STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

DETERMINATION

JOHN C. KING, SR.,

a Justice of the North Hudson Town
Court, Essex County.

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THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission

John C. King, Sr., *pro se*

The respondent, John C. King, Sr., a Justice of the North Hudson Town Court, Essex County, was served with a Formal Written Complaint dated September 19,

2006, containing one charge. Respondent filed an answer dated November 15, 2006.

On December 12, 2006, the administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On January 25, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the North Hudson Town Court, Essex County, since January 1, 2006, having successfully run for election in November 2005. He is not an attorney.

2. In 2005, while running as a candidate for North Hudson Town Justice, respondent engaged in various prohibited partisan political activities, as follows.

3. Throughout 2005, respondent was Chairman of the North Hudson Republican Party.

4. In or around June 2005, respondent became a candidate for North Hudson Town Justice, in that he began collecting signatures on a nominating petition in support of his candidacy.

5. Notwithstanding that he became a judicial candidate in or around June 2005, respondent did not resign the position as Chairman of the North Hudson Republican Party until January 1, 2006.

6. Respondent was a member of Friends of Richard B. Meyer, a campaign committee formed in 2005 to promote the candidacy of Richard B. Meyer for the position of Essex County Family, County and Surrogate's Court Judge. Respondent's name was listed on the letterhead of the Meyer campaign committee in August 2005.

7. In or around July 2005, respondent circulated a nominating petition for Richard B. Meyer's candidacy for the position of Essex County Family, County and Surrogate's Court Judge.

8. On or about September 18, 2005, respondent attended and participated in a meeting of the Republican Committee of the Town of North Hudson, at which Deborah Duntley was nominated as a Republican candidate for a second position as North Hudson Town Justice, which had recently become vacant. Respondent signed the certificate of nomination as Chairman of the Republican Committee. Ms. Duntley had previously been nominated to run against respondent as a candidate of the Wisdom Party. After Ms. Duntley was nominated as a Republican for the second judicial position available in North Hudson, respondent asked her to withdraw as the Wisdom Party candidate opposing him for the other available judicial position. Ms. Duntley did so.

9. In the fall of 2005, respondent displayed on his property the campaign signs of candidates Richard B. Meyer (a candidate for Essex County Family, County and Surrogate's Judge), Julie Garcia (a candidate for Essex County District Attorney) and Henry Hommes (a candidate for Essex County Sheriff).

10. Respondent did not engage in any prohibited political activity after he

became a judge, and asserts that he was unaware during his campaign of the limitations on political activity by judicial candidates but recognizes that he was nevertheless obliged to know and abide by the Rules. Respondent assures the Commission that he will abide by all ethical requirements in the future.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(1)(a), 100.5(A)(1)(c), 100.5(A)(1)(d), 100.5(A)(1)(e) and 100.5(A)(1)(g) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Judicial candidates are strictly prohibited from engaging in partisan political activity, except for certain, limited activity in connection with the candidate's own campaign for office. The ethical mandates explicitly prohibit a judge or judicial candidate from holding office in a political organization (Section 100.5[A][1][a] of the Rules), engaging in partisan political activity on behalf of other candidates (Sections 100.5[A][1][c] and [d]), endorsing other candidates (Section 100.5[A][1][e]) and attending political gatherings (Section 100.5[A][1][g]). While a judicial candidate, respondent engaged in partisan political conduct that clearly violated these standards.

Although a non-judge candidate for judicial office is permitted to belong to

a political organization (Section 100.5[A][3] of the Rules), such a person cannot be a "leader" or hold office in a political organization (Section 100.5[A][1][a]). By continuing to serve as chairman of the local Republican Party until taking office as a judge, respondent violated that mandate. As the Party chairman, he continued to play an active, visible role in local political affairs. Notably, he attended a political meeting at which a candidate for the other available judgeship was nominated, and he signed the certificate of nomination.

Respondent also participated in the political campaign of another candidate and publicly endorsed other candidates, which is expressly prohibited (Section 100.5[A][1][c]-[e]). He played an active role in supporting a candidate for another judicial position, serving as a member of the candidate's committee, circulating a nominating petition for the candidate, and being listed on the candidate's letterhead. In addition, he displayed signs on his property supporting not only the judicial candidate but local candidates for District Attorney and Sheriff. Such endorsements are clearly barred. *See, e.g., Matter of Campbell*, 2005 Annual Report 103 (Comm. on Judicial Conduct); *Matter of Farrell*, 2005 Annual Report 159 (Comm. on Judicial Conduct); *Matter of Crnkovich*, 2003 Annual Report 99 (Comm. on Judicial Conduct); *Matter of Cacciatore*, 1999 Annual Report 85 (Comm. on Judicial Conduct); *Matter of Decker*, 1995 Annual Report 111 (Comm. on Judicial Conduct). A judge may not even make anonymous telephone calls from a telephone bank on behalf of a candidate for public office. *Matter of Raab v. Comm. on Judicial Conduct,* 100 NY2d 305 (2003). When respondent openly

supported the candidates for District Attorney and Sheriff, he not only put the prestige of the court behind the endorsement but conveyed the impression that he had political alliances with individuals who would likely appear before him in future cases.

The ethical restrictions on political activity by judges and judicial candidates address "the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary" (*Matter of Raab*, *supra*, 100 NY2d at 316). As the Court of Appeals has held, such limitations are not only constitutionally sound, but fair and necessary to "preserv[e] the impartiality and independence of our State judiciary and maintain[ ] public confidence in New York State's court system" (*Id.* at 312).

It is no excuse that, as respondent claims, he was unaware of the relevant limitations on political activity by judicial candidates. Every judge and judicial candidate is obliged to know and abide by the applicable ethical rules.

By reason of the foregoing, the Commission determines that the appropriate disposition is admonition.

Mr. Felder, Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Emery files a concurring opinion.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: February 14, 2007

Raoul Lionel Felder, Esq., Chair
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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CONCURRING OPINION
BY MR. EMERY

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Respondent, John C. King, Sr., is accused of engaging in campaign activity in his quest for judicial office that compromised his obligation to "'preserv[e] the impartiality and independence of our State judiciary and maintain[ ] public confidence in New York State's court system'" (Determination at p. 6, quoting *Matter of Raab*, 100 NY2d 305, 312 [2003]). This accusation grows out of King's undisputed failure to resign his post as Chairman of the North Hudson Republican Party and, in that capacity, his active support of other local Republican candidates in 2005, during a period when he was running for judicial office. Notably, at the time he ran he was not a judge.

On their face, the Rules Governing Judicial Conduct, in particular Section 100.5(A)(1)(a), preclude a candidate – judge or non-judge – from holding office or being a "leader" in a political organization, and Sections 100.5(A)(1)(c)-(e) and (g) proscribe endorsing and supporting other candidates as well as attending political gatherings. Despite these selective restrictions on a judicial candidate's political activities, the Rules

do NOT forbid a non-judge candidate from being a member, as opposed to a "leader," of a political organization or from paying dues to a political organization (Section 100.5[A][3]). Nor do the Rules restrict any judicial candidate from active campaigning as a party endorsed candidate, advertising and campaigning as a member of a slate of party candidates, being endorsed by a political party, buying two tickets to and attending a political fund-raising event, receiving non-anonymous campaign contributions from political parties and party leaders, contributing to his/her campaign, reimbursing a party to pay for expenses in the judicial campaign, or standing on street corners soliciting votes. Most significantly, the rules do not prohibit receiving non-anonymous campaign contributions from the very lawyers and their clients whose cases the judge is, or will be, deciding. In other words, the Rules allow, as they must, blatant and aggressive politicking by judges and non-judges running for a judicial office, even though, without any rhyme or reason, they purport to cherry pick certain political activities as violations.

Juxtaposing sanctions for otherwise normal, accepted and necessary campaign practices – endorsing, campaigning for and supporting fellow candidates as well as contributing to and supporting party activities – with the campaign activities that the Rules allow – running on a party slate, accepting party endorsements, receiving party and party leader contributions, attending certain fund-raising events, reimbursing the party for campaign expenses and accepting non-anonymous campaign contributions from lawyers and clients who appear before the candidate judge – renders it hard to fathom any unifying rationale for the Rules that we enforce today. At a minimum, as in this case, these byzantine rules are a trap for the unwary. More importantly, it is hard to see how

the Rules viewed as a regimen of regulation serve their purported interest to "preserv[e] the impartiality and independence of our State judiciary and maintain[ ] public confidence in New York State's court system." *Matter of Raab*, *supra*, 100 NY2d at 312. And most importantly, this hodgepodge scheme of political regulation tramples the First Amendment rights of judicial candidates and voters.

I have written several times before on the constitutional ramifications of this contradictory and, ultimately, futile scheme of political regulation. *See Matter of Farrell*, 2005 Annual Report 159; *Matter of Campbell*, 2005 Annual Report 133; and *Matter of Spargo*, 2007 Annual Report ___ (Emery Concurrences). In those cases I concluded that the Rules suffer from the fatal constitutional flaws of over- and underinclusiveness, and cannot withstand the strict scrutiny that the Supreme Court in *Republican Party of Minnesota v. White*, 536 US 765 (2002), requires. I need not belabor that analysis here, and I refer anyone interested to those opinions.

My point today is a somewhat different one. The confluence of two current events makes this a propitious time for the Commission to exercise its discretion and refrain from enforcing this unconstitutional scheme of political regulation. First, apart from what I believe is our obligation not to impose punishment under unconstitutional and blatantly unfair rules, the Commission is facing a potentially crippling crisis of resources that our staff has ably documented in its current budgetary request to the Legislature ("Judicial Ethics and the New York State Budget: How Acutely Inadequate Funding Seriously Challenges the Commission's Effort to Fulfill Its Critically Important Constitutional Mandate," Nov. 21, 2006). Second, after the Second Circuit's affirmance

of District Judge John Gleeson's decision in *Lopez Torres v. NY State Bd of Elections*, 462 F3d 161 (2d Cir 2006), which invalidated the party convention system for selecting judicial nominees and substituted, at least for the immediate future, primary elections to select judicial candidates, the pervasive presence of hotly contested judicial campaigns will imminently and exponentially expand. Starting this June, when petitioning begins, campaign politics and judicial elections will converge in ways, and with an intensity, the likes of which this state has never seen.

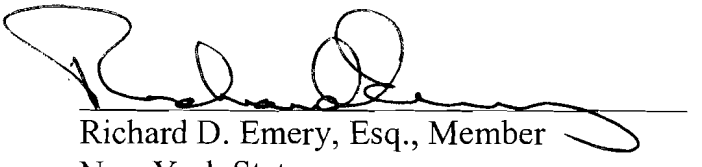
As a practical matter, the Commission simply does not have the resources to begin to cope with what will inevitably be a tidal wave of complaints nor with the First Amendment defenses these campaign tactics will generate. There is no conceivable way that we will be able to determine with any sense of confidence which candidates violated this absurd scheme of political regulation, let alone determine which candidates did so knowingly and intentionally. And if we do find some violations, we are likely to be embroiled in difficult constitutional litigation in federal court. Therefore, it behooves us to concentrate our paltry resources on the far more important strains of judicial impropriety such as abuse of litigants and lawyers, misappropriation of funds, and abuse of the judicial office for personal advantage, to name a few of the routine serious complaints with which we are inundated.

This is the worst time for the Commission to pretend that we have the ability, let alone the capacity, to enforce contradictory rules in the quagmire of election politics. Rather, this is the time for us to fix on higher priorities and refrain from providing Band-Aids for a self-inflicted wound that our State Constitution has impaled us

with by requiring judicial elections. *See Matter of Spargo*, *supra* (Emery Concurrence). Finally, we should frankly and openly admit that under this absurd scheme of political regulation mandated by the Court of Appeals in *Matter of Raab*, we cannot fulfill our mission because enforcement of these conflicting rules will never "preserv[e] the impartiality and independence of our State judiciary and maintain[ ] public confidence in New York State's court system." Rather, such "enforcement" will undermine it.

Nonetheless, because respondent agrees that he violated the Rules, and the Rules were upheld as constitutional in *Raab*, I am constrained to concur in the result that the majority reaches in this case. Until some enterprising litigant challenges the *Raab* result in a federal court or the Court of Appeals overrules the decision, *Raab* remains binding on me and this Commission.

Dated: February 14, 2007



Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct