STATEMENT OF DORIS L. SASSOWER
DIRECTOR, NINTH JUDICIAL COMMITTEE

In Opposition to the Confirmation of Justice Howard Levine to the New York State Court of Appeals. Presented to the Senate Judiciary Committee, Tuesday, September 7, 1993.

I am here today as Director of the Ninth Judicial Committee, a non-partisan, grass-roots citizens' group formed in 1989 to improve the quality of the judiciary in the Ninth Judicial District, comprising the five counties of Westchester, Putnam, Dutchess, Rockland and Orange. In September 1990, our group spearheaded the case of Castracan v. Colavita, an historic case challenging a political deal involving cross-endorsements of seven judgeships--implemented at judicial nominating conventions conducted in violation of the Election Law. Justice Howard Levine sat on the Appellate Division, Third Department panel that decided Castracan on appeal. Its May 2, 1991 decision (33-35) affirming the lower court's dismissal on other grounds, and its subsequent two-sentence October 17, 1991 decision (103) denying Petitioners' motion for reargument/renewal/recusal and, alternatively, for leave to appeal to the Court of Appeals show convincingly that Justice Levine's elevation to this state's highest Court not only disserves the public interest, but jeopardizes it.

Copies of both those decisions, as well as Petitioners' reargument motion (36-60) and supporting Memorandum of Law (61-92) are included in the compendium of documents[1] assembled to assist you in evaluating the substantial nature of this opposition to Justice Levine and the need for full review of the file in this case.

By way of overview, and based on direct personal knowledge--not hearsay--Justice Levine's on-the-job performance in Castracan shows:

(1) disregard for ethical conflict of interest rules applicable to judges, who are required to disqualify themselves where their "impartiality might reasonably be questioned" (Canon 3C(1) of the Code of Judicial Conduct, 43-45, 53-56, 86-89, 95-97);

(2) disregard for controlling law and the public interest which required adjudication of the case on the merits, rather than dismissal based on factually and legally inappropriate procedural technicalities, applied in a one-sided manner (66-67; 69-86);

(3) indifference to the profound constitutional, legal, and public policy issues raised by the case, requiring at very least, the granting of leave to appeal to the Court of Appeals--which was denied (90-91);

(4) failure to perform his duty to correct the lower court's deliberate disregard for elementary legal standards and wilful misrepresentation of the factual record (66-67, 96-97);

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[1] The numbers within parentheses annotating this statement indicate page references in the compendium.

(5) disregard for ethical rules requiring initiation of appropriate disciplinary measures against lawyers and judges for unprofessional conduct, about which this case made him aware (Canon 3B(3) of the Code of Judicial Conduct).

No confirmation of this most important nomination should properly proceed unless and until there is a full review of the Castracan v. Colavita files by the members of this Committee. Such review would support the public perception that what was done by the Appellate Division, Third Department, with Justice Levine's knowledge and consent, was a "cover-up" of the lower court's misconduct (66-67, 96-97), as well as a deliberate perpetuation of the manipulation of judgeships by the two major political parties, directly being challenged by the Castracan case (64-65).

Indeed, the question the public has a right to have answered--and which this Committee is in a unique position to explore--is whether Justice Levine would be here today for confirmation had he properly performed his adjudicative duties in Castracan v. Colavita.

The 1988 Report of the New York State Commission on Government Integrity, "Becoming a Judge: Report on the Failings of Judicial Elections in New York State", reflects the fact that sitting judges, facing re-election or looking for advancement on the bench, are subject to political pressures in conflict with their judicial obligations. It is quite plain that Justice Levine, a top contender for appointment to the Court of Appeals for many years, whose elective term expires next year, would not have wished to jeopardize the support of his political patrons. There is no doubt that a decision in favor of the Castracan Petitioners by Justice Levine would have had severe repercussions on his career. Consequently, an already cynical public might well perceive that Governor Cuomo's nomination of Justice Levine to the Court of Appeals is a "pay-back" for his having protected--not the public--but the political powers that control "judge-making".

Justice Levine's concurrence in the Castracan decisions gives unmistakable evidence that he lacks the independence of mind and moral courage to chart a course consistent with applicable ethical and legal standards, where to do so would cause him to diverge from his colleagues. Such path might have precluded his consideration for this exalted appointment.

Before presenting the specifics, I believe it appropriate to state my relevant credentials (117):

Since graduation, cum laude, from New York University Law School in 1955, I have devoted most of my professional life to the cause of legal and judicial reform. In 1956, I worked as an Assistant to Arthur T. Vanderbilt, then Chief Justice of New Jersey's highest court, credited with having led the reform of New Jersey's archaic judicial system, turning it into one of the most modern justice systems in the country.

As President of the New York Women's Bar Association from 1968 to 1969, I, likewise, sought to improve the quality of justice and the judiciary. In 1971, I served on one of the first pre-nomination judicial screening panels set up to improve selection of Supreme Court judges in the First

Department. My article recounting that experience, published on the front page of the New York Law Journal (116), led to the renaming of the Judiciary Committee of the New York State Bar Association as the Judicial Selection Committee and to my appointment as the first woman ever to serve on such a committee. In that capacity, from 1972 to 1980, I interviewed and evaluated the qualifications of every judicial candidate during that eight-year period for the Court of Appeals, as well as for the Appellate Division and the Court of Claims. Indeed, my acquaintance with Archibald Murray, now President of the New York State Bar Association, here today on behalf of Justice Levine, goes back to the days when he joined me as a member of the State Bar's Judicial Selection Committee.

I myself was nominated as a candidate for the Court of Appeals in 1972 and also served as an elected Delegate to several Judicial Nominating Conventions.

Throughout my years in my own private practice, I had the highest rating of "AV", given by Martindale-Hubbell's Law Directory. In June 1989, I was honored by election to the Fellows of the American Bar Foundation, "an honor reserved for less than one-third of one percent of the practicing bar in each State".

In September 1990, I became counsel to the Ninth Judicial Committee and to the Petitioners in the case of Castracan v. Colavita. I acted as such counsel, pro bono, from the inception of the case in Supreme Court of Albany County through the decision on appeal to the Appellate Division, Third Department, rendered May 2, 1991 (39).

In Castracan, Justice Levine was presented with a case of extraordinary public concern involving the sanctity of the franchise and the integrity and independence of the judiciary. The Petition centered on Election Law violations occurring at the Judicial Nominating Conventions of both major parties so fundamental and fatal as to require that the certificates of nomination be voided. These included the lack of a quorum and the lack of a roll-call at the Democratic Judicial Nominating Convention and the fact that at the Republican Judicial Nominating Convention, Anthony Colavita, the Westchester Republican Party Chairman and former State Republican Party Chairman, acted in a proscribed dual capacity as both Convenor of that Convention and as its Permanent Chairman.

Complying with Election Law procedure, Petitioners, Dr. Mario Castracan, a registered Republican, and Professor Vincent Bonelli, a registered Democrat, as citizen objectors, duly filed their Objections and Specification of Objections with the New York State Board of Elections, detailing various convention violations. As the record before Justice Levine showed, the State Board of Elections dismissed the Objections, without any investigation or hearing and notwithstanding that the Republican Certificate of Nomination revealed facially the aforesaid jurisdictional Election Law violation.

Because the State Board of Elections totally failed to provide the administrative remedy afforded under the Election Law by the Legislature, Petitioners were required to seek judicial review in accordance with the exacting and arduous provisions of the Election Law--which they did.

The Election Law violations pleaded in the Petition initiating Castracan v. Colavita were supported by Petitioners' Objections and Specifications, as well as by affidavits of three eye-witnesses to the Judicial Nominating Conventions (4-25).

The Petition alleged further that the Judicial Nominating Conventions of both major parties implemented an illegal "Three-Year Deal", made in 1989, providing for cross-endorsement of identical candidates in seven judicial races in 1989, 1990, and 1991, with resultant disenfranchisement of the people from their constitutionally guaranteed voting rights.

The Deal, which had been reduced to a writing (1-3), was annexed to the Petition. All judicial nominees endorsed thereunder were required to accept terms and conditions as the price of their cross-endorsed nominations. These included contracted-for early resignations to create vacancies for other judicial nominees under the Deal, as well as an agreed split of judicial patronage, in accordance with "the recommendations" of the party leaders (64-65).

When Castracan v. Colavita was brought in September 1990, the second phase of the Deal, election of the Westchester Surrogate was already being performed. Pursuant to the Deal's most pivotal terms, Albert Emanuelli, cross-endorsed and elected under the 1989 phase of the Deal to a 14-year Supreme Court judgeship, had already resigned after seven months in office so that he could run as the cross-endorsed candidate for Surrogate under the Deal's 1990 phase. It was the 1990 judicial nominations under the Deal that were the subject of Castracan.

The ramifications and catastrophic consequences of the Deal on the million and a half-residents of the Ninth Judicial District, particularly on the women and children of divorce, many of whose lives hung in the balance while their cases remained unadjudicated because of the resignation of then Supreme Court Justice Emanuelli and the resulting four-month vacancy until induction of his cross-endorsed successor--were fully developed in the record and oral argument before Justice Levine, as well as in the subsequent reargument motion (63-64, 98, 101-102). Hence, Justice Levine was fully cognizant that the Deal's purpose was not to benefit the public interest, but to advance the private interests of the political leaders and those through whom they could gain and control judicial power. The record made plain that the cynical motivation behind the 1989 Deal was to enable the Republicans to maintain their historic control of the Surrogate's Office, one of the richest sources of patronage, when it became vacant in 1990. The Republican's expected loss of that position, due to changing demographics in Westchester County, gave to the Westchester Democratic leadership a bargaining chip to trade for Supreme Court judgeships. The parties thus deliberately bypassed and subverted the democratic process.

The record before Justice Levine also gave him notice of a pattern of judicial rulings so unusual and aberrant as to be clearly suspect. As an Election Law proceeding, the Castracan v. Colavita appeal was entitled to be heard before Election Day 1990. Yet, as the record reflects, oral argument of the appeal, already calendared for October 19, 1990, was inexplicably cancelled by Presiding Justice Mahoney, with the result that the case was put over until after Election Day, permitting the judicial

nominees to take office. Petitioners' attempt to obtain a stay by formal motion for a preference--which should have been automatic without need for a motion--was denied, also without reasons stated, and notwithstanding a state-wide alert issued by the New York State League of Women Voters, (annexed as Exhibit "A" to Petitioners' formal preference application) urging the Court to hear the case before Election Day.

Likewise reflected in the record before Justice Levine was the support expressed by the NAACP Legal Defense and Educational Fund, which had applied for amicus curiae status. Yet, the Appellate Division required submission of the amicus brief on the same date as the NAACP had indicated in its letter application as its filing deadline in a U.S. Supreme Court case involving judicial elections. Although what the NAACP/LDF sought was only one additional week, still almost two weeks in advance of the March 25, 1991 oral argument date--which request was unopposed by Respondents--a panel headed by Presiding Justice Mahoney denied it, again without reasons. The result was that NAACP/LDF could not file its amicus brief to explicate the national ramifications of Castracan and the impact of judicial cross-endorsements on ethnic minorities.

The decision of the lower court (28-32) was, likewise, aberrant and both legally and factually insupportable. The lower court dismissed the Petition for failure to state a cause of action on the ground that there had been no "proof" that the conventions had not been properly conducted (32). The lower court could be presumed to know what is learned by every first year law student: that the standard to be applied on a motion to dismiss rests on the legal sufficiency of the pleading--not proof. Moreover, review of the factual record showed an abundance of "proof": the Objections, Specifications, and the three eye-witness affidavits, attesting to the violations. Such documents were unrefuted by any proof from Respondents.

In light of the unexplained and inexplicable rulings by his colleagues of the Third Department and by the lower court and the sensitive political nature of this public interest case, Justice Levine was duty-bound to consider how it would look to the public for judges who were cross-endorsed in their own judicial races to rule on a case involving the legality of judicial cross-endorsements. Justice Levine is presumed to know that the "appearance of impropriety" is the standard by which is measured a judge's duty to disqualify himself. Yet three of the five judges on the five-judge panel hearing the appeal were themselves the products of cross-endorsements. This included Presiding Justice Mahoney--with a triple cross-endorsement (53).

The undisclosed cross-endorsement background of three of Justice Levine's brethren on the panel deciding the appeal was discovered by a news reporter immediately after the decision was rendered (43-44) and reported the next day in banner headlines. Further discovered was that all five judges of the five-judge panel that had denied Petitioners' formal preference motion were also cross-endorsed when they ran for election to the bench (44-45). That panel, which also had made no disclosure, included Justice Casey, who also had a triple cross-endorsement (45, 53) and Justice Weiss, with a quadruple cross-endorsement (45, 56), who have today both offered their public support for Justice Levine.

These extraordinary disqualifying facts were set forth in Petitioners' motion for reargument and renewal, together with controlling legal authority, which holds that even though a judge may believe him or herself to be impartial, it is the objective "appearance of impartiality" that determines whether a judge must recuse him or herself.

By that standard, the Appellate Division's decision had to be vacated on reargument, since the panel should have recused itself in the first instance based on apparent bias. The panel, however, denied that motion, without reasons--with the concurrence of Justice Levine (103). In view of the dispositive documentary and legal presentation on the reargument motion (36-102), the inference of actual bias becomes compelling.

Petitioners' reargument motion (36-60) and supporting 30-page Memorandum of Law (61-92) showed further that the Appellate Division's dismissal on the cited technical grounds was inappropriate. Such grounds were not jurisdictional, not preserved for appellate review, and were remediable. Consistent with the public perception that the Court's prime purpose was to "dump" the case, the Appellate Division did not even refer to the "interests of justice"--the only relevant standard for dismissal on the technical non-joinder objection on which it relied. Had it discussed that standard, it could not have jettisoned the case, as it did (75-76, 79-83).

Moreover, in relying on the technical non-joinder objection, the Appellate Division failed to concern itself with Petitioners' own technical objections--which the lower court's decision alluded to, but did not rule on (30)--affecting the standing of the individual Respondents to raise any technical objections, since they were in default as a result of their untimely and improperly verified pleadings. Plainly, if the Court were going to determine Respondents' technical objections, it first had to address the threshold technical objections of Petitioners, which the lower court had not done. That the Appellate Division refused to do so reflects its "double standard"--indicative of actual bias.

Simultaneous to its not addressing Respondents' lack of standing to raise objections in light of its default, the decision on appeal went out of its way to express, without citation to any legal authority, "grave doubts" about Petitioners' standing (35). Such comment by the Court could only discourage and deter any further challenge by Petitioners.

It is noteworthy that the Appellate Division did not see fit to express any "doubts" about the legality of the judicial cross-endorsements Deal at issue or the Judicial Nominating Conventions that implemented it. Nor did it comment on the failure of the State Board of Elections, the public agency designed to enforce the law, to perform its statutorily mandated duties or its gross litigation misconduct. Petitioners' extensive and documented complaints on that subject, placed before the Court on the original decision and again on reargument, were all totally ignored.
Justice Levine had to know that if the Court were not disposed to address the critical issues before it decisively, as was its adjudicative duty in view of the record, a referral to appropriate investigative and disciplinary agencies was indicated. This would have included the New York State Ethics Commission to review the conduct of the State Board of Elections, the Commission on Judicial Conduct, to review the conduct of judges and judicial nominees in participating in the Deal and the

fraudulently-run judicial conventions, and to the Grievance Committee of the Ninth Judicial District to review the conduct of the lawyers likewise involved and who had signed perjurious and otherwise improper Certificates of Nominations.

It must be noted that as part of the reargument motion, Justice Levine had before him the forthright comments of various judges concerning the Three-Year Deal, made in the context of their review in the related case of Sady v. Murphy, in which the Ninth Judicial Committee challenged the Deal's 1991 phase. Such comments included those of Judge Richard Simon of the Court of Appeals, who, on argument before him of the Petitioners' leave application in that case, characterized the Deal as "disgusting"; and William Thompson, Justice of the Appellate Division, Second Department, who, on the oral argument of the appeal in Sady stated that "people...involved in this deal...should have their heads examined", and, speaking of the contracted-for resignation required on the part of Justice Emanuelli under the Deal, that "these resignations are violations of ethical rules and would not be approved by the Commission on Judicial Conduct" and further that "a judge can be censured for that". Justice Thompson is himself a member of the Commission on Judicial Conduct. Also in Petitioners' papers were the comments of Hon. Guy Mangano, Presiding Justice of the Appellate Division, Second Department, who at the same argument on Sady stated, "Judge Emanuelli and the others will have a lot more to worry about than this lawsuit when this case is over."

The reargument papers also made known to Justice Levine that--despite such candid comments by justices of the Second Department--they had, in a one-line decision, sustained the dismissal of Sady v. Murphy--using the same failure of proof ground as was used by the lower court in Castracan, although Petitioners in that case had similarly been denied a hearing by the lower court. At that point, Justice Levine should have readily recognized from what was then before him that something aberrant, legally indefensible, and pernicious was taking place on every court level.

Yet even on reargument, Justice Levine did not address the lower court's complete disregard of law and fact in dismissing Castracan, which was not discussed in the panel's decision. He thereby impliedly condoned and approved that court's deliberate abandonment of the proper standard of adjudication. The result was to reward and protect the lower court for dismissing Castracan without a hearing--rather than to correct and discipline it for its manifest and highly prejudicial error. Indeed, Justice Levine, by his inaction, participated in the pattern of politically-motivated decision-making.

Justice Levine's tacit acceptance of political decision-making may also be seen from his failure to respond even when I reported on reargument (39-60) that following the Third Department's decision and my public announcement that I would be taking Castracan to the Court of Appeals, I was suspended from the practice of law by order of the Appellate Division, Second Department issued "without any statement of reasons or findings, as required by law and without any evidentiary hearing having been had". The opening paragraph of my affidavit in support of reargument expressly stated:

> "I have reason to believe my...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." (40)

Such serious accusation, made by a lawyer in the context of a highly political case involving palpable judicial self-interest, could not be ignored without sacrificing public trust and confidence in the judiciary. The implication of doing nothing was that, even were such charge true, the Court did not care. Only a biased or politically-minded Court could tolerate even the possibility--let alone the fact--that such judicial retaliation had occurred.

To prove that there is no other explanation for the suspension of my license than the vindictive desire to punish me for having challenged the political powers controlling judicial office in this State and to discredit me with the stigma of suspension when I speak out on the subject, I have brought with me today the files relative to my suspension so that its complete lack of factual and legal basis can be verified by this Committee. Such files show--even more vividly than Castracan--the extent to which judges in this State employ their power, unrestrained by law, to accomplish raw political and self-interested objectives. As of this date--more than two years after the Second Department's immediate, indefinite, and unconditional suspension order, I am still suspended--without ever having had a hearing prior to the suspension or at any time since. My motions to the Appellate Division, Second Department for a hearing have been denied, without reasons, with maximum motion costs imposed against me.

In the context of Justice Levine's nomination to the Court of Appeals, the Third Department's denial of leave to appeal to the Court of Appeals (37, 62, 90-91) is particularly significant. Justice Levine did not dissent even from the denial of such requested alternative relief (103). This raises the serious question as to why he would not favor review by our highest Court of a public interest case of such magnitude. Particularly where the panel's failure to disqualify itself was in issue (90), did Justice Levine not recognize that public confidence would be enhanced by having judges more detached review the decision in the light of such issue? Did Justice Levine see no substantial constitutional issues in a deal disenfranchising citizens from their constitutionally-guaranteed voting rights? What was his view of the Petitioners' Memorandum in Support of Subject Matter Jurisdiction as of Right in the Court of Appeals--which Memorandum was an exhibit on the reargument motion before him (93-102)? The answers to these questions are essential since Judge Levine, as an Associate Judge of the Court of Appeals, would be voting on what cases will be accepted by that Court, which also hears appeals from the Commission on Judicial Conduct. A judge who could read Petitioners' aforesaid Memorandum and, with knowledge of the factual record in Castracan, deny Petitioners' right to review by the Court of Appeals is a judge who should not be sitting on the Court of Appeals--if on any court at all.

Justice Levine's willingness to go along with a tainted majority, rather than stand up--in dissent--for the public interest indicates that he is unable or unwilling to perform the duties of that Court, intended as the last state resort to protect our democratic processes of government from abuse. The evidence is that Justice Levine will, instead, continue to protect the judiciary from accountability for its misconduct and will not disengage politics from the courts, which, years ago the New York State

Commission on Government Integrity said is what had to be done.

The havoc created by the Three-Year Deal to the entire state court system and its direct causal relationship to the "crisis" in the Appellate Division, Second Department, has yet to be investigated and reported. As shown by my October 24, 1991 letter to the Governor (104-117), the need for a special prosecutor to do what our courts and the State Board of Elections have failed to do was then clearly evident.

Justice Levine should be called upon at these hearings to account to the public for his acts of commission and omission in Castracan v. Colavita, the case brought on their behalf and for their protection. The press reported this past weekend that Justice Levine agreed to respond to questions of the Senate Judiciary Committee on the subject. The public has the right to expect that this Committee will make the appropriate inquiries, which the files in the case show to be well warranted.