E-6

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.

ORAL ARGUMENT: MARCH 25, 1991

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CASTRACAN v. COLAVITA

APPELLATE DIVISION, 3rd DEPT.
Index No. 62134

ORAL ARGUMENT OF PETITIONERS
March 25, 1991, 1:00 p.m.
DORIS L. SASSOWER, Pro Bono Counsel

1. Why are Petitioners here?

We are here today, on March 25, 1991, because there are two Supreme Court justices now sitting in the 9th Judicial District and a Surrogate of Westchester County, who got there by virtue of a corrupt political deal, "the Three Year Plan", made by the Westchester Republican and Democratic Parties and their judicial nominees--furthered, implemented and performed via unlawfully conducted judicial nominating conventions--and because Justice Kahn made a mistake when he granted, without a hearing, Respondent Parisi's dismissal motion.

For all the many reasons stated in Appellants' Brief and Reply Brief, Justice Kahn should have denied Respondent Parisi's dismissal motion, granted the Petition, and required reconvening of the conventions, on either or both grounds set forth in the petition: (A) by finding the contract illegal, void and against public policy; and/or (B) by finding that the judicial conventions were conducted in violation of the absolute requirements of the Election Law, and that the delegates were thereby rendered unable to nominate Supreme Court justices, as

required under Election Law 6-106.

What is particularly unprecedented about the Three Year Plan is that it was reduced to a writing (R.52) and adopted in resolution form. Consequently, there can be no dispute as to its essential terms and conditions, which have all been admitted: major party cross-endorsements in seven (7) judicial races over a three year period, early resignations by certain nominees to create vacancies in succeeding years, and, additionally, a judicial appointments pledge for equal division of patronage.

Justice Kahn, for purposes of the motion to dismiss, had to accept as fact that the actions taken at the 1990 judicial conventions were in furtherance of the "Three Year Plan", since it purported "to select candidates for the office of Supreme Court justice", the prerogative of the delegates under Sec. 6-106, and, therefore, "must be considered inconsistent with the Election Law". Nonetheless, he took the view that if the nominating conventions complied with quorum and other Election Law requirements, which, in fact, Petitioners' unrefuted pleaded allegations and documentary proof showed they did <u>not</u>, the nominations resulting from the deal could not be invalidated. His Honor relied on readily distinguishable cases involving private, unregulated committee action of a political party--the internal affairs of which do not justify judicial intervention--and then only as a last resort and most sparingly--rather than cases involving judicial nominating conventions, at which our state court judges are nominated, strictly regulated by the

Election Law to prevent injury to the public interest and the elective franchise.

Justice Kahn was in error as to the lack of proof by Petitioners of convention fraud and irregularity at the conventions. As the record shows, even apart from their right to a hearing, which Petitioners were not afforded, Petitioners did submit such proofs. Respondents failed to challenge them by coming forth with any countervailing proofs. Indeed, the Republican Nominating Certificate showed, on its face, Election Law violation in that the Convenor of the Convention, Respondent Colavita, Chairman of the Westchester Republican Party, continued to preside as Temporary and Permanent chairman of the Republican convention after it was organized, a fatal violation. This alone required Justice Kahn to reverse the palpably erroneous determination by Respondent New York State Board of Elections that the Republican nominating certificate was valid. Likewise, on the uncontradicted evidence and state of the record before him, Justice Kahn was required to find that the Democratic nominating convention did not comport with quorum and other mandatory Election Law requirements.

Petitioners, at that point, were entitled to a reconvening of the Conventions. Moreover, Petitioners had satisfied the very predicate enunciated by Justice Kahn before he would rule on the legality of the contract--i.e., that election law abuses had occurred at both Judicial Nominating Conventions. Under Section 16-100 and 16-116 of the Election

Law, Petitioners were then entitled to a summary ruling by the Court as to the legal validity of the cross-endorsements contract and the resultant nominations and as to whether the nominees were disqualified. This, however, Justice Kahn failed to provide.

2. What relief do Petitioners now seek from this Court?

(A) a holding that Election Law abuses at the Judicial Nominating Conventions invalidated the judicial nominations;

(B) a holding that these judges were nominated and elected in furtherance of an illegal political contract, implemented and performed via unlawfully conducted nominating conventions.

(C) a holding that the seats to which these judges were illegally elected are vacant by operation of law, in the same manner as if they had been found to be affected by a disqualifying factor precluding their holding judicial office.

3. The issues are squarely presented before this Court.

Respondents' technical defenses and objections were not preserved for appellate review and will not be addressed by me at this time.

4. What was illegal about the cross-endorsements deal at issue?

(A) It is illegal because it violates and subverts the Constitution of the State of New York which, like most states in

this country, provides for election of state court judges. As shown by the historical references to the Debates of the 1846 New York State Constitutional Convention in my Briefs, it was here in Albany--some 150 years ago--that the framers of our third State Constitution, after vigorous debate, adopted the principle of popular democracy in the judicial arena--expressly rejecting an appointive system which did not give "the people" a chance to participate in a voting process.

While the party leaders here involved publicly proclaimed that the purpose of the deal was to "depoliticize the judiciary", its practical effect was to amend our State Constitution which gives the people of New York the right to elect their Supreme Court judges. Indeed, the deal permitted two party bosses to, in effect, appoint our Supreme Court judges and other judges, hand-picked by them on political considerations, in secret, behind closed doors, and guarantee them uncontested election. Such deal eliminated the meaning of democratic election as a contest between our major parties.

(B) The deal also contravenes the penal provisions of the New York State Election Law. People v. Hochberg, a case decided in this Department and cases cited therein, shows the potential criminal aspects inherent in the cross-endorsements contract in question, surely more than sufficient to invalidate it in a civil proceeding. Based on those authorities, there should be no doubt that bartering judgeships is just as bad as buying them--that payment in kind, rather than in cash, is no

defense to the penal sanctions of Election Law 16-158 relating to corrupt use of position or authority, or the proscriptions of 17-162, which unequivocally state that judicial candidates shall not, directly or indirectly, contribute "money or other thing of value, nor shall any contribution be solicited of him".

(C) The ratio decidendi of Rosenthal v. Harwood, cited and relied on by several Respondents, in fact, supports Petitioners' Petition. In Rosenthal, our Court of Appeals enunciated the fundamental principle that a major political party cannot restrict the independence of its judicial nominee by requiring, as a condition to his nomination, that he agree to forego the endorsement of a minor party. Rosenthal was not a case involving a cross-endorsement, but rather involved the endorsement of a major-party candidate by a minor party. Moreover, our highest court made clear in that case that it would strike down even an internal by-law of a political party if it compromised the independence of a judicial candidate in making his own judgment. The Court of Appeals has not to date ruled on the legality of cross-endorsements by major parties, destructive of the voters' constitutionally protected right to "elect", to choose between our two major parties, or of a contract as at bar, requiring the nominee to accept such cross-endorsement, as well as other conditions, including the judicial appointments pledge, so fundamentally destructive of judicial independence and integrity. Assuredly, the reasoning of Rosenthal would suggest similar invalidation of the "Three-Year

Plan" of cross-endorsements, in similar contravention of public policy.

5. Why is the deal unethical?

Under the Code of Judicial Conduct and the Rules of the Chief Administrator, any impingement on the independence and integrity of a judge or judicial nominee is unethical and proscribed. That Respondent Emanuelli felt himself bound by the terms of the 1989 deal is just one of many examples. This is proven by his action in August 1990 when he resigned the Supreme Court position to which, but eight months before, he had been elected to a 14-year term. The August 7, 1990 Gannett article of David McKay Wilson, attached to my Reply Brief, as well as the column appearing on August 8, 1990, shockingly describes Respondent Emanuelli's reluctance to resign--and details the severe pressure openly placed upon him by Respondents Colavita and Parisi, here today, pro se, to get him to keep his word and stick to the deal. Would anyone seriously argue that Respondent Emanuelli was "independent" when he resigned against his personal wishes and professional judgment? The independence of the other judicial nominees was likewise compromised by their knowledge and acceptance of the benefits of that deal.

Similarly, judicial appointments based on political considerations are abhorrent to the merit principle, which the Codes of Ethics and the Rules of the Chief Administrator prohibit in connection with judicial nominations and judicial

appointments. Moreover, political considerations exclude wide segments of our society, historically outside the political power structure, minorities, and women, independent and unregistered voters, thus unfairly discriminating against them, irrespective of their merit.

6. Why was it Against the Public Interest:

Over and beyond the reasons already discussed, the deal was antithetical to the public interest in more subtle sociological ways. The cornerstone of the deal was the race for Surrogate judge for Westchester County. By 1989, registered Democrats of Westchester County significantly outnumbered registered Republicans and could reasonably have captured that judicial office when it became vacant in 1990, the same year that Governor Cuomo would be running for re-election. Under those circumstances, the Westchester Republican leadership was ready to entertain a deal with the Democrats, guaranteeing Republican retention of the Surrogate position--and the "Three Year Plan" was hatched.

The deal was devised for political reasons--to counter and overcome the reality of the voting demographics. And just as the deal was formulated to frustrate the will of the political majority of the voting populace, it also callously ignored the needs of the litigants, whose lives, liberty, and property were entrusted to the judicial holders of the public trust. These political leaders and would-be judges cavalierly saw judicial

positions of utmost responsibility as chess pieces to be manipulated for their own personal and political convenience. In plotting the future early resignations of Respondents Emanuelli and Nicolai, the parties to the deal were unconcerned as to the catastrophic impact of those resignations--and the prolonged vacancies--on the motion and trial calendars of the Courts on which they would be sitting. In the case of Respondent Emanuelli, his Supreme Court judgeship was planned deliberately to remain vacant for five months until Judge Nicolai's induction; and in the case of Judge Nicolai, his County Court position, from which he resigned on January 1st, remains vacant to the present time. Such pre-arranged resignation and vacancies could not remotely be--and were not--in the public interest. Indeed, in the Ninth Judicial District, the deal has created a crisis backlog of cases unresolved, motions undecided, and trials still unassigned to new judges--cases where, prior to Respondent Emanuelli's resignation, dates for trial last August had already been set, and since then many of those cases, still unadjudicated, hang in limbo.

Were it not for the deal, Respondent Emanuelli could have continued to perform his duties as Supreme Court judge, <u>without</u> resigning, had he truly wanted to run for Surrogate in November 1990. However, had he done so, there would have been no Supreme Court vacancy for Respondent Nicolai to run for in November 1990, and other executory portions of the deal would have collapsed. Indeed, had Respondents Colavita and Weingarten

trusted each other, Respondent Nicolai should have moved up directly in the 1989 election and Respondent Emanuelli could have run for Surrogate directly in 1990.

7. The cross-endorsements deal represents a dangerous precedent:

Respondents Colavita and Weingarten said in 1989 that their cross-endorsements deal would be a model for future similar arrangements. And, indeed, the "Three Year Plan" spawned its progeny. In 1990, a new cross-endorsements arrangement, in furtherance of the 1989 deal, nominated Respondent Miller. And, according to a local Gannett news story on February 27, 1991 (a copy of which, with the Court's permission, I will hand up in conjunction with my argument, with copies for my adversaries), there are now similar contracts in the works for 1992--again treating judgeships as musical chairs, to be vacated by early resignations and filled by appointment at will of the party bosses through guaranteed uncontested elections of their politically loyal hand-picked candidates, with the seats kept warm by gubernatorial appointees pledged not to run in 1991.

The immediate, profound, and far-reaching political and social importance of this Court's decision as to whether or not cross-endorsements agreements, assuring uncontested election of state judges are illegal, unethical and against public policy is evident. Justice Kahn's opinion must not be viewed as a green light for "Five Year Plans" or "Plans for the Decade".

8. It is shocking that because of the failure of the public agency charged with the duty to protect the public interest, Respondent New York State Board of Elections, and the Attorney General's failure to participate, although served, private civic-minded citizens should have had to bear the burden, as private attorneys-general of bringing on this proceeding for judicial review. As detailed and documented in my Reply Brief, Respondent New York State Board of Elections completely abdicated its statutory duty to make any investigation--even ignoring the facially apparent violation of the Election Law appearing on the Republican Nominating Certificate. Moreover, in this proceeding, Respondent New York State Board of Elections compounded its nonfeasance of its statutory duty, by taking a hostile adversarial stance--a position clearly opposed to the public interest.

Petitioners respectfully ask this Court for a reversal of the Lower Court and granting of the relief outlined in my argument.