D-8

To be argued by:
Doris L. Sassower, Esq.
Time requested: 30 Minutes

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,

-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,

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.

REPLY BRIEF OF PETITIONERS-APPELLANTS

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CPLR, Secs. 3211; 3212; 5528; 5528(b); 5528(e); 5529(3)(b)

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Judiciary Law, Sec. 90(4)

Public Officers Law, Sec. 30

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Debates in the New York State Convention, 1846, pp. 585-594

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Parties, Elections, and Representation in the State of New York, Scarrow, Howard A., New York University Press (1983)

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Prefatory Statement

This Brief is submitted on behalf of Petitioners-Appellants (hereinafter referred to as "Petitioners") in reply to the six separate Opposing Briefs interposed on behalf of above-named Respondents, other than as herein indicated. Respondent Brevetti is in default, having served no Opposing Brief, and Respondent Westchester County Board of Elections has expressly waived filing of an Opposing Brief[1]. The New York State Attorney General, although served, declined to participate.

A. The Issue Before this Court is a Substantial But Narrow One

The fundamental and relatively simple issue to be addressed by this Court is whether or not Justice Kahn was correct in summarily dismissing the Petition for failure to state a cause of action (R1-7), thereby depriving Petitioners of their "day in Court".

Petitioners' appeal asks this Court to correct that injustice by finding as a matter of law that:

1. the Petition does state a cause of action, and further that

2. Petitioners' Record before the Lower Court (R13-76), i.e., the Petition (R13-25), the Exhibits thereto (Ex. "A" through "G") (R26-54) and the undisputed corroborating Affidavits

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[1] By letter, dated December 12, 1990, to the Clerk of this Court, the Westchester County Board of Elections expressly stated it was taking no position on the merits of the cross-endorsements issue raised on this appeal. It failed to submit a Brief, in conformity with CPLR 5528(b); Supreme Court Rules, Third Dept. 800.9, and is, therefore, also in default.

of three witnesses at the Judicial Nominating Conventions (R55-76), required vacating of the Certificates of Nomination as a matter of law on grounds of illegality, fraud, and public policy and the related ancillary relief requested.

The pleaded Election Law violations, detailed in Petitioners' Objections and Specifications of Objections, filed with the New York State Board of Elections (R35-51), included, inter alia, as to the Democratic Judicial Nominating Convention: lack of a quorum, failure to take a Roll Call of Delegates to determine the presence of a quorum, failure to provide adequate seating to accommodate the required number of Delegates and Alternate Delegates. As to the Republican Nominating Convention, the pleaded Election Law violations included: Party Chairman and Convenor thereof, Respondent Colavita's continuing to preside as Temporary and Permanent Chairman after the Convention was organized.

The latter violation is evident from the very face of the Certificate of Nomination filed by the Republican Party (R26-27). Therefore, the "Determination" of Respondent New York State Board of Election validating the Certificate of Nomination on the ground that the "objections go behind the documents and records on file in this office" (R129) is clearly erroneous.

On judicial review, this Court must find that Respondent New York State Board of Election failed to discharge its statutory duty to invalidate the Republican nominating certificate by reason of its facially revealed violation. See,

Meader v. Barasch, 133 A.D.2d 925, 521 NYS2d 113, (3rd Dept. 1987), where the Board voided a Certificate of Nomination because the Minutes appended showed that the number of votes cast did not add up to a quorum.

All the aforesaid violations contravened mandated Election Law safeguards contained in Sec. 6-126(1) thereof, designed to protect the electorate from the coercive, corruptive influences of party "bosses".

In construing the Election Law, its history has considerable force. Matter of Knollin, 59 Misc. 373, 112 NYSupp 332, aff'd. 128 App. Div. 908, 112 NYSupp 1134, aff'd. 196 N.Y. 526, 89 NE 1105 (1908). It must be given "liberal interpretation", In re Barber, 24 AD2d 43, 263 NYS2d 599, aff'd. 16 NY2d 963, 265 NYS2d 282, 212 NE2d 769 (1965), to effectuate the legislative intent to provide:

> "absolute assurance to the citizen that his wish as to conduct of affairs of his party might be expressed through his ballot, and thus give effect, whether it be in accord with wishes of leaders of his party or not." Kooperstein v. Power, 153 NYS2d 908, aff'd 2 AD2d 655, 153 NYS2d 541, aff'd 1 NY2d 868, 154 NYS2d 633, 136 NE2d 708, motion granted 1 NY2d 917, 154 NYS2d 972, 136 NE2d 914 (1956).

It is rudimentary that the absence of a quorum at a judicial nominating convention renders the nomination a nullity, and the certificate of nomination will be declared void in a judicial proceeding brought pursuant to Sec. 16-102 of the Election Law. (see, Meader v. Barasch, supra, citing Matter of Wager v. New York State Board of Elections, 59 AD2d 729, 731, 398

NYS2d 551, aff'd. 42 NY2d 1100, 399 NYS2d 659, 369 N.E. 1192 (1977).

No less fatal are the other pleaded convention violations. (see, Bannigan v. Heffernan, 203 Misc. 428, 115 NYS2d 889, mod. on other grounds 280 App.Div. 891, 115 NYS2d 444, aff'd. 304 NY 729, 108 NE2d 209 (1952)).

Respondents have totally failed to refute Petitioners' argument that the Lower Court erred in ruling that the Petition did not state a cause of action on which relief could be granted, and in finding no cause of action stated because "there is no proof" by Petitioners (R4) as to their factually undisputed allegations of jurisdictionally fatal violations at the judicial conventions. Respondents have not cited any record reference or any legal authority to sustain such finding, particularly egregious in the face of Petitioners' overwhelming factual showing to the contrary (R26-27a, R32-51, R55-76).

Moreover, the Lower Court erred in failing to accord Petitioners' an evidentiary hearing, as a matter of due process, to prove by oral testimony the violations at the Democratic Judicial Convention (as hereinabove stated, the Republican Nominating Certificate and Minutes appended thereto showed clear violation of Election Law 6-126(1)). Such evidentiary hearing would also have required Respondents to explain the genesis of "the Three Year Plan" and their participation in it, as well as the factual contentions of convention abuses.

B. Respondents' Inclusion of Matters Dehors the Record is Improper and Sanctionable

Petitioners object to the excessive inclusion by Respondents of numerous factual matters in their Opposing Briefs, which are not only completely irrelevant and strongly disputed, but completely dehors the record. As stated in Mulligan v. Lackey, 33 AD2d 991, 307 NYS 2d 371, 34 App.Div. 2d 732, 312 NYS2d 451 (4th Dept. 1970):

> "It is well-established that review by the appellate division is limited to the record made before Special Term and the court is bound by the certified record on appeal. Matters contained in the brief, not properly presented by the record are not to be considered by an appellate court."

The inclusion of matters not in the record is sanctionable under CPLR 5528, and the brief may be stricken from the record. Terner v. Terner, (44 AD2d 702, 354 NYS 2d 161 (2d Dept., 1974), Norgauer v. Norgauer, 126 AD 2d 957, 511 NYS 2d 731 (4th Dept., 1987).

1. Counsel for Respondent Emanuelli makes reference to certain alleged remarks at oral argument before Justice Kahn, nowhere found in the Record on Appeal. Even assuming they were relevant and not self-serving, these unsworn statements by Respondent Emanuelli's counsel as to his (Emanuelli's) alleged view of the propriety of the pledge provision could not be considered by this Court.

The oral argument before Justice Kahn was recorded by a Court Reporter. Respondents did not object to the absence of a transcription thereof from the Record on Appeal. The Court will

recall that when Petitioners formally moved for a preference, several Respondents cross-moved to dismiss Petitioners' appeal for omission of other documents deemed necessary by them. Accordingly, Respondent Emanuelli must be deemed to have waived any contention as to the relevance, materiality, or probative value of his counsel's remarks at oral argument, particularly, as he has not offered any transcribed copy thereof.

2. Respondents Parisi and Colavita, as well as Respondents Emanuelli and New York State Board of Elections, refer in their Opposing Briefs to a dehors-the-record alleged May 25, 1990 "Determination" by Respondent New York State Board of Elections concerning a dehors-the-record complaint-letter by a third person, unrelated to Petitioners in this proceeding, transmitted to said agency by the Governor's Office. They also refer to a dehors-the-record letter, dated May 25, 1990, allegedly transmitted by the New York State Board of Elections to such third person[2]. Without troubling to explain how they acquired possession of these statutorily "Privileged and Confidential" documents, Respondents Parisi and Colavita annex copies of such documents as exhibits to their Opposing Brief for

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[2] In light of the uncontroverted refutation facts put before this Court on Petitioners' preference application (see Appendix hereto), such dehors-the-record references by Respondents are in bad-faith. The documentary proof submitted with that application showed, irrefutably, that (a) Petitioners were not parties to such prior complaint; (b) the third-party complainant never received a copy of either the May 25, 1990 letter or the "Determination" of the same date; and (c) the New York State Board of Elections conceded that it made no investigation prior to issuance of said May 25, 1990 "Determination".

their purely prejudicial value. The dehors-the-record alleged May 25, 1990 "Determination" document is also, most improperly--and knowingly so--annexed as an exhibit to the Opposing Brief submitted by counsel for the New York State Board of Elections.

3. The aforesaid documents -- all unpaginated, in violation of CPLR 5529 (3)(b) -- along with four (4) similarly unpaginated, selectively-chosen Gannett newspaper articles[3], annexed by Respondents Parisi and Colavita as exhibits to their Opposing Briefs, are nowhere contained in the Record. These Respondents surely know that "exhibits containing data not in the

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[3] Parisi and Colavita's selectivity is demonstrated by their failure to put before the Court, inter alia, two articles appearing in the Gannett newspapers on August 7, 1990 and August 8, 1990 relating to the "arm-twisting" of then Supreme Court Justice Emanuelli to secure his resignation under the 1989 deal. The August 7, 1990 article quotes Respondent Colavita as saying:

> "Out of deference to me, and a recollection of the agreement with the Democrats, (Emanuelli) acceded to my wishes."

The August 8, 1990 column reports:

> "Emanuelli did resign but not before giving leaders of both political parties a bad case of heartburn. Real political leaders revere and adhere to a code that says their word is their bond. Never did they guess that Emanuelli, a product of the political system, would even hint at allowing a deal, a publicly proclaimed one at that, to be broken."

Copies of the two aforementioned omitted articles are included in Petitioners' Appendix hereto, for sanctions purposes, as evidence of these Respondents' bad faith.

record will not be considered on appeal", Granville v. Ross, 274 App.Div. 491, 84 NYS2d 658 (1st Dept. 1948), and that "appeals must be decided on the content of the record alone". Fehlhaber Corp. v. State of New York, 65 AD2d 119, 410 NYS2d 920 (3rd. Dept. 1978). Even apart from controlling case law, these Respondents have violated CPLR 5528, sanctionable under CPLR 5528(e) and this Court's Rule 800.9(d), including the striking of their Opposing Briefs. Jenkins v. Marsh, 136 Misc. 291, 240 NYSupp 728 (Monroe County, 1930), Ford v. Walker, 277 App.Div. 416, 237 NYSupp 545 (1st Dept. 1929), Hess v. Kennedy, 171 NYSupp. 51 (App. Term 1st Dept. 1918).

4. Respondents Emanuelli, Miller, New York State Board of Elections, Westchester Democratic County Committee, Mehiel and Weingarten set forth a "Counter-Statement of Facts". A "Counter-Statement of Facts" is plainly inappropriate to a case arising on appeal from the granting of a dismissal motion where all facts alleged by Petitioners, and inferences therefrom, are assumed true for purposes of the motion. (See Point II, hereinafter). Respondents' inclusion of these Counter-Statements, replete with sharply disputed statements, must be perceived in its true light -- intentional confusion of the central issues in this case and for the purpose of introducing irrelevant, incompetent, and prejudicial matter.

5. Respondent Emanuelli's Opposing Brief represents the ultimate bad-faith submission. Although Respondent Emanuelli is represented by one of Westchester's largest law firms, his

"Counter-Statement of Facts" is devoid of any record references and contains numerous factual statements, entirely unsupported in the record. Nineteen (19) separate statements therein are completely irrelevant to this appeal. In addition, such allegations represent inadmissible hearsay, opinions or conclusions, rather than "facts". Several of the statements are demonstrably false, (e.g., his par. 11, Opp. Br. p. 7, as to the timeliness and compliance with statutory requirements in the commencement of the proceeding before the New York State Board of Elections, which, in addition, he lacks standing to assert, see Par. D, infra). Such inexcusable improprieties, replicated in the text of the Opposing Brief, not only of Respondent Emanuelli, but, also in the Counter-Statements of Respondents Miller and New York State Board of Elections, merit this Court's condemnation.

C. Respondents' Failure To Cross-Appeal Precludes Consideration of Their Affirmative Defenses On This Appeal. References Thereto Are Improper and Should Be Stricken

Respondents, all of whom are represented by seasoned, politically attuned counsel, have attempted to divert, obfuscate, and confuse the issues raised on this appeal by discussion of their legally and factually unfounded pleaded defenses. None of those defenses, however, have been preserved for appellate review. They were not ruled on by the Court below, and no exception thereto was taken by any of the Respondents.

The Lower Court's decision explicitly ruled out consideration of such defenses as its ratio decidendi:

> "Various defendants have moved to dismiss upon considerations of jurisdiction, failure to state cause of action, latches (sic), statute of limitations, etc... 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." (R5-6)

Respondents did not cross-appeal from the Lower Court's deliberate decision not to rule on the validity of their defenses. Had they done so, this Court would have been limited preliminarily to a determination of the correctness of said decision. Respondents do not even include in their Opposing Briefs as one of the "Questions Presented" the correctness of Justice Kahn's decision. Nor did Petitioners include it among their "Questions Presented"[4]. Hence, that question is not properly before the Court. Since this Court is not a court of original jurisdiction, but a court of intermediate review, any question as to the validity of the defenses themselves is clearly not properly raised by Respondents before this Court. Petitioners will, therefore, not encumber or protract this Reply Brief with any reply to Respondents' arguments with respect

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[4] Neither did Petitioners include among their "Questions Presented" (pp. 3-3a of Petitioners' main Brief), nor did they otherwise address, the question of the correctness of Justice Kahn's decision not to rule on the validity of Petitioners' contention that Respondents were "in default for having failed to timely serve pleadings or defectively verified pleadings." (R5).

thereto, other than to reemphasize their utter lack of merit, as set forth in the Preliminary Statement of Petitioners' main Brief.

It is improper for Respondents to include in their Opposing Briefs such extraneous matters -- having nothing to do with the action of the Lower Court, which is the subject of Petitioners' appeal -- or any action (or non-action) of the Lower Court complained of by them, properly the subject of a cross-appeal[5].

The root of appellate jurisdiction being an appeal by the party aggrieved, an appellate court will not correct error where such party took no appeal. Burns v. Burns, 190 NY 211, 82 NE 1107 (1907); Burmester v. O'Brien, 166 App.Div. 932, 151 NYSupp 1107 (2nd Dept. 1915). In the circumstances, Respondents' Opposing Briefs, the major portion of which relates to their defenses, should be disregarded or Respondents required to redact their improper inclusion of such extraneous material.

D. Respondent New York State Board of Elections Has Waived All Defenses by Failing to Assert Them in Its Answer or By Motion and by Rendering a Determination on the Merits

1. Over and beyond the waiver of defenses raised by Respondents in their Opposing Briefs by their failure to file a cross-appeal and the legal irrelevance of such defenses to this appeal, Respondent New York State Board of Elections has further waived all defenses:

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[5] See footnote 4, supra.

(a) by failure to interpose same in its Answer (R127-8), as required by CPLR 3018 or by Motion under CPLR 3211; and

(b) by rendering a Determination (R129) on the merits of Petitioners' Objections (R32-37) and Specifications thereto (R38-51).

Accordingly, any objections based on Petitioners' standing as Objectors, the timeliness of their Objections, or other procedural compliance by them has been waived by the only Respondent with standing to assert them.

E. The Partisan Position Taken by Respondent New York State Board of Elections Makes the Need for Judicial Review Imperative as a Matter of Public Policy

Respondent New York State Board of Elections is a public agency charged with the duty of enforcement of a law designed "to encourage the broadest possible voter participation in elections", with power to hold hearings, conduct investigations, and to initiate judicial proceedings, including criminal prosecutions to enforce the penal provisions of the Election Law (Secs. 3-102, 3-104).

As this case clearly demonstrates, however, the administrative process before Respondent New York State Board of Elections afforded neither investigation, nor a hearing to Petitioners. The admitted practice of Respondent New York State Board of Elections, as shown by its October 1, 1990 "Determination" (R129), which it annexed to its Answer (R127-8) to the Petition herein, is not to address Objections that "go

behind" the face of the Certificate and papers on file with them.

> "...the issues raised in the specifications of objections go behind the documents and records on file in this office and, as such, cannot be determined by this Board."

As shown hereinabove, even where, as here, the Republican Certificate of Nomination is, indeed, facially improper, the Board, nonetheless, refused to invalidate it. Administrative redress through the New York State Board of Elections is, thus, an illusory remedy and serves to underscore the compelling need for judicial intervention.

Unquestionably, the suspect conduct of Respondent New York State Board of Elections explains its hostile position in these judicial proceedings. Clearly, it is inappropriate for such public agency to actively seek to foreclose review judicially of the Election Law abuses pleaded in the Petition herein[6] -- which it failed and refused to provide administratively. This abdication of the Board's statutory responsibility to the public is part of an on-going pattern of inaction, neglect, and misfeasance, demonstrated by its failure to address complained-of 1989 convention violations.

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[6] This indefensible position on the part of Respondent New York State Board of Elections is particularized in Petitioners' October 28, 1990 Reply Affirmation in further support of their Preference Application. Pertinent extracts with the exhibits referred to therein are included in Petitioners' Appendix hereto.

Point I

RESPONDENTS HAVE FAILED TO REFUTE CONTROLLING AUTHORITY THAT THE "THREE YEAR PLAN" IS, AS A MATTER OF LAW, ILLEGAL, UNETHICAL AND PROHIBITED BY PUBLIC POLICY

A. Rosenthal v. Harwood, 35 N.Y.2d 469, 363 NYS2d 937, 323 NE2d 179 (1974), Relied on By Respondents, Does Not Sustain the Legality of the "Three-Year Plan.

1. Respondents argue that because the cross-endorsement of judicial candidates is not a practice specifically prohibited by the Election Law, Justice Kahn correctly decided that the Petition failed to state a cause of action. They cite Rosenthal v. Harwood, supra, as signifying Court of Appeals' approval of judicial cross-endorsements, and as having "determined this very issue" in Respondents' favor (Miller's Opposing Brief, at p. 8).

The cross-endorsements issue in this case is one of first impression. It is "the other side of the coin" of Rosenthal, unresolved by that case, but logically governed by its rationale, which, on closer analysis, supports Petitioners' contentions.

In Rosenthal, the Court of Appeals said that a major political party could not, by its by-laws, impinge on the independence of a judicial nominee by precluding him from accepting the cross-endorsement of another party. In the instant case, the two major parties, by written resolution adopted by their Executive Committees, thereafter adopted and ratified by the judicial nominees at the Judicial Nominating Conventions, ignored the very bedrock on which Rosenthal rests: they did

impinge on the independence of the judicial nominees by requiring them, inter alia, to accept the cross-endorsement of the other major party. The independence of the judiciary is unethically compromised in both cases.

Indeed, the instant case is a fortiori: Rosenthal involved a single cross-endorsement by a minor party[7] of a major party's judicial candidate in one election year. The instant case involves, inter alia, major party cross-endorsements in multiple judicial races over a period of years -- a serious impingement on the two-party system, as well as a real disenfranchisement of the voters and the negation of their vote, since on Election Day, voters would be limited to an identical slate of candidates on both Republican and Democratic lines. Additionally, the agreement required the judicial nominees to accept contracted-for resignations so as to create vacancies for other judicial candidates, and a pledge to split judicial patronage, once nominated -- a far more pernicious practice and precedent than the limited situation proscribed by the ethical rationale behind Rosenthal.

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[7] The significance of minor party cross-endorsements in the development of New York's virtually unique multi-party system, permitting minor parties to hold the balance of power, is discussed in Scarrow, Parties, Elections, and Representation in the State of New York, at 55-79, (New York University Press, 1983).

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

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

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

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

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

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

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

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

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

the Court of Appeals, nonetheless, concluded that

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

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

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

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

stating that:

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

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

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

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

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

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

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

5. Likewise, Rosenthal did not involve a case where the judicial nominees, as specifically pleaded in the Petition, engaged in conduct proscribed by the Code of Judicial Conduct as well as the Rules of the Chief Administrator of the Courts (see Petitioners' main Brief at pp. 18-19). Significantly, the required contracted-for resignations of two of the judicial nominees (dutifully implemented by them), as well as their verbal and written acceptance of the specific terms of "the deal" at the Judicial Nominating Conventions, including the pledge to split patronage provision of the subject cross-endorsements deal (Exhibit "G" to the Petition (R52-3) are either completely ignored by Respondents, glossed over, or dealt with by reference to hearsay matters dehors the record.

Respondent Emanuelli states, erroneously, at page 21 of his Opposing Brief that "There was no factual averment that any of the judicial candidates had agreed to anything improper nor were any such facts offered to Justice Kahn."

In fact, the Petition and the reasonable inferences therefrom, literally shriek with averments that the judicial nominees were parties to and beneficiaries of "the illegal 'three-year plan'" (Par. 33 of the Petition, R22), whereby their election was guaranteed, and that they "adopted and ratified" it (id.), and in various ways acted upon it (Par. 26-29, R20-21). This applies to Respondent Miller, who benefitted from the extension of the deal, no less than to the original judicial candidates nominated as part of the 1989 deal. For purposes of

the motion to dismiss, it must be assumed as true that Respondent Miller, who was nominated at the 1990 judicial conventions for a Supreme Court judgeship as a result of Republican and Democratic cross-endorsements, was also a party to it, adopted, ratified, acquiesced in, and acted on it. Hence, Respondent Miller's "Counter-Statement of Facts" is completely irrelevant, improper, and misleading[8].

Undocumented by a single record reference, transcript, or in any probative way, Respondent Emanuelli asserts, in deliberately vague, misleading, conclusory fashion, that "It was made clear before Justice Kahn that the nominees were well aware of the legal and ethical obligations imposed on judicial candidates and on judges that they intended to honor and comply with all such requirements, both in spirit and in fact."

As set forth hereinabove, Justice Kahn heard oral argument when the Petition was heard before him on October 15, 1990. No sworn testimony was taken, nor did any of the judicial nominees appear in person. For Samuel Yasgur, Esq., counsel to Respondent Emanuelli, to make the argument before this Court that somehow the flimsy, self-serving, unsworn, hearsay

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[8] In light of the dehors the record comments concerning Respondent Miller's background, it must be noted that his attorney, Sanford S. Dranoff, Esq., fails to disclose that at the time Respondent Miller obtained the cross-endorsement for the Supreme Court vacancy, he was not a sitting judge, as his Counter-Statement would imply. In fact, he was a practicing lawyer, having quit the bench some years earlier and become a partner in the law firm of Mr. Dranoff, who himself has been politically active as Law Chairman of the Republican Rockland County Committee.

interpretations of such pledge provision as he urged before Justice Kahn at the argument could possibly be considered as probative evidence of anything, has to be viewed as the epitome of bad faith.

Plainly, the pledge provision must be interpreted to give it reasonable, common-sense meaning, i.e., a promise to recognize and extend, rather than to reject and deny, future party influence and patronage -- to listen to the recommendations of both Parties' leaders on an equal basis, not to disregard them equally. To view it as anything other than an agreement to split, on a strictly political basis, the patronage flowing out of the Surrogate's Office, would deny political reality and the very essence of the deal. It is a fact of which this Court may take judicial notice that by 1989, Republicans in Westchester County had become significantly outnumbered by Democrats. The acknowledged purpose behind the cross-endorsements deal[9] was to permit the Republicans to retain control of the Surrogate's Office by giving the Democrats a couple of otherwise unattainable Supreme Court judgeships and splitting the judicial patronage, of particular importance in bargaining for the Surrogate judgeship.

This Court cannot blind itself to the contextual backdrop against which the cross-endorsements deal must be scrutinized. In so doing, the Court must reach the inescapable conclusion that the independence of the judiciary was severely

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[9] So acknowledged in a March 1, 1989 Gannett newspapers article (a copy of which is annexed to the Opposing Brief of Parisi and Colavita)

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

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

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

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

Just as it is improper for a candidate for judicial

office to agree with a political organization, as a required condition to designation by its party, not to accept nomination of another political party (at p. 182, citing the Ethical Opinions of the New York State Bar Association), by like reasoning, can there be any reasonable doubt that it is similarly unethical and against public policy for a judicial candidate to be required to accept such designation as a pre-election condition to his or her nomination? Respondents' Opposing Briefs do not even pretend that any of Respondent judicial nominees would have been nominated, had they refused to accept the terms and conditions of "the deal". This includes not only their acceptance of the required cross-endorsements and the contracted-for resignations[10], but also the crucial, mandatory pledge to split patronage (R5).

6. Also undenied, undisputed or even discussed by Respondents is the unassailable law enunciated in the multitude of cases and other legal authorities, cited by Petitioners under Point I of their main Brief, at pages 10-19, demonstrating, beyond peradventure of doubt, that the "Three-Year Plan" is illegal, unethical, and against the public interest[11].

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[10] See footnote 3, supra, describing Respondent Emanuelli's last-minute reluctance to abide by the deal and the pressure placed upon him by Respondent Colavita.

[11] "If we agree that the system as a whole is preferable to a breakdown of the system, it would then follow that actions seeking to influence policies in ways endangering the system are contrary to the public interest."

7. The "depoliticize the judiciary" argument raised by Respondents as justification for the "cross-endorsements" deal, comparable to the sugar-coated language that its purpose was "to promote a non-partisan judiciary" found in the preface to the Resolution (R52-54) adopted at the conventions, is attractive "window-dressing", which is but a transparent disguise to its true purpose. Could anything be more political than replacing a choice between competing candidates with a single, hand-picked slate created by the collusion of two political machines? That the deal was announced after-the-fact to the public and heralded by the local press as something new and beneficial only obscured the fact that the nominations and the terms of the deal were arrived at in the same old way: secretly, and behind closed doors.

Nothing could be more harmful to the democratic process and the two-party system than the long-term negative effect such a cross-endorsements deal has on informed citizens. Inevitably, uncontested elections result in substantially diminished voting, either as a protest to the meaninglessness of a "rubber stamp" vote or because it is seen as an exercise in futility[12].

See generally Down, the Public Interest: Its Meaning in a Democracy, 29 Soc. Research (1962).

[12] Statistics as to the progressive decline in voter participation in State Supreme Court Elections are available in Judicial Elections in New York, a publication of the Fund for Modern Courts, Inc., 1984. This interesting study highlights the fact that in New York, "the nomination, not the election, is the linchpin of the judicial selection process. Political leaders [unaccountable to the citizens of New York State], not the

Point II

THE MATERIAL FACTS PLEADED AND INFERENCES THEREFROM STATE A CAUSE OF ACTION AS A MATTER OF LAW

Justice Kahn had before him a Petition and seven (7) supporting exhibits, detailing and documenting a political deal between the Republican and Democratic Party leaders and their judicial nominees to trade judgeships in barter fashion (Pars. 18, 19, 20,), to create judicial vacancies by contracted-for resignations (Pars. 21, 22, 29) and to split patronage in accordance with the recommendations of the party leaders (Exhibit "G" to the Petition--R52-54).

The Petition further alleged that the judicial candidates were parties to, and beneficiaries of, the deal, which they adopted and ratified (Par. 33), that it was implemented at the Judicial Nominating Conventions, which violated specified Election Law mandates (Pars. 30, 32), and that further, once nominated, the judicial nominees acted in accordance with the terms of the deal (Par. 29).

On a motion to dismiss, the Court must assume the truth of the allegations of the Complaint, under CPLR 3211, with the non-moving party given the benefit of every favorable inference. Kelley v. Galina-Bouquet, Inc., 155 AD2d 96 (1st

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voters, control judicial conventions and decide who will receive the nomination--and thus who will be the judge". Its prior studies also confirm that "political party endorsement is the major factor in the selection Supreme Court judgeships in New York State".

Dept., 1990), citing Court of Appeals cases. Quoting O'Henry's Film Works v. Nabisco, Inc., 112 AD2d 825 (1st Dept. 1985), the Kelley Court stated:

> "[T]he prospect of a pleading's success is not the criterion by which it should be adjudged under CPLR 3211."

See also, Holly v. Pennysaver Corp., 98 AD2d570, 471 NYS2d 611 (2d Dept, 1984), defining the scope of judicial review of lower court action on a 3211 motion to dismiss as limited to the same test:

> "...the Appellate Division's inquiry is limited to ascertaining whether the pleading state any cause of action, not whether there is evidentiary support for the complaint, and the complaint must be liberally construed in the light most favorable to the plaintiffs with all factual allegations being accepted as true".

Yet, Justice Kahn ignored the correct legal standard and failed to apply this well-settled rule of law, when he found, contrary to the facts pleaded by Petitioners, that the judicial conventions were properly convened and conducted, and dismissed the Petition for failure to state a cause of action upon which relief can be granted (R7). What other explanation might there be for Justice Kahn's statement in his decision (R7)":

> "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." (emphasis added).

Such language might be appropriate to a decision rendered after an evidentiary hearing or after notifying the

parties that the motion is to be treated as a motion for summary judgment under CPLR 3212 and affording them the opportunity of presenting evidence. Not, however, as shown by a legion of cases, on a motion to dismiss for failure to state a cause of action.

Petitioners' pleaded facts, accepted as true on the motion to dismiss, alleging a corrupt judge-trading agreement and implementation thereof at unlawfully-conducted judicial conventions at which the candidates were nominated. The culpable conduct alleged, if proved, against the individual Respondents, all of whom are lawyers, constitutes a felony under the Election Law, Sec. 17-158(3). Conviction of a felony results in automatic disbarment under the Judiciary Law of the State of New York, Sec. 90(4). A felony conviction also disqualifies an attorney from holding judicial office, Public Officers Law, Sec. 30.

At minimum, Petitioners were entitled to an evidentiary hearing to prove their allegations and the participation of these Respondents in the alleged illegal, if not, criminal, conduct.

Point III

THE PUBLIC IMPORTANCE OF THIS CASE TRANSCENDS THE PARTIES TO THIS PROCEEDING

The Rosenthal case, supra, put to rest any contention of mootness, and none has been raised by Respondents. Our highest Court there stated:

> "Although the...election...is well behind us and this proceeding could be said to be moot, the issue tendered...involves questions of public importance likely to arise again."

Here, too, notwithstanding that the challenged 1990 elections have occurred, the issue of the legality of major party cross-endorsement agreements between political leaders and their judicial nominees to trade judgeships on a long-term, regular basis is clearly a question of public importance likely to arise again and again, if they are deemed an acceptable mode of judicial selection. Moreover, the executory portions of the 1989 deal remain to be performed: the 1991 Supreme Court Judgeships, as well as the ongoing patronage pledge binding the judges elected pursuant to the 1989 deal, as a political commitment, if not a legal contract.

This case is an opportunity to chart new waters in the definition of future limits of permissible activity by party officials and judicial candidates. As the historical background, hereinabove discussed, and the prior judicial interpretations thereof make manifest, the Legislature has spoken to the long-standing tradition of political abuse by clever party leaders and all-too-eager judicial office-seekers. The Election Law is the

vehicle, provided by the Legislature, to enforce mandated standards of political conduct so as to protect the public and their right of election. Any deal effectively disenfranchising the electorate and diminishing the value of that vote is repugnant to the expressed legislative intent.

Over and beyond the direct effect this case can have in breathing new life into the Election Law is its wide-ranging state and national ramifications. It offers a unique and historic opportunity to democratize the judicial branch of government--opening it up to minorities and women, traditionally excluded by the political power structure--and to create a meaningful system of judicial selection based on merit, rather than party labels and loyalties.

CONCLUSION

The Lower Court's dismissal of the Petition should be reversed, with costs, and sanctions against Respondents for their improper Briefs. The "Three Year Plan" should be declared illegal as a matter of law and public policy, and the Certificates of Nomination vacated. Appropriate ancillary relief should be granted in light of the subject judicial elections having been held.

Dated: January 24, 1991
White Plains, New York

Respectfully submitted,

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APPENDIX

1. Gannett Newspapers: August 7, 1990: "State Supreme Court Justice Resigns"

2. Gannett Newspapers: August 8, 1990: "Judicial Deal Survives Last-Minute Shuffle"

3. Extract of October 28, 1990 Affirmation of Petitioners' Counsel in Reply and in Opposition to Respondents' Cross-Motions: pp. 22-28, together with Exhibits "B", "C", "D-1" and "D-2" referred to therein

4. Debates in the New York State Constitutional Convention, 1846, p. 586.