judgment nullifying the certificates of candidates whose nominations resulted from an illegal, unconstitutional, fundamentally unfair cross-bartering agreement to nominate them on an uncontested basis.

Finally, CPLR 1001(b) contemplates excusing non-joinder of necessary parties "when justice requires", and allows an

action to proceed, even where the necessary party cannot be joined. As already noted, that is not the case here. Both Justice Lefkowitz and Justice Roberts could readily be added by Court direction at this post-election juncture. Under such circumstance and considering the enormous investment of legal and judicial time already made in this public interest case, justice requires that the action be allowed to proceed.

B. The 1989 Cross-Endorsed Judicial Candidates

The 1989 cross-endorsed judicial candidates were not joined as parties to this proceeding. Nor, as "the WHEREFORE clause" of the Petition shows, was any relief asked against them. As noted hereinabove, under Section 16-102 of the Election Law, no challenge could be made against 1989 judicial candidates in an Election Law Proceeding brought in 1990. Hence, they were not "necessary" parties. Such omitted persons could have sought intervention, whether as necessary or proper parties under CPLR 1013. This case was well-publicized--and there is no claim, nor could there be, that they were unaware of the proceeding. Their failure to seek intervention shows they have no desire to become parties and the failure of any of the Respondents to implead them shows the lack of prejudice. Cf. Fink v. Salerno 105 App. Div. 2d 489, 481 NYS2d 445 (Third Dept, 1984), app. dism'd. 63 NY2d 212, 483 NYS2d 212, 472 NE2d 1040, where intervention was denied when the proposed intervenors delayed unduly in making their motion, and there was no claim they were unaware of the proceeding early enough to have made their motion promptly.

C. Other County Executive Committees And Boards of Elections

The Decision also cites as "necessary parties" the party County Committees in the Ninth Judicial District, other than Respondents Westchester Republican and Democratic County Committees, and the County Boards of Election, other than Respondent Westchester County Board.

The Westchester entities were named in the Petition because the challenged nomination of Emanuelli involves a Westchester County office. Nominations are made by the county political committee and certified with the County Board of Elections, jurisdiction over which would have been necessary to implement a direction by the Court. No other county committee was necessary to effect complete relief, since no nominations to judicial positions in any other county are involved.

Nominations for the office of Supreme Court Justice take place at a district-wide convention over which the county political committees and boards of election have no control. No other county committee or boards of election are involved in the nomination of any public official whose election is challenged by this proceeding. Thus, no other such party would be "inequitably affected" by a decision for Appellants in this proceeding. See, Matter of Berman v. Board of Elections of the County of Nassau, 68 N.Y.2d 761, 506 N.Y.S.2d 432 (1988); Matter of Buley v. Tutanjan, 153 A.D.2d 784, 544 N.Y.S.2d 399 (3d Dept. 1989) (Vacancy committee of political party not a necessary party). Nor are any such parties required to implement any relief against

any party hereto.

D. Officers At Nominating Conventions

Unnamed officers elected at the conventions are not under challenge here. Their positions were temporary and limited to the pre-election period. Once the election is over, they are officio defunctus. The pro tanto invalidation of the nominating certificates does not require any further action on their part and no relief was sought against them.

The cases cited in the Decision do not involve a post-election situation, such as the instant case. Nor do they support invalidation of this proceeding by dismissal of this Petition. In those cases the petitions raised objections only to the technical procedure by which nominations in each case were made. Matter of Greenspan v. O'Rourke, 27 N.Y.2d 846, 316 N.Y.S.2d 639 (1970); Matter of Sahler v. Callahan, 92 A.D.2d 976, 460 N.Y.S.2d 643 (3rd Dept. 1983) ("proceeding pursuant to Section 16-102 of the Election Law for late filing of list of party members]..."); Matter of McGoey v. Black, 100 A.D.2d 635, 473 N.Y.S.2d 599 (2d Dept. 1984) (petition invalidated for insufficient number of signatures).

In stark contrast, this Petition challenges an illegal and unconstitutional agreement to control the selection and conduct of judges. The nominating conventions at which the subject cross-endorsements agreement was actualized were not only themselves violative of the Election Law because of the fraudulent and illegal manner in which they were conducted--they

were used by the party leaders and their judicial nominees as vehicles whereby their illegal contract was implemented. All of the cases cited in the Court's Decision, unlike this one, address only narrow, technical objections to nominating petitions or conventions[7], rather than the fundamental, larger questions at issue--the sanctity of the franchise and the integrity of our democratic and judicial process.

The conclusion reached by the Appellate Division that necessary parties were omitted and that therefore "this proceeding is fatally defective" overlooked the fact that the Court, under CPLR 103, could, inter alia, have converted the proceeding into an action for a declaratory judgment--an appropriate vehicle for the examination of the constitutional infringement resulting from the cross-endorsements agreement in question, Boryszewski v. Brydges, 37 N.Y.2d 361, and permitting joinder of any omitted parties deemed necessary by the Court. Considering the importance of establishing the legal and ethical efficacy of the cross-endorsement judge-bartering agreement, the fact that the 1991 phase of the agreement is already being implemented preparatory to this year's general elections, and that other similar judicial cross-endorsement deals are in the making--it was, and is, incumbent upon the Court to facilitate a prompt adjudication on the merits.

---

[7] Petitioner-Appellants do not intend by this argument to waive their timely objections to the nominating certificates of which all necessary parties had notice (R. 32-51).

POINT III

LEAVE TO JOIN, IMPLEAD, OR INTERVENE--NOT DISMISSAL--IS THE APPROPRIATE REMEDY FOR ANY OMITTED PARTY DEEMED NECESSARY BY THE COURT

It is Appellants' position that although the alternate avenue of relief by conversion of this proceeding into a declaratory judgment action was available, CPLR 1001 itself indicates that there was no jurisdictional non-joinder here[8]. As hereinabove noted, under CPLR 1001(a), a person is not a necessary party if "complete relief can be accorded between the persons who are parties...or who might be inequitably affected by a judgment". In the instant case, the Petition shows that complete relief could have been granted against the three judicial candidates named without inequitably affecting a person not a party, and that there were no unjoined necessary parties.

Even assuming necessary parties were not joined, necessary parties are not always indispensable parties. Indeed, the Court itself does not so characterize them in its Decision. That characterization is limited to those cases where the determination of the Court would adversely affect non-parties. Castaways Motel v. Schyler, 24 N.Y.2d 120, adhered to 25 NY 2d

---

[8] Apart from the issue as to Respondents' lack of standing to make any motions by reason of their being in default, in the absence of a jurisdictional non-joinder, the motion to dismiss by one Respondent should not inure to the benefit of all other Respondents who made no motion on that ground. (cf. Smith v. Pach, 30 AD2d 707 in which the court ruled that where a motion to dismiss on lack of subject matter jurisdiction was served after the time when service of the answer was required, the motion would be denied and defendant required to raise the issue by answer.)

692. The absence of a necessary party does not mandate the drastic remedy of dismissal, if the action can proceed without such joinder, Ayers v. Coughlin 72 NY2d 346 (1988); Re Comcoach Corp. 698 2d 571 CA2 NY (1983).

It is respectfully submitted that dismissal in this case is repugnant to the public interest and should be avoided--particularly at this post-election posture of the instant proceeding.

CPLR 1001(b) specifically provides as follows:

> "When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party." (emphasis added)

Plainly, justice requires this proceeding to continue until a final adjudication on the merits as to the legality of the cross-endorsements judge-bartering agreement and of the judicial nominating conventions. The legislative intent expressed in CPLR 1001(b) is antithetical to dismissal for non-joinder, except in the most narrow and limited situations--and then only as a last resort, without prejudice (CPLR 1003), if there is absolutely no possibility of bringing in such absent necessary parties, (e.g., when they are outside the Court's jurisdiction--not the situation here), and the action cannot proceed in their absence.

This Court apparently overlooked said applicable law in

dismissing the Petition. It is respectfully submitted that Matter of Marin v. Board of Elections of the State of New York, 67 N.Y.2d 634, 499 N.Y.S.2d 644 (1986), cited by the Court to justify dismissal, is also inapposite. There was no indication in that case that petitioners had even served the initial Objections, called for under the Election Law, on all challenged nominees, as is the case here. Indeed, the Court may have overlooked the fact that although the nominations of Joan Lefkowitz and George Roberts were not being challenged, Appellants did serve their Specifications of Objections on each of those individuals (Exhibit "D")--both of whom were running for the Supreme Court, without benefit of cross-endorsements, on the Democratic and Republican lines respectively.

Having had due and timely notice of Appellants' Objections to the certificates of nomination ensuing from the 1990 judicial nominating conventions at which they were both nominated, Justice Lefkowitz and Mr. Roberts could have intervened if they believed it necessary to protect their interests. Matter of Martin v. Ronan, 47 N.Y.2d 486, 419 N.Y.S.2d 42 (1979) (permitting intervention by necessary parties) or if Respondents deemed themselves inequitably affected by their non-joinder, they could have moved to implead them.

Under CPLR 1001(b), once the Court determines an omitted party to be necessary and he is within the jurisdiction of the court, "the court shall order him summoned", or it may allow the action to proceed without him being made a party,

i.e., the action is not automatically dismissed.

Had Justice Kahn ruled adversely to Appellants on Respondents' non-joinder objection on October 15, 1991, they would have still had time to bring in Justice Lefkowitz and Mr. Roberts, both of whom had already been served with Specifications of Objections. The Court could have granted Appellants' leave to amend their Petition by adding parties deemed necessary. See CPLR § 1003 which provides that "[P]arties may be added...by the court on motion of any party or on its own initiative, at any stage of the action and upon such terms as it may be just".

The transcendent public interest issues affected by this Petition demand that the Court exercise its discretion, at this stage, to allow Appellants leave to amend the Petition to add any parties which the Court finds necessary[9].

POINT IV

THE ATTORNEY GENERAL DEFERRED TO THE STATE BOARD OF ELECTIONS AS THE STATE BODY TO BE SERVED IN THE CASE

This Court held that "[a]nother basis for dismissal of this proceeding is Petitioners' failure to serve the Attorney-General..." (Exhibit "A", fn. 3).

It is respectfully submitted that this holding must be reconsidered in light of the fact that no motion was made by

---

[9] As shown by Appellants' Record, Briefs on Appeal, and as hereinabove described, Respondents failed to preserve their technical objections for appellate review.

Respondent New York State Board of Elections to dismiss on that ground, nor was any objection based thereon included in their Answer (R. 127). Indeed, that agency had no such objection and specifically waived service in this proceeding (Exhibit "C"). This case is similar to Duffy v. Schenck, 73 Misc.2d 72, 341 N.Y.S.2d 31 (Sup. Ct. Nassau Co.), affirmed, 42 A.D.2d 774, 346 N.Y.S.2d 616 (2d Dept. 1973), in which the Attorney General evidenced his awareness of the action by participating in an appeal even though he had not previously been served; the Court held that failure to serve the Attorney General did not require dismissal.

The Attorney General was aware of this proceeding, and opted explicitly not to be involved, deferring to the State Board of Elections which has its own counsel. See Exhibit "C", as well as accompanying Affidavit of Doris L. Sassower. Here, as in Duffy, the Attorney-General made a conscious decision, in the one case to participate even though not served, in this case, not to participate directly, but instead to rely on the legal representation of the public agency's own counsel.

It would work an injustice and offend important public interests in this far-reaching case to dismiss an otherwise valid Petition on the merest of technicalities, especially where the Attorney General explicitly deferred participation to the State Board of Elections, and its counsel so advised all parties.

Assuming, arguendo, that failure to serve the Attorney General were considered jurisdictional, non-waivable, and non-

remediable, the omission can result only in dismissal of the Petition against the State Board of Elections, the only "State body or officers" named in the Petition. See, CPLR 2214(d); see, De Carlo v. De Carlo, 110 A.D.2d 806, 488 N.Y.S.2d 228 (2d Dept. 1985). However, as noted, the New York State Board of Elections made no motion to dismiss by reason of the failure to serve the Attorney-General, nor did it include such objection in its Answer, thereby itself waiving same as a ground for dismissal.

Since the Court has ruled on an issue expressly not considered by the lower court, Petitioners are entitled to renewal of their appeal of the Decision and Order. CPLR 2221; Whitbeck v. Erin's Isle, Inc., 109 A.D.2d 1032, 487 N.Y.S.2d 147 (3d Dept. 1985) (Motion to renew motion to vacate default judgment granted upon showing of cause for not including information in original submission); see, Bassett v. Bando Sangau Co., Ltd., 103 A.D.2d 728, 478 N.Y.S.2d 298 (1st Dept. 1984) (Motion for renewal granted and order dismissing answer and counterclaims reversed because "[a]ctions should, wherever possible, be resolved on the merits..."); Esa v. New York Property Insurance Underwriting Association, 89 A.D.2d 865, 866, 453 N.Y.S.2d 247, 249 (1st Dept. 1982) (where an issue is raised for the first time sua sponte, the Court should exercise its discretion by granting a motion for renewal bringing additional facts bearing on that issue to its attention).

As in the case of the non-joinder objection, it is respectfully submitted that this Court likewise improperly

deprived Appellants of notice and an opportunity to make an adequate record on this technical objection specifically rejected as a basis for decision by the Court below and not the subject of a Notice of Appeal by Respondents.

POINT V

THE JUSTICES ON THIS PANEL WHO WERE CROSS-ENDORSED SHOULD RECUSE THEMSELVES

Three of the Justices on the panel which heard the appeal in this case were themselves products of cross-endorsement arrangements. They are, thus, not disinterested in the outcome of this litigation--which may explain why this Court decided not to address the serious issues concerning cross-endorsement agreements, either in general or as to the specific agreement involved in this case, or the fact that Justice Kahn's dismissal was based on a wholly erroneous view of the facts and applicable law.

The cross-endorsements of these, as well other Appellate Division judges, may also explain why this case was denied the automatic preference given Election Law cases and not calendared for oral argument before the Appellate Division on the last day of the term, October 19, 1991--even though all specified preconditions were met by Appellants in order for it to be argued on that date. Indeed, it may further explain why even after Appellant's made formal written application[10] for the preference, to which they were entitled to as a matter of right,

---

[10] See Exhibits "E", "F", and "G" to Doris L. Sassower's Affidavit.

that was also denied, with no mention of the support for Appellants' asserted preference, given by the State League of Women Voters, which issued a state-wide alert urging that this case be heard and decided before Election Day. A copy of their press release to that effect was appended as Exhibit "A" to Appellants' Reply Affirmation, dated October 28, 1990.

The failure of judges of this Court's bench to disqualify themselves from deciding an appeal in which their impartiality "might reasonably be open to question" or even to disclose their own cross-endorsements necessarily erodes public confidence in the integrity of the judiciary, particularly when the Decision results in dismissal of the Petition.

In view of the fact that the Petition is based on the unconstitutionality, illegality and impropriety of cross-endorsement of judicial candidates by the two major parties (see, Petition, passim; R. pp. 13-25), Appellants respectfully submit that it is unwise, unfair and unethical for any Justice of this Court who has himself or herself been cross-endorsed to participate in this proceeding.

Appellants' position follows from fundamental principles of judicial ethics embodied in the Rules of the Chief Administrator of the New York Courts, and the Code of Judicial Conduct. These key precepts mandate that a judge must

* "observe high standards of conduct so that the integrity and independence of the judiciary may be preserved." (Canon 1, Rules § 100.1);

* "respect and comply with the law and... conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary; and"

* "disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned." (Canon 3(c)(1), § 100.3(c)(1)).

As the Supreme Court of the United States has affirmed

> "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 150, 89 S. Ct. 337, 340 (1968).

Thus, however confident a judge may be of his or her own impartiality, and even though he or she may in fact actually be impartial, he or she is bound to consider the appearance to the litigants and the public of participating in a proceeding. In Matter of Fuchsberg, 426 N.Y.S.2d 639 (Court on the Judiciary 1978), the Court, relying on this "objective factor of the appearance of impartiality" held that respondent had violated Canon 3(c)(1) by not withdrawing from a case in which he had a possible financial interest. The Court went on to say:

> "We reach this conclusion without questioning respondent's belief in his own impartiality, or, indeed, the fact of his impartiality in contributing to the decision of this case. Our concern, rather, is with "[t]he guiding consideration...that the administration of justice should reasonably appear to be disinterested as well as be so in fact." [Citations omitted.] 426 N.Y.S.2d at 645.

See, 28 N.Y. Jur. "Judges," § 179 (1983) ("[I]t is of transcendent importance to litigants and the public generally that

there should not be the slightest suspicion as to [a judge's] fairness and integrity.")

This same "guiding consideration" applies in this case. Justices of the Supreme Court who owe their offices to cross-endorsement by political parties might reasonably be concerned with how a decision favorable to Appellants would impact on their own positions, particularly if it were to be viewed as having retroactive effect. Indeed, as shown by the accompanying Affidavit of Doris L. Sassower, the question as to retroactive application was expressly raised by the Court on oral argument, when she was asked specifically by the Presiding Justice to comment on the propriety of the cross-endorsement of certain other judges many years ago. The Presiding Justice, however, did not reveal his own more recent triple cross-endorsement.

Certainly, self-interested concern for position, salary and status would objectively appear to compromise the impartiality of a Justice considering the Petition in this proceeding, whatever the true facts are. Thus Canons 1 and 3(c) and §§ 100.1 and 100.3(c) counsel that any Justice of the Appellate Division, Third Department, cross-endorsed by the Democratic and Republican parties disqualify himself or herself from any further considerations in this proceeding.

POINT VI

ALTERNATIVELY, LEAVE TO APPEAL TO THE COURT OF APPEALS SHOULD BE GRANTED

The legal issues to be presented to the Court of Appeals are, inter alia, as follows:

1. Whether the cross-endorsements bartering contract in issue is an invidious violation of the New York State Constitution, the Election Law of the State of New York, the Code of Judicial Conduct and court rules relative thereto, including the Rules of the Chief Administrator of the Courts and as such, illegal, void, and against public policy.

2. Whether the Decision of the Appellate Division deprived Appellants of the right to be heard by an impartial bench in violation of their rights under the New York State and United States Constitutions, and whether judges of this Court, themselves cross-endorsed, should have recused themselves.

3. Whether the Appellate Division's dismissal of the Petition against all Respondents on the ground of Appellants' non-joinder of necessary parties is proper where (a) Respondents were in default by filing untimely and unverified papers, and, therefore, without standing to raise objections; (b) the lower court expressly refused to address the technical objections, raised by both sides, including specifically Appellants' objection that Respondents were in default and the individual Respondents' objection as to non-joinder of necessary parties; and (c) Respondents took no separate appeal or cross-appeal from the lower court's ruling on that or any other technical defenses

or objections, and whether, therefore, the objection of non-joinder of necessary parties was not preserved for appellate review; and (d) only one Respondent made a motion to dismiss on the ground of non-joinder of necessary parties.

4. Whether all parties necessary for the relief sought by Appellants were joined.

5. Whether the failure of the Respondent New York State Board of Elections to make any motion to dismiss based on the failure to serve the Attorney-General or raise any objection based thereon, as well as the Attorney General's express waiver of service upon his office, dispensed with the requirement for service upon him, and precludes a dismissal on that ground.

6. Whether in light of the transcendent public interest issues involved and the lack of prejudice to Respondents at this post-election stage of the proceedings, any omission of necessary parties can be cured by direction of the Court under CPLR 1001(b).

7. Whether under all the relevant circumstances, dismissal a drastic and inappropriate remedy as a matter of law and in the interests of justice.

Although it is Appellants' position that appeal to the Court of Appeals lies as of right pursuant to CPLR Sec. 5601(b), it is respectfully requested that in the event the Appellants are not entitled to appeal as of right, that the Appellate Division grant permission for leave to appeal to the Court of Appeals.

CONCLUSION

For all the reasons set forth hereinabove and in the accompanying supporting papers, it is respectfully prayed that the relief prayed for should be granted in all respects.

Dated: Yonkers, New York
July 25, 1991

Respectfully submitted,

ELI VIGLIANO, Esq.
Attorney for Petitioners-
Appellants
1250 Central Park Avenue
P. O. Box 310
Yonkers, New York 10704
(914) 423-0732

On the Brief:
Margaret A. Wilson, Esq.

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 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

---

[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"

---

[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

---

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).

---

[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]

---

[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-

---

[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.

---

[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.

F-14

Supreme Court—Appellate Division
Third Judicial Department

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.

A-1

DORIS L. SASSOWER

283 SOUNDVIEW AVENUE • WHITE PLAINS, N.Y. 10606 • 914/997-1677 • FAX: 914/684-6554

By Fax and Mail
518-474-1513

October 24, 1991

Hon. Mario M. Cuomo
Executive Chamber
Albany, New York 12224

Dear Governor Cuomo:

I read with interest the story in The New York Times of October 22, 1991 indicating you may be making a decision to run for the presidency of the United States. As one of your fans from way back, such an announcement would have brought me great pleasure--were it not for my present firm belief that you need to put your New York house in order before you start looking after the national scene.

Just about this time two years ago, a letter written by an attorney, Eli Vigliano, Esq., was hand-delivered to your Executive Offices in New York City. As an eyewitness to the 1989 Judicial Nominating Convention of the Democratic Party in the Ninth Judicial District, Mr. Vigliano detailed serious Election Law violations--that there had been no quorum, no roll call to determine a quorum (because it was readily apparent to all that there were too few delegates there to constitute a quorum), and that the number of seats in the convention room was inadequate to accommodate the required number of delegates and alternate delegates (to make it less obvious that there was no quorum)--all fatal procedural flaws, requiring annulment of the nominations and a reconvening of the convention.

Mr. Vigliano further reported that the Minutes and Certificate of Nomination, signed and sworn to by the Chairman and Secretary of the Democratic Judicial Nominating Convention, both lawyers, perjuriously attested to due compliance with Election Law requirements. The felonious nature of the violations complained of was cited in support of a request for you to appoint a Special Prosecutor to investigate.

Mr. Vigliano's letter enclosed many documents, including the Resolution adopted by the party bosses of the Democratic and Republican parties of Westchester County and their counterparts in Putnam, Dutchess, Rockland and Orange, the other four counties of the District--and ratified at the 1989 judicial nominating conventions of both parties. Set forth in the Resolution were

the precise terms and conditions of a Deal: a cross-bartering of seven judgeships in 1989, 1990, and 1991 between the two major parties, including contracted-for resignations to create new vacancies, which Mr. Vigliano contended violated Election Law prohibitions against making or accepting a nomination to public office in exchange for "valuable consideration". The Deal also included a pledge by the nominees that, once elected, they would divide judicial patronage in accordance with party leaders' recommendations.

What happened to this citizen's complaint implicating prominent lawyers and sitting judges in what, if proven, would have amounted to a "judicial Watergate"? NOTHING--not even an investigation by the public agency charged with the duty of enforcing the Election Law, the New York State Board of Elections, all four of whose commissioners are appointed by you.

Indeed, after the 1989 elections, your legal counsel transmitted Mr. Vigliano's complaint to the New York State Board of Elections. Other than a pro forma acknowledgment of receipt of his complaint from the Board's "Enforcement" Counsel, Mr. Vigliano received no further communication--although he let that "Enforcement" Counsel know that he had a tape recording of the Democratic convention. Seven months later, on May 25, 1990, Mr. Vigliano's complaint was dismissed on the stated ground that there was "no substantial reason to believe a violation of the Election Law had occurred"--although, as subsequently acknowledged by the Board, it had conducted no hearing or investigation into the matter.

Mr. Vigliano did not learn of the dismissal of his citizen's complaint until October 15, 1990, at the oral argument of the case of Castracan v. Colavita, before the Albany Supreme Court. At that time, the State Board's May 25th letter notifying Mr. Vigliano of the dismissal inexplicably turned up in the hands of counsel for the Westchester Republican Party, named as a party respondent in that case[1].

As you know, the Castracan case, spearheaded by the Ninth Judicial Committee, was brought in September 1990 by two citizen objectors, acting in the public interest, to obtain judicial

---

[1] The "Enforcement" Counsel of the State Board has been unable to offer any explanation as to how such dismissal letter was obtained by counsel for the Republican Party and has informed us that the State Board has no record of any request for such document having been made. Since the May 25th dismissal letter indicated a copy was sent to your counsel, Pat Brown, we would ask to know what his file reflects concerning any transmittal of same.

review of the failure of the State Board of Elections to invalidate the nominations resulting from the 1990 Democratic judicial nominating conventions. Election Law violations affecting that year's judicial nominations--similar to those reported the previous year concerning the 1989 conventions--were this time reported directly to the State Board in the form of Objections and Specifications, in strict compliance with the Election Law. The State Board again failed to undertake any investigation or hearing and, notwithstanding that the Republican Certificate of Nomination was invalid on its face, claimed in its Determination of Dismissal that the State Board does not address Objections that "go behind the documents and records on file".

As a result, the citizen objectors, Dr. Mario Castracan and Professor Vincent Bonelli, were obliged to seek judicial intervention because the public agency charged with enforcement of the Election Law refused to perform even its most minimal duty.

The Record in the Castracan case--on all court levels--demonstrates conclusively that the State Board actively obstructed judicial review of its inaction, and, in a bitterly partisan manner, aided and abetted the political leaders and public officials charged with corrupting the democratic and judicial process--even going so far as to seek sanctions against the pro bono petitioners and their counsel for bringing the lawsuit.

Consequently, there was never any adjudication as to whether the State Board acted properly in dismissing Petitioners' Objections to the 1990 nominations. Nor did the courts rule on the illegality of the Three Year Deal. This, as well as the otherwise inexplicable court decisions in the Castracan case[2] have led many people to believe that behind-the-scenes political influences successfully effected a "cover-up" to protect the politically well-connected lawyers and judges who were parties to the Deal.

---

[2] Such decisions included the sudden denial by the Appellate Division, Third Department, of the automatic preference accorded by law to Election Law proceedings. The cancellation of the scheduled October 19, 1990 date set for oral argument prevented the case from being heard before the November elections, as urged by The League of Women Voters of New York State. Thereafter, the Appellate Division denied the request of the NAACP Legal Defense & Educational Fund for one additional week to file an amicus curiae brief before the re-scheduled post-election date for oral argument.

That conclusion is borne out by what transpired in the related case of Sady v. Murphy, brought earlier this year by Mr. Vigliano, counsel to the pro bono petitioners, to contest the 1991 judicial nominations under the third phase of the Deal. At the oral argument this past August before the Appellate Division, Second Department, forthright comments about the Deal emanated from the bench consisting of Justices Mangano, P.J., Thompson, Sullivan and Lawrence. The following are illustrative:

(a) When Alan Scheinkman, Esq., arguing on behalf of both Democratic and Republican Respondents therein, who filed a joint brief, said that the parties to the Three-Year Deal were "proud of it", Justice William Thompson stated:

> "If those people involved in this deal were proud of it, they should have their heads examined".

(b) Referring to the contracted-for resignations that the Three Year Deal required of Respondents Emanuelli and Nicolai, Justice Thompson further stated:

> "these resignations are violations of ethical rules and would not be approved by the Commission on Judicial Conduct"

and additionally said:

> "a judge can be censured for that".

(c) When Mr. Scheinkman sought to argue that the Three Year Deal embodied in the Resolution was merely a "statement of intent", Presiding Justice Guy Mangano ripped the copy of the Resolution embodying the Deal out of Appellants' Brief, held it up in his hand and said:

> "this is more than a statement of intent, it's a deal"

and that:

> "Judge Emanuelli and the others will have a lot more to worry about than this lawsuit when this case is over".

(d) In response to Mr. Scheinkman's attempt to claim that the Decisions rendered by in the Castracan case in the lower court and Appellate Division, Third Department were on the merits of the cross-endorsement

Deal and that the Appellants in the Sady case were collaterally estopped, Justice Thomas R. Sullivan pointed out the difference in the parties and the causes of action, and further stated:

> "what the Third Department does is not controlling in the Second Department, we do what we believe is right, irrespective of whether the Third Department agrees with us".

Yet, overnight these candid views of the Appellate Division, Second Department were submerged into a one-line decision that there was "insufficient proof" to invalidate the nominations. This ruling was made by an appellate court which knew that there had been no hearing afforded by the lower court at which to present "proof", and notwithstanding that, as a matter of elementary law, "proof" is irrelevant on a motion to dismiss, which assumes the truth of the allegations and all reasonable inferences therefrom.

When leave was sought to take the Sady case to the Court of Appeals, Judge Richard Simon stated at the oral argument of that application: "it's a disgusting deal". When Mr. Scheinkman contended that since no money passed as part of the Deal, there was no "valuable consideration", Judge Simon replied:

> "A promise for a promise is consideration under basic law of contracts. Why, then, wouldn't a promise by the Democrats to nominate a Republican for a judgeship in exchange for a promise by the Republicans to nominate a Democrat for a judgeship constitute 'valuable consideration' under the Election Law?"

Nonetheless, the Court of Appeals denied leave to appeal Sady v. Murphy, and dismissed the appeal as of right.

After the Sady v. Murphy decisions came down, the familiar aphorism "one call does it all" was heard a lot around town in the Westchester legal community.

The man generally credited as the architect of the Deal was Samuel G. Fredman, former Chairman of the Westchester Democratic Party, well known as one of your earliest backers who "delivered" a record vote for you in your 1982 run. In return, you rewarded Mr. Fredman with an interim appointment to the Supreme Court in early 1989--although he had no judicial experience and was approaching 65 years of age. It is believed that Mr. Fredman laid the groundwork for his appointment via an "arranged" vacancy for you to fill. In 1988, with the help of Anthony

Colavita, Chairman of the Westchester Republican Party, an incumbent Republican judge agreed to resign so as to create a vacancy for Mr. Fredman to be named to by you. The bargained-for exchange was the cross-endorsement by the Democrats of the nomination of another incumbent Republican judge, then 69 years old, for a further 14 year term. That manipulation of the judiciary, involving a single judgeship in 1988, enabled Mr. Fredman to become an incumbent in 1989 via your interim appointment--and laid the foundation for the Three-Year Deal, emerging later that year.

It was the Westchester County Surrogate judgeship which formed the cornerstone of the Deal--the most "valuable consideration" traded by the party bosses. Historically, Republican hands held that important office--controlling the richest patronage in the county. However, Westchester's changing political demographics made it apparent that the Democrats would capture that position in 1990 when the seat became vacant. This then was the bargaining chip for the Democratic party leaders. Because the party bosses did not trust each other sufficiently, they employed contracted-for resignations to ensure performance of the Deal. Thus, Albert J. Emanuelli was cross-endorsed in 1989 for a 14-year term on the Supreme Court, subject to his commitment to resign after seven months in office to create a vacancy for another cross-endorsed candidate to fill. Under the Deal, Mr. Emanuelli would then be cross-endorsed in 1990 as the nominee of both parties for Westchester County Surrogate.

Neither the party leaders nor their would-be judicial nominees were troubled by the destructive impact such resignations and the consequent protracted vacancies would have upon litigants and the back-logged court calendars. As was eminently foreseeable, the impact of such musical-chairs has been devastating. Indeed, the reason why the courts are now in crisis is precisely because politicians have put their favorites on the court--without regard to merit--no matter how lacking in experience or other judicial qualifications. Illustrative is that neither Samuel Fredman nor Albert Emanuelli had <u>any</u> judicial experience for the exalted judicial offices they obtained through political connections. Mr. Emanuelli never even tried--let alone judged--a contested case in Westchester Surrogate Court. And yet, he was <u>cross-endorsed</u> as the nominee for Surrogate.

What has been the result of this "quantum leap" in the politicization of the judiciary in the Ninth Judicial District? Judges who do not honor their oaths of office and who all too often do not decide cases on the facts and the law, but on political considerations or other ulterior motives.

As an active practitioner for more than 35 years--nearly 25 of which have been spent in Westchester--I and other practitioners can document for you over and again the egregious decisions of judges in this District for whom applicable law, the rules of evidence, and fundamental due process are dispensable commodities. In this connection, I believe my own personal experience can lend to the public discussion as to why our court system is in such crisis that you and Chief Justice Wachtler are litigating over budgetary cut-backs and why the Appellate Division, Second Department is currently seeking at least "five more judges".

Based upon my experience, the obvious solution is not more judges for the appellate courts, but better judges in the lower courts. This will sharply decrease the number of appeals being taken--by litigants who presently feel, with reason, that they got "a raw deal" in court. What is needed is a system of pre-nomination screening panels in which the best qualified lawyers are recommended for judicial office--based on merit, not political affiliation or party loyalty.

This conclusion is reinforced by a recent personal experience which should be of particular interest to you since it raises a substantial question as to the judicial fitness of your interim appointee to the Supreme Court, Samuel G. Fredman.

Shortly after his induction to office in April 1989, Justice Fredman used his office and diverted its vast resources to further his political ambitions and settle old scores. He accepted a jurisdictionally void proceeding brought against me by Harvey Landau, Esq., Chairman of the Scarsdale Democratic Club, then actively promoting Justice Fredman's candidacy for a full 14 year term in November. Justice Fredman used that factually and legally baseless proceeding to accomplish a three-fold purpose: (a) to reward his friend and political ally, Harvey Landau; (b) to punish and discredit me, his former adversary and professional competitor; and (c) to promote himself in his bid for full-term election. Consequently, Justice Fredman needlessly caused the expenditure of hundreds of hours of judicial and legal time on a minuscule matter which could have been disposed of in an hour's court time--if not summarily on papers.

I invite an examination by your office of the matter brought under the caption Breslaw v. Breslaw (#22587/86) so that you can confirm the full extent of Justice Fredman's profligate use of court time and facilities to wage a personal vendetta against me and to create for himself and Mr. Landau a media opportunity to benefit their mutual political ambitions. I would specifically request a review of the transcripts of the proceedings before Justice Fredman, as well as the numerous decisions written by him

in the matter, reflecting not only his intense bias, but his utter lack of judicial competence and outright disregard for elementary legal principles and rules of evidence.

Between Justice Fredman's misconduct on the bench, as illustrated by my own direct experience with him, and Justice Emanuelli's contracted-for resignation in August 1990, the matrimonial part of the Supreme Court, Westchester County--which Justice Fredman in the summer of 1989 had publicly proclaimed would become "a model for the state", was effectively destroyed. You can be certain that such destruction was replicated in the lives and fortunes of the non-politically connected litigants and lawyers appearing before them.

The necessity of your investigating the foregoing is underscored by the fact that, according to the local Gannett newspapers of May 22, 1991, you were intending to nominate Harvey Landau, Esq. to fill an interim vacancy on the Westchester Supreme Court this year. We can only speculate on the source of that appalling recommendation and trust that our submission documenting his unethical conduct in connection with the Breslaw matter enabled you to recognize his professional unfitness. However, with all due respect, the fact that his name could have been given any serious consideration at all makes it evident that you are out-of-touch with "the home front".

It should be evident that this State can no longer afford squandering of the resources of our courts by incompetent, unscrupulous politicians turned lower court judges--whose decisions are seen as a means of furthering their political ends and which are so outrageous as to leave litigants with no option, but to appeal.

Unfortunately, as shown by Petitioners' experience in Castracan v. Colavita and Sady v. Murphy, appellate court decisions may also reflect improper political motivations. Those two cases presented to the Court of Appeals a historic opportunity to reverse the political impingement on the essential independence and integrity of the judiciary, which would have promoted judicial selection on merit, not party labels. In so doing, the Court would have fulfilled the intent of the framers of our State Constitution--who meant what they said when they gave "the people" of New York the right to vote for their Supreme Court, Surrogate, and County Court judges. Instead, the Court of Appeals abandoned "the people" of this State to the manipulations of politicians who see the voters' sole function as "to be a rubber stamp". These politicans have now gotten the "go-ahead" from our highest court that they can freely commmit the "crimes against the franchise" which the Election Law was designed to prevent.

The Court of Appeals' refusal to hear those cases--affecting as they did the lives, liberty and fortunes of millions of people in this State--says more about that Court's commitment to a quality judiciary and the true administration of justice--than all its public posturing in justification of Chief Judge Wachtler's current law suit against you.

We respectfully urge that the court records of both Castracan v. Colavita (AD, 3rd Dept. #62134) and Sady v. Murphy (AD, 2nd Dept. #91-07706) be requisitioned by your counsel for your consideration.

Because of the refusal of our state courts--including the Court of Appeals--to adjudicate the illegality of the Three Year Deal and the fraud at the judicial nominating conventions that implemented it--the party leaders of the Ninth Judicial District have again this year taken it upon themselves to by-pass the mandatory requirements of the Election Law and engaged in open bartering of judgeships. And once again, the State Board of Election has become an active participant in the fraud upon the voting public.

Now more than ever before, a Special Prosecutor is needed to investigate and halt the corruption in the courts which has already tainted your administration--and which is leading steadily to the collapse which has brought our Chief Judge into legal confrontation with you.

Unless and until that is done, public confidence in the Governor of this State--not to mention his political appointees on the bench and at the New York State Board of Elections--will be at a very low level--hardly inspiring of support for a presidential race.

Very truly yours,

Doris L. Sassower

DORIS L. SASSOWER
Director, Ninth Judicial Committee

P.S. I should note that I was privileged to act as pro bono counsel to the Petitioners in the case of Castracan v. Colavita from its inception until June 14, 1991, the date on which the Appellate Division, Second Department, issued an Order suspending me from the practice of law--immediately, indefinitely, and unconditionally--without any evidentiary hearing ever having been had, and notwithstanding the proceeding was jurisdictionally void for failure to comply with due process and other procedural requirements. The Order

was issued less than a week after I announced in a New York Times "Letter to the Editor" that I was taking Castracan to the Court of Appeals, and, likewise, only days after I transmitted to you my sworn and documented affidavit concerning the political relationship between Justice Fredman and Harvey Landau, Esq. and their other unethical conduct in the Breslaw case.

The Court of Appeals denied my application to have my suspension Order reviewed--particularly shocking in view of the fact that my counsel raised the serious issue that my suspension was retaliatory in nature. Review of the underlying papers would show there was no other legitimate explanation for the suspension by the Court. I would waive my privilege of confidentiality in connection with that application so that you can determine for yourself the complete corrosion of the rule of law where issues raised touch upon vested interests able to draw upon the power and protection of the courts.

cc: Chief Judge Sol Wachtler, Court of Appeals
Hon. Guy Mangano
Presiding Judge, Appellate Division, 2nd Dept.
Hon. A. Franklin Mahoney
Presiding Judge, Appellate Division, 3rd Dept.
Hon. Angelo J. Ingrassia
Administrative Justice, 9th Judicial District
Hon. Christopher J. Mega
Chairman, N.Y. State Senate Judiciary Committee
Hon. G. Oliver Koppell
Chairman, N.Y. State Assembly Judiciary Committee
Commission on Judicial Conduct
Hon. Samuel J. Silverman
Chairman, Advisory Committee on Judicial Ethics
Fund for Modern Courts
New York State Bar Association
Association of the Bar of the City of New York
Westchester/Dutchess/Putnam/Rockland/Orange Bar Associations
Elliot Samuelson, President, Academy of Matrimonial Lawyers

Enclosures: Three Year Deal Resolution
The New York Times, June 9, 1991
New York Law Journal, October 22, 1971
Martindale-Hubbell listing

DLS/er

THE THREE-YEAR JUDGE TRADING DEAL, ANNEXED TO DORIS SASSOWER'S OCTOBER 24, 1991 LETTER TO GOVERNOR MARIO CUOMO CAN BE FOUND AT PAGES 1-3 HEREIN.

LETTERS TO THE EDITOR

Cross-Endorsement: Questions of Protection

The story on the highly controversial cross-endorsements case ["Lawyer to Pursue Suit on Cross-Endorsement," May 19] gives rise to serious questions: who is being protected, by whom and why? There are significant errors and omissions, even omission of the name of the case, Castracan v. Colavita, now headed for the Court of Appeals based on issues including constitutionally protected voting rights.

No information was given as to the genesis of the Ninth Judicial Committee, its purpose, the credentials of its chairman, Eli Vigliano, a lawyer of 40 years standing, or to my own extensive credentials in law reform. No reference was made to the ethical mandates of the Code of Judicial Conduct, requiring a judge to disqualify himself "in a proceeding where his impartiality might reasonably be questioned" — clearly the situation where three of the five judges who decided the appeal failed to disclose their own cross endorsements.

The Ninth Judicial Committee is a nonpartisan group of lawyers and other civic-minded citizens, concerned with improving the quality of the judiciary in Westchester and the four other counties of the Ninth Judicial District. The committee came into being in 1989 as a response to the "Three-Year Deal" between the Westchester Republican and Democratic party leaders and their judicial nominees, which effectively disenfranchised voters in all five counties and furthered political control of the judiciary. Your reporter failed to discuss the essential terms and criminal ramifications of the deal: the trading of seven judgeships over three years; the requirement that judicial candidates agree to early resignations to create and maintain protracted vacancies; divvying up judicial patronage along political lines.

There was no mention that the lower court's dismissal was without any hearing and ignored the uncontradicted documentary evidence of Election Law violations at both Republican and Democratic judicial nominating conventions. Nor was there any reference to the content or effect of the long delayed appellate decision. By not ruling on the cross-endorsement issue but instead affirming the dismissal on technical objections by the public officials sued, the Appellate Division did not consider the public interest and the horrendous impact the deal has had on already backlogged court calendars.

Your reporter skewed the article by personalizing this major legal proceeding as if it were "Mrs. Sassower's case." Overlooked were the petitioners: Dr. Mario Castracan, a registered Republican in New Castle, and Prof. Vincent Bonelli, a registered Democrat in New Rochelle who teaches government.

The New York Times has done its best to bury the story. In October 1990 it did not see fit to print that the New York State League of Women Voters had issued a statewide alert to voters, urging the Appellate court to review the case before Election Day; or that the statutory preference to which Election Law proceedings are entitled was denied after being vigorously opposed by the judicial nominees defending the case. The Times failed to report that in February the N.A.A.C.P. Legal Defense and Educational Fund was granted permission to file an amicus brief. Also ignored was an extensive Associated Press story by a prize-winning journalist released nationally two weeks before last year's election, but which The Times did not see fit to print.

The article's reference to "a personal court case" in which I was involved before Justice Samuel G. Fredman two years ago suggested that my concern for the transcendent issues of Castracan v. Colavita was personally motivated and of recent origin. In fact, my concern with the method of selecting judges is longstanding. I began my legal career 35 years ago by working for New Jersey Chief Justice Arthur T. Vanderbilt, a leader in court reform. More than 20 years ago the New York Law Journal published my article about my experience on one of the first pre-nomination judicial screening panels. From 1972-1980 I served as the first woman appointed to the Judicial Selection Committee of the New York State Bar Association.

Justice Fredman — a former Democratic Party chairman — was identified only as having been cross-endorsed as part of the 1989 deal, without stating that he was *not* named as a party to the Castracan v. Colavita cross-endorsement challenge. The reporter's garbled version of the proceeding before Justice Fredman (still undecided more than one year after final submission to him) failed to reflect a true or accurate story. The reporter did not check her "facts" with me. Indeed, a proper report would depict what occurs when party bosses become judges.

The inaccurate, slanted, inadequate coverage shows that The Times has not met its journalistic responsibility to fully and fairly report the facts — or to make any independent investigation of its own.

It is shocking that your newspaper repeats the self-serving statements of politicians like Richard Weingarten and Anthony Colavita that political parties "do a better job of picking candidates" than merit-selection panels and that their handpicked candidates are a "major step toward nonpartisan election of judges," without giving the committee an opportunity to put the lie to these claims. The reporter, who had the relevant appellate records, should have exposed the hypocrisy of politicians who professed disappointment that "the substantial issues in the case were not reached," when they and the cross-endorsed sitting judges involved in the deal fought vigorously to prevent them from being addressed.

Unless the public is immediately apprised of what is taking place, the cross-endorsed judicial nominations representing the third phase of the deal will proceed as scheduled in the 1991 elections. DORIS L. SASSOWER
Pro Bono Counsel
Ninth Judicial Committee
White Plains

Journal

NEW YORK, FRIDAY, OCTOBER 22, 1971

Notes and Views

Judicial-Selection Panels: An Exercise in Futility?

By Doris L. Sassower

Hopes were raised recently for improvement in the process of choosing our judges. In early September, readers of the NEW YORK LAW JOURNAL learned that a nine-member impartial panel had been formed by the Committee to Reform Judicial Selection to recommend the eight most qualified candidates for State Supreme Court in Manhattan and the Bronx. From these it was thought that three would emerge as the nominees at th Democratic Judicial Nominating Convention.

In retrospect, disappointment in the ultimate effect of the recommendations of this panel might have been anticipated. A prenomination screening panel under the chairmanship of Judge Bernard Botein was set up in 1968 in connection with the unprecedented number of new judgeships created by the New York State Legislature. Advance assurances were secured from the party leaders that nominations would be limited to those approved by the panel. This was not the case, however. As subsequent events proved, the party leaders failed to honor their bipartisan commitments.

Despite the sour experience of the Botein Committee, we agreed to serve believing that such panels perform a genuine service to the public and the Bar.

The candidates came to us, one by one, each the embodiment of the popular belief that "every lawyer wants to be a judge."

Doris L. Sassower is a former president of the New York Women's Bar Association and served on the nine-member judicial selection committee discussed in this article.

Meeting almost every night over a fifteen-day period, interviewing several dozen candidates, intensively reviewing and investigating their credentials, the panel faced the difficult decision of choosing among them eight who would carry the banner of "preferred." The Reform Democrats had pledged to endorse from that number those who would fill the three positions. Hours of evaluation, discussion and then, eureka—agreement!

The task done, we went our respective ways, satisfied we had done our conscientious best, gratified that those chosen reflected their own merit, not their party service; their outstanding qualifications, not their "connections."

Minorities Considered

There was some consideration given the idea of judicial representation for our disadvantaged—the blacks, Puerto Ricans and other minorities, as well as for a woefully under-represented majority—women. The panel after all, not unintentionally, reflected these divergent groups. True, too, that the social philosophy of the various applicants who came before us preoccupied us in some measure in our deliberations.

But competence pure and simple, sheer worth undiluted by political involvement remained our unalterable guideposts.

It must be said to their credit

(*Continued on page 3, column 5*)

Judicial-Selection Panels

(Continued)

that the Reform Democrats kept their commitment to the panel to endorse only those candidates the panel approved. As it became clear, no such commitment had been secured from the regulars. It would therefore be less than fair to condemn them for not following a similar course.

Yet, can they not be faulted for not having initiated a panel of their own or joined in the commitment to the one formed under the wing of the Reformers? The commonly understood purpose of such panels being to take the judiciary out of political hands, the inference is that the Regular Democrats had no wish to do so. The fact is that deals for the judicial plums were made before the Democratic Judicial Nominating Convention which only ratified a foregone conclusion among those in the political know, as far as the contested vacancies were concerned.

The numerical division of votes among the delegates to the Democratic Judicial Nominating Convention strictly on intra-party political lines, Regulars v. Reformers, made it obvious that the Reformers' effort to change the course of judicial power politics on the state Supreme Court level was hopeless, at least this time around.

Is there a lesson to be learned from this experience? Does the judicial pre-selection panel offer a viable means of achieving a better judiciary?

Discourage the Hack

On the plus side is the fact that those who came before our panel were almost uniformly of the highest calibre, many of the most brilliant scholars of the profession, our respected judges, our more successful lawyers. If, then, our screening panel did no more than offer recognition and new status to those candidates it recommended, that would be enough to justify it, for, in time, this might lead to their ultimate elevation to the Bench. The inherent virtue of a well-constituted panel is its tendency to discourage the political hack, the mediocrity, or the lawyer whose sole asset is "friends in the right places."

The question is how those genuinely concerned with the improvement of our judicial process can assure the selection of the former over the latter. One might also query whether the device of a screening panel can be made functional. This assumes that one does not wish to do away with party-dominated judicial conventions altogether. There are those who contend that the federal system of appointment is the superior one and produces judges of higher quality.

This is a reasonable expectation where appointments are made by a public official accountable to the people. Yet the appointive hand may also be vulnerable to political pressure and not necessarily point to qualifications alone. Still it is better than a system which pretends that the public elects our judges when, in fact, the choice is preordained so that what we have is appointment by a clique of party leaders not directly responsible to the public.

Certainly, a better judiciary would result from wider use of screening panels and, concomitantly, adoption of their recommendations by those making the appointments.

Vital Factors

The experience of this panel indicates that the workability of a pre-selection panel depends on two basic factors:

(1) The composition of the panel should be as broad-based as possible, including representatives from major county Bar associations as well as community organizations;

(2) Advance public assurance by party leaders (read appointing authorities) that they will choose only from among the panel's recommendations.

In essence, this entails a relinquishment of power by those in power. Some people may feel it is unrealistic to expect this to take place. Perhaps the day when the judiciary is wholly divorced from political influence can be seen only in the eyes of visionaries. But unrelenting public interest and the glare of publicity focused on every judicial vacancy can make that day come sooner. *

DORIS L. SASSOWER, P.C.

White Plains Office: 283 Soundview Avenue. Telephone: 914-997-1677.

Matrimonial, Real Estate, Commercial, Corporate, Trusts and Estates, Civil Rights.

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 Trial Consultants; Westchester Association of Women Business Owners; American Womens' Economic Development Corp.; Womens' Forum. Fellow: American Academy of Matrimonial Lawyers; New York Bar Foundation.