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# Restoring the Public Trust: A Blueprint for Government Integrity

New York State Commission on Government Integrity

# RESTORING THE PUBLIC TRUST: A BLUEPRINT FOR GOVERNMENT INTEGRITY

New York State Commission
on Government Integrity

September, 1990

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> I believe that a continued commitment to improvement by our Legislature, a persistent, undeviating emphasis on reform by the executive — together with your help — can make this the beginning of the most exciting reform era in this State's history.
>
> It will take foresight, tough advocacy, intelligence and courage, but this great State has proven over and over for 210 years that it is capable of that kind of strength when needed. And this surely is a moment of need . . . and a moment of great opportunity.

*Governor Mario M. Cuomo*
*Remarks to New York State Commission*
*on Government Integrity (the Commission)*
*September 9, 1987*

> The public is entitled to expect from its servants a set of standards far above the morals of the marketplace. Those who exercise public and political power are trustees of the hopes and aspirations of all mankind. They are the trustees of a system of government in which the people must be able to place their absolute trust; for the preservation of their welfare, their safety and all they hold dear depends upon it.

*Governor Thomas E. Dewey*
*Public Papers* 10 (1954)

Instances of corruption are commonplace in practically every segment of American society. From Wall Street to government, the failures of those who wield great power and influence and in whom we place great trust is chronic in modern life.

The last few years have been a particularly bad time for government integrity in New York. Since 1985, New York City has been rocked by a series of highly publicized scandals, arguably the worst since the days of Tammany Hall. One borough president was convicted of felonies; another committed suicide while under investigation; a congressman was recently convicted of bribery and extortion; former party chairmen in two boroughs were convicted of serious crimes; and a number of agency heads, judges, and lesser officials have either been convicted or forced to resign under a cloud of suspicion. And the City does not have a monopoly on malfeasance. Scandals have also plagued the New York State Legislature and governments elsewhere in the State.

Although certainly the vast majority of public officials are dedicated and honest, these cases are representative of others in New

York in the last few years. And probably, there are more corrupt public officials who have not been — and may never be —caught and punished. Our democratic system is in crisis.

Although the scope of recent scandals is dishearteningly large, many of our greatest institutions and reforms have come about in the course of courageous struggles against corruption. The terrible disruption created when a public servant violates the public trust eventually awakens the citizenry and opens a possibility for change. It arouses us from cynicism and complacency and alerts us to our common responsibility not only to halt but also to reverse ethical decline.

Consider the chaos of the 1780s which, like every other age, had corrupt elements. The Framers of our Constitution did not throw up their hands in despair or become cynical about government and the political process. Instead, they gave us one of the greatest examples of political leadership in history. They scrapped an unworkable system for an entirely new one, viewing morality, virtue, and religion as insufficient deterrents to the tendency of people who possess power to abuse it. The Framers recognized the ineludible temptations of power, and consequently that controls and precautions are necessary if democratic government is to survive. The Constitution they wrote grants power and simultaneously limits it in every possible manner. As Madison noted in the *Federalist Papers*: "Ambition must be made to counteract ambition. . . . It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature?"

References to the Framers may seem distant from the challenges of the present. They are not. The success of the Framers suggests that if we are to convert this period into one of renewal and reform, we must do as they did: take a hard look at ourselves and adopt substantial changes in the way we conduct our affairs. And we must do so soon if we want to avert widespread political apathy and public mistrust.

Obviously, as a society we must concentrate great resources on enforcing the law. Wrongdoers must be uncovered and punished. And if this requires additional resources, then we must be serious about honest government and commit whatever time and monies are necessary to do the job properly.

Investigations and prosecutions are not enough, however, to meet the challenges we face. Honest government officials labor under burdens unparalleled by those imposed upon the rest of us. When those burdens become too great, and there is no clear moral support from the community, they can easily fall prey to the pressures they con-

front. Private citizens have an obligation to make their ethical expectations clear by communicating with their representatives, voting and participating in political party activities. Most important, we need sweeping reforms of our laws to safeguard the public sector from the pressures brought to bear by private sector special interests and to reduce the temptation of officials to abuse their trust.

## CAMPAIGN FINANCE

> The idea is to prevent . . . the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the Legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public. It strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government.[1]
>
> *Elihu Root (1894)*

In a democracy, holding elective office is one of the highest forms of public service. We entrust to our officeholders not only the business of government, but the ultimate protection of our liberty and community. And as a result, impropriety in the way candidates campaign strikes at the heart of our democratic system.

To compete successfully, candidates must have public relations advisors and media consultants and, for the highest offices, they must raise and spend millions of dollars. Although we complain about the expense of elections and the superficiality of campaigns based on 30-second television spots, for many these expensive advertisements provide the only information on which to base their votes. The result is contradictory demands on candidates. We expect them to wage effective campaigns for public office, yet we are suspicious when they raise the money they need to do it. There is only one way out of this dilemma, and that is campaign finance reform.

Campaign finance laws in New York are a disgrace. They impose minimal limitations and are not vigorously enforced, resulting in not only corruption and the appearance of impropriety, but voter skepticism about the electoral process itself.

Good campaign finance regulations must satisfy a number of objectives: limiting the undue influence of wealthy special interests, insuring that the public is informed about the sources and amounts of a candidate's support, providing for adequate enforcement, encouraging democratic competition for office and promoting confidence in government. New York's regulations fail these tests miserably.

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1. Elihu Root served as U.S. Senator from New York, U.S. Secretary of War, U.S. Secretary of State, and won the 1912 Nobel Peace Prize. The passage is from a speech he gave urging a constitutional convention in New York to pass campaign finance reform.

*Contribution limits*

Currently, the ceiling on contributions for political purposes by individuals is so high it can hardly be termed a limit: $150,000 per year. Large contributors dominate New York political campaigns. For example, among the three New York Citywide officeholders — Mayor Edward Koch, Comptroller Harrison Goldin, and City Council President Andrew Stein — no more than 4% of their total contributions in the last five years came from gifts of less than 100 dollars. More than 80% of the total in each case came from gifts of $1,000 and above, and between 43% and 65% came from gifts of $5,000 or more.

The contribution pattern of the four statewide officeholders — Governor Mario Cuomo, Lieutenant Governor Stan Lundine, Comptroller Edward Regan and Attorney General Robert Abrams — is similar. No more than 5% of their totals in the last five years came from gifts of less than $100, roughly 80% from gifts over $1,000 and between 24% and 55% from gifts of $5,000 and more. And less than 0.3% of the voters in New York State even make political contributions, further strengthening the power of the wealthy elite that give huge amounts. The current law's outrageously high limits render the gift of the average person insignificant, while insuring that the gifts of the wealthy remain the cornerstone of every campaign.

Our study of legislative campaign funding practices reveals a similarly disturbing pattern. Corporations, unions and their political action committees (PACs) accounted for roughly 60% of the $11 million raised during a five-year period by the Democratic and Republican Senate and Assembly legislative committees. PAC contributions to these committees are virtually unlimited by the law. Contributions as high as $10,000 and $20,000 from PACs are commonplace, with single donations swelling to a staggering $100,000. Top legislative leaders control the committees' coffers, funneling large sums to hotly contested races and transferring lesser amounts to the campaigns of incumbents seeking reelection to "safe" seats. This creates a climate of indebtedness, with some candidates owing their success to party leaders who are in turn dangerously dependent on special interests.

Corporate contributions are similarly unrestrained. Technically, of course, they are limited ($5,000 per year) but there is a huge loophole: the gifts of subsidiary and affiliated corporations are not included in the parent company's total. A real estate developer testified to the Commission that in a single month he used 21 subsidiary corporations as vehicles for giving $100,000 to City Comptroller Harrison Goldin. "My friend needed help, so I helped him," he said. The federal gov-

ernment has banned corporate contributions since 1907; 19 other states have followed. It is long past time that New York did the same.

More pernicious still, the current law allows those doing business with the government to contribute directly to the very people deciding who gets the government's business. As an example, more than 90% of State Comptroller Regan's campaign contributions between January, 1983 and January, 1988 came from the financial, legal and real estate communities; three groups that benefit directly from his office's decisions as sole manager of the state's $38 billion pension fund. On August 29, 1985, another real estate developer gave $30,000 to City Council President Andrew Stein through 17 corporations he controlled. Such contributors' profits are directly affected by discretionary actions by Stein and the other members of the Board of Estimate, who in turn rely on such large contributions to get elected.

The testimony received at our public hearing from various business leaders suggests that it would be naive to think that these gifts are always a pure expression of democratic support. One witness said he contributed "more to avoid a negative impact, than trying to incur a positive result." Commission staff members were told by some business people that "it would be bad business judgment to stop contributing to campaigns." Some of those testifying had no idea how much they had given; others, playing it safe, gave to different candidates vying for the same office and, not surprisingly, saw no necessity to vote in the election in which they had contributed. What is clear is that many business people see their contributions as a cost of doing business, a payment for benefits they might not otherwise receive.

It is not the Commission's function to prove a direct link between a big contribution and a lucrative contract. That is a job for prosecutors. Yet it is undeniable that large contributions by those doing business with government provide access that average citizens do not enjoy, and create an appearance of impropriety that damages the voters' confidence that our democratic process is fair.[2]

*Disclosure*

Democracy depends on a well-informed electorate. As Justice

2. The Commission proposes limiting individual contributions to the following ranges: governor, lieutenant governor, and comptroller of the State of New York: *$2,500 to $4,000*; state legislators: *$1,500 to $2,000*; mayor, City Council president, and comptroller of New York City: *$2,500 to $4,000*; all other city and county offices: *$1,000 to $2,000*; town, village and other local offices: *$500 to $1,000*. The Commission also recommends that PAC contributions be limited to similar ranges in their contributions to candidates, and to $5,000 in their contributions to state, legislative and local party committees.

Brandeis stated, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[3] Unfortunately, the current disclosure requirements involving contributors are so inadequate they seem designed to hide a candidate's sources of support. The Commission's investigation has uncovered several examples. Candidates do not have to reveal their contributors' employers, allowing the executives of a single company to make large individual contributions that add up to what is in effect a huge secret corporate contribution. Insuring that a candidate is aware of the extent of a company's support is easy: the executives' checks simply are delivered in a single bundle, and the public is none the wiser. Political advertisements do not have to state their sponsors, keeping the public in the dark about who is behind the slick and persuasive political messages that bombard them before many elections.[4]

The State Board of Elections, which is supposed to correct these problems, instead compounds them. It does not even insist that the current disclosure forms — which are inadequate to begin with — be typed, resulting often in completely illegible and useless filings. It has also failed to computerize and publicize the vital data it does receive. Without computerization and enhanced disclosure requirements, the public cannot know who has paid the fare to bring their leaders to office.[5]

*Public funding*

In the 1986 election cycle, the winners of the four state-wide races together spent more than $20 million on their campaigns. In the 1985 election cycle, New York City Mayor Edward Koch, Council President Andrew Stein, and Comptroller Harrison Goldin, spent a total of more than $10 million to win their races. When running for public office requires enormous expenditures of privately raised funds, chal-

3. BRANDEIS, OTHER PEOPLE'S MONEY 62 (National Home Library Foundation ed. 1933).

4. Contrast this with the law governing federal elections that requires that all political advertisements that "expressly advocat[e] the election or defeat of a clearly identified candidate," or ask for contributions, clearly state their sponsors and whether the advertisement has been authorized by the candidate. *See* 2 U.S.C. § 441d(a) (1980).

5. In an effort to investigate the campaign finance issue thoroughly, the Commission undertook a massive project to computerize the records of the Board of Election. That effort is well under way, and as a result, for the first time, it is possible for the public and the press to determine the amount of campaign support public officials have received from specific individuals and corporations. Printouts of the data base may be borrowed for copying from the Commission's offices, and the entire data base is available on computer diskette free of charge.

lenges to incumbents are all but limited to the most wealthy and well-connected. Moreover, huge campaign costs pressure candidates to maintain political views that do not offend big money interests.

To address these problems, several states — and the federal government for presidential campaigns — have adopted public funding. And on November 8, 1988, New York City's voters approved public funding for city-wide races by an overwhelming 79% margin.

If properly formulated, public funding can have several salutary effects on the political process. First, it provides a constitutional way to limit campaign expenditures. Second, public funding encourages more vigorous competition by insuring that challengers have sufficient resources to get their message across to the electorate. Third, it helps keep the focus of campaigns on political issues rather than on fund-raising.

Finally, public financing lessens the influence of particularly generous individual donors. Public funding gives candidates a source of income that will not demand access or favors at some later date. It gives elected officials an independence from vested community interests and as a result, the freedom to challenge those interests for the public good. And, if properly designed, public funding strengthens the relationship between candidates and the public they represent, and will allay the cynical belief that current campaign fund-raising practices are a form of "legalized bribery."[6]

*Enforcement*

Since its creation in 1974, the State Board of Elections has been an ineffectual watchdog. It has done little more than collect candidates' campaign contribution and expenditure filings, let them sit undisturbed for five years, and then destroy them. The State Board does not computerize, analyze or disclose the important information it receives in any meaningful way. Without computerization and analysis, the Board cannot enforce the basic features of the Election Law.

New York's Board of Elections lags behind other states. The Assis-

6. The Commission supports public funding for state-wide offices, and believes other municipalities should be permitted to institute such programs if they wish. However, after careful study, the Commission has declined at this time to recommend public funding for legislative races. The Commission feels that the vast majority of legislative candidates do not currently spend excessive amounts on their general election campaigns and, accordingly, that these elections do not present the various evils attendant to excessively costly campaigns. The Commission also believes that the effect of the other reforms we have proposed should be studied carefully before public funds are committed to legislative races.

tant Staff Director of the United States Federal Election Commission testified before the Commission:

> If you want to be a leader . . . you have got to be out front, you have got to be thinking of new ideas, you have to have a budget, you have to have the staff to do it, you have to have the support of the Legislature to do it. I don't think that New York has done very much at all. I would probably put New York where New Jersey was about fifteen years ago. . . .
>
> New York has a long, long way to go. I don't think it is anywhere near being a leader. You are not even in consideration in that regard.

The testimony of a former Board of Elections investigator gives a clue about why we have fallen short:

> It seemed like the [State Board of Elections] Commissioners didn't want anything new happening, or anything innovative happening within the Board. They just wanted to keep things nice and quiet and not distribute that type of information that could lead to questions, and potential problems. . . .

Commissioners of the Board of Elections are appointed under a system that all but guarantees complacency by the Board toward its campaign financing responsibilities. The budget as well as the appointments to the Board are controlled by the most powerful people the Board is supposed to police. Under the current practice, the Governor must appoint one of the people recommended by the chairperson of the State Democratic Committee, one of the people recommended by the chairperson of the State Republican Committee, the person jointly recommended by the Democratic Party's two legislative leaders and the person jointly recommended by the Republican Party's two legislative leaders.[7]

The resulting potential for conflict of interest is obvious even to the Board's Executive Director, who testified before the Commission that:

> I think another thing we have to recognize is that in effect, the Legislature is our clientele. We are asking them for more auditors, more investigators, so that we can do a better job reviewing the reports of legislators, and so forth. I think there is a reluctance there.

The solution is clear: a new, independent agency must be formed with sole responsibility for enforcing the campaign finance laws. This

7. The potential effects of the Board's ties to the political establishment are further exacerbated by the fact that Commissioners serve two-year terms, making it easy to replace them quickly if the Board's actions are unpopular.

new agency should be charged only with campaign financing responsibilities. Ballot administration and voter registration should be the responsibility of a separate body. Campaign financing experts consulted by the Commission were unanimous in their view that these areas should be separated. As the former chairman of both the New Jersey and federal campaign financing agencies testified,

> My feeling and conclusion is that it would be best to have a single agency charged with campaign finance disclosure responsibility, simply because of the nature of the work involved.
>
> Contrast it, if you will, with what the State Board of Elections does. They do extremely important work but of an entirely different sort. They are involved in insuring that everything goes well on Election Day, that we all vote, and if that ever becomes tarnished, we are all in trouble and we know it.
>
> But what you're talking about in terms of campaign financing is very sophisticated investigation, and I think that's best left to one specific agency, if we are talking about the financing of elections.

If both responsibilities are given to a single agency, that agency will inevitably devote more of its resources and attention to issues it must resolve — such as which candidates are to appear on the ballot — than to issues such as post-election review of the adequacy of a candidate's financial disclosure statements.

The Commissioners of this new campaign finance enforcement agency should be appointed by the Governor from choices provided by an independent nominating commission. Such a nominating commission, patterned after the successful independent commission which nominates judges for the Court of Appeals, should include members of civic groups, business and religious leaders, as well as people more directly involved in politics. The new agency must be adequately funded, and its budget must be insulated from reprisal by public officials.

We must guarantee that the taxpayers' money for campaign financing will be spent carefully, that contribution limits will mean something, and that they will have easy access to matters of public record. But without an effective, independent enforcement agency these reforms will be as meaningless as criminal laws without police.

New Yorkers are well aware of the problems with our current campaign finance system. According to a poll conducted for the Commission, 77% of voters support campaign finance reform, 78% believe that individuals have far too little influence over state government, and approximately 60% think that corporations, labor unions and political parties give in order to "influence or control" a candidate.

We find these statistics shocking. When 60% of the registered voters in our state believe that corporate, union and party contributions are a form of legal bribery rather than an expression of support, our system is in a state of crisis. The extent of voter cynicism in New York is alarming. Our leaders must take the steps necessary to restore public confidence. The Commission has not worked on any issue more important than campaign finance reform.

## JUDICIAL SELECTION

> I'm against elected judges because the way you get elected judges is the way they do it in the Bronx. You get three political leaders together, boom, they pick a guy and he's the judge, he's elected.
>
> *Governor Mario Cuomo (1988)*

> It is very difficult to take people who are successful in practice and say to them, become a judge in our State system, work well, work diligently, and then if everything is all right you can go back to the political leader and perhaps seek renomination to run again.
>
> *New York State Chief Judge Sol Wachtler*

> It is hard indeed to face, in middle or later age and with your practice and clients gone, the prospect of being turned out of office because you have made an honest but unpopular decision. Indeed, I am continually gratified and amazed at the frequency with which my colleagues on the state bench do just that; but it is a test to which they should not be put, over and over and day by day.
>
> *Thomas Gibbs Gee, Circuit Judge, U.S. Court of Appeals, Houston*

Unlike the other branches of government which are primarily concerned with the wishes of majorities, the judicial branch is charged with protecting the basic rights of individuals. In doing so, the judiciary necessarily must focus on the facts of particular cases, blocking out personal or political prejudice, bias, and self-interest. At their best, our courts serve as an institutional refuge for the oppressed, the powerless and the mistreated; a place where any citizen can turn for a just and fair hearing.

Even the appearance of partiality in the judiciary is dangerous. Without public confidence in the independence of our judges, the moral foundation of the rule of law is threatened. As Chief Judge Wachtler stated, "the whole justice system is balanced very delicately on what we call the public trust."

Most judges in New York are chosen by elections that are almost totally controlled by political party leaders, a system which clashes with the ideal of an independent and nonpartisan judiciary. By promoting political favoritism and rewarding party loyalty, judicial elections enhance political leaders' undue influence over judges,

discourage lawyers without political connections from seeking judgeships, and threaten public confidence in the integrity of the judicial system. Partly for these reasons the Framers of the Federal Constitution mandated an appointive system for Federal judges and Justices of the United States Supreme Court, and the voters of New York State chose this method for their highest court.

In virtually every county in New York, a few political party leaders effectively control judgeships by making the crucial decisions: who will be designated or nominated, and who will receive the support of the party organization critical to election. As one political leader testified before the Commission,

> I don't recall a judicial convention in twenty years that the candidates recommended by the County Leader were not designated. There were conventions where other names were put in but they never were successful in getting enough votes to be the designees of the Convention . . . .
>
> I'm talking about Queens, because I reside there. I know for a fact this is true in Manhattan and other counties in the City and the State, where the Judicial Convention really operated as a rubber stamp of the County Leader and it has done so for many years, probably continues to do so.

The overriding concern of these party leaders is quite naturally political: advancing the party organization, cementing party loyalty, and consolidating their power. But what is natural for political leaders is not necessarily healthy for the judiciary. Choosing judges based on party service demeans the bench by drastically narrowing the pool of potential judges, by introducing a standard other than judicial excellence, and by creating criteria for reelection which are at best irrelevant and at worst dangerous. The testimony of another political leader about the selection process is particularly revealing:

> Well it's based on friendships, relationships built up over the years. For example, there's a young man that goes to my church who has been — I've known him since he was a Little Leaguer, so now he's a lawyer, and he also belongs to my political club, and I sort of look to the day when I will be able to nominate him for a judgeship, you know.
>
> So that's a particular personal relationship. If you run out of friends, then you look to see other considerations. You don't hardly run out of friends before somebody else comes up with a friend, and rather than take another opportunity, you may have to step aside and let somebody else put forth their candidate.
>
> Obviously, the only requirements that I know of for being a judge, and I may be wrong, is having been admitted [to the bar] for

> ten years, and I don't even know of any other objective test besides that. . . . So if you have been admitted to practice and you are without experiences of a negative nature, I assume that on the face of it, that qualifies you to become a judge.

New York can and must do better. Our State and its citizens deserve to have the finest people that will serve. We expect much from our judges: independence, courage, honesty, ability, knowledge, understanding and compassion. Political connections should not be the overriding consideration in their selection.

Obviously, the fact that judges owe their positions to party leaders, and depend on them for renomination when their terms expire, directly threatens judicial independence. When asked if he would feel pressure in deciding a case where one of the lawyers was a political leader who could affect his judicial career, one judge testified,

> Yes I'm human. I'll think about it, and I shouldn't have to think about it. I shouldn't have to have my energies dissipated in wondering what the reaction is going to be or how I'm going to kill myself for the next election . . . but that's the system. It should be changed.

The appeal of elections is clear. Allowing the voters to choose who will judge them sounds like the fulfillment of a democratic ideal. However, the rosy picture of the informed voter carefully choosing the candidate he or she believes can best be fair, impartial and judicious has nothing to do with the election of judges in New York.

Currently, judgeships in the Supreme, Surrogate's, County, City, District, Civil, and Family Courts outside of New York City are elective positions, more than 800 in total. Yet, very few people even know the name of *any* of the judges in their districts, much less the names or backgrounds of the range of candidates.

Judicial races simply do not attract voter interest. Judges must make decisions based strictly on the specific facts of an individual case, and it is therefore obviously improper for them to make campaign promises about how they would rule on particular issues.[8] For them to do so would institutionalize bias and debase the ideal of nonpartisanship. Widespread public cynicism would be the certain outcome. As a result, judicial elections are intrinsically "issueless," and it is hopelessly unrealistic to imagine they will ever attract the interest of very many voters.

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8. This potential impropriety is recognized by the American and New York Bar Associations. Canon 7 of the Code of Judicial Conduct prohibits candidates from expressing their views on "disputed legal or political issues." *See* N.Y. CODE OF JUDICIAL CONDUCT Canon 7 (McKinney 1975).

Moreover, even if genuinely democratic, an elective system would still threaten judicial independence. Public officials are concerned with the majority's will. The dispensing of justice turns on very different factors; that is why we do not have trial and punishment by popular opinion.

Politics cannot be banished altogether from judicial selection, whether under an elective or appointive system. If properly designed, however, an appointive system will foster judicial independence and guarantee that qualified candidates without political connections have a fair chance to become judges.

Nominating commissions should be created to send only a limited number of the very best candidates to an executive — such as a Governor or Mayor — who would then make the appointments. By limiting the executive's latitude, we limit the possible influence of politics on the choice. To insure that the commissions remain independent, they should be composed of a broad range of individuals of various professions and political backgrounds, and should be officially charged with making their selections purely on the basis of judicial merit.

A properly designed appointive system will take power out of the hands of unaccountable party bosses and give it to elected public officials accountable to the voters for their decisions. Appointive systems have been endorsed by every major civic group that has studied the issue, including the Citizens Union, Common Cause, the League of Women Voters, the Fund for Modern Courts, and the New York City and New York State Bar Associations. Nationally, 34 states use appointment to select at least some of their judges, and since 1950, every state that has made a change has moved toward appointment.

We must stop perpetuating the myth that judicial elections have anything to do with democratic choice. They do not and they cannot. The right kind of appointive system will hold judicial ability — not political party service — paramount, and will give New Yorkers the finest judiciary possible.

## THE ETHICS IN GOVERNMENT ACT

> Let us raise a standard to which the wise and the honest can repair.
>
> *George Washington*

> Morality can't be legislated, but behavior can be regulated.
>
> *The Reverend Dr. Martin Luther King, Jr.*

> But the great pity about virtue being its own reward is that the reward always seems so small. It's the appearance, not the fact, of conflict that is so often troubling. Appearances do count. And most especially when it affects public officials. The appearance of conflict counts almost as much as reality. A great gray area exists called unseemliness. It ain't illegal. But it just ain't right.
>
> *William Safire*

Government both influences and reflects the ethical tenor of our society. As bearers of the public trust, our officials must be held to the highest standards of behavior. When they falter, they not only betray their responsibilities to the citizens of our State, but they encourage us to do the same to each other. As Justice Brandeis wrote, "[o]ur government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."[9] Ethics-in-government legislation is, therefore, doubly important. Not only does it deter abuse, it articulates a moral standard for the entire community.

New York's current Ethics Law falls short in many areas. When the State Legislature passed the Ethics [in Government] Act in 1987,[10] regulating the actions of executive and legislative branch officials and employees, it was called an historic advance. Without question it was an important step and represents a real improvement over the laws that existed at the time. But the Act still has huge loopholes, and some of its enforcement provisions actually tie prosecutors' hands.

The Act paralyzes district attorneys by barring them from prosecuting violations without an official referral from one of the oversight commissions the Act created. Unlike every other situation in which a crime is committed, a district attorney with evidence that a govern-

9. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
10. N.Y. GEN. MUN. LAW § 811 (McKinney 1987).

ment official has broken the law cannot do anything if the oversight commission has not officially transferred the case.

This referral requirement sends the wrong message to New Yorkers. It teaches that while private citizens are subject to the inquiries of an independent prosecutor, those who hold government office are not. It suggests that public officials have something to hide, and intend to hide it. The referral requirement is clearly a double standard, and it is probably unconstitutional as well.[11]

In fact, the oversight commission may have good reason for not referring the case: the Act forbids the commission from imposing civil fines once it has referred a case to a prosecutor, even if the criminal prosecution is unsuccessful. Faced with the choice of an inadequate but assured civil penalty, and the possibility of no penalty at all, the oversight commission may hesitate to refer even the most egregious examples of official misconduct.

The Act's preferential treatment of public officials goes beyond inhibiting investigation. Under some interpretations, the law gives an official who intentionally files false disclosure information 15 days after he or she is caught to revise their filings secretly and without penalty, an opportunity not afforded any other person accused of breaking a law. Our public leaders must be held to the highest possible ethical standards. Yet the Ethics Act gives them a legal loophole unavailable to the average citizen. As District Attorney Morgenthau wrote, "No other law permits a violator such an opportunity to undo his crime with full confidentiality. The result is that serious misconduct will go unpunished."[12]

The Act also permits state officials to represent private clients before all municipal agencies for any purpose, and before state agencies in a number of crucial areas including certain tax and criminal matters. This creates obvious problems. Because budget appropriations and other decisions made in Albany affect municipalities and state agencies, local and state officials may be subjected to excessive pressure, even if not intended. Government officials' appearances

11. The New York Constitution provides:

> The power of the grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of information in connection with such inquiries, shall never be suspended or impaired by law.

N.Y. CONST. art. I, § 6. *See also* Letter from Elizabeth Holtzman, District Attorney, Kings County, to Governor Mario M. Cuomo (July 24, 1987); Memorandum from Robert Abrams, Attorney General of New York, to Governor Mario M. Cuomo at 6 (July 7, 1987). Both are contained in the Governor's Bill Jacket for S.6441.

12. Letter from Robert M. Morgenthau, New York County District Attorney, to Governor Mario M. Cuomo (July 15, 1987) (written on behalf of the District Attorneys Association of New York).

before those agencies are inevitably intimidating, and may taint the eventual decision in the public eye. They should be forbidden.

There is one area where the Act goes too far, and in fact overburdens public officials. The Act mandates absurdly excessive financial disclosure requirements for all government employees making more than $30,000 per year (roughly 70,000 in all, not counting employees of Public Authorities), unless they appear before the appropriate commission and demonstrate that their job duties do not necessitate disclosure. The disclosure form the Act requires is seven pages long and correspondingly detailed. In other words, the enforcement commissions throughout the State will be burdened with more than 490,000 pages of financial disclosure information, a mountain of paper that will effectively block enforcement of the law when it matters, and impose an onerous burden on tens of thousands of employees covered for no good reason.

It is difficult enough to attract talented people into government service. Many more will be discouraged if they are required to reveal publicly the particulars of their personal finances. Certainly, broad financial disclosure is important for people in policy-making positions. But those positions should be defined by the responsibilities that accompany them, not by salary level.[13]

Although most public officials are dedicated and honest, the faith of many people in the government has been weakened. Our system depends on public confidence in the basic integrity of the government and its elected officials. In a democracy, distrust can be as damaging as corruption itself. A reformed Ethics Act would not only deter wrongdoing, it would also be the best demonstration that the political leadership of New York is committed to fundamental change.

13. Commissioners James L. Magavern and Richard D. Emery support a different approach to disclosure, which they believe would prove both less intrusive upon the personal lives of state employees and more effective in protecting the public interest. Instead of annual, uniform disclosure for all covered employees, regardless of relevance to their particular jobs, the Act should require disclosure on a transactional basis. Before taking action in a particular matter in which the employee (or a party related to the employee by family or business) has an interest, the employee should be required to file a transactional disclosure statement identifying that interest and relationship in reasonable detail.

## BALLOT ACCESS

> The problem of ballot access has eliminated or completely crippled many candidacies, for many years. They have been almost exclusively insurgent candidacies in less well-publicized races, and many had legitimate popular support for a place on the ballot . . . . The ballot access problem has — for too many years — impeded or eliminated valid candidacies, deprived voters of a choice, and damaged our political system.[14]
>
> *Vance Benguiat, Executive Director,*
> *Citizens Union of the City of New York*

The heart of our democratic ideal is the right of the people to choose whom they want to represent and lead them. This maxim has guided our country and state for more than 200 years. Our commitment to it has been tested in struggles over voting rights, the infamous "Jim Crow" laws, and redistricting. Today in our state, the test of our commitment comes in a less dramatic, but no less important, form. New York's ballot access laws are supposed to protect the political process from frivolous candidates, and insure that qualified voters decide who gets on the ballot. In reality, they throw serious candidates off the ballot for frivolous reasons, and frustrate democratic choice through meaningless litigation.

Unlike most other states, getting on the primary ballot in New York requires a candidate to collect a substantial number of signatures of party members on a nominating petition.[15] And unlike other states, the rules governing the validity of the petitions are unbelievably complex and rigid.

Technical defects can nullify entire petitions. A petition may be thrown out simply because the person carrying it for the candidate is registered to vote in a district other than the one in which the signatures must be obtained, or because the pages of the petition are not consecutively numbered. In Erie County in 1984, for example, a candidate for county committeeman was denied a place on the ballot because his two-page designating petition was not consecutively numbered.[16]

Similarly, if the person actually carrying the petition fails to date it,

14. Statement to Joint Public Hearing of the State Senate and Assembly Election Law Committees on Ballot Access (October 15, 1985).

15. Most states permit a candidate to get on the primary ballot by paying a filing fee or, alternatively, through a simpler petition process.

16. Braxton v. Mahoney, 63 N.Y.2d 691, 468 N.E.2d 1111, 479 N.Y.S.2d 974 (1984).

or misstates or omits various information, such as his or her address or assembly and election districts, the entire petition is invalid. For example, in 1979 in Erie County, a candidate for town councilman filed a petition with almost twice as many signatures as the law required. Unfortunately for the candidate and his many supporters, the people that carried the petition failed to list their assembly districts. Because of this the candidate was dropped from the ballot, even though listing the assembly district was listing the obvious: the town had only one assembly district and all the people carrying the petition lived in the town.[17]

A petition may also be thrown out if its pages are not correctly bound together. In Albany County, a candidate for county legislator was denied a place on the ballot in part because his petitions were held together with a spring clip, and the court upheld the ruling of the Albany County Board of Elections that the spring clip did not constitute a binding.[18] Likewise, if a petition is not filed during the precise period of time specified by the law, the candidate may be barred from the ballot. In one instance in 1987, candidates for local office filed their designating petitions at 8:30 a.m., shortly after the Village Clerk arrived at work, rather than between the hours of 9:00 a.m. and 5:00 p.m., as the law instructs. The candidates were thrown off the ballot.[19]

These examples are not isolated instances. Last year, New York accounted for *one half* of all the election law litigation in the country.[20] In 1986 alone, 200 New York candidates in primary elections were denied places on the ballot because of technical errors on their petitions, even though they had significant public support and had substantially complied with the Election Law's procedural requirements. These technicalities effectively disenfranchise tens of thousands of voters every year.

Worse still, the ballot access laws overwhelmingly favor incumbents and candidates with the support of the party organization. These candidates have access to large numbers of highly experienced party volunteers who can get two or three times the number of signatures necessary to survive challenges to their petitions, and are able through the party organization to hire experts and lawyers to review

17. Higby v. Mahoney, 48 N.Y.2d 15, 396 N.E.2d 183, 421 N.Y.S.2d 35 (1979).

18. Bouldin v. Scaringe, 133 A.D.2d 287, 519 N.Y.S.2d 72 (3d Dep't 1987).

19. Rutherford v. Jones, 128 A.D.2d 978, 512 N.Y.S.2d 934 (3d Dep't 1987).

20. *See, e.g.*, New York Newsday, May 17, 1988, at 20 (quoting Angelo T. Cometa, chairman of the New York State Bar Association's Special Committee on Election Law).

their opponents' petitions and to engage in the protracted ballot litigation chronic to New York elections.

The State Legislature and Governor should appoint a blue-ribbon, multipartisan panel to recommend fundamental reformation of the law. And in the interim, the Legislature should pass a bill providing that candidates will not be penalized for insubstantial deviations from the requirements of the current law. As with campaign finance reform, the incumbents who benefit from the ballot access laws are the same officials who hold the power to reform them. The public must make it clear to their representatives that they want these laws changed.

## PENSION FORFEITURE

> Government is more than the sum of all the interests; it is the paramount interest, the public interest. It must be the efficient, effective agent of a responsible citizenry, not the shelter of the incompetent and corrupt.
>
> *Adlai Stevenson*

No one believes that crime *should* pay. Unfortunately, in New York, public officials who betray the public trust and are convicted of crimes relating to their position still receive huge sums of the taxpayers' money in the form of pension benefits.

The case of convicted former Syracuse Mayor Lee Alexander dramatically illustrates the problem. Alexander pleaded guilty in January, 1988 to federal charges that he turned the Mayor's office into a racketeering enterprise and extorted at least $1.2 million from contractors doing business with the City during his 16 years as Mayor. He was sentenced in March, 1986 to ten years in prison. He draws an annual state pension of $18,716.

The pensions of corrupt judges are likewise insulated. Former State Supreme Court Justice William C. Brennan was convicted in December, 1985 of accepting almost $50,000 in bribes to fix four criminal cases. Released after serving 26 months in prison, he receives $41,236 per year. The former Supreme Court Justice and Administrative Judge of Queens County, Francis X. Smith, who was convicted of perjury in 1987 in a Queens cable television scandal, receives $47,877 annually.

Convicted New York City employees are similarly treated. John Cassiliano, a former superintendent of the City Sanitation Department's Bureau of Waste Management, pleaded guilty to federal racketeering charges. Over an eight-year period, Cassiliano permitted millions of gallons of hazardous chemical waste to be dumped in New York City's solid waste landfills, collecting more than $660,000 in bribes and payoffs in return. While New York City still struggles, at a cost of millions of dollars, to clean up the environmental damage Cassiliano left behind, taxpayers are footing a second bill: in the six years since Cassiliano retired, he has collected almost $125,000 in pension benefits, and the checks totalling more than $20,000 keep rolling in every year.

Cassiliano is not alone. Alex Liberman, the former Deputy Director of the New York City Department of General Services, pleaded

guilty in June, 1984 to a federal racketeering charge of extorting over $1 million from building owners seeking to lease space to the City. Liberman got 12 years in jail and a $9,951 annual City pension.

New York's retirement systems should be explicitly based on the principle that the faithful and honest performance of a public employee's official duties is as much a precondition to eligibility for a pension as fulfilling the existing statutory age and length of service requirements. In the public sector, pensions are not merely a form of deferred compensation. They are a "reward for faithfulness to duty and honesty of performance."[21] Pennsylvania, Florida, Georgia, Illinois and Massachusetts have all enacted pension forfeiture statutes which recognize that loyal, honest public service is a prerequisite to pension eligibility. New York must do the same, although we should leave room for a portion of the convict's public pension to be paid to his or her spouse, children or other beneficiaries upon demonstration to a judge of severe financial hardship. It is time we put an end to the unjustifiable practice of pensioning corrupt public officials at public expense.

21. Pell v. Board of Education, 34 N.Y 2d 222, 238, 356 N.Y.S.2d 833, 845 (1974).

## OPEN MEETINGS LAW

Secrecy and a free, democratic government don't mix.

*Harry S. Truman*

Liberty cannot be preserved without a general knowledge among the people, who have a right . . . and a desire to know; but besides this, they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean of the characters and conduct of their rulers.

*John Adams*
*A Dissertation on the Canon and Feudal Law* (1765)

It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain public control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.

*Legislative Declaration, New York State*
*Open Meetings Law (1976)*

Back room decisions about the public's business breed self-dealing and disregard of the public's interest. Democracy demands public participation in public issues, and when that participation is undermined, apathy, cynicism and an erosion of confidence in the integrity of government are the sure results.

New York's Open Meetings Law, as first enacted in 1976, recognized that openness and honesty in government are fundamentally linked. Summarized simply, it required that "every meeting of a public body shall be open to the general public,"[22] that these meetings should be announced in advance, and the minutes should be available to anyone who wants to see them.

Obviously, exceptions to this rule are necessary. The law properly

22. N.Y. PUB. OFF. LAW § 103(a) (McKinney 1988).

exempts discussions about collective bargaining negotiations, litigation, and most judicial and quasi-judicial proceedings. These exemptions reflect a balance between the principle that the public's business must be conducted in a public manner, and the recognition that certain deliberations must be free from the pressures that accompany publicity.

Unfortunately, this balance is upset by another recent exemption, so broad it can be exploited to effectively gut the law. In 1985, the State Legislature passed an amendment to the law allowing private political caucuses,

> without regard to (i) the subject matter under discussion, including discussion of public business, (ii) the majority or minority status of such political committees, conferences and caucuses, or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations. . . .[23]

Many communities in our state are dominated by one political party. The 1985 amendment means that in these areas, a majority of the legislative body can meet privately as a political party caucus and effectively reach binding decisions on public business. Worse, they can systematically exclude democratically elected representatives from the minority party from any role in the decision-making process.

For example, the sole Republican member of the Rochester City Council testified in hearings before the Commission that the Democratic majority regularly met in closed caucus and received "agenda briefings" by staff and others on various matters, including an industrial expansion in that Republican member's district; a review of the proposed line item school budget by the superintendent of schools and school board; and a statement by a utility representative on the utility's stand on a proposed reassessment program. As the council member stated, "[m]y exclusion prevents me from representing my constituents adequately because city policy questions are decided at closed meetings outside my presence."

The enforcement provisions of the law are feeble. The law allows less-than-quorum meetings to be held secretly, even if the participants in the meeting systematically rotate people in and out for the express purpose of insuring that there is never a quorum present. Such behav-

23. N.Y. PUB. OFF. LAW § 108(2)(b) (McKinney 1988). The amendment was introduced just six weeks after reporters from the New York Post obtained an advisory opinion from the Committee on Open Government that caucuses held by a majority of the members of either house of the New York State Legislature for the purpose of conducting public business are subject to the law. The amendment was passed by both houses a week later, and Governor Cuomo signed it within 24 hours.

ior should be expressly prohibited. In addition, after secret deliberations, if the final vote is taken in public, the courts do not have the power to void the decision. Obviously, this law must be given teeth, including fines against public officials who intentionally flout the law's provisions.

Open meetings, like democracy itself, are not always pleasant or convenient. As one witness testified,

> Yes, it is uncomfortable to vote yourself a pay raise in public. Yes, it is uncomfortable to talk about a school with asbestos in it in front of anxious parents. Yes, it is uncomfortable to talk about where to locate low income housing when you have people in the audience who might live next to the site, but, whoever said democracy had to be easy or comfortable?

Every time a citizen sees a closed meeting as a blind for misconduct, democracy suffers. We all wonder for good reason what officials have to hide when they wrap themselves in a cloak of secrecy.

## PATRONAGE

> By definition, I think that [patronage], leads people to believe government is corrupt, that it is not serving the public interest generally, that it is serving the interests of one party or one set of people, rather than the community as a whole.
>
> *Professor David Rosenbloom*[24]
> *Testimony to the*
> *New York State Commission on Government Integrity*
> *(January 9, 1989)*

> To surrender dreams is madness, but maddest of all is to see the world as it is and not as it should be.
>
> *Miguel de Cervantes*
> *(January 1605)*

Patronage has been a part of municipal government for a long time, in New York and elsewhere throughout the country. Although its heyday — as exemplified in New York City's Tammany Hall organization or Chicago's Democratic machine — may be over, patronage is still used to purchase favors, reward contributors, and cement political power. There is a good reason why patronage is no longer widespread. Even in small amounts, politically motivated hiring and firing of public employees demeans government service.

The Commission's conclusions about the role of patronage in government stems from a highly publicized investigation we conducted into certain hiring practices of the City of New York. The investigation uncovered a patronage program run out of the Mayor's Talent Bank and City Hall between 1983 and 1986 that seriously undermined the merit selection process and subverted the affirmative action objectives of the Talent Bank. According to the testimony, job candidates referred by political leaders were given preferential treatment in hiring, including exclusive rights to compete for some of the highest paid unskilled positions. In at least two agencies — the City Department of Environmental Protection and the City Department of Transportation — officials were pressured to hire politically connected candidates over others that the agencies preferred and thought were more qualified.

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24. Professor Rosenbloom is the Distinguished Professor of Administration at the Maxwell School of Citizenship and Public Affairs at Syracuse University.

Employees of the agency testified they feared retaliation if they didn't "play ball" with City Hall.[25] They were forced to alter legitimate agency needs — sometimes creating jobs for politically connected candidates and filling positions they had not intended to staff. Despite a mayoral directive making the posting of all jobs obligatory, laborer vacancies at these agencies were neither posted nor advertised. Instead these desirable jobs which previously required no more than good health and a driver's license took on a new prerequisite — a referral from City Hall.

Patronage has several detrimental effects on the functioning of government. First, hard-working public servants are demoralized when they see appointments made mainly for political reasons. In fact, the professionalism of the government's work force is debased. As Robert Jean, a former Personnel Director at the New York City Department of Transportation, testified before the Commission:

> It was difficult on the part of some of my subordinates when they saw somebody — someone who they had signed up and who they knew did not sound like someone who was capable or someone they dealt with that they knew was incapable, and they would be getting a large increase and they would know that through that person's connections either politically or personally, that they got there. It had a bad effect.[26]

Patronage insidiously attacks the best government employees. The most professional public servants, the ones that are deeply committed to the mission of their agency, experience that much more frustration when they see the mission obscured by political considerations. These employees feel ethically compromised when they "play ball," and are forced to participate in the patronage practices they find offensive. Cynicism, resentment and resignation are the sure results.

Second, the efficiency of government operations is impaired. Merit selection means hiring the people with the best qualifications who will do the best job for the tax dollars spent on their salary. Patronage means hiring the people with the best connections. Witnesses said in sworn testimony before the Commission that sometimes in order to justify hiring a politically connected candidate for a laborer job, a rating would be fudged so that the candidate looked qualified.

Third, even if used in a limited way, partronage undermines demo-

25. For more information on the New York City patronage investigations, please see our report, "PLAYING BALL" WITH CITY HALL: A CASE STUDY OF POLITICAL PATRONAGE IN NEW YORK CITY (August 1989).

26. Transcript of April 4, 1989 hearing on political patronage practices in New York City, at 63.

cratic government. Government is supposed to be accountable only to the people; patronage subordinates government to unaccountable private political powers. Citizens vote leaders into office with the understanding that those leaders will use the resources of government to serve the interests of the citizens. That is what "public service is a public trust" means. Using those resources for political aggrandizement betrays that trust.

Finally, patronage discourages whistleblowing. Patronage employees, particularly provisional employees, generally have little job security. Losing one's job is a strong deterrent to speaking out about corruption.

Abolishing patronage is crucial to the quest for ethical government. Patronage may be legal, but its destructive effects reach outside the door of any particular agency to touch all citizens. Even if the number of personnel actions tainted by politics is limited, patronage shakes the public's confidence that government is serving their interests rather than those of powerful political figures.

Although the Commission's investigation focused on the problems of patronage in the New York City personnel system, its lessons apply beyond the city's limits. First of all, having a person in the Mayor's office with absolute power over hires, promotions, transfers and salary increases can be destructive. In the case we investigated, this power was misused by pressuring agencies to hire political referrals. Such control also adds an unnecessary layer of bureaucracy to decision-making that should be left to professionals in public personnel administration.

Second, it should go without saying, yet sadly needs to be said, that hiring should be done openly and fairly. This means the posting of job vacancies should be required by law. And for positions such as laborers, where skills testing is not appropriate, other procedures, such as a lottery, should be used to give everyone — whether or not they have political connections — an equal shot at obtaining a job.

Third, for reasons of policy, it is important for a Mayor to be able to select a few senior staff who will be directly accountable to him, serve at his pleasure and wholeheartedly share his agenda. However, merit must be the first concern in making these type of appointments, and they should be handled through a separate Appointments Office to ensure that.

Fourth and most fundamentally, hiring large numbers of people outside the civil service system lends itself readily to patronage. In New York City, where approximately 30% or 45,000 employees are in discretionary positions, it is critical that the personnel system be

overhauled. Although the civil service system may be in a state of crisis, large-scale discretionary hiring is not the solution to its problems.

Most reasonable people would agree that government jobs are not commodities for politicians to trade for power and favors and that politically-connected candidates should not be given advantages over others. Yet many say there is nothing inherently wrong with patronage. They fail to understand that by definition patronage involves this type of trading and favoritism. It is wrong to shrug off patronage as the way things are. It is time we made our government the way it should be.

## MUNICIPAL ETHICS

> The very essence of a free government consists in considering offices as public trusts, bestowed for the good of the country, and not for the benefit of an individual or a party.
>
> *John Caldwell Calhoun*
> *Speech, February 13, 1835*

> He who exercises government by means of his virtue may be compared to the north polar star, which keeps its place and all the stars turn towards it.
>
> *Confucius*

> Having this type of legislation [ethics and financial disclosure law] within our town, we think lends greater credibility and integrity to the people serving within the community.
>
> *Raymond O'Connor*
> *Councilman, Wilton, New York*[27]

In 1987, the State Legislature passed the Ethics in Government Act [Act or Ethics Act], regulating the behavior of executive and legislative branch officials and employees. Although the Act can be improved, it is far better than what it replaced, and represents an important first step.[28] It only applies to state officials, however, and in one minor way to municipalities of more than 50,000 residents. More than 95% of the municipalities in the state are completely unaffected by the 1987 Act. Yet clear and consistent ethical standards are just as important for local public officials.

At present, local officials are only regulated by inadequate and vague legislation passed more than 20 years ago. The legislation inadequately defines conflicts of interest, and requires each county, city, town, village and school district to adopt its own code of ethics. Municipalities are permitted to create ethics boards that can only issue advisory opinions; the boards do not have the authority to conduct investigations, levy sanctions, or to enforce the law in other ways.

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27. Transcript of November 22, 1988 public hearing on proposed Municipal Ethics Act, at 92. Wilton, located in Saratoga County, has a population of approximately 9,000.

28. For more on the 1987 State Ethics in Government Act, see *supra* notes 9-13 and accompanying text.

The result has been a confusing and often contradictory patchwork of unenforced and unenforceable ethics codes. New York needs a set of minimum ethical standards for *all* public officials, a statement that certain behavior is simply not acceptable for a government servant, no matter where he or she works and lives. Such a law would bring legal and ethical standards closer together, provide critical guidance for the multitude of public servants whose honesty and integrity are above reproach, reduce the pressure brought on local officials by private interests, and deter abuse by those who taint the reputations of all by using their public office for private gain.

In December of 1988, we proposed a Municipal Ethics Act [Proposed Act] that sets uniform ethical standards for all municipalities in New York State. These standards are intended only as a minimum; localities can adopt more stringent legislation where they feel it is appropriate to do so. In some areas — particularly in smaller towns and villages — extensive requirements might discourage public service, and we have tried to make our Act's demands as moderate as an effective ethics law permits. The Governor has proposed legislation based on our recommendations. We hope that with sufficient local support, this bill will be enacted into law.

*Disclosure Requirements*

Current law does not require local officials to disclose any meaningful information about their finances, making it almost impossible for the public to spot potential and actual conflicts of interest. Although the 1987 Ethics Act requires municipalities over 50,000 inhabitants to adopt their own financial disclosure requirements by January 1, 1991, these requirements do not have to meet any minimum standard.[29] A municipality could literally meet the dictates of the 1987 Act with a form that asked only for an official's name, business address, and whether the official made between $500 and $1 million in the previous year. Obviously, more needs to be done.

Our [P]roposed Act mandates three types of disclosure: *applicant* disclosure for individuals making bids for municipal business; *annual* disclosure by all elected and paid municipal officials of personal financial interests; and *transactional* disclosure for situations where the official's actions may be personally profitable. The applicant disclosure requirement is a simple safeguard against hidden conflicts of interest. It obliges anyone making a bid for public business to disclose any

29. New York City is the one exception and is required by the 1987 Act to have disclosure requirements at least as strict as those the Act mandates for state officeholders and employees. N.Y. GEN. MUN. LAW § 811 (McKinney 1987).

campaign contribution of $250 or more to any local official, and to reveal the nature of any officer's or employee's "interest" in either the application or the applicant.[30]

The annual disclosure requirement mandates that elected and paid public officials with authority over the government's business dealings reveal basic information about their personal finances.[31] Opponents of annual disclosure claim that *any* requirement is an unfair invasion of privacy so onerous it will discourage qualified people from considering government service. Our investigations reveal that this fear is groundless. Nineteen other states, and several counties, cities and towns in New York, currently require annual disclosure. None report any shortage of good people willing to serve in local government. Annual financial disclosure for public officials is a vital tool in preventing conflicts of interest and assuring citizens that government decisions are made for public, not private, betterment.

The current law also inadequately and inappropriately deals with conflicts of interest. Current law prohibits municipal officers and employees from having a direct or indirect "interest" in the municipality's contracts if they have the power or duty to take some action on the contract. Such an absolute ban often runs counter to the public interest. For example, it may be less expensive and more convenient for a small municipality to contract with a town supervisor's snow removal company to clear the streets or with a planning board chairman's construction company to do renovation work on the town hall.

The transactional disclosure requirement proposed by the Commission is a more effective and realistic response than the absolute ban in the present law. It requires that local officials disclose their interests in a public contract and take no official action involving the contract.

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30. A municipal officer or employee is defined to have an "interest" when the officer or employee or their spouse: is the applicant, or a family member of the applicant; owns more than 5% of the stock of the applicant; has or intends to enter into an employment, professional, business or financial relationship with the applicant; has received from the applicant, during one year of the previous two, a benefit of more than $2,000; or will receive a benefit if the municipality's disposition is favorable to the applicant. Proposed Municipal Ethics Act § 9(4), New York State Commission on Government Integrity (December 1988) [hereinafter Proposed Act]. Violation of this provision of the Act subjects the applicant to misdemeanor prosecution. Proposed Act § 9(5).

31. Officials must reveal their real estate holdings in the municipality or within five miles of the municipality; employers' names; ownership interests in businesses and corporations; self-employment over $2,000; and for those who are licensed professionals—such as lawyers—a description of their area of expertise and the nature of their clients' businesses. No dollar amounts or client names must be disclosed. The public official must similarly disclose his or her spouse's information, and the real estate holdings of all family members of the household. The [Proposed] Act provides relief for public officials who are unable, after reasonable efforts, to obtain such information.

After that, if the other non-interested decision-makers in the government decide that the official's firm is the best for the job, then the best firm gets the contract, and the public is kept informed. In situations where there is no actual contract, officials would still disclose their interest in the matter and abstain from taking any official action on it.

*Conflicts of Interest*

Almost by definition, public officials must act in the public interest without consideration of their personal business relationships. Yet current law allows public officials to represent private clients on business matters before the municipality. Permitting such relationships openly invites conflicts of interest and other abuses.

For example, in one upstate city, the head of the water department purchased $12,000 worth of supplies from a company in the area. The official never disclosed to anyone in the town government that he also was a vice president in the company, its sales representative in surrounding communities; and that he had loaned the company more than $60,000, and had leased almost $15,000 worth of equipment to the company. The official clearly had a direct conflict of interest, and should not have been involved in purchasing. Yet three separate investigations determined the official did not violate the current law. That he did not says far more about the current law than about his behavior. The official's relationship would be revealed under all of our [Proposed] Act's disclosure requirements[32] and the official actions he took to benefit the company would be punishable[33] as a misdemeanor.

*Revolving door*

One of the most serious shortcomings of the current law is the lack of any restrictions on employment after leaving municipal government. Such restrictions have become commonplace at other levels of government. Commission investigations have revealed occasions where the "revolving door" from the public sector to the private sector spun far too fast.

In one town, the chairman of the planning commission resigned, and within *four* days, was soliciting consulting work from developers, specifically hawking his government experience and contacts. He was hired by the developers and represented them before town agencies on the very same projects he had acted on as chairman. This kind of

32. Proposed Act, *supra* note 30, § 4(1)(a).
33. Proposed Act, *supra* note 30, § 4(8).

behavior is terribly damaging to public confidence in government, at a minimum. Why should people believe that his official actions were anything more than a payment for a lucrative future in private life? Our [Proposed] Act allows former municipal officials to work for anyone they choose, but bars them from accepting or soliciting employment on any particular matter they had discretionary power over while serving the public.[34]

Of course, without adequate enforcement, any reform proposals are practically meaningless. Our [Proposed] Act would create powerful and independent municipal or regional ethics boards with the authority to investigate violations, conduct hearings, subpoena documents and witnesses, impose tough sanctions and issue advisory opinions.

Elected officials are elected to serve the common good and most do serve the common good diligently, honestly, and without the salary and recognition many in the private sector enjoy. Some do not, and their behavior can taint the reputations of all hard-working government employees. Vague ethics laws — like New York's — and an understandably suspicious public make every government official vulnerable to arbitrary attacks and unfounded accusation and rumor. The Commission's proposed Municipal Ethics Act would strengthen local democracy and help to build the faith of New York's citizens in their representatives.

34. This does not include the proposal, consideration or enactment of local laws, ordinances or regulations of general application. Proposed Act, *supra* note 30, §§ 3(11), 3(4), 4(1)(k).

## CAMPAIGN FINANCE: STATEWIDE OFFICEHOLDERS

> It is a terrible system. It is a terrible system, and the only argument I hear against campaign financing is, you know, it is a political welfare system. I am utterly unimpressed by the arguments against public financing. It comes down to judgments by individual incumbents, mostly, as to what is best for them.
>
> *Governor Mario Cuomo*
> *Testimony before the New York State*
> *Commission on Government Integrity (September 9, 1987)*

Elections are the central democratic event in our political system. It is essential that they be conducted in a manner above scandal, suspicion and impropriety. When people stop having confidence in the integrity of the electoral process, the consequences for democracy are dire. A healthy democracy depends on public faith that officials serve the public trust, not private interest. Those who believe the system is fixed in favor of the wealthy and connected have little reason to vote or even to recognize the legitimacy of elected officials.

In a poll conducted for the Commission in 1988, 78% of the registered voters in New York believed they had too little influence over state government decisions; only 27% believed that most people running for public office are honest; and a solid plurality felt that the candidate that raised the most money usually won. Unfortunately, so far our political leaders have not taken the steps to reform the lax New York State laws on political fund-raising that contribute to this deep cynicism.

The Commission investigated and held hearings on the fund-raising practices of New York's statewide elected officials — Governor Mario Cuomo, Attorney General Robert Abrams and Comptroller Edward Regan — that clearly demonstrated the enormous pressures on candidates to solicit campaign funds from a select group of wealthy special interests. These pressures will persist until the current system is reformed.

In testimony before the Commission, every statewide official said that fund-raising was the most distasteful activity he had to perform. Yet despite their distaste, these officials are consummate fund-raisers with extremely effective fund-raising organizations that operate even when the next election is two or three years away.

Fund-raising ability may not be relevant to serving the public trust but it is an absolute prerequisite to getting elected in the first place.

Good ideas do not matter unless they are heard, and getting them

heard in the modern world of New York politics means spending millions of dollars. Air time alone for a single 30-second prime time television commercial can cost as much as $30,000. In addition, candidates must hire an array of expensive pollsters, media consultants, and public relations advisors. These huge costs mean that fundraising is an unending process demanding a public official's constant attention.

The preoccupation with fund-raising undermines the political process. Running for public office takes a great deal of money now, and it will take even more in the future. The source of those funds must be changed. They should come from a broad base of support rather than from the wealthy few who often have a direct financial stake in the decisions the candidate will make as an officeholder. Unfortunately, in the current system, it is the giant gifts of gilded special interests that provide the cornerstone for financing political campaigns in New York State.

The current law allows basically unlimited contributions by corporations, unions, and those doing business with the state. The current limit on an individual's political contributions is an absurdly high $150,000 per year — which does not include gifts by dependent children or other family members.[35] The limit on corporate contributions is just as chimerical: $5,000 per year, *not including gifts by subsidiary and affiliated corporations.*[36] Creating a subsidiary corporation is a simple and inexpensive legal procedure; developers, for example, often incorporate each building they construct. The Attorney General's campaign director summed up the current law in a memo to one such developer:

> Any corporate entity, no matter how closely related to any other corporate entity, may contribute up to $5,000 to political candidates in a calendar year. For example, if [your firm] consists of ten buildings, and each building is separately incorporated, *each* building may contribute up to $5,000, even though all of these corporations may have the same Board of Directors, officers, etc.
>
> In sum, any corporate entity that you or your family control may give up to $5,000 per calendar year to political candidates for non-federal office.[37]

Corporations have poured millions of dollars through this huge loophole every election. These gifts are particularly insidious. Corporations are not people. They do not have the vote. They exist to make

35. N.Y. ELECT. LAW § 14-114(1) (McKinney 1978).
36. N.Y. ELECT. LAW § 14-116(2) (McKinney 1978).
37. Transcript of March 10, 1989 hearing on campaign finance, Exhibit 22.

money for the people that own them; they do not have a political ideology or particular beliefs. By definition, corporate contributions represent a business decision, an attempt to influence the political system or to purchase access, or avert some negative result. Corporations should not be allowed to use their vast wealth and resources to influence elections or to pretend that they are constituents of the political process.

Even more basic, contributions from those that do business with the government must be prohibited. Allowing groups that depend on the government's business to make gifts to the same people deciding who gets the government's business is an open invitation to public cynicism and potential corruption. More than 90% of the Comptroller's campaign funds in the period January, 1985 to July, 1988, came from industries that do business with his office. More than 90% of the engineers who received contracts during 1984-87 from the New York State Department of Transportation and from the State Thruway Authority made contributions to the State Democratic Party campaign committee or Governor Cuomo's campaign committee between 1982 and 1987.[38] The appearance of influence-seeking created by gifts from people doing business with government is terrible. The system that forces candidates to reach out to such groups that do business with government so they can generate enough campaign funds to be competitive is worse.

The links between fund-raising and official actions go beyond targeting industry groups for solicitation. Although each of the statewide officials tries to keep his official and political roles separate, they often use top aides from their offices for campaign purposes. When staff members work on the campaign, this separation begins to break down, and adds to the perception on the part of those solicited that contributions buy access and influence. High level staff members talked to the Commission about the difficulty they have in purging from their minds the knowledge that a given person they are dealing with is also a major contributor. As the Comptroller's campaign committee chairman stated, "I think you've hit the heart of what's wrong with our system, and it cries out for reform."[39] Particularly with statewide races, an officeholder's top aides should be barred from campaign fund-raising. Without such a separation, it is inevitable that some contributors will perceive a link between their gifts and

38. Engineers do not typically contribute to other campaign committees.

39. Transcript of September 19, 1988 Commission Deposition Huntington; transcript of September 24, 1989 hearing, Exhibit 1.

official action. Without such a separation, we come uncomfortably close to legalizing bribery or extortion.

*Enforcement*

Without adequate enforcement, reforms are meaningless. Unfortunately, the Board of Elections has so far proved itself unable to enforce even the simple regulations we now have. One reason has been complacency. The second reason, born of this complacency, is the Board's failure, over the years, to use computers to record and analyze the campaign finance information that candidates and party committees are required to disclose. Without computers, enforcing rules as basic as contribution limits has been impossible and the public is denied easy access to data that is vital to an informed vote. When one employee of the Board attempted to introduce a modest computer information system, Board officials told him they "[did not] want that type of data leaving the agency."[40]

Beginning in late 1987, our Commission, with limited funds and no special technological expertise, computerized all the contribution records — going back five years or more — for the State Legislature, the statewide elected officials, the New York Citywide elected officials and the New York City Council. For the first time in the history of our state, the public received basic information about who is paying the fare to bring their leaders to office, in a format that allows easy analysis. This type of computerized information is available on the federal level and in many other states. It is appalling that a temporary Commission like ours was forced to spend valuable time and money performing a task that should have been taken care of as a matter of course by the Board of Elections.

In addition to computerizing campaign finance information, for two years, the Commission detailed the Board's failings. We held public hearings, issued reports and testified before the State Senate and Assembly. The Board of Elections seems to have responded. They have hired a computer specialist who has begun to design a comprehensive system to pick up where the Commission has left off. They have even purchased computers. But this equipment will sit idle without the money to hire qualified staff and unfortunately, the Legislature has, so far, failed to fund this praiseworthy effort. This failure is more vivid evidence of the need for a separate campaign finance enforcement agency, well-funded and independent of the officeholders

40. Transcript of March 15, 1988 hearing, at 43.

it is supposed to police.[41]

*Public financing*

Better enforcement, tough contribution limits, stricter disclosure requirements and a ban on contributions by corporations, unions and those that do business with the government, would all be great improvements in New York's campaign finance system. But none of these reforms go to the heart of the problem.

Running for statewide office is enormously expensive. Because less than one-tenth of one percent of the citizens of New York make political contributions in the state, it is simply impossible to finance a credible statewide candidacy without relying on large contributions by wealthy special interests. No reforms will make it possible for the average citizen to afford a $1,000 political contribution, much less a $50,000 contribution.

New York State must institute a program to use public funds to pay part of the cost of campaigns for statewide office. Such a program would provide a constitutional way to limit campaign expenditures, would ensure that a challenger has enough money to mount a credible campaign, and would strengthen the bond between candidates and the taxpaying public they serve. Public funding would make the citizens of New York the special interest of every candidate.

*Conclusion*

The public's basic faith in democratic institutions depends on the belief that leaders are elected fairly; that the democratic arena is open, equitable and just. The way we finance political campaigns in New York is too important an issue to be ducked or ignored. The stakes are high, and correspondingly, the regulations governing campaign financing should be clear and strict.

New York's regulations are anything but clear and strict. Their problems have been well-documented by our Commission and other groups. The Governor, the Attorney General, the Comptroller, the leaders of the State Senate and State Assembly, and the Mayor, Comptroller and City Council President of New York City, have all appeared before us and publicly promised their support for some reform in the system. Yet, at least on the state level,[42] no essential re-

41. If fiscal constraints make formation of a separate campaign finance enforcement impossible, the Board should be substantially reorganized. A separate Campaign Finance Enforcement Office should be set up within the Board; it should be headed by a Director that reports directly to the Board's officers.

42. In 1988, New York City passed a new campaign finance law which is a substantial

forms of New York's fundamentally corrupt campaign finance system have been enacted into law.

The difficulty of reforming campaign funding practices is directly related to their importance to incumbents and the wealthy special interests that support them. We are asking our leaders to look beyond narrow self-interest, to give up a measure of security, to change the system that has brought them to power. We are asking them to do this because our public officials are pledged to hold the public trust above personal gain. It is time they enacted the campaign finance reforms that New York needs and New Yorkers deserve.

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improvement over the state's regulations and provides matching public funds for candidates. On the state level, a Commission investigation stimulated the Legislature to require political party organizations to reveal the finances of their "housekeeping accounts." Previously, large contributions were allowed to be deposited, in secret, into these accounts as long as the money was used for the operation of party offices and not to support candidates. However, account expenditures were also secret. The secrecy was an invitation to abuse. Our investigations show that invitation has been accepted.

## UNFAIR INCUMBENT ADVANTAGE

What you do not want done to yourself, do not do to others.

*Confucius*

"To the victor belong the spoils" is not the code of conduct we expect from victorious candidates for public office. Unfortunately, some incumbent officeholders act as if the public resources they control are theirs to use as they see fit in subsequent election campaigns. Because campaigning is a private function, this amounts to a sneaky public subsidy that can seriously disadvantage an opponent who does not hold office.

In election campaigns, many of the advantages of incumbency occur naturally — through the very acts of governing and creating a record of achievement. This advantage — heightened by incumbents' high visibility at ceremonial events, speeches and press conferences, all usually well-covered by the media — cannot and should not be regulated.

Other incumbent advantages are no more naturally occurring than the Los Angeles smog. They result from the unregulated use of public resources for campaign activity, and by allowing incumbents to use public employees as a pool from which to solicit campaign workers and contributions. There is no New York State law that specifically addresses this problem.[43] But there should be.

Most forms of campaign activity have no reasonable connection to serving the public. The use of public resources should be outlawed for fund-raising efforts and other election activities such as organizing campaign events, preparation and distribution of campaign literature, creating campaign advertisements, giving campaign "stump" speeches and the like.[44]

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43. Although the State Constitution prohibits using public resources in aid of private activity, and the courts have held that campaigning for political office is private activity, efforts to prosecute such conduct are fraught with problems. *See* N.Y. CONST. art. VII, § 7. Chief among them is the absence of any clear delineation between what is "campaign related" and what is "related to official duties." Neither New York Civil Service Law Section 107(3), prohibiting the solicitation of campaign contributions in public buildings, nor Public Officers Law Section 74(d), forbidding a public officer or employee from "[using] his official position to secure unwarranted privileges . . . for himself or others," is sufficiently specific or comprehensive to bar the inappropriate conduct the Commission has found.

44. Public resources would include public money, facilities, time or information compiled for government purposes and not generally available to the public. The ban on the use of public time should not apply to elected officials who have no fixed workday. They should be allowed to define the time they spend performing their official duties.

However, not all campaign activity is so easy to define and to spot. The definition may depend on the circumstances. Let's look at a hypothetical example: During a re-election campaign, a District Attorney delivers a Monday morning speech on women's rights to a local chapter of the National Organization for Women. A public employee has prepared the speech on office time, using office equipment and the D.A. has been driven to the meeting by two detectives in an office car. Is this reasonably related to the D.A.'s job or is it campaign activity? What if the speech touched on discrimination against women in the courts and the lack of counseling facilities for victims of rape and spouse battering? What if it did not?

The list of activities that falls into this twilight zone between government work and recognized campaign activity is varied and dependent on circumstances impossible to anticipate. Any law must leave to an enforcement agency the task of defining activity that is not reasonably part of official duties.[45] If an incumbent were found to have improperly used public resources in an election effort, he or she could be compelled by the enforcement agency to reimburse the public treasury. Under this approach, incumbents would know they were being scrutinized and would feel the consequences of the bad publicity that would surely result from inappropriate activity.[46] This alone could be a powerful deterrent to wrongfully dipping into the public purse.

Another way in which incumbents can magically convert tax dollars into campaign contributions is through mass mailings and other forms of mass communication at election time. This practice is an abuse of the public trust, yet sadly — as any observer of modern campaigns knows — it is widespread.

The Commission has seen examples of campaigning incumbents spending tax dollars for communications ranging from billboards and bumper stickers to pamphlets, radio ads and Halloween trick-or-treat

45. We recommended on December 21, 1987, in "Campaign Financing: Preliminary Report," that a separate Campaign Finance Enforcement Agency assume the campaign finance enforcement responsibility that the State Board of Elections has, but consistently neglects. This is the agency that we envision would provide guidance to incumbents concerning what is inappropriate use of public resources, and where needed, strong enforcement.

46. There may be occasions where the intrusion of campaign activity into official time is incidental and unavoidable. For example, if an official travels at public expense to an official function and on the same trip also makes a campaign speech, the official should reimburse the state for the prorated cost of travel to the site for campaign-related purposes. Colorado has a law similar to the one we are proposing and, according to the Election Officer at the Colorado Office of the Secretary of State, the law is almost self-enforcing.

bags, all featuring prominently the incumbent's name, picture or voice.

These communications may be of value to the public; many convey health and safety information, such as the hazards of drinking and driving or a drug hotline number. Nonetheless, their public purpose is far outweighed by their campaign usefulness and potential unfairness to a non-incumbent opponent.

Officials obviously need to communicate with their constituents, but during an election their communications can also unfairly promote their candidacy. The solution is a law that would ban the public financing of mass communications that bear the name or picture or, in the case of TV and radio, the voice of any candidate.[47]

One of the most important assets in any political campaign, in addition to abundant cash, is people. Campaign workers are the backbone of election races. Here too, incumbents have a big advantage over challengers. They control a pool of public employees that can be asked to make campaign contributions or to perform campaign work during off-hours. Challengers do not.

Public employees who testified before the Commission about being asked, while they were at work, to volunteer after-hours on a campaign, said they resented the solicitation and felt demoralized and their professionalism demeaned by the request. Others said they complied because they thought it would help their careers or that the boss would take notice.[48] This should not be allowed.

Elections are the central event in a democracy; they are the competitions that make our way of life possible. Yet in New York State electoral contests, the rules and absence of rules favor the prior victors. First, as we have pointed out earlier in this report, the law controlling who gets on the ballot causes challengers, who often do not have access to expensive election lawyers and legions of political party workers, to be tossed off the ballot for frivolous reasons.[49] Second, current campaign contribution laws, which allow virtually unlimited sums from corporations and those doing business with government, also clearly favor incumbents. And third, incumbents' unregulated use of public resources for campaign purposes stack the deck against challengers.

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47. The prohibition should apply from the first day that nominating petitions are circulated. In the few cases where candidates do not circulate petitions, the restriction should apply from the time they are nominated for public office.

48. *See* NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY, EVENING THE ODDS: THE NEED TO RESTRICT UNFAIR INCUMBENT ADVANTAGE Appendix II, at 6 (October 31, 1989).

49. *See supra* note 20 and accompanying text.

It is ironic that the only people who have the power to mandate fair play in the State's election campaigns are the ones who benefit from the present one-sided system. We must no longer permit them to perpetuate such fundamental unfairness in the most important form of competition in America.

## CONTRACTING PRACTICES AT THE STATE DIVISION OF SUBSTANCE ABUSE

> To me this is a critical point in this country. Are you committed to [drug] treatment or aren't you? . . . You can't do it with smoke and mirrors and rhetoric.
>
> *Governor Mario M. Cuomo*
> *(January 3, 1990)*

> No one is out of harm's way. When 4-year-olds play in playgrounds strewn with discarded hypodermic needles and crack vials — it breaks my heart. When cocaine — one of the most deadly and addictive illegal drugs — is available to school kids — school kids — it's an outrage. . . . It's time we expand our treatment systems and do a better job of providing services to those who need them.
>
> *President George Bush*
> *(September 5, 1989)*

Drug abuse is ruining people's lives everywhere — from urban ghettos to Wall Street. There is now a consensus among top elected officials that unless treatment is available for addicts, we cannot win the war on drugs. Stepped-up prosecution alone will not solve the problem.

In New York State the Division of Substance Abuse Services (DSAS) provides drug education, methadone maintenance and drug-free therapeutic treatment by awarding contracts to privately operated programs, usually not-for-profit.[50] Eighty percent of DSAS' budget goes for services in New York City and Long Island, where, it is estimated, a million addicts live. Since the mid-1980's when crack use exploded, close to half a billion dollars has been awarded to drug-free therapeutic treatment programs in the City.[51]

Even though DSAS doesn't actually deliver services itself, but rather "purchases" them, it still has a duty to the taxpayers and to addicts seeking help to get value for the money it spends. This can

50. DSAS is one of two divisions within the Office of Alcoholism and Substance Abuse Services. The other is the Division of Alcoholism and Alcohol Abuse. The Office is part of the State Department of Mental Hygiene.

51. Drug-free therapeutic treatment, unlike methadone maintenance which is effective in helping heroin addicts only, does not involve the use of a prescription drug and is used to help cocaine and crack users too.

only happen if programs are held to high performance standards. In addition, fair and open competition is as important in the awarding of DSAS grants as it is in the marketplace. If the contracting process lacks these characteristics, it is vulnerable to influence-peddling, favoritism, and the squandering of tax dollars.

Part of DSAS' response to the crack crisis was to fund four proposed residential drug-free treatment programs in New York City. Because the agency's contracting process is bereft of competition or adequate controls and the former Director disdained what few rules do exist, the handling of these contracts is a case study in how to waste tax dollars while helping friends.[52] In fact, personal relationships with the former Director smoothed the way for funding of each program and interfered with the ability of the agency's contract management staff to assure quality performance and accountability.[53] Three of the four programs failed to treat a single addict.

One of the four programs, known as Young Adults in Transition Center (YATC), was proposed by a long-time friend of the then Director. The friend had already received over $2.2 million in DSAS funding for a day program that had a history of financial irregularities and extremely poor performance. Despite this history, the Director made a commitment to fund YATC, bypassing the agency's contract management staff and securing his friend nearly $974,000 from 1986 to 1989 for a treatment program in Queens that never treated anyone.

In another case the Director and the Deputy Director for Chemotherapy Services usurped the role of DSAS' contract management staff and committed $174,253 to a proposed residential drug-free treatment program backed by another friend, a wealthy businessman.[54] Although all the money was spent, the program never materialized. During the contract period, DSAS staff — aware of the great personal interest in the contract at the highest levels of the agency —

52. The Commission conducted a one-year investigation of how DSAS awarded and managed the contracts for these four programs. Our findings and recommendations for improving the integrity and effectiveness of the agency's contracting practices are contained in a Commission report, EXPANDING DRUG TREATMENT: THE NEED FOR FAIR CONTRACTING PRACTICES (December 14, 1989). Our investigation did not establish whether the four programs are typical of other DSAS-funded programs. However, the favoritism and waste of agency resources found in each of the four stemmed from weaknesses in leadership and in the contracting system that can undermine the effectiveness of every DSAS-funded program.

53. The contract management staff has day-to-day responsibility for evaluating proposals and negotiating and monitoring contracts; the Director does not.

54. The Deputy Director's involvement in this contract was inappropriate because his official responsibility was the oversight of methadone maintenance programs and had nothing to do with drug-free treatment programs.

either ignored or failed to detect serious conflicts of interest and financial irregularities involving the businessman, some of which resulted in higher costs. These included the use of DSAS funds to pay for a rarely used "office" which turned out to be a one-bedroom apartment in a fashionable New York City neighborhood rented by the businessman and sublet to the program.

Another friend of the former Director was able to bypass completely DSAS' contract management staff to secure a $2 million contract to provide drug-free residential treatment to 40 clients in Brooklyn. Although $1 million has been spent since July, 1986 the facility has not yet opened and will cost over $500,000 to renovate. This contract too has been plagued with irregularities, including the payment of four full-time staff salaries at a virtually nonexistent program.

DSAS also bungled its contract with National Expert Care Consultants (NECC), a profit-making treatment provider whose president's personal access to DSAS' then Director helped him obtain $4 million between July, 1986 and March, 1988. DSAS has no guidelines or regulations for dealing with profit-making ventures yet went ahead and awarded, without competition, a contract that authorized NECC to earn over half a million dollars in profit and then to turn its program for indigent clients into a business serving fee-paying clients instead. The business operates in a prime mid-Manhattan location at a building purchased with state funds.

Favoritism and informality in DSAS' contracting practices are two elements in an equation that added up to waste and fraud. A third element of the problem is the absence of a local substance abuse agency in New York City. This is the City's responsibility. Nearly everywhere else in the State, county social service agencies are responsible for determining community drug treatment needs, advocating for state funds and selecting private treatment providers. In New York City, DSAS' regulatory responsibilities have been given a back seat as its advocacy for treatment programs has driven the agency to throw good money after bad. DSAS has become hostage to the New York City programs it is supposed to regulate. Its pursuit of conflicting functions — as a regulator and an advocate — assures that neither is carried out successfully. The creation of a New York City substance abuse agency would ease the conflict between these two important missions.

But as long as DSAS continues its direct involvement in contracting with drug treatment providers in New York City, it must reform all stages of the process. There must be competition for funds,

with no more grants to friends who make personal appeals to top agency officials. DSAS must strictly monitor the start-up period of a contract to assure that good money is not thrown after bad. Once a program begins treating addicts, DSAS must enforce high performance standards and impose penalties where programs fall short or spend money inappropriately.

New York State's recent efforts to expand the number of residential drug treatment programs in New York City were thwarted by flawed contracting practices: a bad response to a desperate program. The Governor has replaced DSAS' Director, an important starting point for reform. But much remains to be done to assure that drug treatment funds are used effectively and not wasted.

## NEW YORK CITY'S CONTRACTING PRACTICES

> A lack of management control can, all by itself, provide opportunities for corruption. In addition, it can magnify existing opportunities and minimize the risks that attend them. Paradoxically, too much control can have the same effect as too little.
>
> *United States Justice Department, National Institute of Justice (1980)*

Contracting is the lifeblood of New York City's operations. Each year the City spends more than $6.5 billion on contracts for an array of supplies, equipment, services and construction. The City buys two-way radios, unmarked police cars and bullet-proof vests for police officers who patrol its streets. It buys food for homeless families and finds contractors to paint and repair City-run homeless shelters. It hires security guards to protect City buildings, contractors to repair City streets and construction firms to renovate City housing.[55]

The problems facing New York City's contracting system have reached a state of crisis, no less real and no less serious than the more conspicuous problems facing the City. The system wastes millions of taxpayer dollars — dollars that otherwise could be spent fighting crime, drug abuse and homelessness. It is mired in red tape, hostile to vendors and vulnerable to corruption.

Competition is the *sine qua non* of a healthy contracting system; it is needed to keep down costs and corruption. Prosecutors have long recognized that where municipal contracts are let to a narrow group of firms, opportunities for corruption abound. Indeed, a questionnaire developed by the United States Justice Department to assist citizens in assessing "whether official corruption or an atmosphere that is conducive to official corruption might exist in their city or state government" asks as its first two questions: 1. Do respected and well-qualified companies refuse to do business with the city or state? 2.

55. Responsibility for the City's purchasing operations varies depending on what is purchased, how the contract is awarded and the dollar amount spent. The lion's share of the City's supplies and equipment is purchased centrally by the Department of General Services' Division of Municipal Supplies, although individual agencies may make purchases under $5,000. In contrast, the purchase of services (such as security guard contracts, car services, repair services and the like) is decentralized, with each of the City's agencies responsible regardless of the dollar amount of the contract. Contracts of $10,000 awarded by means other than sealed bids (such as sole source contracts and those based on requests for proposals), have required approval of the Board of Estimate before the award could be finalized.

Are municipal contracts let to a narrow group of firms?[56] In New York City the answer to both questions is "yes," a warning the City must not ignore.

A few examples illustrate the magnitude of the problem, which is not limited to any one agency or any one type of commodity or service:

> When the Department of Correction wanted to replace the company responsible for maintaining the elevators in City prisons, it split the job into five separate components and put each one out to bid separately. Only one company stepped forward to bid — the same company the Department wanted to replace.[57]
>
> Between October, 1987 and June, 1988, the Departments of Sanitation and Transportation awarded five security guard contracts worth $6.8 million to a single firm, the only one that bid.
>
> From March, 1988 through July, 1988, the Human Resources Administration awarded one car service company nearly $9 million in four separate contracts to drive children in Manhattan, Queens and the Bronx to and from foster homes, hospitals and court appointments. It was the only company to submit a bid of the 535 invited to do so.

The reluctance among vendors to bid on City business is understandable. Those brave enough to do so face an awesome mountain of paperwork. Even worse, the terms and conditions for City contracts are not standardized — each agency sets its own, even if the service it is purchasing is identical to that of other agencies. Vendors must pay for lawyers to check the fine print of each and every contract, lest there be some hidden term or condition that will come back to haunt them. Small companies, unable to shoulder this additional expense, simply stay away. A vendor testifying at the Commission's public hearing summed up the problem:[58] "My biggest problem with the City agencies is that every one of them requires a different piece of paper. You would think that you were dealing with Gimbel's and Macy's and Sterns." The City is also notoriously late to pay its bills, scaring away some potential bidders for whom payment delay means a struggle to meet their payroll.

The average shopper knows that when stores are competing for

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56. *See* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, MAINTAINING MUNICIPAL INTEGRITY: TRAINERS HANDBOOK Appendix F, at 275 (April 1980).

57. Depending on the circumstances, experts consider five bids or three bids the bare minimum necessary for adequate competition.

58. Two days of public hearings on contracting and procurement practices of New York City government at which City employees and contracting experts testified were held by our Commission on October 24 and 25, 1989.

business, prices go down, and that the lack of competition drives them up. This maxim holds true in the marketplace of government procurement as well. New York City is clearly paying higher prices than it should as a result of the dwindling number of vendors competing for City business.

The lack of competition has been partly caused by the inexperience and poor training of some City contracting staff who lack the skill to attract new vendors. It is not uncommon for bid materials to be sent to vendors too late for them to submit a bid or to vendors who are not even in the business of providing the service being sought. The Commission found, for instance, that bid documents for elevator maintenance contracts were mailed to an artesian well company; "Island-Wide Photo" was sent bid documents for a contract to repair window sashes; invitations to bid on a contract to install canvas awnings were mailed to one ironworks company, three asphalt paving companies, one hydrographic survey company, one water main and sewer company and six construction companies, among others. At present, there is no requirement that the hundreds of employees who spend billions of taxpayer dollars on services, supplies, equipment or construction be professionally certified as proficient in buying skills, a requirement commonplace in other jurisdictions.[59]

The problems of the City's contracting system have been aggravated by the City's reaction to the municipal corruption scandals which began to unfold in late 1985 and early 1986. An ordinary consultant contract is now subject to ten separate layers of review and approval, not counting the layers of internal review within the agency awarding the contract. Although each added layer of oversight originated from a good intention, their cumulative effect is to slow the City's business to a crawl, impairing vital programs and deterring vendors from bidding on City business.

Fortunately, the new City Charter adopted by the voters on November 7, 1989 sets the City on a new course. A new five-member Procurement Policy Board is charged with developing uniform, City-wide rules for soliciting bids, selecting vendors and managing contracts. It also has the power to impose deadlines aimed at cutting back on the delay that plagues the City's contracting system and to simplify and standardize the contract language which now confuses and discourages vendors.

Sweeping though the Charter changes are, they are not self-execut-

59. Government procurement is a profession complete with professional examinations and certification procedures, a professional oath and code of professional ethics. As of 1989, only eleven City employees had attained professional certification.

ing and the Charter alone cannot restore integrity to the City's contracting operations. First, the City needs a Deputy Mayor who would oversee, for a two-year period, reform of the City's contracting operations. Currently, responsibility is so diffuse that coordinated reform is impossible.

Second, the reforms to be proposed by the Procurement Policy Board will never materialize if the expertise is lacking at the agency level — where the actual purchases are made — to implement those reforms. Each City agency must appoint at a senior management level a Chief Contracting Officer with a professional procurement background. This person would have responsibility for all aspects of the agency's contracting functions, making sure that the City gets the most for its contract dollars.

Third, the hundreds of employees who spend billions of taxpayer dollars each year must be given professional training in government procurement practices. Too much money is at stake to entrust this responsibility to purchasing staff who lack the skills necessary to get the best possible deal for the City.

Fourth, after clear rules are in place and accountability is clearly established, the City must stop trying to police each contract — with layer upon layer of review — before it is awarded. Instead, it must move to a system for spot-checking contract decisions after the fact, to make sure that contracts are awarded in accordance with the City's rules and procedures.

One of the expert witnesses at the Commission's hearing testified that the appointment of a Chief Contracting Officer in each agency — coupled, among other things, with upgrading the experience and training of City contracting staff and improving the City's data collection — would save the City at least $60 million in the first year alone. The City, now face-to-face with declining tax revenues and a serious budget deficit, cannot afford to ignore these savings.

New York City's contracting operations suffer from both too little and too much control: too many layers of review, too few clear rules and streamlined procedures. It is widely recognized that "good management is the foremost antidote to corruption in government." Yet New York does not so much as manage its contracting operations as police them — through a system of checks, controls and barriers — that strangles competition and efficiency.

Good management of the City's contracting does not require the City to launch into uncharted territory. The road to reform is clearly mapped out.

There is no longer time for half-measures. The new City Charter

creates an unprecedented opportunity to reform the City's outmoded and inefficient contracting system and, at the same time, to safeguard that system from corruption. The citizens of New York City deserve nothing less.

## ETHICS TRAINING FOR PUBLIC EMPLOYEES

> The whole art of government consists in the art of being honest.
>
> *Thomas Jefferson*

> It is not what a lawyer tells me I may do; but what humanity, reason and justice tell me I ought to do.
>
> *Edmund Burke (1775)*

Public employees face a thicket of laws, regulations and disclosure requirements designed to prevent conflicts of interest and to insure that the public interest is not subordinated for private gain. Many agencies in New York State fail to translate these complex rules and regulations into clear and simple guidelines understandable to non-lawyers, leaving public employees on their own to figure out how the law applies to their own situations. Far too many agencies simply hand new employees a daunting package of laws, regulations and formal legal opinions.[60]

In New York City, new employees are warned in ominous language that they are "subject to" the City Code of Ethics. Their ethical responsibilities sound more like a debilitating disease to which public employees are prone than to the embodiment of an honorable tradition of service which goes back thousands of years. Typically, new City employees are handed an orientation packet containing copies of the Code of Ethics and a welter of mayoral executive orders, Board of Ethics opinions and excerpts from the State's penal code. Some City agencies supplement this blizzard of legalese with clear and simple explanations to assist the average employee to comply with the requirements of the law.

At the State level, the situation is only slightly different. In many agencies, new employees receive no more than a printed copy of the State Public Officers Law and are asked to swear that they will abide by its provisions. The Public Officers Law, like most statutes, is not self-explanatory.

The responsibility of translating key ethics laws into plain English that the average employee can understand should not be left to individual state or local government agencies. It must be shouldered cen-

60. The Commission surveyed over one hundred government agencies in New York City and New York State, collecting the materials, when there were any, that they used to educate their employees about their ethical obligations as public servants.

trally: in New York City, the job belongs to the Conflicts of Interest Board. At the State level, it belongs to the State Ethics Commission.[61]

Although clear guidelines spelling out a public employee's obligations under existing ethics-in-government laws are essential, they alone are not sufficient to inspire public servants to dedicate themselves to the public good. The law's overwhelming objective is to prohibit certain actions and punish transgressors. Ethics laws should represent a minimum standard; obeying the law should not be all we expect from our public servants. Unfortunately, however, it sometimes ends up that way. "I did nothing illegal" echoes as justification for a wide spectrum of violations of the public trust. What should be a starting point for ethical conduct becomes a resting place. "Persons are not 'ethical' simply because they act lawfully. One can be dishonest, unprincipled, untrustworthy, unfair and uncaring without breaking the law."[62]

A small minority of City and State agencies have recognized the need to go beyond the law's prohibitions and punishments. They have developed and communicated a positive, inspirational statement of their agency's mission that conveys to employees how their individual efforts contribute to the agency's success or failure. But more must strive to do this. Once an agency has clearly articulated its sense of purpose, its "mission statement" should become the springboard for developing an employee code of ethical conduct which not only prohibits behavior detrimental to the achievement of the agency's goals but which affirmatively encourages ethical conduct.

Public employees may be subject to enormous pressures in the course of a typical work day to cut ethical corners or to turn a blind eye to padded bills, requests for political favors and wrongdoing by co-workers or bosses. With a few striking exceptions, State and City agencies fail to provide adequate training to help public employees recognize the many ethical dilemmas they face and to withstand the often formidable pressure to depart from the standards of honesty and impartiality the public rightfully expects.[63]

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61. There is hope that this responsibility will be met. The New York State Ethics Commission is in the process of drafting a practical guide to the State Ethics in Government Act which it hopes to disseminate before the end of 1990. The City Conflicts of Interest Board is further behind, although it appears to recognize the need to develop such materials.

62. M. Josephson, *Limitations of Ethics Laws, reprinted in*, ETHNET (Spring 1989).

63. A handful of agencies with law enforcement responsibility, such as the New York City Police Department, the New York City Buildings Department and the State Department of Taxation and Finance use extensive training materials to help recruits and new

Ethics training for public employees is a crucial management responsibility, as important as budgeting or strategic planning. Agency heads must devote time, energy and thought to identifying the kinds of ethical dilemmas which employees are likely to encounter in their day-to-day work. By exposing their employees, in workshops and seminars, to case studies in ethical issues derived from the agencies' own experience, agency heads must strive to encourage employees to feel that public service is a source of honor and pride.[64] All too often, in the rush to ferret out government corruption, the preventive value of comprehensive ethics training — from plain English explanations of the law to courses and seminars — has been overlooked and ignored. The explosion of resources devoted to investigative agencies and to the hiring of investigators, auditors and the like contrasts sharply with the relative lack of attention and resources allocated to ethics training. If "an ounce of prevention is worth a pound of cure," surely the time has come for a more widespread and imaginative use of ethics training.

inspectors recognize, understand and withstand the ethical problems they will encounter on the job.

64. At the State level, the Governor's Office of Employee Relations (OER) has put together training materials to help management employees cope, among other things, with situations where they have been directed to take action which conflicts with their personal and professional values. Unfortunately, these materials are not yet widely used and only a handful of relatively senior managers who sign up for one of OER's courses benefit from them. In addition, lawyers in the State Attorney General's Office attend a two-day annual training conference that offers an optional ethics workshop. In 1987, the State Division of Criminal Justice Services held a full-day conference on ethics that was attended by over 800 public employees from the law enforcement field. These are all important efforts that need to be expanded.

## WHISTLEBLOWERS

> The only thing necessary for the triumph of evil is for good men to do nothing.

Even if the best efforts are made to minimize opportunities for corruption — if all the Commission's recommendations were adopted tomorrow — governments in New York State would still fall victim to some degree of corruption, waste, mismanagement, fraud or illegality. For this reason, government must do all it can to encourage and protect public employees who come forward to "blow the whistle" on these bad practices.

Public employees are the single most important source of information about misconduct in government and perform a valuable public service when they speak out. Yet they face powerful pressures to remain silent. We live in a society that puts a premium on "minding your own business" and uses pejorative labels such as "rat" and "snitch" to refer to those who tell on their peers. With good reason, many public employees think that those who blow the whistle are likely to be fired, demoted, denied advancement, harassed or otherwise suffer retaliation.

Time and again, public employees who, in the privacy of their offices, spoke candidly to Commission staff about problems in their agency were unwilling to repeat the same testimony publicly. Others simply refused to talk with us at all. If public employees are reluctant to be truthful and candid with investigators who ask them for help, how likely is it they will come forward on their own initiative to reveal corruption?

In 1987, the Legislature recognized the importance of protecting public employees who disclose wrongdoing and adopted a law that specifically prohibits state agencies from retaliating against whistleblowers.[65] But the law's provisions fall short in four major ways. In fact some of its provisions can backfire — harming the very people it was intended to protect.

First, the best shield for a whistleblower is anonymity. If the person's identity is unknown to the agency, they cannot be harassed, demoted or fired. Unfortunately, the law itself makes anonymity impossible and poses an intolerable dilemma for the employee who wants to speak out about wrongdoing: the only way that employee can claim protection under the whistleblower law is if he or she has first brought the information to the attention of superiors.

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65. N.Y. CIV. SERV. LAW § 75-b (McKinney 1984).

The problems with this approach are obvious. If the superiors are involved in wrongdoing themselves, this notification requirement means whistleblowers are "damned if they do and damned if they don't." And it not only gives the agency an opportunity to punish the messenger but also to cover up the misconduct.

The other bad side effect of the notification requirement is that if an employee is unaware of this provision and brings wrongdoing to the attention of an outside authority, such as a prosecutor, he or she cannot claim protection. There is a good chance that many public employees will not know about this requirement because public agencies are not required to make them aware of the law or how it works. Clearly it is unfair to protect only those who are sophisticated about how to protect themselves.

The law is too narrow in a second area: a public employee who provides information at the request of an investigative body such as our Commission, to a grand jury or even at a trial, has no protection from retribution. It is ironic that on the one hand a person has a legal obligation to testify truthfully, but on the other hand can be fired for doing so. This is not just a theoretical problem. There were occasions when public employees interviewed by the Commision were reluctant to cooperate because they were afraid of reprisals. Other states have recognized the need to protect this kind of cooperating witness; it is time New York did the same.

Third, public employees are only given protection if they disclose governmental misconduct which they believe to be a violation of law. Yet clearly public officials must be held to a higher standard than not being lawbreakers. The whistleblower law should therefore also protect public employees who reveal corruption, gross mismanagement, conflicts of interest, gross waste of funds, abuse of authority or a substantial and specific danger to public health or safety.

Fourth, while retaliation against whistleblowers is against the law, it will inevitably occur from time to time. When it does, whistleblowers are given no governmental assistance to redress the harm they suffer. If an employee is demoted or fired, he or she must bear the emotional and financial burden of going to court for vindication. Even though they have performed a courageous public service, they must stand alone to fight for their rights. By contrast, the federal whistleblower provision provides for the Office of Special Counsel to investigate and prosecute retaliatory actions.

When a New York State employee speaks out about governmental wrongdoing the whistleblower law offers little comfort and about as much protection as an umbrella with holes. Until this law is im-

proved, the brave voices of whistleblowers will be silenced, either by fear or acts of revenge.

## THE UNDERGROUND GOVERNMENT

> Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.
>
> *Justice Brandeis*
> *Other People's Money* 62

In New York State there is a burgeoning shadow government — powerful, wealthy and largely immune from scrutiny, let alone accountabilty. This shadow government is not one monolithic entity, rather it is comprised of myriad state authorities, local authorities, not-for-profit corporations attached to state agencies and corporations run by local governments.[66]

Together these entities will spend over $14.5 billion in fiscal year 1990 for public purposes. And although they are created by government and controlled by government officials, they are exempt from many of the controls designed to check favoritism, undue influence and abuse of official position, as well as corruption, fraud, waste and misuse of government funds.

This Commission is troubled by the phenomenon increasingly revealed by its work. The rigid constraints imposed on traditional governmental units do indeed hamper their effective functioning. The reasons for seeking new forms of governmental organization are compelling. But with the advent of authorities what has evolved in effect are two governmental systems, one far more accountable to the public than the other. The Commission questions the need for two distinct systems. Perhaps the goals of government could be equally well realized by modifying some of the provisions which hinder the effectiveness and flexibility of traditional governmental bodies, and imposing the same ethical standards and oversight on all governmental bodies, including authorities and not-for-profit corporations.

Certain basic priniciples should apply to all those doing the business of government, including authorities and other public corporations. These principles include at a minimum: public disclosure of transactions; contracting procedures that ensure competition; employment decisions based on merit and fitness; decisionmaking by leaders free from conflicts of interest; documentation of all decisions; sound

66. *See* NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY, THE UNDERGROUND GOVERNMENT: PRELIMINARY REPORT ON AUTHORITIES AND OTHER PUBLIC CORPORATIONS (April 1990).

internal controls; and periodic audit of books and records, with the results made public.

We strongly urge the Governor to create another Moreland Act Commission to examine this area in depth and make recommendations for further specific reforms.

## WESTCHESTER COUNTY

> The first requisite in the citizen who wishes to share the work of our public life . . . is that he shall act disinterestedly and with a sincere purpose to serve the whole commonwealth.
>
> *Theodore Roosevelt*

> If public faith in the trusteeship value of public office is the keystone of democracy's arch, self-serving behavior is the cardinal vice of public officials.
>
> *Joel Fleischman*

The "stewardship of public officers is a serious and sacred trust"[67] and in an ideal world, a strong conscience would be enough to guide a public official in safeguarding that trust. But we do not live in an ideal world. In fact, the political system itself creates the need for other controls. Many officials in New York emerge from strong political parties and owe their place on the ballot to political party leaders; yet once they take office we expect them to shift their allegiance to those they govern. And it is the elected official who must govern, not the unelected, unaccountable party leader.

Political party leaders have vastly different concerns than public officals: advancing the party organization, rewarding the party faithful and filling the coffers of the party's campaign committee. Because these are private activities and not governmental, party leaders are not held to the same ethical standards as public officials. Nor are they subject to the control that citizens exercise in the voting booth. For this reason, there is a real danger to government integrity when political party leaders insinuate themselves into the actual operations of government — a place they do not belong.

The Commission found that in Westchester County what should have been a bright line between the dominant political party and the operations of the county government, was instead a blur. In fact, Anthony Colavita, the leader of the Westchester County Republican Party had such extraordinary influence over the affairs of government that he became a *de facto* official of the government. He controlled county jobs, was involved in the budget negotiations of county offices and was able to fill the coffers of the party committee with contributions from those doing business with the county.

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67. Franklin D. Roosevelt.

Nowhere was the party leader's power more visible than at the Playland Amusement Park. The Park is county owned, and at least in theory, operated by the County Department of Parks. A startling example of Colavita's power occurred in 1983 when Richard Keeler, a loyal and active member of the Westchester County Republican Party, was faced with the loss of his job. Colavita helped Keeler — a man with virtually no amusement park or recreation experience — to obtain a job at Playland. Several months later Keeler was named general manager, replacing a 25-year veteran of the amusement park business who was forced into retirement. As general manager, Keeler had complete discretion over hiring full-time and seasonal employees and control over the private companies that wanted Playland contracts to run rides, games and food stands.

The extent of Keeler's control and political connections was quite plain to Playland vendors. Many thought his political connections were his best "qualifications" for the job. During Keeler's tenure as the Park's manager, nearly all Playland vendors contributed to the Westchester County Republican Committee with which he was so visibly connected. The vendors gave to "make Mr. Keeler happy," as "insurance" of continued business opportunities at Playland, and because they believed that the County Republican party "was responsible for [their] lease[s]." Some vendors even dropped off their contributions at Keeler's Playland office.

One company which wanted to do business at Playland even went to the office of the Westchester County Republican Party to initiate a contract. Party officials did nothing to indicate to the company that it was county officials and not party officials who were the proper persons to approach on these matters. Later, Keeler agreed to a lopsided deal with the company that was so skewed it caused the county to lose over $900,000. The contract was renewed for five years, even though the county was aware of the previous losses. For its part, the company became the biggest contributor to the party committee of all the Playland vendors. Although the company's president claims the company's political contributions were not linked to his business dealings with the county, the perception of influence-seeking is inescapable.

The motivation, risk and appearance of a *quid pro quo* will always exist when those doing business with a government make political contributions — whether the money is given to a candidate or a party committee. These types of contributions jeopardize the faith of citizens that government is serving the public good and not selfish private interests — they must be banned.

Keeler's control over jobs at Playland served the party well when

Republican Guy Parisi ran for County Clerk in 1985. Parisi hired David Warager as his campaign coordinator in May of 1985 but lacked campaign funds to pay him a full-time salary. In order to tide him over until the campaign was in full swing, Keeler gave Warager a secret high paying, part-time job at Playland. Warager's own words best describe this package deal: "[i]f you're asking me is this cronyism in the old-fashioned sense, that this job paid me so that the Republican party could pay me less for doing their work, I'm not going to deny that."

As head of the Westchester County Republican Party, Colavita controlled the party's nominations for office and parlayed this control into a successful patronage operation that extended beyond the amusement park. In one case, he agreed to give the County Clerk, George Morrow, the party's nomination for re-election in exchange for control over appointment of the Clerk's deputies and a commitment from Morrow to seek increased contributions from the deputies to the party.

Although Morrow was not re-elected in 1982, the party lost none of its power over jobs in the Clerk's Office. The new, Democratic County Clerk, Andrew Spano, went to Colavita for assistance when the County Board of Legislators cut staff positions from his budget. Colavita prevailed upon the legislators, most of whom were Republicans, to restore a number of positions. In exchange, Spano hired only Republican-referred candidates for half of the restored slots.

The party leader's control over jobs was a blatant and classic form of patronage: jobs which belonged to the public became the currency with which he rewarded supporters, favored friends and increased his own power. The effects of this patronage were also classic — impaired employee morale and decreased government effectiveness. The quest for more ethical government demands the abolition of patronage, wherever it exists in New York State.

Westchester County provides an example of how a political party leader's influence over the workings of government can equal or exceed that of public officials. If a public official uses his power for corrupt purposes, such as promising someone a job in exchange for campaign assistance or a vote, he faces felony prosecution. When a party leader's power extends to governmental affairs such as public employment then he should also be subject to the same prohibitions against corrupt use of power and face the same penalties for transgressions.

## THE POUGHKEEPSIE 1985 TOWN BOARD ELECTION

You shouldn't be able to do what we did in Poughkeepsie.

*Robert Congel, Pyramid*

In the fall of 1985 the voters of Poughkeepsie, New York, a Hudson River town with a population of approximately 40,000, experienced a Town Board election campaign that was the first of its kind — slick, sophisticated, and high-priced. When the voters went to the polls they did not know that the price — over three quarters of a million dollars — effectively had been paid by a giant real estate conglomerate with an economic stake in the outcome of the election. The story of that 1985 election reveals how New York's weak election law can be manipulated to serve wealthy business interests and in the process undermine the integrity of the townspeople's votes. Until there is sweeping reform, the integrity of local elections everywhere in New York State is at risk.

The company that so effectively influenced that election is called Pyramid. Pyramid took these actions in order to build a controversial shopping mall —"The Galleria" — on 109 acres located in Poughkeepsie. The land was zoned for residential use and without a zoning change Pyramid could not build. Pyramid first sought the change from the Dutchess County Planning Department, which turned them down, on October 4, 1985, after concluding that the proposed mall was incompatible with the county and town master plans and would worsen existing traffic problems.

Because of the rejection, Pyramid's hopes then lay with the seven-member Town Board, which could override the county's veto by a "supermajority" of five of the seven votes. All board members were up for re-election and controversy over the mall had been raging all summer. Based on public positions taken by both incumbent board members and challengers, Pyramid knew that they were assured of only three favorable votes. The results of opinion polls and focus group discussions, financed by Pyramid, further revealed that four other pro-mall candidates, who were Republicans, were likely to lose in the upcoming elections and would need a big boost. If Pyramid could influence the outcome of those races, with an infusion of large sums of money, they could build their mall.

In order to do so it was necessary to skirt the $1,000 limit on contributions to Town Board candidates. It was also essential to the scheme that Pyramid's financial backing be kept secret for fear that a

backlash against their influence could damage the pro-mall candidates. Pyramid developed a campaign strategy in consultation with an Albany-based attorney, Thomas Spargo — then counsel to the Republican State Committee and State Senate Elections Committee — that achieved both goals.

Instead of making direct contributions to the campaigns of the pro-mall candidates, a devious indirect route was taken: contributions were made to two political party committees and one political action committee whose purse strings were controlled by Spargo, with the understanding that the money would be used to help the four Republican pro-mall candidates. Under current New York Law the only limit on contributions to such committees is $150,000 per year! Pursuant to this secret and deceptive strategy nineteen Pyramid partners and their relatives contributed $301,000 to the New York Republican State Committee, the New York Republican Federal Campaign Committee, and Building a Better New York, a political action committee (PAC) formed by Spargo three weeks before the election. These committees in turn spent $267,245 in the four pivotal races. By funnelling campaign contributions through the committees, Pyramid was able to outspend the Democrats by 15 to 1 and still remain invisible to the voters. Most of the money was contributed and reported post-election and none of the contributions were ever disclosed to the Dutchess County Board of Elections.

Spargo's scheme for paying the more than 40 vendors involved in the campaign further guaranteed Pyramid's invisibility: Philip Friedman, a New York City based political consultant hired by Pyramid, acted as Pyramid's general contractor. Vendors would send invoices to Friedman, who would forward them to Pyramid. Pyramid, after consultation with Spargo, would then forward the bills to one of the three committees that had received Pyramid contributions. The disclosure forms filed by Spargo on behalf of the committees did not reveal which expenditures were made in Poughkeepsie.

Friedman also helped devise a campaign strategy for Pyramid that played up two themes that would appeal to residents who might vote for the Republican pro-mall candidates: opposition to high taxes and emphasis on careful town planning. Friedman knew what themes to stress from the results of the same opinion polls and focus groups that revealed which pro-mall candidates needed help.

There were two major elements to the campaign strategy. One was a media blitz. During a three-week period prior to the election, Pyramid had more than 80 different pieces of literature, all fine-tuned to

reflect the themes of planning and taxes, distributed to voters in the pivotal wards. As Friedman stated:

> Direct mail . . . . [a]llowed us to create artificial issues. In letters and brochures we articulated for the voter the concerns he might not have been able to articulate. . . . The voter was unaware that he told us, through focus group discussions and responses to poll questions, what issues to present in our mailing.

The second element was door-to-door campaigning, which enhanced the candidates' name-recognition and helped them make their pitch in a direct and personal way. Two Pyramid-paid consultants coached candidates on how to present themselves, instructed them on the issues to emphasize — planning and taxes — and even accompanied them on door-to-door visits. The consultants kept Pyramid regularly informed of the campaigns' progress.

Pyramid's influence was even concealed from the very candidates who received its help. At Pyramid's direction, both the source of the campaign funding and the contents of the campaign literature were never discussed with the candidates. In fact, some campaign literature sent by Pyramid's consultants contained the forged signatures of the candidates.

In addition to the $301,000 in campaign contributions from Pyramid-connected individuals, the company itself spent at least $475,967 for campaign and image building services in Poughkeepsie. The investments paid off. Three of the four Pyramid-backed candidates were elected; the new Town Board approved the zone change; and Pyramid built its mall.

Shortly after the election, the Town Supervisor complained to the State Board of Elections about numerous election law violations during the campaign by Spargo, the Republican State Committee, Building a Better New York and others. The Board of Elections' investigation of those complaints was shocking for its failures. The Board not only failed to uncover a large percentage of the $301,000 contributed to the three committees or a single penny of the company's $475,967 in independent expenditures, but it also never investigated or discovered the true purpose animating Pyramid's contributions to the committees: its desire to promote secretly the campaigns of pro-mall candidates without the restriction of campaign contribution limits.

Although there is a need for sweeping reform of the election law, this case study points out five reforms in particular that will help prevent "another Poughkeepsie:"

First, the limit on what an individual can give to a political committee — currently $150,000 — must be reduced to no more than $4,000 to a party committee and no more than $2,000 to a PAC. Further, there must be a reasonable limit on what committees can spend on a particular candidate — currently there is no limit.

Second, such limits alone cannot prevent the indirect infusion of vast sums into local races. Had limits existed in 1985, Pyramid could have created a multitude of PACs to serve as funnels to the candidates. The law must be changed to control this "earmarking" — contributing to a committee with an understanding that the contribution will be used for a particular candidate. An earmarked contribution to a political committee should be considered a contribution to the candidate for whom it is intended and subject to the same limit as a direct individual contribution to that candidate. The political committee that receives the earmarked contribution should be responsible for reporting both the identity of the contributor and the identity of the candidate for whom the money is intended.

Third, even with these changes, unless Poughkeepsie voters were familiar with the names of Pyramid partners they could not have known that the $301,000 in contributions came from people connected to the company. Lax disclosure rules in New York State do not require political committees to report the name and address of the contributor's employer or business affiliation. This is a serious weakness that prevents the public from learning if a particular business interest has paid the fare to bring leaders to office.

Fourth, apart from the contributions by Pyramid-related individuals, the company itself paid almost a half-million dollars to firms for work in Poughkeepsie, an indeterminate percentage of which was campaign related. These so-called "independent" expenditures were not disclosed anywhere. The Federal government requires disclosure of this type of campaign support and there is clearly an urgent need for a similar requirement in New York State.

Fifth, the voters in Poughkeepsie never knew that the avalanche of slick campaign literature was unauthorized by the candidates and paid for with Pyramid money because the law does not require that such sponsorship be revealed. This omission threatens the integrity of the electoral process.

During the 1985 Poughkeepsie Town Board election campaign, a mockery was made of New York's election law. Unless the law is strengthened and the Board of Elections made more independent, the devious scheme that subverted the integrity of the 1985 election in Poughkeepsie can be perpetrated again, anywhere in New York State.

Under the State's current law one is left to wonder how many other times similar schemes have been perpetrated in New York without any public knowledge.

## CONCLUSION

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.
>
> *The Federalist, No. 51*

> When you realize [Athens'] greatness, then reflect that what made her great was men with a spirit of adventure, men who knew their duty, men who were ashamed to fall below a certain standard.
>
> *Pericles*

When the recent corruption scandals broke in the New York City government and in the State Legislature, officials across the political spectrum declared that they were fully committed to sweeping change, ready to do whatever was necessary to reform the government. And in the last three years, there have been some moves in the right direction. New York City has a new public campaign finance law and a tougher ethics law. The City has also disbanded the Talent Bank as it existed and is moving to reform its contracting procedures. The State has a new ethics law, and the housekeeping accounts of the major political parties are finally open to public scrutiny. But, as noted elsewhere in this report, these reforms do not go nearly far enough.

The stakes are high for all New Yorkers. It is clear what needs to be done. The Commission's recommendations, and the similar outcry of civic groups, bar associations, concerned citizens, and editorial boards throughout New York must be heeded. When, according to a poll conducted for the Commission in 1988, only 27% of the voters in our State believe that "most people who run for public office are honest," our democracy is in trouble. We cannot afford more of the same.

The recommendations of the Commission follow thorough investigation. If adopted they will change the political climate in our State

from one of mistrust and cynicism, to one much closer to the ideal of openness and honesty.

But right now, these are only recommendations. That is all a Moreland Act commission can provide. The Commission is neither a lobby, nor representative of a special interest, nor a citizen's advocacy group. Now it is up to our representatives to take action. It is time for our officials to rise above partisanship and self-interest, and enact the tough reforms we must have, reforms that may require that they give up personal advantage for the common good. So be it; that is what it means when we say, "public service is a public trust." And as citizens, we must stay informed about these issues and work actively for change, and we must be willing to pay for such reforms as public campaign financing and adequate enforcement of the new laws. None of us can escape the stark choice we face: recurring scandal and ever-deepening apathy if we continue to ignore these problems, or a new era of inspiration and change if we are willing to meet the tasks at hand with determination and conviction.

In September, 1987, several months after the Commission on Government Integrity was appointed, Governor Cuomo said this to us: "I believe that a continued commitment to improvement by our Legislature, a persistent, undeviating emphasis on reform by the executive together with your help can make this the beginning of the most exciting reform era in this State's history."

The Commission has fulfilled its commitment. The legislature and executive must now fulfill theirs.

We know from experience that often, when it comes to ethics reform, nothing gets done unless there is a scandal. Some public officials have told our Commission that without scandal, ethics reform is not possible in New York State. But we know that it does not have to be that way. Nor should it be. This State has neglected ethics reform for a long time; the people of this State are entitled to laws which promote honest government without waiting for more scandals. It is clear what needs to be done.

The battle against lethargy and self-dealing has never been easy. But we must go forward nonetheless.

## Appendix A: Executive Order

Executive Order 88.1, creating the Commission on Government Integrity.

STATE OF NEW YORK EXECUTIVE CHAMBER

EXECUTIVE ORDER No. 88.1:
APPOINTING SPECIAL COMMISSIONERS TO INVESTIGATE INSTANCES OF CORRUPTION IN THE ADMINISTRATION OF GOVERNMENT AND TO DETERMINE THE ADEQUACY OF LAWS, REGULATIONS AND PROCEDURES RELATING TO GOVERNMENT INTEGRITY

WHEREAS, in March 1986, I, acting jointly with the Mayor of the City of New York, appointed the State-City Commission on Integrity in Government to make recommendations for improving laws, regulations and procedures relating to the prevention of corruption, favoritism, undue influence and abuse of official position in government;

WHEREAS, such Commission has issued reports identifying serious flaws in certain existing laws, regulations and procedures within the subject matter of its inquiry;

WHEREAS, such Commission has issued a final report in which it recommends the appointment of a new Commission with investigative powers, including the authority to compel the attendance and testimony of witnesses and the production of records;

WHEREAS, since the appointment of such Commission last March, events bearing on public confidence in the integrity of government have continued to unfold;

WHEREAS, certain completed and ongoing criminal prosecutions raise issues relating to integrity in government which are more appropriately explored in a parallel investigation than in the course of such prosecutions; and

WHEREAS, it is my judgment that it is of compelling public importance that weaknesses in existing laws, regulations and procedures relating to government integrity be further investigated and addressed;

NOW, THEREFORE, pursuant to section six and subdivision eight of section sixty-three of the Executive Law, I, MARIO M. CUOMO, Governor of the State of New York, do hereby:

I. Appoint a Commission to be known as the Commission on Government Integrity with seven members, who shall be John D. Feerick, Richard D. Emery, Patricia M. Hynes, James L. Magavern,

Bernard S. Meyer, Bishop Emerson J. Moore and Cyrus R. Vance, as special commissioners, to investigate the management and affairs of any department, board, bureau, commission (including any public benefit corporation) or political subdivision of the State in respect to the adequacy of laws, regulations and procedures relating to maintaining ethical practices and standards in government, assuring that public servants are duly accountable for the faithful discharge of the public trust reposed in them, and preventing favoritism, conflicts of interest, undue influence and abuse of official position and to make recommendations for action to strengthen and improve such laws, regulations and procedures.

II. The Commission shall, subject to Paragraph I of this order:

1. Investigate weaknesses in existing laws, regulations and procedures intended to prevent the use of public or political party position for personal enrichment and determine whether such weaknesses create an undue potential for corruption, favoritism, undue influence or abuse of official position or otherwise impair public confidence in the integrity of government.

2. Investigate weaknesses in existing laws, regulations and procedures intended to prohibit conflicts of interest or bring about the disclosure of potential conflicts of interest and determine whether such weaknesses create an undue potential for corruption, favoritism, undue influence or abuse of official position or otherwise impair public confidence in the integrity of government.

3. Investigate weaknesses in existing enforcement machinery for laws, regulations and procedures relating to unethical practices and determine whether such weaknesses create undue potential for corruption, favoritism, undue influence or abuse of official position or otherwise impair public confidence in the integrity of government.

4. Investigate weaknesses in existing laws, regulations and procedures regarding the sale or leasing of real property by or to governments, public authorities or public benefit corporations, the sponsorship of publicly assisted housing or other development projects, the solicitation of government business, permits, franchises, and the like and determine whether such weaknesses create an undue potential for corruption, favoritism, undue influence or abuse of official po-

sition or otherwise impair public confidence in the integrity of government.

5. Investigate weaknesses in existing laws, regulations and procedures relating to campaign contributions and campaign expenditures and determine whether such weaknesses create an undue potential for corruption, favoritism, undue influence or abuse of official position or otherwise impair public confidence in the integrity of government.
6. Investigate weaknesses in existing laws, regulations and procedures regarding the representation of private parties by public or political party officials before public agencies and determine whether such weaknesses create an undue potential for corruption, favoritism, undue influence or abuse of official position or otherwise impair public confidence in the integrity of government.
7. Investigate weaknesses in existing laws, regulations and procedures regarding the selection of judges and to determine whether such weaknesses create an undue potential for corruption, favoritism, undue influence or abuse of official position or otherwise impair public confidence in the integrity of government.

III. John D. Feerick is hereby designated Chairman of the Commission. I hereby give and grant to the Commissioners all the powers and authorities that may be given or granted to persons appointed by me under authority of section six of the Executive Law, provided, however, that (1) the issuance of subpoenas shall require the prior approval of the Chairman and at least three other Commissioners and (2) the Commissioners may adopt such procedures as they believe necessary governing the exercise of the powers and authorities given or granted to the Commissioners pursuant to such section six.

IV. Pursuant to subdivision eight of section sixty-three of the Executive Law, and subject to Paragraph I of this Order, I hereby direct the Attorney General to inquire into the matters set forth in Paragraph I of this Order which I find involve public peace, public safety and public justice, and request that the Attorney General do so by appointing one or more of the above named Commissioners or their counsels or deputies as Deputy Attorneys General and delegating to such Deputy Attorneys General authority to exercise the investigative powers that are provided for in an investigation pursuant to such sec-

tion sixty-three upon a majority vote of the Commission and with the approval of the Chairman.

V. The Chairman shall have the power to employ such counsel, deputies, officers and other persons as the Commission may require to accomplish the purposes of this order and to fix their compensation.

VI. The Commission in its inquiry shall comply with section seventy-three of the Civil Rights Law and with such other regulations and procedures as the Commission may adopt to protect the rights of those affected by its inquiry and the integrity of its proceedings.

VII. If in the course of its inquiry the Commission obtains evidence of the violation of existing law, such evidence shall promptly be communicated to the appropriate law enforcement authorities. The Commission shall cooperate with prosecutorial agencies to avoid jeopardizing ongoing investigations and prosecutions.

VIII. Every department, board, bureau, commission (including any public benefit corporation) or political subdivision of the State shall provide to the Commission every assistance and cooperation, including use of State facilities, which may be necessary or desirable for the accomplishment of the duties or purposes of this Order.

IX. Executive Order Number 88, dated January 15, 1987, is superseded by this Executive Order.

G I V E N under my hand and the Privy Seal of the State in the City of New York this 21st day of April in _____ the year one thousand nine hundred eighty-seven.

BY THE GOVERNOR

_____/s/
Mario M. Cuomo

_____/s/
Gerald C. Crotty
Secretary to the Governor