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PUBLIC HEARING ON THE MORELAND COMMISSION
TO INVESTIGATE PUBLIC CORRUPTION.

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655 West 34th Street
New York, New York

October 28, 2013
5:00 P.M.

Reported By:
Stefanie Krut

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COMMISSIONERS PRESENT:

- Kathleen Rice - Co-Chair
- Milton Williams, Jr. - Co-Chair
- William Fitzpatrick - Co-Chair
- Joanne Mahoney
- Eric Corngold
- Daniel J. Castleman
- Makau Mutua
- Derek Champagne
- Patrick Barrett
- Seymour James
- Lance Liebman
- Betty Weinberg Ellerin
- Kathleen Hogan
- Benito Romano
- Kristy Sprague
- Richard Briffault
- Peter Zimroth
- Robert Johnson
- Frank Sedita III
- Thomas P. Zugibe
- David R. Jones
- Aylin Ictemel - Special Counsel
- John Spagna - Special Counsel
- Alex Kardon - Special Counsel
- Barbara Bartoletti - Special Advisor
- Regina Calcaterra - Executive Director

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1 MS. CALCATERRA: Everyone be seated please.

2 MS. RICE: Good evening, everyone. I thank you all
3 for coming here tonight. I'm Kathleen Rice. I'm one of
4 three co-chairs of the Moreland Commission. I am joined by
5 my co-chairs William Fitzpatrick and Milt Williams, and
6 almost all the other commissioners on Moreland Commission.
7 In the interest in allowing for the most possible time for
8 testimony, we are going to spare the introductions and get
9 right into hearing from the folks that are going to be
10 offering testimony this evening.

11 We are here tonight because New York's political
12 system is broken. In July, in the wake of both the
13 parliament and legislative inaction and staggering
14 legislative criminality, this Commission was born. Since
15 then we've enjoyed sweeping independent jurisdiction
16 authorized by the State's Executive Law and made possible by
17 the willingness of the Governor and Attorney General to
18 fully deputize our members.

19 While 90 percent of what we have accomplished we
20 cannot yet share with the public, these hearings give the
21 public an important window into what we are looking at. In
22 the case of tonight's hearing, these opportunities also give
23 the public an accounting they deserve to help with the
24 public servants and units of government.

25 The financing of political campaigns and outside

1 activity in New York is rarely a transparent process. It
2 can be a deeply unfair process, and it is almost always a
3 process fraught with intentionally ambiguous rules. While
4 the factors that give rise to these problems may be credibly
5 argued, what is not in question is that New York's campaign
6 finance system is deeply broken and that it has been a
7 direct contributor to the crisis of confidence New Yorkers
8 have in many aspects of their state government. We are here
9 tonight to try and understand how this has happened and what
10 we can do about it.

11 As we question witnesses and explore the dark
12 recesses of our State's campaign finance laws, we as a
13 Commission are tasked with figuring out whether or not the
14 problems that plague our State's politics are procedural and
15 isolated, whether they are structural and widespread, or
16 whether they are some potent combination of the two. One
17 focus of this inquiry, as stated in the Executive Order, is
18 the State Elections Board. In a few moments we will hear
19 from their representatives. It should be noted that the
20 information we have gleaned from the State Board of
21 Elections up to this point has not been secured completely
22 voluntarily. The information they have provided has not
23 been complete nor has it been provided to this Commission in
24 an easily usable way.

25 I now call New York State Board of Elections

1 Co-Executive Directors Robert Brehm and Todd Valentine, and
2 the Board's Deputy Enforcement Counsel William McCann, who
3 are sitting at the desk right in front of us. It should be
4 noted that Liz Hogan, Counsel to the Board's Campaign
5 Finance and Enforcement Unit received a subpoena for this
6 Commission for a deposition on October 5th. The subpoena
7 ordered her to appear before the Commission for a deposition
8 on October 23rd. Since that time, it is this Commission's
9 information that she has retired and moved out of the State
10 and has since verbally informed this Commission that she
11 would not be returning to offer her testimony.

12 At this time I will allow the three members of the
13 Board of Elections to make a whatever statement they plan to
14 make to the Commission.

15 MS. CALCATERRA: You have 10 minutes for your
16 presentation.

17 MR. VALENTINE: Good evening. As you said, my name
18 is Todd Valentine. I am one of the Co-Executive Directors
19 for the New York State Board of Elections. Alongside me is
20 Robert Brehm, the other Co-Executive Director, and William
21 McCann, the Deputy Enforcement Counsel at the State Board.
22 We have submitted written testimony to the Commission, which
23 goes into more depth on the issues we are going to talk
24 about. We are only going to briefly highlight several
25 things in the written testimony, and then we understand you

1 may have a few questions.

2 One thing we have learned in this process is that we
3 need to educate the Commission and the public about what we
4 do. In order to give some context, I am going to briefly go
5 over the structure and what the agency does beyond campaign
6 finance, and then Mr. Brehm will specifically review our
7 campaign finance program and some challenges we face, and
8 Mr. McCann will continue with some more detail about our
9 campaign finance unit.

10 One of the areas that this Moreland Commission is
11 tasked with investigating is the effectiveness of Campaign
12 Finance Laws. It's important to not only understand what
13 those existing laws are but also the reason why they were
14 enacted and how they have been implemented. Article 14 of
15 the New York State Election Law contains provisions
16 regarding campaign finance disclosure. One of the public
17 policy purposes it was enacted for is transparency of
18 election funding, which allows for an informed electorate.
19 This transparency enables the public to be informed on who
20 is raising or spending money in connection with the
21 election. Disclosure also allows the public to see who is
22 contributing to candidates and political committees, which
23 assists the State Board, public media and many outside
24 groups in determining whether or not applicable contribution
25 limits have been complied with.

1 The existing financial disclosure system will be
2 described by Mr. Brehm and Mr. McCann shortly, but in
3 summary is composed of two primary parts; the treasurers of
4 the committee who report and the State Board as the
5 repository and publishing house for the data. Treasurers,
6 despite often taking on such responsibilities as being a
7 campaign volunteer or being a local candidate themselves
8 with no previous accounting experience, are faced with the
9 ensuring that the information that they are reporting is
10 accurate and timely. The State Board has been constant in
11 its efforts to facilitate not only the collection of
12 accurate campaign finance information through compliance
13 with disclosure requirements but also ensuring that the
14 public have access to this information in both a prompt and
15 practical manner.

16 Our agency structure. We were created in 1974. The
17 State Board of Elections is vested with the authority and
18 responsibility for the execution and enforcement of all laws
19 relating to the elected franchise. Now, this includes
20 reviewing the practices of all 62 county boards of
21 elections, regulating access to the ballot for State
22 offices, approving voting systems for use within the State,
23 maintaining the statewide voter registration database,
24 disclosure and enforcement of campaign financing and
25 practices, implementing various federal voting programs, and

1 the promotion and maintenance of citizen confidence and full
2 participation in the political process of our State. By
3 statute, the State Board is set up as a bipartisan
4 structure. It was taken out of the Secretary of State's
5 Office, which was controlled only by the party in the
6 Executive Chamber. This change was modeled on a
7 long-established structure in the State Constitution of the
8 local Boards of Elections. This allows for a clear check
9 and balance in the often charged political arena.

10 Now, our agency is divided into seven units; the
11 executive unit, the counsel's office, election operations,
12 public information, NVRA, I will describe what that is
13 shortly, campaign finance and enforcement, and then
14 information and technology and administration. The State
15 Board currently addresses its responsibilities with both the
16 budget and the staffing level that has decreased or remained
17 flat over the past six budget cycles. The Board currently
18 has a budget appropriation of roughly \$5.3 million with a
19 staffing authorization for 58 full-time equivalents. And
20 once again, for the upcoming budget, we have been told that
21 it will be a zero growth budget, which is ironic, given the
22 need that's been demonstrated. Now, as an aside, we've also
23 been told by the division of budget that we are not allowed
24 to put in any side letters stating our need for additional
25 resources.

1 To put our budget in perspective by comparison, the
2 Wisconsin Elections Agency has stayed with a population
3 almost one-fourth the size of New York, has a slightly
4 larger budget of \$6.5 million with an almost identical staff
5 size. The State Board of Elections is a state with roughly
6 seven million fewer residents, not only has a larger staff
7 but also an annual budget of \$13.4 million, more than two
8 and a half times that of the State Board. Despite this lack
9 of resources, the State Board works diligently within its
10 available budget to address its core responsibilities, and
11 among those are county board oversight. I mean, the State
12 Board is in contact with each of those 62 county boards
13 through semiannual meetings, monthly conference calls and
14 on-site visits. The oversight includes review of procedures
15 for conducting elections, such as ballot election setup, pre
16 and post election testing, audits and associated tasks. We
17 look at the organization of the boards and its staff,
18 document security storage and retention, training efforts,
19 education and security for voting systems, as well as asset
20 management confirmation with an inspection of each county's
21 voting system service center and any issues of special
22 interest or concern between the State Board or the county
23 board. We also deal with ballot access. The county Board's
24 candidates and campaigns rely on the advice and expertise of
25 the State Board to guide them through the State's ballot

1 access process. Specifically, the State Board is
2 responsible for overseeing the access to the ballot for all
3 statewide offices, President, United States Senate,
4 Governor, Attorney General and Comptroller --

5 MS. CALCATERRA: You have five minutes left.

6 MR. VALENTINE: Thank you -- as well as other State
7 and federal offices which cross county lines; Congress,
8 Senate, Assembly, justice of the supreme court. The State
9 Board also deals with the filing location for a number of
10 political party positions; State committee members,
11 delegates, judicial conventions, delegates to presidential
12 conventions. With an increasingly national focus, the
13 federal government continues to create or enhance electoral
14 related requirements, so there's been a number of federal
15 programs which have been put on the State Board, including
16 the National Voter Registration Act, the NVRA, the Help
17 America Vote Act, HAVA, and the Military and Overseas Voter
18 Empowerment Act (MOVE). The NVRA, commonly known as the
19 Motive Voter Law, was a groundbreaking act to establish an
20 overseer program to have State agencies provide broad
21 opportunities for persons to register to vote. The Help
22 America Vote Act of 2002 required significant changes to the
23 way New Yorkers cast our ballots and is impacting each and
24 every aspect of election administration.

25 The scope of the HAVA agenda is tremendous. The

1 certification and acquisition of acceptance testing for
2 voting equipment with optical scan systems culminated in the
3 replacement of mechanical lever voting, and now we shift to
4 a monitoring in support of over 7,000 pieces of voting
5 equipment. While HAVA provided initial significant federal
6 dollars for this, you know, the new programs will need to
7 continue as the federal funds are depleted with
8 responsibilities belonging to the State Board must be funded
9 with State monies. The Military and Overseas Voter
10 Empowerment Act, passed in 2009, requires military and
11 overseas voters to have their ballots transmitted to them no
12 later than 45 days prior to an election for federal office,
13 and those ballots must be accessible through an electronic
14 system. Working with the Department of Defense's Federal
15 Voter Assistance Program, the State Board developed a
16 program for electronic ballot delivery.

17 MS. CALCATERRA: Mr. Valentine, your team has three
18 minutes left. Thank you.

19 MR. VALENTINE: Thank you. The electronic ballot
20 delivery system, which has been successful and serves New
21 York's military and overseas voters. Since then, the State
22 Board has moved forward with this system, working to
23 integrate the best practices and improve the functioning of
24 the MOVE system. However, again, the ongoing cost, while
25 originally paid for out of federal dollars, will continual

1 to be borne by the State and will require significant
2 resources. And as an outgrowth of HAVA was the, what we
3 call, the Nice Voter, the statewide voter registration
4 database, created in 2007, which is the single voter
5 registration list. Again, like all aging technology
6 infrastructure, Nice Voter is faced with critical hardware
7 and software obsolescence in the near future. The
8 components will be seven years old in 2014 and are
9 approaching or in some instances have reached end of life.

10 Now, we have done a refresh project that will take
11 approximately two years and \$4.5 million to complete, and we
12 have been trying to work with our office's information and
13 technology services and the division of budget about our
14 needs. And we have also added two recent programs for data
15 collection that came out of the legislation; full site
16 accessibility surveys and election night reporting. We are
17 responsible for collecting surveys and having them posted
18 for all poll sites, over 7,000 in the State, so that people
19 can see which ones are accessible and what their processes
20 are. And also recently, in 2013, a new law allowed results
21 to be posted on the county board website, which also need to
22 be sent to State Board for election results. We need to
23 move forward, but again, resources will still need to be
24 dedicated to make these a success. Now, the New York State
25 Board has worked diligently to embrace each of the new

1 programs it has faced and it's recognized in the national
2 leader in voting system certification arena and enhancing
3 the participation of eligible voters in the elected
4 franchise. The Board remains committed to providing
5 transparent and accessible and accurate elections. And now
6 I will turn it over to Mr. Brehm.

7 MS. CALCATERRA: We are actually at the nine minute
8 mark. It was a joint 10 minute statement, so you have got
9 one minute left. Thank you.

10 MR. BREHM: Thank you. I will abbreviate what I
11 was going to say then and save time for questions.
12 Generally I think it's a misnomer that the State Board is
13 divided when it comes to campaign finance enforcement
14 matters. During the period of time that this Commission's
15 been looking at, the Board has not been divided once on one
16 of the enforcement matters. Where we have the resources and
17 the -- to put in programs with regard to audits, etcetera,
18 those programs have been cohesively working. Where we have
19 problems are the underfunded. I think we have put in our
20 written testimony, and specifically we have had an 800
21 percent increase in the responsibilities since local filers
22 were required to file at the State Board of Election and a
23 30 percent reduction in staff. That has just been a very
24 difficult model. And if I can just say, 30 seconds, and I
25 will really summarize, is we really look at the Campaign

1 Finance Board in the City of New York as a model because
2 it's come out in a number of hearings. And if you compare
3 the key tasks that it does with regard to its auditing and
4 review of reports that are filed with it, they have a staff
5 ratio to case ratio of almost 207 -- we are below them 274
6 percent. That is a -- 274 times. It's just a real
7 demonstration of the lack of resources to get into the meat
8 of the issues, and we have placed, as the highest priority,
9 getting the reports filed. And because of the lack of
10 resources, we don't have the ability to get to the next
11 step. And that's paraphrasing.

12 MS. CALCATERRA: Thank you, Mr. Brehm.
13 Constructive questioning with Commissioner Zimroth.

14 MR. ZIMROTH: Good afternoon, everybody. Can you
15 hear me? First, thanks very much for coming. I wanted to
16 pick up with what both Mr. Valentine and Mr. Brehm said
17 about the bipartisan nature of the Board and just to sort of
18 put the structure in -- I mean, I think people up here know
19 it pretty well and you know it pretty well, but other people
20 might not. I would like to unpack that a little bit. The
21 Election Law requires that there be four commissioners,
22 correct?

23 MR. BREHM: Correct.

24 MR. ZIMROTH: Two chosen by the Democrats and two
25 chosen by the Republicans, correct? I see Mr. Brehm say

1 yes, right?

2 MR. BREHM: Yes.

3 MR. ZIMROTH: If one of you disagrees, then you can
4 speak up. And that is required by statute?

5 MR. BREHM: Correct.

6 MR. ZIMROTH: And the statute of the Election Law
7 also requires, I believe, that the executive directors also
8 be split by party, correct?

9 MR. BREHM: That's correct.

10 MR. ZIMROTH: One Democratic appointee, that's you,
11 Mr. Brehm, correct?

12 MR. BREHM: Correct.

13 MR. ZIMROTH: And one Republican appointee, that's
14 you, Mr. Valentine, correct?

15 MR. VALENTINE: Yes.

16 MR. ZIMROTH: Now, if you look at the chart behind
17 tab or behind Exhibit-1, this is something that you supplied
18 to us, your organization chart.

19 MS. CALCATERRA: We haven't given them the books
20 yet? Binders please.

21 MR. ZIMROTH: Yeah, but just -- that is the first
22 page of that chart, and I think you actually presented the
23 same thing in your testimony --

24 MS. CALCATERRA: There are three binders.

25 MR. ZIMROTH: -- as well. And if you look after

1 the first page, which is that pretty chart that you just
2 flashed, Mr. Brehm -- do you have that yet?

3 MR. VALENTINE: No, we don't have the book.

4 MR. ZIMROTH: All right. Let's wait for a second.
5 If you look behind -- it's Exhibit-1. I think that's -- I
6 know that's a document you supplied to the Commission. And
7 if you look down this whole chart, starting with the second
8 page, they are not numbered, I think you will see that,
9 except for the competitive -- by the way, the word
10 competitive there, does that mean civil service?

11 MR. BREHM: Correct.

12 MR. ZIMROTH: It does? Correct, it does?

13 MR. BREHM: That's correct.

14 MR. ZIMROTH: So except for the civil service
15 positions, all of the other positions on this chart are
16 divided equally in half as well --

17 MR. BREHM: That's correct.

18 MR. ZIMROTH: -- Democrats and Republicans; is that
19 right?

20 MR. BREHM: Correct.

21 MR. ZIMROTH: Is there any statutory mandate for
22 that?

23 MR. BREHM: There is a Constitution and a statute
24 which generally provides for equal distribution at local
25 boards and for -- and that's the model that was used in 1974

1 when they created the State Board. The positions that are
2 politically appointed are equally divided.

3 MR. ZIMROTH: Well, I couldn't find it in the
4 Election Law. Maybe you can point that to me. I am not
5 talking about the county boards of elections. I am talking
6 about the State Board of Elections. Is there any statutory
7 mandate to that?

8 MR. BREHM: Structurally that's the way -- it's
9 been as a bipartisan agency, other than the four
10 commissioners and the other positions. But all of the
11 positions that are in the exempt class are equally divided.

12 MR. ZIMROTH: And that's a matter of practice?

13 MR. BREHM: Yes.

14 MR. ZIMROTH: Was that explained to you when you
15 became, Mr. Brehm, when you became a Co-Executive Director?

16 MR. BREHM: Yes.

17 MR. ZIMROTH: Who explained that to you?

18 MR. BREHM: Well, I started with the agency before
19 Co-Executive, and from that position on, it was an equally
20 divided position. So the staff at the time when I started
21 in 2006 -- but I had been a County Commissioner since 1991,
22 and that has been the explanation that came from when I was
23 a County Commissioner starting in 1991.

24 MR. ZIMROTH: Mr. Valentine, I see you shaking your
25 head. Yes, you agree with that?

1 MR. VALENTINE: Yeah. Our understanding is that
2 since the agency was created in 1974 -- since the agency was
3 created in 1974, they would have a bipartisan structure.
4 And as the positions were approved, and you saw in the chart
5 that they're divided between, as they're classified by the
6 Department of Civil Service, either exempt from civil
7 service requirements, often referred to as management
8 confidential, or were just exempt, and then competitive.

9 MR. ZIMROTH: I'm sorry. I miss that last phrase.

10 MR. VALENTINE: Or the civil service are actually
11 referred to as competitive class jobs. That's been the
12 structure of the agency since that time.

13 MR. ZIMROTH: So when you were appointed, each of
14 you, Mr. Brehm and Mr. Valentine -- start with Mr. Brehm.
15 Who is it that authorized your hire as Executive Director?

16 MR. BREHM: My appointment was made by the two
17 Democratic commissioners.

18 MR. ZIMROTH: Do you know whether there was anybody
19 outside the Commission who approved your appointment?

20 MR. BREHM: Approved? Not that I know of. It
21 required the vote of the two Democratic commissioners for my
22 appointment per the statute.

23 MR. ZIMROTH: You don't know whether anybody
24 outside the Commission had any input in your appointment?

25 MR. BREHM: I'm sure there were conversations at

1 the time. I can't say who spoke to the commissioners to
2 give them advice or not.

3 MR. ZIMROTH: You have no idea whether anyone
4 outside of the Commission had any input?

5 MR. BREHM: I can't speak for the two
6 commissioners. I can only speak for the time I got the vote
7 and -- my original appointment or my appointment as
8 Co-Executive Director? So --

9 MR. ZIMROTH: Well, let's start with Co-Executive
10 Director.

11 MR. BREHM: My position coming to the Board I
12 believe required the vote of all four commissioners. As
13 Co-Executive Director it only required the vote of the two
14 Democratic commissioners.

15 MR. ZIMROTH: So as you sit here now, you have no
16 understanding, recollection or knowledge that anybody
17 outside of the Commission had any input in your being
18 chosen --

19 MR. BREHM: I don't know that they did or didn't.
20 I can't speak to the specific so --

21 MR. ZIMROTH: I ask the same question of you, Mr.
22 Valentine.

23 MR. VALENTINE: I would agree. I am nodding along
24 here with Mr. Brehm --

25 MR. ZIMROTH: I can't hear you. I apologize.

1 MR. VALENTINE: I am nodding along here because I
2 agree with Mr. Brehm on this point. I don't know or don't
3 know or don't know. That's not --

4 MR. ZIMROTH: Okay. So now let's focus us on the
5 positions below the executive director. Who within the
6 Board of Elections approves the hiring of those people? I
7 am not talking about the competitive. I am talking about
8 the exempt.

9 MR. BREHM: The commissioners vote on the deputies
10 and the unit heads and either Todd or I, representing the
11 respective side, would recommend the appointed positions
12 below deputy or unit head.

13 MR. ZIMROTH: And I will ask you the same question
14 I asked you earlier --

15 MR. BREHM: The proper word is appoint.

16 MR. ZIMROTH: Excuse me?

17 MR. BREHM: The proper word is appoint. I or Todd
18 would appoint those individuals that are not a unit or a
19 deputy unit head.

20 MR. ZIMROTH: So for the positions below your
21 level, the ones that you appoint, does anybody outside the
22 Board of Elections have any role in their appointment?

23 MR. BREHM: I'm trying to think in my period of
24 time since 2009, and I don't believe I had an opportunity to
25 appoint one, but that's going from memory. But I might be

1 wrong on that. I wish I had that opportunity and I could
2 answer that a little differently.

3 MR. ZIMROTH: Then you could answer the question.
4 So if you have not appointed anybody then --

5 MR. BREHM: I'm going through my mind as to who we
6 did since that period of time and I -- I don't -- I will
7 look, and certainly if one comes to mind, I will clarify
8 that for you. But I really think in my period of time I
9 have not had that -- I have had a chance to work with -- to
10 get recommendations for other people.

11 MR. ZIMROTH: For?

12 MR. BREHM: For a deputy position.

13 MR. ZIMROTH: You have made recommendations for
14 other people?

15 MR. BREHM: Well, we have worked at the time for
16 the commissioners to vote on a deputy. It would have
17 required all four.

18 MR. ZIMROTH: So the question I have is are you
19 aware of anybody outside the Commission, outside of the
20 Board of Elections having any role?

21 MR. BREHM: You know, at the time certainly there's
22 input from a number of people as to if there's any
23 interested or qualified individuals.

24 MR. ZIMROTH: Who?

25 MR. BREHM: You know, there's -- certainly if jobs

1 are open, we hear from a number of people, from counties,
2 from legislature, from government, from outside of
3 government, you know, if there's a retirement or, you know,
4 a vacancy.

5 MR. ZIMROTH: And in your role, have you spoken to
6 anybody in the Democratic party structure?

7 MR. BREHM: Certainly.

8 MR. ZIMROTH: To make a recommendation?

9 MR. BREHM: Well, I let people know there was an
10 opening in case -- usually if there's an opening, it's known
11 to people, and if there are qualified people out there, that
12 they could send us resumes.

13 MR. ZIMROTH: And so you would tell someone in the
14 Democratic party that there's an opening?

15 MR. BREHM: I mean, we tell a lot of people that
16 there's an opening if we are looking for, you know, people.
17 The people that work in our line of business, we tell them
18 there's an opening.

19 MR. VALENTINE: Yeah. And I'm going to dovetail
20 with that. I mean, in Albany, that's going to be, as Bob
21 said, a lot of people in the county boards, people in the
22 legislatures and certainly people in any level of
23 government. It's Albany.

24 MR. ZIMROTH: Do you advertise when there is an
25 opening?

1 MR. VALENTINE: For the -- no. No, not generally.
2 Not as an agency.

3 MR. ZIMROTH: Not ever?

4 MR. VALENTINE: For the competitive class we do.

5 MR. ZIMROTH: I am not talking about the
6 competitive class. I am talking about the noncompetitive
7 class. Have you ever advertised?

8 MR. VALENTINE: No, but we've never had any problem
9 finding recommendations to fill positions.

10 MR. ZIMROTH: So word of mouth.

11 MR. VALENTINE: Yes. This is part of the questions
12 we were asked on our interview, and it's a small agency.
13 So, you know, personalities make a big difference in, in
14 dovetailing with the other members of the staff. So, you
15 know, getting to know people personally becomes a critical
16 factor in a small agency.

17 MR. ZIMROTH: Mr. Brehm, I think that when you were
18 interviewed by our staff, were you not, and I reviewed that
19 interview with them, and what they told me, and you can
20 disagree with this if it's different from your recollection,
21 is that for the Democratic hires, talking about the
22 noncompetitive positions below executive director, there is
23 no advertising and that the hires come from within the
24 Democratic party.

25 MR. BREHM: Not within the Democratic party.

1 Certainly -- but they are Democratic appointees, because
2 they are appointed positions to equally represent the
3 agency. But they don't come from any one source. They are
4 people that come from a number of sources --

5 MR. ZIMROTH: Within the Democratic party?

6 MR. BREHM: Well, as appointees to equally
7 represent, they are eventually -- I mean, they are Democrats,
8 but they come from a number of sources, not necessarily from
9 any one source. But they just happen to, you know, to be
10 Democrats.

11 MR. ZIMROTH: And is the same true of the
12 Republican appointees, Mr. Valentine?

13 MR. VALENTINE: Yeah. I mean, you know, that would
14 be an accurate statement, and they're appointed based upon
15 the custom and practice, on the Republican side, and they're
16 not necessarily coming down from a party structure or
17 anything like that saying you have to hire this person.

18 MR. ZIMROTH: So from where I sit, looking at this
19 chart, it looks like the Board below the level of
20 commissioners is sort of constituted with two teams, the
21 Republican team and the Democratic team. Is that an
22 accurate statement, Mr. Valentine? Is that an accurate
23 observation that I am making?

24 MR. VALENTINE: It's accurate and that's the way we
25 describe each other, but it's not accurate as far as the

1 workings of the Board.

2 MR. ZIMROTH: So are staff -- at least when I look
3 through the e-mails that you sent, I saw a pattern in which
4 you, Mr. Valentine, would often send e-mails to Kim Galvin.
5 She's the Republican agency counsel, right?

6 MR. VALENTINE: Yes. Well, she's a special counsel
7 for the agency.

8 MR. ZIMROTH: Special counsel for the agency. And
9 on those, you did not copy Mr. Paul Collins, who is the
10 Democratic deputy agency counsel. Is that fair? Does that
11 happen?

12 MR. VALENTINE: Yeah. She's the counsel for the
13 agency, so I would often send things to her, yes.

14 MR. ZIMROTH: But not copy Mr. Collins.

15 MR. VALENTINE: Not always -- electronically, no.

16 MR. ZIMROTH: Do you have meetings with the
17 Democratic team and the Republican team? I will stick with
18 you for the moment. Do you have meetings with the
19 Republican team that exclude the Democratic team, Mr.
20 Valentine?

21 MR. VALENTINE: Not necessarily excluded, but often
22 I will meet with our senior staff on the Republican side,
23 but on the other hand, we do -- it's a small agency, so the
24 meetings are not necessarily about business. It's more
25 about stress relief, talking. Sometimes things come up, but

1 it's not -- you know, the business is conducted in a
2 bipartisan manner.

3 MR. ZIMROTH: So can you take a look at Exhibit-5?
4 And this is an e-mail from you to several others. Do you
5 see that, Mr. Valentine?

6 MR. VALENTINE: Yeah, I think I might have -- yes.

7 MR. ZIMROTH: And all the recipients, Kimberly
8 Galvin, Joseph Burns, William McCann, etcetera -- I am not
9 going to read them all here -- they are all part of the
10 Republican team?

11 MR. VALENTINE: Yes. And you can see somebody had
12 a problem with a dog to the vet. That would probably --
13 well, based on the e-mail, that would have been my dog.

14 MR. ZIMROTH: So you had to notify the whole
15 Republican team that that's why you were cancelling the
16 meeting?

17 MR. VALENTINE: Well, often we will do movie
18 reviews, if I'm not there. Yeah. Unfortunately, not to
19 bring you down, but that dog has since passed away.

20 MR. ZIMROTH: What do you mean you do movie
21 reviews?

22 MR. VALENTINE: Well, it's an opportunity to talk
23 in just a friendly manner. Sometimes, you know -- but it's
24 not necessarily about the business of the agency. It's just
25 an opportunity to talk among people that are on, you know,

1 that side. That's all.

2 MR. ZIMROTH: And these Republican team meetings,
3 you don't ever talk business?

4 MR. VALENTINE: I can't say that we don't ever talk
5 business, but the purpose is to build a morale issue, and a
6 lot of times it's just personal issues and venting. But --

7 MR. ZIMROTH: How often would you talk business at
8 these Republican team meetings?

9 MR. VALENTINE: Oh, it's hard to say. You know,
10 generally we meet in the staff level on a weekly basis,
11 biweekly basis, and issues like reminder about travel forms
12 have to be done differently, you know --

13 MR. ZIMROTH: Is there a Republican travel form and
14 a Democratic travel form?

15 MR. VALENTINE: No. No. Bob and I talk about the
16 travel forms. It may be a chance, in a small group, to deal
17 with an explanation for some of the administrative
18 properties that we deal with on a day-to-day basis.

19 MR. ZIMROTH: So could you take a look at Exhibit
20 number six, Mr. Valentine? Now, if you start from the
21 bottom of that e-mail chain -- and it's at 3:37 p.m., Todd
22 Valentine. Do you see that?

23 MR. VALENTINE: Yes.

24 MR. ZIMROTH: 3:37 on September 23rd, 2011. Do you
25 see that?

1 MR. VALENTINE: Yes.

2 MR. ZIMROTH: I'm going to read it. "Okay, but I
3 just agreed to the revised survey, the one with Tom's chart.
4 Don't worry, I took your name off it. We are having the
5 conference call on Monday at 11." First of all, who is Tom
6 in that e-mail?

7 MR. VALENTINE: I don't -- probably Tom Connolly,
8 but I don't know that.

9 MR. ZIMROTH: Okay. And then Ms. Galvin responds
10 to you at 5:01 p.m. Do you see that?

11 MR. VALENTINE: Yes, I do.

12 MR. ZIMROTH: I will read it to you. "I think it
13 is bullshit that they took over this part of my case without
14 my input and waited until I told them I was leaving before
15 they even bothered to attempt to share anything with me. In
16 addition, their survey does not account for certain things
17 that are necessary to explain the numbers. Why would we
18 bother to sit in a room for 90 minutes and develop questions
19 and a process only to have them highjack it and not put up a
20 stink? As far as I am concerned, if I don't have the
21 information by Wednesday, I don't care. It doesn't matter
22 anyway. This is very frustrating place." So let me ask you
23 a few questions about that. What's your understanding about
24 who the "them" was in that sentence?

25 MR. VALENTINE: You know, it's a little hard to

1 tell from there, because based upon what I'm reading in this
2 survey, it looks like we were trying to develop a survey
3 jointly and we were trying to come to a bipartisan consensus
4 with both -- and working with the -- if I read up further,
5 if that's Tom Connolly, we were working with the Public
6 Information Office to develop a survey --

7 MR. ZIMROTH: You were working with whom?

8 MR. VALENTINE: Our public -- deputy public
9 information officer. Developing a survey for -- it's a
10 little hard out of context, but it looks like the court case
11 relating to what we often refer to as the under-vote and
12 over-vote case. There were two different cases. And we
13 were trying to survey the counties about it.

14 MR. ZIMROTH: So let me read you your response and
15 see if this refreshes your recollection a little bit.

16 MR. VALENTINE: Sure.

17 MR. ZIMROTH: This is you to Ms. Galvin on the same
18 date, 21:10 GMT, I guess that means Greenwich Mean Time, but
19 anyway. "It can be very frustrating, but on the other hand,
20 I don't care what the numbers from 2010 are. If DOJ wants
21 the information, let them send the survey out and see how
22 well they do. If this falls flat again, which it probably
23 will then it's Connolly's fault." That's the Mr. Connolly
24 you just mentioned?

25 MR. VALENTINE: It would appear to be, yes.

1 MR. ZIMROTH: And he is a Democrat appointee?

2 MR. VALENTINE: Yes.

3 MR. ZIMROTH: "I found it's best not to ask the
4 Dem's -- I guess that's the Democratic team, right?

5 MR. VALENTINE: Yes.

6 MR. ZIMROTH: "I found it's best not to ask the
7 Dem's to write anything but rather give it to them as take
8 it or leave it. Avoid the negotiating because none of them
9 here has any authority to do anything, and that includes
10 Kellner." Kellner is one of the two Democratic
11 commissioners, correct?

12 MR. VALENTINE: Yes.

13 MR. ZIMROTH: Is that right?

14 MR. VALENTINE: Yes.

15 MR. ZIMROTH: "I let them write things I don't care
16 about, like the FVAP waiver -- what's the FVAP waiver?

17 MR. VALENTINE: Federal Voting Assistance Program.

18 MR. ZIMROTH: -- "and the HAVA plan." What's that?

19 MR. VALENTINE: Help America Vote Act.

20 MR. ZIMROTH: So why did you think it was best to
21 give the Dem's a take it or leave it proposition?

22 MR. VALENTINE: This is a --

23 MR. ZIMROTH: And to avoid negotiating with the
24 Dem's?

25 MR. VALENTINE: Well, we're building consensus. So

1 what you have to do is work within the structure of the
2 agency and the personalities that you have. So how you
3 approach them -- I mean, this is a frank e-mail exchange
4 between Ms. Galvin and myself, as you can see. But at the
5 end of the day, that survey went out, the responses came
6 back, and we responded to the Department of Justice. They
7 received the survey information and we moved forward with
8 that.

9 MR. ZIMROTH: And one of the reasons you give for
10 not negotiating with anyone on the Democratic team is
11 because "none of them here has any authority to do anything
12 and that includes Kellner." So who does have the authority
13 to make decisions for the Democratic team?

14 MR. VALENTINE: It's -- the full Board does. It's
15 the Board. It's the agency doing it. No single person has
16 that authority. Working together we come to projects.

17 MR. ZIMROTH: Is this e-mail an example of what you
18 were talking about earlier, about collegial atmosphere in
19 the Board?

20 MR. VALENTINE: Not relating to the team itself.
21 This is a frank exchange between me and the counsel for the
22 agency.

23 MR. ZIMROTH: So let me ask, just in your view -- I
24 think I know what your answer is going to be, but I think I
25 ought to ask it anyway. In your view, does the splitting of

1 the agency into these two teams have any effect on the
2 agency's ability to function efficiently?

3 MR. VALENTINE: I think it provides the check and
4 balance, as that structure was created and modeled, again,
5 after the county boards of elections, which have been in
6 existence since the beginning of the 20th century --

7 MR. ZIMROTH: I appreciate that, but now could you
8 answer the question I asked, which is, does the splitting,
9 in your view, in your expert opinion, into two separate
10 teams have any effect on the agency's ability to function
11 efficiently?

12 MR. VALENTINE: I think it provides for strong
13 advocacy that -- you know, efficiency is one way to examine
14 an agency, but, you know, it's also about, at the end of the
15 day, were the elections conducted properly --

16 MR. ZIMROTH: Is that a yes or no answer to my
17 question?

18 MR. VALENTINE: I don't know that there is a yes or
19 no answer to that --

20 MR. ZIMROTH: So I will ask Mr. Brehm. Do you mind
21 if I ask Mr. Brehm?

22 MR. VALENTINE: No. Go ahead.

23 MR. ZIMROTH: In your view, does the splitting of
24 the agency into the Republican team and Democratic team have
25 any effect on the agency's ability to function efficiently?

1 MR. BREHM: I think when I first started in 1991 as
2 a County Commissioner, that first year it took a lot of
3 learning on my behalf because I didn't come from an
4 environment where that was an issue, and that first year was
5 very difficult, I have to say. We see that when we work
6 with all kinds of county commissioners. But once we got
7 through that initial learning structure that there was a
8 conversation that needed to be had, sometimes it's more
9 difficult, sometimes it's ideological, sometimes it's
10 philosophical. But after my initial year in 1991, I think
11 it worked -- I came to understand it better and it worked
12 better. Now, certainly how did I have words from time to
13 time are usually more focused on policy, not necessarily to
14 this level in this e-mail, certainly. So in the end, I
15 think it works, surprisingly, and I know a lot of people
16 don't understand that. My mother, to be one, speaks the
17 same way that you do on this subject. She's asked me my
18 whole life why, and just as recently as this weekend when I
19 told her I was coming here to speak to you nice people.

20 MR. ZIMROTH: She said why?

21 MR. BREHM: She said why did you ever do this?
22 Yes, I will admit that she said that, and I hope she's
23 watching at home.

24 MR. ZIMROTH: Well, let me say, do you think that
25 it has any effect on the agency's ability and willingness to

1 move quickly, if speed is required?

2 MR. BREHM: There are some items that I would think
3 would take us longer to accomplish, and they surprisingly
4 get done faster than I anticipated. There are some that I
5 think should just go right through that surprisingly take a
6 lot longer than I personally would like. So there's no
7 rhyme or reason. But certainly there is a vetting of the
8 issue and a discussion.

9 MR. ZIMROTH: So let me just -- one last sort of
10 issue that I wanted to raise with you. I notice on page
11 nine of your report, I mean of your written testimony, you
12 are here talking about that in fiscal year 2007 and 2008 the
13 budget authorized 21 additional exempt class positions --

14 MR. BREHM: Correct.

15 MR. ZIMROTH: -- right? And so we looked on the
16 website, the government website and saw that the budget for
17 that fiscal year was passed on April 1, 2007. Does that
18 sound about right to you?

19 MR. BREHM: For the budget. This was a budget
20 amendment, so it was a couple of days later. This was an
21 amendment to the budget. I think it was a different chapter
22 number than the original number. But it was close to that
23 date. But it wasn't exactly the same date.

24 MR. ZIMROTH: And were you, either one of you, Mr.
25 Valentine, Mr. Brehm, aware that it was to be included in

1 the budget?

2 MR. BREHM: I think there were discussions at the
3 time. We're never -- it was an amendment to the budget so
4 we're never sure until we see an amendment. You know, it
5 was a negotiated --

6 MR. ZIMROTH: Would you be talking to various
7 people in --

8 MR. BREHM: I wasn't the Co-Executive Director at
9 the time. I was the Deputy PIO --

10 MR. ZIMROTH: Mr. Valentine, you were Co-Executive
11 Director at the time, were you not?

12 MR. VALENTINE: No, I was not.

13 MR. ZIMROTH: So you may not be aware of that. But
14 are you aware of any discussion about those increased --
15 that is those 21 additions?

16 MR. BREHM: Certainly. I was going to address that
17 but our time ran short. From the period of time that the
18 amendment was adopted, the agency began to create
19 classifications of titles to fill those positions. We did
20 them in two phases. One was two of the assisting counsels,
21 the assistants to the group, and I forget the exact number,
22 they are part of our exhibit and our attachment, and
23 those -- once we created the job descriptions, they go to
24 civil service for classifications, their duties and
25 responsibilities. I think it took civil service about three

1 months to get us an answer, and then we started to fill
2 those positions. Kim Galvin was one of the original because
3 she started as a counsel in that agency. And then the
4 second phase were the number of auditors and support staff
5 to the unit, and that was another 15 people. That went to
6 the Board in November of 2007, with that group of
7 classifications, it was the plan, and that went to civil
8 service, it took them about another three months for them to
9 approve the classifications so we could start the hiring.
10 We didn't hire 13 people --

11 MR. ZIMROTH: Why did it take until November to --

12 MR. BREHM: I would like to say this was the only
13 thing we were doing, but if you look at the parallel track,
14 we were in a number of litigations with the federal
15 government for the implementation of the Help America Vote
16 Act, roll out the new voting equipment, so we -- and the
17 staff was busy taking care of the intake of new people. So
18 it did take a period of time to get that done. It wasn't
19 the only issue we were doing.

20 MR. ZIMROTH: It took from April, when you had the
21 approval sometime in April until November to get the
22 approval?

23 MR. BREHM: Well, the first phase was underway
24 already, and I think from the material in the list that I
25 know we had provided when we spoke to staff, when -- and we

1 provided specifically, when did it go to civil service and
2 when did we get civil service and when did we start filling
3 those positions. So those initial six went very quickly.
4 To identify that initial six is what their duties and
5 responsibilities. And once we handed that off to civil
6 service, they worked on the additional 15. And that was the
7 timeline. I wasn't involved in that level at that time, but
8 that was the timeline, as far as when it went. And we
9 started to fill those positions --

10 MR. ZIMROTH: And the Governor, the then Governor
11 Paterson announced the hiring freeze, I believe, at the end
12 of July of 2008 --

13 MR. BREHM: Correct.

14 MR. ZIMROTH: -- right? So from April of 2007 when
15 the budget was approved to November of, I'm sorry, to July,
16 end of July of 2008, that's I think 16 months, for whatever
17 reason the Board was not able to hire the number of staff
18 that had been authorized originally.

19 MR. BREHM: Not all of them. We hired 13 people in
20 that period of time. We offered a position to a 14th for
21 one of the counsels, but he went off to military service,
22 and by the time he came back, the freeze was in place. So
23 we would have had a 14.

24 MR. ZIMROTH: So I don't want to go through this
25 now, because it may be getting into too much detail, but I

1 would appreciate if you would undertake and get back to us
2 with some documentation for the hiring of the 13, because in
3 the documents that we have seen, we can only see that you
4 hired six. Now, you may have hired more, but I'm just
5 saying --

6 MR. BREHM: We can provide that again.

7 MR. ZIMROTH: -- that the documents that we have
8 seen, we have seen only six. So it would be appreciated if
9 you could send us the documentation on the other seven.

10 MR. BREHM: Certainly.

11 MR. ZIMROTH: Okay?

12 MS. RICE: So Mr. McCann, I would like to ask you
13 some questions, if you could, if you would, would you
14 describe how the enforcement unit is organized, and you can
15 refer to Exhibit-1. And you probably know off the top of
16 your head but --

17 MR. MCCANN: The enforcement unit at the New York
18 State Board of Elections and campaign finance is comprised
19 of four units. There is the enforcement unit, there is the
20 campaign finance intake and processing subunit, there is the
21 audit and investigations unit, and then there's the
22 educational outreach and training unit. So that makes up
23 the four.

24 MS. RICE: And that's a total of how many people?

25 MR. MCCANN: Presently we have 17 people.

1 MS. RICE: 17. So it looks to me as if the
2 substantive units within the campaign finance unit and the
3 enforcement unit are all the political appointees, correct?
4 So the audit department, education and outreach and
5 enforcement, those are all political appointees, correct?

6 MR. MCCANN: Correct. Originally the campaign
7 finance unit was only comprised of -- we only had civil
8 servants. When they created the 21 exempt class positions,
9 they were creating those political positions.

10 MS. RICE: Right. But so the substantive positions
11 are all political appointees, correct?

12 MR. MCCANN: Yes.

13 MS. RICE: And the others are the noncompetitive or
14 civil service?

15 MR. MCCANN: Correct.

16 MS. RICE: Right. So why don't you describe for us
17 the process by which complaints are received by the
18 enforcement unit.

19 MR. MCCANN: When -- well, when complaints come in
20 the mail, generally speaking, they are provided to the
21 secretary who will, you know, copy them, etcetera, and
22 provide them to the enforcement counsel for processing. And
23 when that occurs, they're placed on a log and --

24 MS. RICE: Hold on a second. So you only get them
25 by mail? How else do you get complaints?

1 MR. MCCANN: Well, they can come by e-mail, and
2 those might be forwarded, but that's generally the process
3 by which we get --

4 MS. RICE: Do you ever get referrals from other
5 agencies?

6 MR. MCCANN: Well, certainly. Certainly. But
7 that's what I mean by --

8 MS. RICE: Do you ever get anonymous referrals?

9 MR. MCCANN: Yes, we do.

10 MS. RICE: And they all go through this process of
11 going to the secretary and then going to enforcement
12 counsel?

13 MR. MCCANN: Right.

14 MS. RICE: And then when they get to the
15 enforcement unit, what happens there?

16 MR. MCCANN: Well, the enforcement counsel gets
17 them, they are reviewed, determined whether or not they are
18 placed on the complaint log. And then the enforcement
19 counsel will assign them, and then they go into the queue.

20 MS. RICE: Who makes that -- so who within the
21 enforcement unit makes the determination as to whether a
22 complaint is actually going to be logged -- are all of them
23 logged in?

24 MR. MCCANN: Well, if a complaint comes in, if it's
25 determined that it could be responded to via correspondence,

1 that it didn't rise to the level of Election Law violation
2 or if there's some other response that might take place, it
3 would not necessarily get logged in.

4 MS. RICE: So why don't you tell us, what do you
5 mean by that? Tell us what kind of complaints fall into
6 that category, that require just a letter.

7 MR. MCCANN: Well, if a complaint came in where it
8 was determined that the information had either been
9 addressed or if there was some response that didn't
10 necessarily make it a complaint or it was outside the
11 Election Law, that would be a determination made by the
12 enforcement counsel and then the correspondence would be
13 submitted.

14 MS. RICE: So that's you?

15 MR. MCCANN: No. I am the Deputy Enforcement
16 Counsel.

17 MS. RICE: Oh, that would be someone -- so that's
18 above you?

19 MR. MCCANN: Yes.

20 MS. RICE: And that would be, what's her name again?
21 Liz Hogan?

22 MR. MCCANN: Elizabeth Hogan, correct.

23 MS. RICE: And you work with her, right?

24 MR. MCCANN: Yup.

25 MS. RICE: And she could make that determination on

1 her own?

2 MR. MCCANN: Well, again, the complaints come in.
3 They would go to her for review. If it was determined that
4 the complaint rose to that level, that it can be addressed
5 in a correspondence, then yes, that would --

6 MS. RICE: Did she ever consult with you before
7 making that determination?

8 MR. MCCANN: I think it would be on a case by case
9 basis.

10 MS. RICE: Give me some cases that she would consult
11 with you and others that she wouldn't.

12 MR. MCCANN: I can't speak to that. I don't have a
13 recollection of specifics on that, but that's the general
14 process.

15 MS. RICE: Well, would she talk to you about ones
16 regarding your particular party or not?

17 MR. MCCANN: I don't -- we didn't have discussions
18 to that level. I don't know that there was a discussion
19 based upon party.

20 MS. RICE: Well, what kind of cases would she talk
21 to you about? Give me one example.

22 MR. MCCANN: Well, again, I think that generally
23 speaking what happens is when the complaint goes and it's
24 received and put on the complaint log, it would get
25 processed and would be assigned, and if it's assigned, you

1 know, then you would take a review of it as the case might
2 be. But I don't know that I can -- a specific one, you
3 know, over the years.

4 MS. RICE: You can't think of one?

5 MR. MCCANN: No.

6 MS. RICE: Okay. So what is the particular method
7 for logging complaints? I mean, is there an electronic log
8 that's maintained by the enforcement unit, a database that's
9 accessible by everyone within that unit?

10 MR. MCCANN: Well, it is maintained by the
11 enforcement unit. It's a log of the complaints.

12 MS. RICE: Is it a written log, is there a more
13 formal process for logging complaints in or is it --

14 MR. MCCANN: It's a log. It's a table that is
15 maintained by the secretary of the unit.

16 MS. RICE: Is that a written log?

17 MR. MCCANN: Well, no. It's typed.

18 MS. RICE: And it's accessible by everyone, everyone
19 can see when a complaint comes in and its history throughout
20 the unit?

21 MR. MCCANN: Well, I don't -- I don't know who
22 everyone would be, but it would certainly be the counsels.

23 MS. RICE: Well, people in the enforcement unit that
24 maybe are doing audits or say the executive directors, if
25 they wanted to know what was going on with a particular

1 complaint, do they have access to that?

2 MR. MCCANN: I do not know if they have access to
3 that.

4 MS. RICE: So you are saying that you don't know if
5 executive directors could access the log system at all?

6 MR. MCCANN: Well, again - well, each unit would
7 maintain its own, you know, drive, so to speak, its own log
8 and, you know, the complaint log, etcetera, would be
9 provided to the commissioners at the Board meeting or prior
10 to the Board meeting as the case might be.

11 MS. RICE: So once it's received and logged in, can
12 you tell me again how it's assigned to an enforcement,
13 person within the enforcement unit?

14 MR. MCCANN: Well, the counsel would assign that to
15 either herself --

16 MS. RICE: Right. But can you explain the process?

17 MR. MCCANN: Well, she would inform the secretary to
18 update the log as to who would be assigned the case, and
19 then it would go to either herself or myself.

20 MS. RICE: And how is that -- so what cases would go
21 to you and which ones would go to her?

22 MR. MCCANN: It's however she assigned it.

23 MS. RICE: So you have no other insight as to how
24 the assignments are made by Liz Hogan?

25 MR. MCCANN: Wekkm she is the enforcement counsel,

1 and the enforcement counsel makes the assignments of the
2 complaints.

3 MS. RICE: Does the enforcement counsel's political
4 affiliation have anything to do with the assignment of the
5 complaints, to the best of your knowledge?

6 MR. MCCANN: No.

7 MS. RICE: How can you say that with such certainty?
8 You just said you had no idea how the process was or how she
9 assigns them. How can you say that political affiliation
10 had nothing to do with that?

11 MR. MCCANN: Well, my understanding of my
12 conversations with Ms. Hogan was is that she tried to do it
13 on an equitable basis and split them evenly.

14 MS. RICE: So how about telling us about that
15 conversation?

16 MR. MCCANN: Well, just in general conversation. I
17 mean --

18 MS. RICE: So that's a process. Explain that
19 process, if you could.

20 MR. MCCANN: Well, again, the complaints would come
21 in, she would review them, she would place them on the log,
22 and she would inform the secretary as to which attorney
23 would be assigned the complaint.

24 MS. RICE: But political affiliation had nothing to
25 do with that?

1 MR. MCCANN: As far as I know, no.

2 MS. RICE: Right. So how long does it generally
3 take for a complaint to be acknowledged? And tell us what
4 that means, to acknowledge a complaint.

5 MR. MCCANN: Well, a complaint would come in. If
6 it's put on the log, the complaint, the secretary would be
7 instructed to issue an acknowledgment letter saying that the
8 Board received the complaint and it would be reviewed.

9 MS. RICE: So the secretary is responsible for
10 sending that pretty much pro forma letter out to whoever the
11 complaint came from, correct?

12 MR. MCCANN: Correct.

13 MS. RICE: And how long did that take?

14 MR. MCCANN: It depends on when it comes from the
15 counsel. So I, you know -- again, it -- presumably, once
16 the complaint came in and had been processed onto the log,
17 within a day or two.

18 MS. RICE: Within a day or two. But I am sure
19 you're aware that there are some cases that took over a
20 month to acknowledge, correct?

21 MR. MCCANN: That would not surprise me, no.

22 MS. RICE: Why wouldn't that surprise you?

23 MR. MCCANN: Because, again, the enforcement aspect
24 of the Board of Elections is a part of what we do. But
25 again, when you look at the resources of the Board, when

1 those complaints come in, they have to be reviewed by
2 counsel. You know, that's a part of the worker day of the
3 agency so --

4 MS. RICE: Mr. McCann, we are talking about sending
5 a form letter out saying we received your complaint and we
6 will be back in touch.

7 MR. MCCANN: Correct.

8 MS. RICE: Explain to me why that would take a long
9 period of time.

10 MR. MCCANN: I guess it would depend upon how long
11 the initial review took.

12 MS. RICE: But according to you, there is no initial
13 review. It's just a log-in, that the secretary, once she
14 logged in a complaint, she would send out that pro forma
15 letter, correct, saying we haven't doing anything with this,
16 we have just received it and we want you to know that.
17 Right?

18 MR. MCCANN: That would be based upon once she
19 received it from the enforcement counsel.

20 MS. RICE: So there would be no reason for that to
21 take longer than a couple of days, right?

22 MR. MCCANN: It would depend upon when the complaint
23 was reviewed by the enforcement counsel.

24 MS. RICE: But you just said there was really no
25 review up to that point, it was logged in and sending a pro

1 forma letter out. There is no investigation that's done in
2 that time period, is there?

3 MR. MCCANN: Well, the enforcement counsel could
4 review the matter, and again, the complaint comes in, it
5 would go into a folder for review. And pending review --
6 after that initial review, then the acknowledgment would be
7 made.

8 MS. RICE: Okay. Mr. Brehm, what is a preliminary
9 determination?

10 MR. BREHM: If there is a preliminary determination
11 as to whether or not to open an investigation, that usually
12 means there is no decision yet, that -- you know, so it's
13 preliminary. There is no decision that is actually made,
14 other than there is an agreement we should take it to the
15 next step.

16 MS. RICE: And who makes that preliminary decision?

17 MR. BREHM: All the commissioners make that
18 determination.

19 MS. RICE: So they are brought to you by whom?

20 MR. BREHM: The cases are brought by the
21 enforcement counsel to the commissioners at a Board meeting,
22 and it would be voted on at a Board meeting, and that would
23 require a majority vote.

24 MS. RICE: Okay. Now, can you explain what system,
25 if any, was in place for the enforcement counsel to alert

1 you or any other commissioner of the maturity of a case?

2 MR. BREHM: The log that is kept is a typed
3 document. It's not -- it's not a case management electronic
4 system. I think that maybe that, that may be your inquiry,
5 if I had to think of that from perhaps your line of work
6 versus our line of work, but it's a log, it's a typed
7 document. It's something that is a legacy item that I think
8 is even in Word Perfect. So that is the log that it goes
9 into, and as it progresses -- as a case progresses from one
10 step to another, that -- and a decision is made or an event
11 is, you know, made, then the log would be updated with that
12 information. But it's printed out. It's not a computer
13 thing that I could look to see, you know, a specific work
14 status of completion.

15 MS. RICE: But the enforcement counsel has to go to
16 the directors, to you guys, the four of you, to get approval
17 to make that preliminary determination, correct?

18 MR. BREHM: No. They make the referral to the
19 commissioners directly. They go on an agenda -- when we
20 make an agenda, we ask them, do you have items to go on the
21 agenda, but it's not an approval at our level as to whether
22 it does or doesn't make an agenda.

23 MS. RICE: Once you are informed by the enforcement
24 counsel of cases, what is the system by which you, as an
25 individual, can checkup on that? I mean, just out of

1 curiosity, say, I wonder what happened with that case, is it
2 getting old, has it fallen through the cracks?

3 MR. BREHM: Generally it's a conversation.
4 Generally, you know, we would look at the log or, more
5 importantly, talk about where are we, how are we making
6 progress. Unfortunately, the conversations usually get back
7 to how few people and how many, you know, forward the
8 enforcement counsel. They also have the other
9 responsibilities of the unit. If we were to get a
10 litigation, which we get quite a bit in that unit. So you
11 have to stop doing something to go do something else, so
12 very often, you know, there would be a conversation as to I
13 wish I could have more resources or something to help get
14 this done. But it's generally, you know, here are the items
15 we have for the agenda or what items or what are we doing in
16 order to get in that realm to have agenda items with regard
17 to cases.

18 MS. RICE: If a director or commissioner of the BOE
19 wanted to be updated on the status of a certain complaint,
20 how would they go about doing that?

21 MR. BREHM: Either speak directly to either Bill or
22 Liz or ask to see the file. The commissioners from time to
23 time will either call, if it's some question that they have,
24 where are we, you know, something that was discussed earlier
25 in a meeting. If it's something that they thought should

1 have been done by now, either they will e-mail, call, wait
2 until the next meeting, you know, send word that I would
3 like to discuss this at the next meeting. Something along
4 that line.

5 MS. RICE: So is it fair to say that at any given
6 time the executive directors would have no way of knowing
7 how many complaints were being vetted by the enforcement
8 counsel at any given time? Would that be fair to say?

9 MR. BREHM: Well, we can look at the log, and we
10 have looked at the log from time to time.

11 MS. RICE: But have you?

12 MR. BREHM: Yes.

13 MS. RICE: How often do you do that?

14 MR. BREHM: Again, generally leading up to each
15 Board meeting and it depends over time whether --

16 MS. RICE: How long before a Board meeting?

17 MR. BREHM: It depends on the season. We have had
18 them -- generally we try not to go longer than six weeks.
19 It depends on if there is a political calendar item that it
20 makes sense to wait two weeks in order to -- because we
21 actually have a decision they need to make with regard to
22 the political calendar, and that is something we can't
23 control so sometimes that impacts creating that calendar.

24 MS. RICE: Mr. McCann, so over the last say six
25 years, would it be fair to say that the Board of Elections

1 has had a backlog of complaints?

2 MR. MCCANN: Oh, certainly.

3 MS. RICE: And can you tell us, you know, you have
4 this backlog, what did you do about it, did you come up with
5 a plan to address it, or do you just accept the fact that
6 you are going to have a backlog?

7 MR. MCCANN: Well, the issue is is that -- and had
8 we been able to provide more extensive opening remarks --
9 one of the things we had hoped to address, as part and
10 parcel of what we do, the enforcement unit, and primarily
11 Ms. Hogan and myself as the supervisors of the unit, have a
12 whole myriad of things we do. And investigations, while
13 they're important, are one piece of what we do. And so the
14 issue is that certainly when you review the process of the
15 Board of Elections, could it be better? Most certainly.
16 But the commissioners were certainly aware that we had a
17 backlog of investigations. We have asked for additional
18 attorneys to assist us with that, and I think what's
19 important, because I think people say well, the Board of
20 Elections --

21 MS. RICE: I'm sorry, can I just stop you there?
22 Who did you ask for additional attorneys to help you with
23 that?

24 MR. MCCANN: It was the division of budget. We had
25 two attorney positions created. We actually had one filled

1 for a short time, and we have asked continually. But I
2 think what's critical and m one of the things that people
3 are going to see here today, which I think is unfair, is
4 that there is a painting of the Board of Elections, and in
5 particular what I do and what the enforcement unit does, I
6 think in an unfair light. And I think it's important for
7 this Commission and also for the public to understand to put
8 things in perspective that you might understand.

9 So right now at the New York State Board of Elections
10 we have -- well, myself. But let's assume under a normal
11 circumstance where we would have two attorneys supervising
12 these four subunits at a Board of Elections where myself,
13 Ms. Hogan, and all the attorneys, since the whole Board is
14 cyclical -- for instance, if it's petition season, Ms. Hogan
15 and myself would have to be either hearing officers on
16 petition challenges or clerks. There is a myriad of federal
17 litigation that's ongoing. But when you look at what the
18 Board of Election does and you put it in the perspective of
19 the folks on this Commission, I think it's important to
20 note. So, for instance, under the Election Law the New York
21 State Board of Elections and myself, as the Deputy
22 Enforcement Counsel, we're responsible for the enforcement
23 of the entirety of the Election Law in the entirety of the
24 State. While that might sound dramatic, I think you have to
25 put it in the proper perspective. Firstly, there are 62

1 counties, there are 556 approximate villages, 932 towns and
2 62 cities. So there is approximately 1,600 municipalities.

3 MS. RICE: Great, but --

4 MR. MCCANN: No, but this is important.

5 MS. RICE: And I thank you for putting it into
6 perspective.

7 MR. MCCANN: And on top of that --

8 MS. RICE: Mr. McCann, I am asking you to answer
9 this one question. You have painted that picture, how
10 incredibly difficult your job is. How many times did you go
11 and ask for more money, more bodies, more help?

12 MR. MCCANN: Every year in our budget. And --

13 MS. RICE: Who did you ask?

14 MR. MCCANN: Well, the Board of Elections, the way
15 the process works is that in every Board meeting, Ms. Hogan
16 and myself would cite the statistics on what the workload
17 was that the Board would have. We would certainly
18 communicate with our commissioners that we had this backlog
19 and we need to address it as part and parcel over all
20 possibilities.

21 MS. RICE: And you always received a no? You never
22 got a yes? I mean --

23 MR. MCCANN: We never received anything. The
24 division of budget -- the way it works is we would make our
25 statements, and certainly the leadership at the Board of

1 Elections would know this, whether it be Mr. Brehm or Mr.
2 Valentine, their predecessors, or our commissioners, and
3 they would then put in our budget request, and then on top
4 of that we would submit budget side letters specifically
5 asking for more resources.

6 MS. RICE: And when you got them, when you got 21
7 additional positions, why weren't they filled? Why didn't
8 you jump on it? Or any one of the three of, you please
9 answer. As Mr. McCann is laying out this impossible
10 herculean effort that the BOE makes, and yet you had 21
11 positions to fill and you didn't fill them. So why was
12 that?

13 MR. BREHM: We have been accused of filling none,
14 of filling six, and I understand that we did provide some
15 information and we will follow-up on that. And we worked
16 diligently to fill them. No one anticipated the fiscal
17 crisis that we would be under and --

18 MS. RICE: This is before the fiscal crisis.

19 MR. BREHM: But at the time -- we were doing a
20 number of items at the time, and I understand we tried to
21 explain, we are a small agency. We worked to create job
22 titles and we worked within the system to get those job
23 titles approved. We started to hire and we did hire. We --
24 certainly if we knew that 21 would be taken away from us,
25 you know, in retrospect we would certainly have done it

1 faster. I don't disagree with you at all on that issue.
2 Todd and I went and spoke with the Governor's counsel at the
3 time and his budget people when they were talking about
4 freezing these positions, making the case, please don't do
5 that.

6 MS. RICE: But they didn't. Before they froze it,
7 you had the time to do it. Now, these were --

8 MR. BREHM: No, we didn't.

9 MS. RICE: Wait a minute, Mr. Brehm. These are
10 political appointees, these are exempt positions, so they
11 can be hired like that. Once they get the approval from the
12 appropriate political people, right?

13 MR. BREHM: Well, after that --

14 MS. RICE: There is no other additional process that
15 had to be gone through, right?

16 MR. BREHM: We had to create the titles and the
17 positions at that time they were requiring Board votes at
18 the time, because the Board voted to appoint some of these.

19 MS. RICE: So if the need was so pressing, why
20 wasn't that done more efficiently.

21 MR. BREHM: In retrospect, I can't speak because I
22 was not in this Co-Executive position and --

23 MS. RICE: So you don't have an answer. Okay.

24 Thank you. Kate.

25 MS. HOGAN: Thanks, Kathleen. I want to follow-up,

1 Mr. McCann, just with some of the questions that Kathleen
2 was asking you about the complaints and some of the
3 assignments of the complaints. I understand that when they
4 come in, Liz Hogan -- not related to me -- but Liz Hogan
5 would make the determination, and you are saying you have no
6 idea what basis she assigned you a CMP number, correct?

7 MR. MCCANN: Well, again, it was -- her position
8 was, is that I would assign them equally so that each person
9 would get a fair number of them.

10 MS. HOGAN: Well, it's only you and Liz Hogan who
11 had the CMP cases, correct?

12 MR. MCCANN: Yeah.

13 MS. HOGAN: And the printout of this doesn't seem
14 like it's proportionate. She has far greater CMP cases than
15 you. Were you aware of that?

16 MR. MCCANN: My understanding was they were
17 essentially equal.

18 MS. HOGAN: Well, we have had an opportunity to do a
19 deposition with your retired investigator, and isn't it true
20 that she had two filing cabinets in her office filled with
21 CMP numbers that she was doing nothing with?

22 MR. MCCANN: Well, the complaint files were
23 maintained in the office of the enforcement counsel, that's
24 correct.

25 MS. HOGAN: Well, she had two filing cabinets in her

1 office and then you had your CMP cases in your office; is
2 that correct?

3 MR. MCCANN: No. The CMP files would be based in
4 the enforcement counsel's office, unless they were being
5 worked upon.

6 MS. HOGAN: Well, let's talk about the work that you
7 did on CMP cases. When you got an assignment from Ms.
8 Hogan -- and this is a complaint alleging an Election Law
9 violation, and that's the basis of your unit's
10 responsibilities, correct, enforcement of the Election Law?

11 MR. MCCANN: Well, it's part of what we do,
12 correct.

13 MS. HOGAN: Okay. What steps would you take when
14 you received a CMP file?

15 MR. MCCANN: Well, you would review the file to
16 determine what the issues might be and then --

17 MS. HOGAN: Let me just interrupt you. That's a
18 letter usually, correct?

19 MR. MCCANN: I don't know what that means.

20 MS. HOGAN: Well, the complaint usually comes in the
21 form of a letter, either written or e-mail. That's what we
22 have seen from our subpoenaed materials. And you have some
23 referrals from other agencies, but usually it's a page or
24 two letter; is that correct?

25 MR. MCCANN: Correct.

1 MS. HOGAN: Okay. How long does that take you?

2 MR. MCCANN: It depends on when you get to it.

3 Again, the -- well, you know, the people want to snicker all
4 they want, but at the end of the day, and again, as I was
5 speaking earlier when Ms. Rice asked one of her follow-up
6 questions, the important thing is this --

7 MS. HOGAN: Mr. McCann, I understand you are
8 overworked and understaffed. My question is when you
9 actually pick up the file and look at it, how long does it
10 take you to review that letter?

11 MR. MCCANN: It all depends. It depends on when I
12 get to it.

13 MS. HOGAN: I am not saying when. I am saying how,
14 how long?

15 MR. MCCANN: Again, it would depend on the case.

16 MS. HOGAN: Okay. An hour, two hours to review a
17 letter?

18 MR. MCCANN: I -- I wouldn't speculate, but yes.

19 MS. HOGAN: And you are very well versed in Election
20 Law and the violations, correct?

21 MR. MCCANN: Yes.

22 MS. HOGAN: So you would know what you would need to
23 create evidence to support a violation that's alleged or
24 disprove -- to prove that the violation never occurred,
25 correct?

1 MR. MCCANN: Well, certainly. If you were going to
2 determine that you were going to undertake an investigation
3 or do whatever follow-up you might do. But again, it's in
4 the perspective of --

5 MS. HOGAN: Let's talk about the word you just used,
6 Mr. McCann, investigation. What tools do you use when you
7 have a CMP file and you are reviewing it? What tools do you
8 use to investigate?

9 MR. MCCANN: Well, I guess the question is how would
10 you define investigation. I mean, investigation as
11 determined by the legislature is very specific, and when you
12 review an Article Three, the process for complaints, okay,
13 the CMP --

14 MS. HOGAN: Mr. McCann, I don't think this is
15 complicated and you don't need a legislature to tell you
16 what an investigation is.

17 MR. MCCANN: No, but I think you are missing the
18 steps. The mere fact that the --

19 MS. HOGAN: Let me --

20 MR. MCCANN: The mere fact that the Board has a
21 complaint does not then bring it to the investigation phase.

22 MS. HOGAN: We are getting right to that, because
23 that's -- I am going to ask you all about the term opened
24 investigation. But you are the sole custodian of that file,
25 correct, when it's a CMP and it's assigned to you?

1 MR. MCCANN: Well, myself and the enforcement
2 counsel.

3 MS. HOGAN: But you are the one who decides what's
4 to be done with that case, correct?

5 MR. MCCANN: Essentially, yes.

6 MS. HOGAN: Now, wouldn't you want to know whether
7 you have any documentation to substantiate the allegations?

8 MR. MCCANN: In what perspective?

9 MS. HOGAN: Well, it seems to me -- tell everyone
10 here what you mean by the term opened investigation.

11 MR. MCCANN: Well, if after the complaint is
12 reviewed by counsel, if the counsel determines that there is
13 an allegation that would potentially be a violation of the
14 Election Law that would warrant an investigation, it can
15 recommend to the Board that an investigation be conducted.

16 MS. HOGAN: Well, you get the CMP file, you read the
17 letter for an hour or two, and then what do you do to advise
18 counsel about your handling of the case?

19 MR. MCCANN: Well, again, I would write-up a
20 preliminary determination based upon my review of the
21 complaint, any supporting documentation, any other review I
22 felt was necessary --

23 MS. HOGAN: You said supporting documentation. You
24 had an investigator who worked for you and retired in May of
25 2012; is that correct?

1 MR. MCCANN: Sure. Yes.

2 MS. HOGAN: And when you had CMP files, it's my
3 understanding from the testimony of this investigator at his
4 deposition, that he was never asked to subpoena any -- very
5 rarely ever asked to do any work on a CMP file; is that
6 correct?

7 MR. MCCANN: Well, Mr. Owens, as the investigator,
8 he is a great man, I have no problems with his work, but the
9 bottom line --

10 MS. HOGAN: Did you ever ask him to do work on a CMP
11 file?

12 MR. MCCANN: I don't have a recollection that I did.

13 MS. HOGAN: Why didn't you?

14 MR. MCCANN: Well, again, Mr. Owens, his work as an
15 investigator was based part and parcel on what we were
16 doing, meaning either Ms. Hogan or myself, relative to our
17 daily work.

18 MS. HOGAN: You just told DA Rice that you were so
19 overworked you couldn't get it done.

20 MR. MCCANN: Right.

21 MS. HOGAN: As I understand it, the investigator
22 advised us that he would go to you and ask for work.

23 MR. MCCANN: That's true.

24 MS. HOGAN: And he was, in fact, going with
25 regularity asking for you to do work, to give him

1 investigations; is that correct?

2 MR. MCCANN: That is correct.

3 MS. HOGAN: And you never gave him any of the CMP
4 files that you said you were just piling up and you were
5 behind on you never asked him to go find that evidence that
6 could substantiate whether that was a crime or not?

7 MR. MCCANN: Well, again, the investigator --

8 MS. HOGAN: That's a yes or no question, Mr. McCann.

9 MR. MCCANN: Well, I'm sorry if I disagree, but the
10 answer is that the investigator's responsibility is when an
11 formal investigation would be opened by the Board.

12 MS. HOGAN: Why wouldn't you use him on a CMP file
13 to gather evidence? It's done all the time in DA's offices.
14 Charges may not be filed, but we use our investigators to
15 gather evidence to determine whether we have reasonable
16 cause to file charges. Why would you not use someone who is
17 sitting at his desk playing Solitaire because you won't give
18 him any work and he's asking for it?

19 MR. MCCANN: Again, Mr. Owens and his work was in
20 the context of what either Ms. Hogan or myself were doing at
21 any particular time, and investigations, as I mentioned, was
22 just one part of what we do.

23 MS. HOGAN: I am unclear what it takes to open an
24 investigation. You get a file, you read the letter --

25 MR. MCCANN: Uh-huh.

1 MS. HOGAN: -- from what I see, not a lot is done on
2 those files, and then you go to the counsel and you make a
3 recommendation; is that correct?

4 MR. MCCANN: Well, no. The counsel, either myself
5 or Ms. Hogan, would make a recommendation to the Board.

6 MS. HOGAN: Okay. And the four commissioners vote
7 to open an investigation?

8 MR. MCCANN: Correct.

9 MS. HOGAN: How long does that normally take?

10 MR. MCCANN: It would depend on a particular matter.
11 But again, that's in the context of what we're doing in our
12 regular work.

13 MS. HOGAN: How many investigations did the Board
14 vote to open in-between 2008 and 2013?

15 MR. MCCANN: 11.

16 MS. HOGAN: The 11 you are referring to -- I am
17 talking about voted to open, not that were opened. Isn't it
18 true that there were five that were opened from complaints
19 in 2008? The complaint is dated 2008.

20 MR. MCCANN: Oh, I'm sorry. I was basing it upon
21 investigations opened in a particular year.

22 MS. HOGAN: From a complaint that came in between
23 2008 and 2013, how many did you vote to open?

24 SPEAKER: Why haven't the committees and the
25 legislature been asking these questions --

1 MS. RICE: I have to ask members of the audience to
2 please hold their comments. Thank you very much.

3 THE WITNESS: I don't know if I have that handy.

4 MS. HOGAN: I do. It's five.

5 MR. MCCANN: Okay.

6 MS. HOGAN: Of the five investigations that you
7 voted to open between 2008 and 2013, how many were open in
8 2008?

9 MR. MCCANN: Well, again, I think the answer that we
10 have in our testimony was three.

11 MS. HOGAN: It's four.

12 MR. MCCANN: Okay.

13 MS. HOGAN: So between 2009 and 2013, the Board
14 voted to open only one investigation; is that correct?

15 MR. MCCANN: If that's the number you are telling
16 me.

17 MS. HOGAN: All of the cases you have, have the
18 potential of being Election Law violations; isn't that true,
19 Mr. McCann? The allegations --

20 MR. MCCANN: Sure.

21 MS. HOGAN: -- they potentially could be, if they
22 were pursued?

23 MR. MCCANN: Well, no. I mean, you could have a
24 complaint that would not necessarily fall within the
25 Election Law.

1 MS. HOGAN: That's correct. But it could be an
2 Election Law violation if you pursued it.

3 MR. MCCANN: Well, again, I don't think the issue is
4 the pursuit. I mean, at the end of the day, as I have said
5 earlier --

6 MS. HOGAN: I beg to differ disagree with you.

7 MR. MCCANN: Well, that's okay. But at the end of
8 the day is this, and as much as people don't like to hear
9 it, the State Board of Elections enforcement unit, with two
10 attorneys and at one time one investigator, four auditors
11 and a staff of 17, if you put it in terms of the district
12 attorney's office, and I think those statistics are telling,
13 we have to enforce potential violations of the entirety of
14 the State of New York, not only with --

15 MS. HOGAN: Mr. McCann, you are talking to a woman
16 who has six ADAs in her county and two part-time
17 investigators and two crime victim specialists. Everyone is
18 understaffed. It doesn't mean that you can abdicate your
19 responsibility. Would you please go to --

20 MR. MCCANN: Well, I would disagree that we are
21 abdicating --

22 MS. HOGAN: Would you please go to Exhibit number
23 nine, and I would like to talk to you about Exhibit number
24 nine. This is complaint 1021; is that correct?

25 MR. MCCANN: Yes.

1 MS. HOGAN: Now, would you explain to the members
2 what a CFO Two is.

3 MR. MCCANN: That's a form that's used by a
4 committee to register with the Board of Elections.

5 MS. HOGAN: And as I understand it, in this
6 particular instance, there was someone who filed 100
7 committees; is that correct?

8 MR. MCCANN: Correct.

9 MS. HOGAN: And what prompted you to look at that?

10 MR. MCCANN: It was an abnormal submission to the
11 Board.

12 MS. HOGAN: And as a result of that abnormal
13 submission to the Board, did you take some investigative
14 opportunities and issue subpoenas?

15 MR. MCCANN: Well, yes. First I went to the Board
16 and said that we had this -- well, actually, the
17 circumstances were that when this envelope came in with 100
18 registration forms, it's extremely unusual and so the
19 campaign finance unit brought it to my attention and said a
20 review of this looks strange and so could we take a look at
21 it. And upon looking at that, since it was such an
22 aberration -- because generally we will get one, and so this
23 was 100 from the same person, with all sorts of different
24 names, and so the speculation at the time was is that there
25 was something untoward going on because there was 100. So

1 we presented that to the Board and said, in essence, we have
2 this circumstance, it appears rather strange and so --

3 MS. HOGAN: There is no SC number. Do you have to
4 present it to the Board to issue a subpoena, Mr. McCann?

5 MR. MCCANN: No. The Board approved the issue and
6 so the subpoena --

7 MS. HOGAN: But do you have to go to the Board and
8 get permission to issue a subpoena?

9 MR. MCCANN: That's generally our process at the
10 Board. Once an --

11 MS. HOGAN: And why do you have to go to the Board
12 to get permission to issue a subpoena?

13 MR. MCCANN: Because, again, that goes to the issue
14 of whether or not an investigation is opened. The Board
15 only issues subpoenas if an investigation is opened.

16 MS. HOGAN: Why is that?

17 MR. MCCANN: That's the policy of the Board, as far
18 as I understand.

19 MS. HOGAN: Who initiated that policy?

20 MR. MCCANN: That was long before I arrived at the
21 Board.

22 MS. HOGAN: In this particular case, the subpoena
23 showed you that there were no accounts that were open of
24 these 100 accounts; is that correct?

25 MR. MCCANN: Correct.

1 MS. HOGAN: And, in fact, nine of these were listed
2 at branches of banks that only had ATM capabilities; is that
3 correct?

4 MR. MCCANN: I believe that's what we ascertained.

5 MS. HOGAN: So that is a violation of the Election
6 Law, is it not?

7 MR. MCCANN: Well, I think in this circumstance, if
8 my recollection serves me correctly, the gentleman in
9 question responded back to the Board and said that it was
10 not his intent to violate the law and therefore -- and under
11 the color of his statement. But again, we didn't --

12 MS. HOGAN: But there was no letter from him in our
13 subpoenaed materials, Mr. McCann.

14 MR. MCCANN: Well --

15 MS. HOGAN: Did you provide that letter to us to
16 comply with our subpoena?

17 MR. MCCANN: Yes, I believe so.

18 MS. HOGAN: Mr. McCann, I want you to take a look at
19 your letter. That's your signature on the bottom; is that
20 correct?

21 MR. MCCANN: We are talking about Exhibit-9?

22 MS. HOGAN: Exhibit-9.

23 MR. MCCANN: Yes.

24 MS. HOGAN: March 23, 2010.

25 MR. MCCANN: Uh-huh.

1 MS. HOGAN: And you write to this individual -- and
2 if you do have that letter, I would like to see it because I
3 want to see if it's in response to your letter to him,
4 because you write to this individual and say "while the
5 Board is troubled by these facts, it assumes that such
6 submission is inadvertent, as intentional submission of
7 documents containing false information to the Board could
8 result in a criminal referral." Is that what you do, you
9 assume that there is no intent because who would intend to
10 commit a crime?

11 MR. MCCANN: Well, again --

12 MS. HOGAN: And, Mr. McCann, how is the repetition
13 of 100 anything inadvertent? Why did you write that?

14 MR. MCCANN: Well, again, the issue was is we
15 weren't going to process the registrations, and we were
16 certainly going to -- again, you know, the Board isn't going
17 to refer every violation to a district attorney's office.
18 And again, this was the position that was taken by counsel
19 and approved by the Board so, again --

20 MS. HOGAN: I want to draw your attention to Exhibit
21 number 10 please. This is CMP 08 dash 61.

22 MR. MCCANN: Okay.

23 MS. HOGAN: And you will recall that the allegation
24 in this is that in an Assembly race there were a number of
25 individuals who were being registered at the candidate's

1 residence and his campaign manager's residence. Do you
2 recall that case?

3 MR. MCCANN: Generally, yes.

4 MS. HOGAN: Now, in terms of -- do you recall how
5 you first received notification of that case?

6 MR. MCCANN: I do not.

7 MS. HOGAN: When you received -- excuse me just one
8 sec. When you received notification of that case, what
9 steps did you take to investigate the allegation?

10 MR. MCCANN: Well, again, my understanding -- well,
11 firstly, this was not my case. It was Ms. Hogan's case.
12 And secondly --

13 MS. HOGAN: And I'm very sorry she's not here to
14 answer, but I'm going to have to ask you.

15 MR. MCCANN: That's fine. Again, my understanding
16 is is that, you know, the circumstances, unfortunately, as
17 it's reflected in that document, is that those complaint
18 files were lost.

19 MS. HOGAN: Well, this was with respect to a 2008
20 election; is that correct?

21 MR. MCCANN: Correct.

22 MS. HOGAN: Okay. And between -- now, this is
23 having people that may not even be entitled to vote in that
24 district potentially voting and influencing an election,
25 correct?

1 MR. MCCANN: Correct.

2 MS. HOGAN: Did you ascertain whether the people who
3 were registered at that address actually voted?

4 MR. MCCANN: The Board -- I do not know.

5 MS. HOGAN: They did.

6 MR. MCCANN: Okay.

7 MS. HOGAN: Now, did you take this to the Board to
8 vote to open an investigation?

9 MR. MCCANN: Well, the fact that there is an
10 investigation number, that means the answer is yes.

11 MS. HOGAN: And when did you do that?

12 MR. MCCANN: I don't have the date handy, but I
13 presume that you do.

14 MS. HOGAN: 2010.

15 MR. MCCANN: Okay.

16 MS. HOGAN: How does it take two years -- with
17 something as serious as that allegation, how does it take
18 you two years to bring it to the Board to ask them to vote
19 to open an investigation?

20 MR. MCCANN: Well, again, these investigations or
21 these complaints, rather, are in the context of whatever the
22 particular attorney is doing in their normal
23 responsibilities before the Board. So, you know, it speaks
24 for itself. I mean --

25 MS. HOGAN: There was no sense of urgency with this?

1 MR. MCCANN: I don't think there is an issue of a
2 sense of urgency. The issue is these matters are in the
3 context of our responsibilities we do on a daily basis.

4 MS. HOGAN: And did you have any investigator do any
5 work on this investigation, that you recall, before it
6 became an SC number?

7 MR. MCCANN: Well, again, the investigators
8 generally do work after the investigation is open, so I do
9 not believe that that would have been the case.

10 MS. HOGAN: But that's only a practice, that's not a
11 statutory requirement, correct?

12 MR. MCCANN: That's the Board's practice, correct.

13 MS. HOGAN: Let's talk about -- and that box was
14 lost, so it was closed because it was lost and you just have
15 no idea -- you couldn't recreate it; is that correct?

16 MR. MCCANN: Well, again, that was a Ms. Hogan
17 matter, and my understanding, based upon her memo, is that
18 in our move from our one building to this building that the
19 box was lost.

20 MS. HOGAN: Do you recall writing a memo with Ms.
21 Hogan, it's Exhibit number three, the enforcement synopsis
22 memo dated November 20, 2007? Do you recall that?

23 MR. MCCANN: Generally, yes.

24 MS. HOGAN: Why don't you take a second and take a
25 look at that. On page two you discuss audit review and

1 investigations and you propose three senior investigators;
2 is that correct?

3 MR. MCCANN: Correct.

4 MS. HOGAN: And at that point you had the recently
5 retired investigator already on staff, so it would have been
6 a hiring of two; is that correct?

7 MR. MCCANN: Two additional -- well, we actually had
8 two positions that were vacant, and we created another --
9 well, we had Mr. Owens and then we had another position that
10 was vacant, and then we created another one for three.

11 MS. HOGAN: I want to draw your attention to page
12 eight on this document. It outlines the duties and
13 responsibilities of an investigator.

14 MR. MCCANN: Okay.

15 MS. HOGAN: And I'm sorry, I don't see anywhere in
16 here that it has to be a voted opened investigation for him
17 to fulfill those duties and responsibilities. Was that
18 delineated anywhere in here and I missed it?

19 MR. MCCANN: Well, again, an investigation is a
20 statutory term. It's a specific term used in Article Three
21 of the Election Law.

22 MS. HOGAN: Is it fair to say that timely gathering
23 of evidence is important to substantiating a claim?

24 MR. MCCANN: Sure.

25 MS. HOGAN: Is it fair to say that the more

1 resources you have to timely gather that evidence would be
2 beneficial to you, the overworked man that you are?

3 MR. MCCANN: Certainly.

4 MS. HOGAN: So did it ever occur to you to go to the
5 commissioners and say hey, our investigator's playing
6 Solitaire and reading Bible verses and is asking me for
7 work, I have an idea, let's let him work on the complaint
8 files? Did you ever ask them for that?

9 MR. MCCANN: No.

10 MS. HOGAN: Why not?

11 MR. MCCANN: Well, again, Mr. Owens and the use of
12 Mr. Owens in the context of our daily work --

13 MS. HOGAN: You are claiming to us that you were up
14 to your eyes in work.

15 MR. MCCANN: Yes.

16 MS. HOGAN: You have an investigator sitting at a
17 computer playing Solitaire, asking you for work, and you
18 never even went to the commissioners and said hey, guys, we
19 have got to revamp this, let's get our investigator to help
20 us on the complaint files?

21 MR. MCCANN: Well, again, the issue of our
22 investigations and our use of our investigators, again
23 that's part of our process. The Board certainly knew about
24 our work and the process.

25 MS. HOGAN: So you're saying they're in on it, that

1 they know how behind you are and it doesn't -- Mr. McCann,
2 let me ask you this.

3 MR. MCCANN: Yeah.

4 MS. HOGAN: Subpoena duces tecum, they were carried
5 around forthwith, filled out forthwith to gather records,
6 correct? Your investigator carried the subpoenas with him?

7 MR. MCCANN: If they were issued, correct.

8 MS. HOGAN: And for the subpoenas duces tecum for
9 the records, they were concerned about destruction of
10 records, correct?

11 MR. MCCANN: As a principle you mean?

12 MS. HOGAN: As a principle.

13 MR. MCCANN: Yeah.

14 MS. HOGAN: So it was the practice of the
15 investigators of the Board of Elections to have a forthwith
16 subpoena duces tecum carried with them so that they could
17 get records when they were out on one of their opened
18 investigations, correct? Wasn't that the practice?

19 MR. MCCANN: If they were directed by counsel, yes.

20 MS. HOGAN: Now, why was it, shortly after Ms. Hogan
21 arrived, she instructed the investigator to no longer carry
22 the subpoenas?

23 MR. MCCANN: I am not aware of that.

24 MS. HOGAN: You didn't realize that that's what she
25 instructed the investigator?

1 MR. MCCANN: I have no recollection of that at all.

2 MS. HOGAN: Did you ever tell the investigator not
3 to carry subpoenas?

4 MR. MCCANN: No, because it was never an issue. The
5 way the subpoenas were worked, to my recollection, is that
6 if the Board opened an investigation and if counsel directed
7 that a subpoena be issued, they would instruct the
8 investigator and the investigator would issue the subpoena.

9 MS. HOGAN: So you only had subpoenas that were
10 authorized by the Board? You only only issued subpoenas
11 that were --

12 MR. MCCANN: After the Board authorized an
13 investigation to be opened, if a subpoena was applicable, we
14 would issue it.

15 MS. HOGAN: Mr. Valentine, I have a question for you
16 with respect to this. On page 10 of the memo that was
17 submitted in the enforcement synopsis, number 23, on any
18 election day or primary day coordinate a law enforcement
19 activities and actually enforce the law by going to the
20 polls. Do you recall instructing the investigator that he
21 was not to go to the polling area when he was going to do a
22 spot inspection in Albany county?

23 MR. VALENTINE: I can't say that I recall that.

24 MS. HOGAN: Okay. And if he testified that you
25 did -- are you saying you don't recall or you never said it?

1 MR. VALENTINE: I'm saying I don't recall.

2 MS. HOGAN: If you did say it, why would you ever
3 instruct him not to go to a polling site?

4 MR. VALENTINE: I guess it would depend on whether
5 we needed him for somewhere else.

6 MS. HOGAN: He is playing Solitaire.

7 MR. VALENTINE: Again, out of context, I don't know
8 what's going on in that election and whether there was some
9 other issue that might have been necessary to have him
10 available for something else.

11 MS. HOGAN: And you have no recollection of that
12 conversation?

13 MR. VALENTINE: I don't recall it, no.

14 MS. HOGAN: Okay. Just one moment please.
15 Kathleen.

16 MS. RICE: So Mr. McCann, I want to go into an area
17 that's been touched upon a little bit. So it's true, and
18 you would know this, right, that the Board of Elections has
19 at its disposal numerous and incredibly powerful
20 investigative tools. Would you say that that's true?

21 MR. MCCANN: Absolutely.

22 MS. RICE: So under Election Law section three dash
23 104 that states that the "Board of Elections shall have
24 jurisdiction of and be responsible for the execution of
25 enforcement of the provisions of Article 14 of this chapter

1 and other statutes governing campaigns, elections and
2 related procedures," correct?

3 MR. MCCANN: Correct.

4 MS. RICE: And so under the statute, what is the
5 BOE's jurisdiction for violations of Election Law?

6 MR. MCCANN: I'm confused as to your question.

7 MS. RICE: You have jurisdiction over those
8 violations, correct?

9 MR. MCCANN: As do you.

10 MS. RICE: That's true. I'm asking you.

11 MR. MCCANN: Yes.

12 MS. RICE: Okay. So according to that section,
13 "whenever the State Board of Elections or other Board of
14 Elections shall determine, on its own initiative or upon
15 complaint, that there is substantial reason to believe that
16 a violation of this chapter or any code or regulation
17 promulgated thereunder has occurred, it shall expeditiously
18 make an investigation which shall also include investigation
19 reports and statements," etcetera; is that correct?

20 MR. MCCANN: Yes.

21 MS. RICE: So other than non-filers and corporate
22 over-contributors, which we'll focus on later, how many
23 investigations did the Board of Elections vote to open which
24 were generated on its own initiative, the initiative that
25 this statute gives them, through the powers that the statute

1 gives them?

2 MR. MCCANN: I don't believe any.

3 MS. RICE: What's the reason for that.

4 MR. MCCANN: Well, again, the, the -- even in the
5 questioning, I can't remember who specifically asked the
6 question, and they said well, you know, when we worked in
7 the US attorney's office or some such thing, if we read
8 something in the paper, we would go investigate it, and we
9 would say well, I think the issue is we have a backlog of
10 the materials that we already have. To say we're all of a
11 sudden going to have additional matters that we're going to
12 put onto that, it's just an impracticality and it's an
13 impossibility.

14 MS. RICE: So just to make reference to the comment
15 that you made. When the Moreland Commission staffers asked
16 Ms. Hogan and you whether you could start Board of Elections
17 investigations based on what you see in the media or on the
18 news, your response, obviously -- I should just make clear,
19 your response was "we do not sit around reading newspaper
20 all day," right?

21 MR. MCCANN: Well, I don't recall what she said.
22 But again, if you're asking me can the State Board of
23 Elections, on its own initiative, undertake investigations,
24 absolutely. There is no question about that.

25 MS. RICE: So do you think that the news and media

1 reports or pieces that are written by good government groups
2 could provide important information for the BOE regarding
3 cases that you would like to start an investigation on? Do
4 you think those are good sources for cases?

5 MR. BREHM: If I might --

6 MS. RICE: Sure.

7 MR. BREHM: I think it's difficult when we start on
8 our own initiative, if we don't have a policy to do it all
9 the time, because when we see one and we act on one, it's
10 criticized that we don't act on all. And it's very
11 difficult from a perspective of resource allocation, and I
12 know, I hate to that say that and I know you hate to hear
13 it, and I don't say it to be glib, but it's very difficult
14 for us when we see issues that we know we just don't have
15 the resources. We have been asking to get the resources, so
16 we have placed the higher priority, which is tough for us,
17 on collecting the reports so that everybody could see them
18 and see they are for what they are.

19 And it takes a great deal of energy to do that part
20 of it, and then the enforcement is generally the stick to
21 bring the noncompliant into compliance, and we use the
22 resources next to do that part of it. And then,
23 unfortunately, we have never been staffed and organized as a
24 real investigatory criminal panel, from what I can tell from
25 a very long time, certainly long before I came to the Board,

1 and certainly since I've come to the Board, and every time
2 we've asked for the general kinds of resources to get to the
3 next step --

4 MS. RICE: Mr. Brehm, I have heard you say that many
5 times. So let me try to distill what you are saying, that
6 because you don't think that you can be fair, in terms of,
7 God forbid, you read something in the newspaper that looks
8 like it might be a violation of Election Law, and you don't
9 want to be accused of just picking things willy-nilly, you
10 just choose to not to do any of it.

11 MR. BREHM: Well, I --

12 MS. RICE: No. It's yes or no.

13 MR. BREHM: That's part of it.

14 MS. RICE: Okay, thank you.

15 MR. BREHM: And then you would have to be fair to
16 them all.

17 MS. RICE: I know. And the resources.

18 MR. BREHM: Well, I think you would have to be fair
19 and do more than -- yes. You would have to do a lot more,
20 and that's my fear, if we did one, it opens the door -- we
21 should do more than one, we should do many.

22 MS. RICE: So in order to assist the Board of
23 Elections to carry out their duties of enforcement, the
24 Board has several investigative tools at its disposal,
25 correct? I mean, all three of you can say yes in unison, or

1 no or some variation. Yes? I see some nodding.

2 MR. BREHM: Yes.

3 MR. VALENTINE: Yes.

4 MR. MCCANN: Yes.

5 MS. RICE: Okay. So under section three dash 107,
6 "the State Board of Elections has the power to appoint a
7 special investigator to take charge of an investigation of
8 cases arising under the Election Law;" is that correct?

9 MR. BREHM: Yes.

10 MR. MCCANN: Correct.

11 MS. RICE: And you further have the power to appoint
12 such additional special investigators and employees as it
13 may deem necessary; is that correct?

14 MR. MCCANN: Can I ask you, who's going to pay for
15 that?

16 MS. RICE: Mr. McCann, that's not the question. Mr.
17 Brehm, you are nodding your head. Okay, that's an answer,
18 yes. You also have the power to inspect -- these
19 investigators have the power to inspect homes and places of
20 business; is that correct, Mr. Brehm? And they furthered
21 have the power to inspect and copy books, records and
22 documents relating to or effecting the election of
23 registration of voters, correct?

24 MR. BREHM: Correct.

25 MS. RICE: And the Board of Elections, through this

1 special investigator, has the power to require the person in
2 charge of such documents to furnish a copy of those
3 documents without charging the Board of Elections, correct?

4 MR. BREHM: Correct.

5 MS. RICE: So there is no expense or resource issue
6 there. Now, "any person who neglects to or refuses to
7 provide an exhibit or such information to the special
8 investigator can be found to be guilty of a misdemeanor;" is
9 that correct? That's also written in the statute, right?
10 And that's actually a power that is greater than what's
11 commonly available to investigators and police officers,
12 right? Correct.

13 MR. BREHM: Well, I can't speak to that part
14 because I am not the lawyer.

15 MS. RICE: I saw you nod your head.

16 MR. BREHM: I did up to that last part of what.
17 Then I thought I should speak up.

18 MS. RICE: Now, in 2013, on approximately how many
19 occasions did the Board of Elections appoint a special
20 investigator?

21 MR. BREHM: We have never appointed a special
22 investigator.

23 MS. RICE: So I guess going back to 2012 the answer
24 is no, 2011, no, 2010, no, 2009, no?

25 MR. BREHM: It gets into out of what funds? It's

1 my understanding, and I know recently we've even discussed
2 this even greatly, if there is some source of funds outside
3 of that which we have in our personal service budget that
4 would allow us to do this, I certainly think we would have a
5 discussion to --

6 MS. RICE: You know what? Just say resource and
7 then I will know what your answer is. I am trying to --

8 MR. MCCANN: With all due respect, I don't think
9 that's being fair.

10 MS. RICE: We are trying to move through this.
11 Excuse me, Mr. McCann. I am speaking to Mr. Brehm. Mr.
12 Brehm, I understand you are saying it's a resource issue.
13 What I am trying to do is to show exactly what the
14 enforcement powers of the unit are, so thank you. I
15 appreciate that. So also under section three dash 107, "the
16 State Board of Elections shall have the power to issue
17 subpoenas duces tecum, correct, as DA Hogan just stated?
18 Mr. Brehm, you want to answer that?

19 MR. BREHM: Uh-huh. I'm sorry. Yes.

20 MS. RICE: So to put that in English, in layman's
21 terms, that's basically a subpoena to produce documents or
22 information, correct?

23 MR. BREHM: Correct.

24 MS. RICE: Okay. Now, in 2013, approximately how
25 many subpoena duces tecum were issued by the BOE?

1 MR. MCCANN: I don't know the answer to that.

2 MS. HOGAN: Mr. McCann, you said you don't know the
3 answer? Well, it's none.

4 MR. MCCANN: Okay.

5 MS. RICE: In 2012, how many times?

6 MR. MCCANN: I don't know the answer to that.

7 MS. RICE: We actually think it was once.

8 MR. MCCANN: Okay.

9 MS. RICE: In 2011? Okay, the answer is no. And so
10 in 2010 you wouldn't know either?

11 MR. MCCANN: Correct.

12 MS. RICE: And 2008 and 2009 you wouldn't know?

13 MR. MCCANN: Correct.

14 MS. RICE: No? So the Board of Elections also has
15 the power to issue subpoenas to compel individuals to
16 testify, correct?

17 MR. MCCANN: Correct.

18 MS. RICE: And these subpoenas also don't confer
19 immunity on individuals compelled to testify; is that
20 correct?

21 MR. MCCANN: As far as I know.

22 MS. RICE: That's another difference there. And
23 that's an enormous power, would you all agree? Yes, okay.
24 So how many subpoenas for testimony were issued by the Board
25 of Elections in 2013?

1 MR. MCCANN: None.

2 MS. RICE: And if you know, between 2008, 2012 how
3 many subpoenas for testimony were issued by the BOE?

4 MR. MCCANN: None.

5 MS. RICE: So just out of curiosity, that's an
6 enormous, enormous tool, is there any --

7 MR. MCCANN: There's no question that the Board of
8 Election has lots of power in the Election Law. It still
9 comes down to who's going to do it. You know, you cite to
10 three 107 and our ability to hire special investigators.
11 When the division of budget won't even let us fill the
12 vacant positions, who is going to authorize the expenditure
13 of the money to hire these special investigators?

14 MS. RICE: I hear you, Mr. McCann. I would just
15 refer back to DA Hogan's questions regarding Investigator
16 Owens and how he spent most of his days, according to his
17 testimony. So I understand what you are saying but I think
18 it's been made clear that there was someone there who could
19 do this work. So under section three dash 104 of the
20 Election Law, "the State Board of Elections may request and
21 shall receive the assistance of the State police in any
22 investigation that it conducts;" is that correct?

23 MR. MCCANN: Correct.

24 MS. RICE: And I'm sure you would agree that New
25 York State troopers are highly trained, professional law

1 enforcement individuals?

2 MR. MCCANN: Not in Election Law necessarily, but in
3 their position, certainly.

4 MS. RICE: From a law enforcement standpoint.

5 MR. MCCANN: Yes. Sure.

6 MS. RICE: And they conduct all types of
7 investigations throughout New York State. Their
8 jurisdiction is pretty broad.

9 MR. MCCANN: Correct.

10 MS. RICE: So now, over the past five years,
11 approximately how many times has the BOE used the State
12 troopers to assist them in an open investigation?

13 MR. MCCANN: I believe the answer is twice.

14 MS. RICE: When was that.

15 MR. MCCANN: I believe we had the one matter that
16 Ms. Hogan supervised this past year and that there was one
17 prior circumstance where Mr. Owens worked with the State
18 police computer crimes unit, I believe, in my review of his
19 testimony.

20 MS. RICE: Okay. Right, right, right. So in
21 2008/2009, during the budget crisis, you were, obviously we
22 have heard quite a few times, you were strapped for
23 resources and employees; is that correct?

24 MR. MCCANN: Correct.

25 MS. RICE: And at that time would it be fair to say

1 that the Board of Elections had a backlog of approximately
2 300 cases?

3 MR. MCCANN: We had a big backlog.

4 MS. RICE: But yet prior to your last investigator
5 retiring in 2012, Mr. Owens, how many times did you request
6 State troopers to assist you for any of your complaints at
7 any time?

8 MR. MCCANN: Other than those mentioned, none.

9 MS. RICE: Those two. Now, were you aware, Mr.
10 McCann, of a letter -- it's Exhibit-11. Let me just give
11 you an opportunity to take a look at that. Okay? Do you
12 see that, Mr. McCann?

13 MR. MCCANN: Yeah.

14 MS. RICE: So Exhibit-11 is a letter from Elizabeth
15 Hogan to Stephen Hogan, who is the First Deputy Counsel of
16 the New York State police, correct?

17 MR. MCCANN: Yes.

18 MS. RICE: And just to read, in part of that, in
19 paragraph one, "as we discussed, Election Law section three
20 dash 104 provides that the State police shall assist the
21 Board relative to any investigation at the Board. In light
22 of the Board's single investigator is retiring at the end of
23 this month, the Board must have a process in place should we
24 require the assistance of the State police," and it goes on
25 to further state that "this is to confirm that you, Mr.

1 Hogan -- again, not a relative of DA Hogan -- that you have
2 been designated the liaison;" is that correct? Do you see
3 that there?

4 MR. MCCANN: That's what it says, yes.

5 MS. RICE: Now, in that letter, the use of the word
6 "shall assist" would indicate that it is an obligation and
7 responsibility of the State police, upon request of the BOE,
8 that they shall, not may or only if they want to, they shall
9 assist you, right?

10 MR. MCCANN: Correct.

11 MS. RICE: And they come with no cost to the Board
12 of Election because they are already being paid as State
13 police, correct?

14 MR. MCCANN: Correct.

15 MS. RICE: So it's not a resource issue there would
16 that be fair to say?

17 MR. MCCANN: As to the State police?

18 MS. HOGAN: Yes.

19 MR. MCCANN: Well, I guess it would be a resource as
20 to whoever is going to supervise the investigator, it would
21 be a resource to them.

22 MS. RICE: No, no. I am talking about getting an
23 actual human body. There is not a resource issue getting an
24 actual human body. Forget who is going to supervise them.
25 I am talking about getting the body.

1 MR. MCCANN: Well, I am presuming that the State
2 police would provide them, and I have no reason to believe
3 they wouldn't, then the answer is yes.

4 MS. RICE: Right. Because the wording is "shall,"
5 and Liz Hogan made that very clear.

6 MR. MCCANN: Yeah.

7 MS. RICE: So before Mr. Owens, who was the single
8 investigator for the BOE, before he retired in 2012, how
9 long was the BOE left with only one investigator? How long
10 was Mr. Owens the only investigator?

11 MR. MCCANN: I don't recall a specific time frame on
12 that.

13 MS. RICE: Would it be about four years? Does that
14 sound about right?

15 MR. MCCANN: I mean, it could be. I'm --

16 MS. RICE: 2005?

17 MR. MCCANN: Well, I think --

18 MS. RICE: Actually, longer than that.

19 MR. MCCANN: When I first came to the Board, there
20 were three investigators, and then there were two and then
21 there were one.

22 MS. RICE: I am asking you the period where there
23 was just one, just Mr. Owens.

24 MR. MCCANN: I don't recall the period.

25 MS. RICE: So we think it could be as far back as

1 2005. Just out of curiosity, if you know, why did the Board
2 of Elections wait until Mr. Owens retired before reaching
3 out to the State police? Any particular reason, when it was
4 not going to result in any additional cost to the BOE?

5 MR. MCCANN: Actually, I think it was -- one of our
6 commissioners, I think, requested that we reach out to the
7 State police to setup that --

8 MS. RICE: Could the commissioners have done that
9 any other prior time?

10 MR. MCCANN: Certainly.

11 MR. BREHM: If I may. When, you know, JR, Mr.
12 Owens, I'm sorry, was retiring, I specifically talked with
13 Liz about that section and said we -- you know, what is
14 the -- what is our direct communication, so that we make
15 sure we have this, you know -- if there is a specific need,
16 that we know who to call and how to call and we are all on
17 the same page together, and then she proceeded to do that.

18 MS. RICE: Write the letter.

19 MR. BREHM: I know the other two investigators were
20 from my home county and I am familiar with them, but I don't
21 remember when they retired. But I came to the State Board
22 in 2006 and we only had one since that period of time.

23 MS. RICE: Mr. Brehm, my point is that that's
24 something that you, as a commissioner, could have asked --

25 MR. BREHM: I understand. I understand.

1 MS. RICE: -- is that correct? And you did --

2 MR. BREHM: I did when I knew JR, Mr. Owens was
3 retiring.

4 MS. RICE: But any time before that when you still
5 had only one investigator?

6 MR. BREHM: I felt we had at least one.

7 MS. RICE: I am assuming you were aware there was
8 that 300 case backlog. I just want to ask about, and I
9 guess I'm going to ask Mr. McCann this, about SC number 12
10 dash 01, which is Exhibit-12.

11 MR. MCCANN: Okay.

12 MS. RICE: So you're aware of that SC case?

13 MR. MCCANN: Yeah. There were two complaints that
14 had been received by the Board. The Board opened an
15 investigation --

16 MS. RICE: No. I just want to stop you there
17 because actually I want to go through that process. So when
18 was the first complaint received regarding that case?

19 MR. MCCANN: Well, based upon the number, it would
20 have been 2011.

21 MS. RICE: June 23, 2011. Does that sound about
22 right? Okay. When was the second complaint received?

23 MR. MCCANN: Well, that was a 12 number, so that
24 would have been 2012.

25 MS. RICE: So March 7 of 2012.

1 MR. MCCANN: Okay.

2 MS. RICE: What steps, if any, did the Board take
3 between receipt of the first complaint in June of 2011 and
4 the second complaint in March of 2012?

5 MR. MCCANN: I do not know.

6 MS. RICE: So is it fair to say nothing, no steps
7 were taken?

8 MR. MCCANN: Well, again, this was a Ms. Hogan
9 matter so I can't speak to that.

10 MS. RICE: In your experience, would that be fair to
11 say, that nothing was done?

12 MR. MCCANN: No, I can't say that.

13 MS. RICE: You don't know. When did counsel
14 recommend that the Board decide to open an investigation in
15 this case mif you know? Let me help you out. How about
16 August 7, 2012 --

17 MR. MCCANN: There you go.

18 MS. RICE: -- which is about a year after the first
19 complaint.

20 MR. MCCANN: Okay.

21 MS. RICE: So do you know or do you happen to know
22 what the cause of the delay between receiving the initial
23 complaint and the Board's preliminary determination was? Do
24 you know what the delay was?

25 MR. MCCANN: Well, I am assuming it was part of the

1 case log, and when Ms. Hogan got to that point, and there
2 was a secondary complaint came in, I believe they were
3 merged for the purpose of the review.

4 MS. RICE: So how long after that decision does the
5 investigation actually begin in this case, if you know?

6 MR. MCCANN: I do not know.

7 MS. RICE: So let's -- I can help you out a little
8 bit. November 2012, does that sound about right, maybe?

9 MR. MCCANN: That could be.

10 MS. RICE: Did the Board of Elections use outside
11 resources to conduct this investigation, to the best of your
12 knowledge?

13 MR. MCCANN: The State police.

14 MS. RICE: They used the State police. So what we
15 just talked about with the statutory authority to use the
16 State police in investigations, that was done in this case,
17 correct?

18 MR. MCCANN: Correct.

19 MS. RICE: And I'm assuming that the decision was
20 made how to use the State troopers?

21 MR. MCCANN: Well, we didn't have an internal
22 investigator so --

23 MS. RICE: That's why, okay. Would you say, in your
24 estimation, that the State police were effective in
25 conducting this investigation?

1 MR. MCCANN: Well, from reviewing the file, it
2 appears that Ms. Hogan issued instructions to them, they did
3 the work and provided the answers.

4 MS. RICE: So the Board issued subpoenas in the
5 course of this investigation, correct?

6 MR. MCCANN: That's my understanding.

7 MS. RICE: Did the State troopers assist in issuing,
8 in serving these subpoenas?

9 MR. MCCANN: That I don't know.

10 MS. RICE: Well, if they were the investigators on
11 the case -- Mr. Brehm, you are nodding your head, correct?
12 Okay. So did the subpoenaed information help the
13 investigation, to the best of your knowledge, Mr. Brehm, or
14 anyone who knows the answer?

15 MR. MCCANN: Well, the fact is is that the Board,
16 based upon the work of the State police, under Ms. Hogan's
17 supervision, determined that the matter warranted a referral
18 to the Westchester County District Attorney.

19 MS. RICE: And they actually -- there were some
20 conclusions that were reached by the Board based on the
21 investigation, specifically potential violations of Election
22 Law 14 dash 130, section 14 dash 112 and 118 and Election
23 Law section 14 dash 102; is that correct?

24 MR. MCCANN: Correct.

25 MS. RICE: And so once the Board reached that

1 conclusion, they then made the referral?

2 MR. MCCANN: Correct.

3 MS. RICE: So would you say that this was one of the
4 BOE's most robust cases, maybe?

5 MR. MCCANN: I don't know what that means, but -- I
6 mean, it was a case where there was an investigation brought
7 to conclusion and it was referred.

8 MS. RICE: Right using all the statutory authority
9 that the BOE has, right?

10 MR. MCCANN: Correct.

11 MS. RICE: And, in fact, the work that the State
12 police did actually help the investigation, correct?

13 MR. MCCANN: That's correct.

14 MR. BREHM: With regard to robust, I know it gets
15 into what -- many of the allegations, generally, are errors
16 in filling out a report. So there's also a robust audit
17 that the staff does. I know that usually doesn't fit into
18 the line of investigation with regard to a criminal
19 referral, but generally many of those types of complaints
20 that we get are generally, they, you know -- if I could
21 categorize a great many of them are in the other category,
22 which we usually have the staff look at from an audit point
23 of view --

24 MS. RICE: I am just talking about the investigation
25 using the State troopers --

1 MR. BREHM: Correct. With regard to an
2 investigation, which the lay people generally understand an
3 investigation. This was a specific one that stood out.

4 MS. RICE: And the State troopers were helpful?

5 MR. BREHM: They were very helpful. We appreciated
6 their service.

7 MS. RICE: Commissioner Zimroth.

8 MR. ZIMROTH: Maybe you could just clarify
9 something that's very puzzling to me, specifically about the
10 State troopers, because we have been sitting here listening
11 to you with maybe some good justification saying how you are
12 understaffed and overworked and so on, on the one hand. On
13 the other hand, you have the State police, which by statute
14 is mandated to help you whenever you ask. And why was not
15 that used way more often than it was? I will ask this to
16 Mr. Valentine and Brehm or both.

17 MR. BREHM: The difficulty in something we speak to
18 often is the cases are part of the duty of the unit --

19 MR. ZIMROTH: I'm sorry, I am having a hard time
20 hearing you.

21 MR. BREHM: It's hard to have both this book and
22 get to the microphone sorry about that. The casework that
23 is done is part of the day's work that the two counsels to
24 the enforcement unit have, in addition to responding to
25 inquiries and the other work that the unit is doing

1 throughout the day. And it's, you know, very time
2 sensitive, different times of the year. If we took say 10
3 cases and gave them to the State police, there's still
4 review, follow-up and analysis simultaneously, and the
5 difficulty that we have is we didn't have -- we felt we
6 didn't have enough resources internally to simultaneously
7 handle, just give out say 10, 15 to the State police and
8 then get them back.

9 It certainly was a difficult judgment to make and
10 it's one that has been discussed -- you know, what is the
11 proper use of the resources, the limited resources we do
12 have. We have never been organized as a criminal -- while
13 we have the authority, I do agree, but from long before I
14 came to the building and for a long time, that certainly has
15 not been the way it was organized structurally,
16 procedurally, financially. And it's -- in hindsight, it's
17 very difficult to say, we had to make choices. We make
18 difficult choices every day, just like you -- and I am not
19 saying we are any different than any of you. We have to
20 make choices as to how best to use the resources.

21 MR. ZIMROTH: So what's puzzling to me -- can I
22 finish my point? And then I will give you both a chance to
23 respond to it. Because it sounds like, to me, what you are
24 saying is we were too busy to ask for help. That's what it
25 sounds like and it doesn't make sense.

1 MR. CASTLEMAN: Peter, can I ask a question? I'm
2 Daniel Castleman. I am sitting here listening, and I just
3 have one question to ask. Do you consider the Board of
4 Elections a law enforcement agency?

5 MR. MCCANN: I consider the Board of Elections to
6 be a compliance agency, first and foremost. We have always
7 said that the Board -- we want to get the stuff, so to
8 speak, not the people. There's no question that if -- and I
9 know you have, so I'm sure -- I hope you would agree, since
10 you have reviewed with great detail our complaints. The
11 vast majority of the complaints that the Board gets do not
12 involve high crimes and misdemeanors. They involve failure
13 to file, missing data. There is an assortment of things
14 that come in.

15 Again, as part and parcel of what we do, we try and
16 get folks, like your treasurers, to be able to comply with,
17 you know, this book. I mean, at the end of the day, you
18 know, when the people are -- the work that we do for suing
19 folks for failure to file, for helping train people, for
20 doing the audits that we get excoriated on, all the work
21 that we do, we can't win. So at the end of the day --

22 MR. CASTLEMAN: So you are a compliance agency, not
23 a law enforcement agency?

24 MR. MCCANN: Well, yes, that's our focus. Based
25 upon our resources, that's our focus.

1 MR. CASTLEMAN: Of course the statute makes you a
2 law enforcement agency. You choose not to use those powers.

3 MR. MCCANN: Well, I don't know that we are a law
4 enforcement -- we can investigate, but we certainly don't
5 have any prosecutorial powers.

6 MS. HOGAN: Mr. McCann, I want to follow-up on some
7 cases and talk to you about the way they were handled and
8 how they were closed if you could draw your attention to
9 Exhibit number 13 please. It's CMP 08 dash 21.

10 MR. MCCANN: Okay.

11 MS. HOGAN: This is, in fact, an allegation that a
12 candidate for the Assembly is skirting the contribution
13 limits by funneling money through his mother, who doesn't
14 have the means to make the contribution of \$29,900. The
15 letter's received on March 14, 2008 by the Board of
16 Elections, and in the letter they highlight for you that
17 this candidate was a protégé of a public official who had
18 pled guilty in federal court to stealing \$2.2 million from
19 union members, little leagues and the Assembly. So this
20 would be a red flag case, is that fair to say?

21 MR. MCCANN: I don't know what red flag would mean,
22 but I can -- speaking of the document, I can only tell you
23 that based -- you know, it says the Board, taking into
24 consideration the limited resources of the Board in line
25 with the Board's recent directive to address cases --

1 MS. HOGAN: Well, no. Go to the letter. The letter
2 is the third page.

3 MR. MCCANN: Oh, I'm sorry.

4 MS. HOGAN: See the letter?

5 MR. MCCANN: Correct.

6 MS. HOGAN: That's what came into the State of Board
7 of Elections. Then if you look at the second page of that
8 exhibit, on June 15, 2009 you and Ms. Hogan sign off on a
9 determination that says "a review of the complaint and
10 supporting materials."

11 MR. MCCANN: Correct.

12 MS. HOGAN: What supporting materials did you
13 review?

14 MR. MCCANN: Well, that's a general line. Whatever
15 we get in with the complaint, etcetera, would go to the
16 Board, and this would be a closing determination.

17 MS. HOGAN: Well, you wrote "supporting materials,"
18 correct?

19 MR. MCCANN: Well, that's what it says.

20 MS. HOGAN: That's your signature?

21 MR. MCCANN: Yes.

22 MS. HOGAN: And you filed it before the Board?

23 MR. MCCANN: Correct.

24 MS. HOGAN: I just want to know, what are the
25 supporting materials?

1 MR. MCCANN: It would have been anything that came
2 in with the complaint.

3 MS. HOGAN: We have a letter. We asked for
4 everything. Do you have anything more than a letter?

5 MR. MCCANN: Not that I'm aware of.

6 MS. HOGAN: So you read the letter and then you --
7 the letter came in on March 14, 2008 and you closed it out
8 on June 15, 2009.

9 MR. MCCANN: Again, this is a --

10 MS. HOGAN: How did it take that long if the only
11 thing you had to do was read the letter? If you are not
12 going to do it -- as Mr. Castleman just pointed out, you
13 view yourself as a compliance agency. If you are not going
14 to do it, at least do it quicker than from March of 2008 to
15 June of 2009.

16 MR. MCCANN: There is no question that the process
17 could work more efficiently and better, but at the end of
18 the day, it's part and parcel of the log. We have a big
19 backlog of cases and the Board directed that we address
20 those.

21 MS. HOGAN: Mr. McCann, on the confidential memo in
22 which you are sending it to the commissioners indicating
23 your preliminary determination. You indicate that it's
24 because of the limited resources, which we're all mindful
25 of, and in line with the Board's recent directive to address

1 cases of a greater vintage, was that a written directive?

2 MR. MCCANN: No. We discussed that in executive
3 session. The issue of the backlog of complaints, as part --
4 you know, the Board would ask counsel and say look, we have
5 to do something about this. Counsel would try to address
6 those as best we can --

7 MS. HOGAN: So we won't get any records, we won't
8 look at anything, we will just close out all the old ones
9 and start out fresh.

10 MR. MCCANN: I wouldn't necessarily characterize it
11 as that, but again, the Board, based upon our resources,
12 just like other agencies have to do, they have to make
13 determinations based upon their resources.

14 MS. HOGAN: Did you have any definition for "greater
15 vintage"?

16 MR. MCCANN: I don't believe so.

17 MS. HOGAN: I'm going to ask you to look at
18 Exhibit-14, Mr. McCann. This is a case in which a candidate
19 for City Council complains to you in letter form that his
20 treasurer cuts two checks that he did not authorize, one for
21 herself in the amount of \$850 and the other for another
22 person in the amount of \$850, and he's asking you to look
23 into it saying it's a violation of the Election Law and
24 arguably a grand larceny. Do you recall that case?

25 MR. MCCANN: Generally.

1 MS. HOGAN: It was your case, is that not true?

2 MR. MCCANN: Yes.

3 MS. HOGAN: And I think that you end up making a
4 determination, on the second page -- now again, did you open
5 an investigation?

6 MR. MCCANN: No. I think we directed that they work
7 with the audit unit to address the issues.

8 MS. HOGAN: So if someone steals money from an
9 account, it's not going to be, you know, subpoenaing whether
10 the bank records would support his allegation, interviewing
11 those people, getting sworn statements. Did you do any of
12 those things with respect to this case?

13 MR. MCCANN: No.

14 MS. HOGAN: And you closed it out?

15 MR. MCCANN: Correct.

16 MS. HOGAN: Now, in this particular case, this says,
17 with respect to this particular closeout memo, you again
18 cite your limited resources and "in line with the Board's
19 recent directive to address cases of greater priority." So
20 whose directive was that?

21 MR. MCCANN: Well, again, we had the issue of the
22 backlog for the Board and it needed to be addressed. The
23 Board directed that we should, again, closeout cases based
24 upon our resources, and then essentially try to catch up, if
25 you will, to have a more timely complaint process.

1 MS. HOGAN: So how much did you have to steal to be
2 a greater priority? Was there a number discussed?

3 MR. MCCANN: No.

4 MS. HOGAN: Was there any definition of priority?

5 MR. MCCANN: No.

6 MS. HOGAN: Let's move on to Exhibit-15, Mr. McCann.
7 Campaign contribution limits are important. Would you agree
8 with that, Mr. McCann?

9 MR. MCCANN: Correct.

10 MS. HOGAN: And it's important in terms of our
11 Election Law to ensure that individuals comply with campaign
12 contributions?

13 MR. MCCANN: Certainly.

14 MS. HOGAN: And with respect to Exhibit-15, the
15 Board received a letter from Dutchess County on September
16 5th, which they have forwarded to you a referral from an
17 individual. And in this election cycle, the Assembly limit
18 was 3,800; isn't that correct?

19 MR. MCCANN: Well, if it was 2008, it would have
20 been something like that, correct.

21 MS. HOGAN: It is. And this individual outlines
22 five people who have contributed in excess of the campaign
23 contributions; is that correct?

24 MR. MCCANN: That would appear to be so.

25 MS. HOGAN: Now, what did you do when this received

1 its CMP number?

2 MR. MCCANN: Well, again, I don't recall who was
3 specifically assigned it, but I'm assuming it was put in the
4 queue and would have been addressed, as appropriate, when
5 whoever was assigned it would have gotten to it.

6 MS. HOGAN: And is this a greater priority or a
7 greater vintage case?

8 MR. MCCANN: No. I think it's an issue of the
9 resources and the investigation it would take to do that.

10 MS. HOGAN: And why did you think that it didn't
11 warrant bringing it to the Board to open an investigation?

12 MR. MCCANN: Because, again, it was part of the
13 backlog and the work that we were doing.

14 MS. HOGAN: You signed the sign-out on September 10,
15 2009, correct?

16 MR. MCCANN: Correct.

17 MS. HOGAN: And it was officially closed -- your
18 memo to the commissioners was August 28; is that correct?

19 MR. MCCANN: That's what it says so --

20 MS. HOGAN: So this excess of contribution case, you
21 give the reason for the closing out and "in line with the
22 Board's recent directive to address cases in the most
23 expeditious manner," correct?

24 MR. MCCANN: That's what it says, yup.

25 MS. HOGAN: So this arrives in your office September

1 2008 and you are closing it out September 2009. Is that
2 what was defined as expeditious by the Board?

3 MR. MCCANN: Again, it was an issue of dealing with
4 the backlog.

5 MS. HOGAN: If you are not going -- may I have the
6 pie chart brought out?

7 MS. CALCATERRA: Exhibit-39 please.

8 MS. HOGAN: If you go to your materials, Mr. McCann,
9 on Exhibit number 39, you are going to see a pie chart, and
10 I just want to talk to you briefly about that, and I'm sure
11 you don't want me to talk anymore. Have you had a chance to
12 review the pie chart?

13 MR. MCCANN: I looked at it.

14 MS. HOGAN: What I am curious about is the average
15 number of days a complaint is open. I have just cited to
16 you cases where there appears to be a legitimate Election
17 Law violation, and during the period of time that is, on
18 average -- your average is 302 days. During that whole
19 time, Mr. McCann -- and I understand you're strapped and I
20 understand you're doing a lot more than just enforcement --
21 but it never occurred to you to ask for anyone to look at
22 this, as Mr. Zimroth said, the State police, anybody? It
23 never occurred to you to ask the commissioners to revamp
24 their policy about needing the Board approval to issue a
25 subpoena?

1 MR. MCCANN: Well, again, I don't think it's an
2 issue that it never occurred to us. I can tell you --

3 MS. HOGAN: It did occur to you?

4 MR. MCCANN: No, no. What I'm saying is, again, in
5 the context of the Board of Elections, the resources that we
6 were, I guess, in essence entitled to, were not being
7 provided. You know, the long and the short of it is that we
8 asked for resources. And I understand the State police
9 could still be of assistance. I don't disagree with that.
10 But it would still require --

11 MS. HOGAN: You didn't need resources. You had an
12 investigator sitting at his computer, asking you for work
13 and playing Solitaire and studying his Bible verses because
14 you refused to give him work. You also had, pursuant to
15 your November 2007 memo, you had both budget and civil
16 service authority to hire an additional investigator, and in
17 February of 2008. So you can talk resources all you want.
18 Isn't it true you didn't want to look at any of these with a
19 critical eye?

20 MR. MCCANN: No.

21 MS. HOGAN: Because that's what it looks like.

22 MR. MCCANN: Well, I disagree.

23 MS. HOGAN: I don't have anything further.

24 MR. CASTLEMAN: I was curious about something Kate
25 Hogan just asked you. There were a number of cases that

1 were closed, and first what the Board cited, were cases of
2 greater vintage, and I understand that. Cases get old and
3 you have to move on to those cases that are the oldest. But
4 then the next reason that was cited, this is Exhibit-14,
5 were cases of greater priority. Do you recall that, Mr.
6 McCann?

7 MR. MCCANN: Correct.

8 MR. CASTLEMAN: My question is: Does the Board
9 have a system by which it prioritizes complaints? Because
10 you have said, a number of times today, that when the
11 complaint comes in, it gets on the queue. And that sounds
12 to me like it comes in and it gets a number, it gets in the
13 queue. Is that the way it works?

14 MR. MCCANN: Well, it gets assigned the year and
15 then the number it and it goes on the list. Correct.

16 MR. CASTLEMAN: But my question is does anyone
17 prioritize these complaints?

18 MR. MCCANN: I -- well, I don't know that they're
19 prioritized from that standpoint. I mean, counsels get
20 assigned them and then review them --

21 MR. CASTLEMAN: You are familiar with the term
22 triage?

23 MR. MCCANN: Sure.

24 MR. CASTLEMAN: It happens in emergency rooms, it
25 happens in prosecutor's offices, it happens everywhere.

1 Agencies that are strapped for resources take a look and
2 make a determination that they will use their resources on
3 the most serious and most pressing matters. You are
4 familiar with that?

5 MR. MCCANN: Sure.

6 MR. CASTLEMAN: Does the Board of Elections do
7 that? It sounds like it does not.

8 MR. MCCANN: Well, again, when we look at the
9 complaints and when they are assigned, they are reviewed
10 but --

11 MR. CASTLEMAN: They are reviewed in the order in
12 which they come in, right?

13 MR. MCCANN: Essentially, yes.

14 MR. CASTLEMAN: But no one, during the course of
15 that, unless I'm mistaken, and you will tell me, no one
16 pulls one out and says this one has to get to the front of
17 the queue because it's so serious?

18 MR. MCCANN: That would be correct.

19 MR. CASTLEMAN: So there is no prioritization of
20 complaints that come into the Board of Elections. You just
21 said that.

22 MR. MCCANN: Well, the issue of the priority in
23 terms of that memo is based on the context of we need to
24 clean-up the backlog which means that we need to get more
25 current, so that's the priority.

1 MR. CASTLEMAN: But you also just said that with
2 the limited resources you were provided, there was not much
3 more you could do. But when you have limited resources, it
4 seems to me, you use those limited resources on the most
5 significant matters. That's not what we're hearing here.

6 MR. MCCANN: Well, again, it's an issue of the
7 directive of the Board to, in essence, catch up, and we were
8 never caught up.

9 MR. CASTLEMAN: And you will never be caught up.

10 MR. MCCANN: That could be.

11 MR. BREHM: Can I -- on that point, if I might? As
12 much as I don't like it, I agree from -- that there was part
13 of the thinking that closing some of the backlog because of
14 the timing issue and to focus more on what was left, and I
15 think that was some of the thinking behind that series of
16 decisions that you read where, you know, if we can't handle
17 300, can we handle 10 kind of a thinking --

18 MR. CASTLEMAN: But you closed --

19 MR. BREHM: And I know that from a perspective and
20 then more come in.

21 MR. CASTLEMAN: You close cases saying that
22 resources had to be provided to the priority cases, yet you
23 have no way of prioritizing those cases.

24 MR. BREHM: Triaging is a difficult issue.

25 MR. CASTLEMAN: So that letter really is an excuse

1 because you are aren't prioritizing cases at all. Let me
2 just move on for a moment. In your written testimony, on
3 page 17, where you are talking about formal complaints, you
4 say, I guess in the second sentence of that paragraph, "over
5 the past six years, the Board has received, on average, more
6 than 100 formal complaints each year." Do you see that?
7 Page 17. And then you go on to say "because of the partisan
8 nature of politics, we do not accept anonymous complaints;"
9 is that right?

10 MR. MCCANN: Correct.

11 MR. CASTLEMAN: Now, to be clear, that is a policy
12 of the Board, right?

13 MR. MCCANN: Correct.

14 MR. CASTLEMAN: It's not dictated by statute or any
15 other regulation?

16 MR. MCCANN: Correct.

17 MR. CASTLEMAN: The Board can change that policy
18 whenever it wants. Can you tell me when that policy was put
19 in place?

20 MR. MCCANN: It was an existing policy before I came
21 to the Board in 2000.

22 MR. CASTLEMAN: Okay. And you are the senior --
23 you have been at the Board the longest of the three of you?
24 Oh, no. Mr. Brehm, you were there in 1991 you said?

25 MR. BREHM: I was at the local county board from

1 '91 until 2006. I came to the State Board then.

2 MR. CASTLEMAN: So none of you are aware as to when
3 that policy came into effect?

4 MR. MCCANN: No.

5 MR. CASTLEMAN: But it has long been the policy of
6 the agency. Just repeating it, it says "because of the
7 partisan nature of politics, we do not accept anonymous
8 complaints," and you state it as if it's a self-evident
9 proposition, and I think myself and my fellow Commissioners
10 do not regard that as a self-evident proposition, so please
11 explain the logic behind that policy.

12 MR. MCCANN: Well, again, you know, the policy of
13 the Board, before I arrived, was that it would not look at
14 anonymous complaints, because the nature of politics being
15 what it was or is, that people could make allegations
16 against someone and have it be anonymous and then since, you
17 know, being under the, you know, the spotlight, so to speak,
18 of saying that there is an investigation or you're under
19 investigation by the Board of Elections, that could be used
20 as a flow, in essence, and so --

21 MR. CASTLEMAN: I get that. I understand that.
22 Politics is a partisan occupation, I understand that. But
23 shouldn't it be the nature of the information received that
24 is the basis of whether or not you take action, not whether
25 it's anonymous or not? I mean, you would agree, there are

1 some anonymous allegations that have great substance.

2 MR. MCCANN: Well, I think, like with any policy,
3 you can find, you know, exceptions to the policy. But
4 again, the policy as a whole, being the policy of the Board,
5 I can see certain benefits of that.

6 MR. CASTLEMAN: Just because information comes in
7 that relates to a campaign doesn't make the information
8 unreliable. That's a determination that you make after, in
9 fact, you do an investigation or have some review, I
10 imagine.

11 MR. MCCANN: Again, I can only speak to what the
12 policy of the Board is.

13 MR. CASTLEMAN: Well, you have got, I guess, 10
14 sitting DAs here, and I myself was at the Manhattan DA's
15 office for 30 years, and I can tell you that some of our
16 best cases were based on anonymous complaints, and I am just
17 curious as to why the Board wouldn't take advantage of that.
18 Do you ignore them as if they don't exist?

19 MR. MCCANN: Well, it would be provided to the
20 Board. The Board would have an opportunity to review it.
21 But again, the Board's policy is that we don't investigate
22 anonymous complaints.

23 MR. CASTLEMAN: And when you receive a complaint by
24 e-mail, which does not list a physical address, do you treat
25 that the same as an anonymous complaint?

1 MR. MCCANN: Well, they would inquire as to have the
2 identifying mailing address of the individual, but if we did
3 not get it, the policy is we would treat them as anonymous,
4 correct.

5 MR. CASTLEMAN: So if you get an e-mail without an
6 address, it's treated as an anonymous complaint, despite the
7 fact that you can e-mail back and ask for the address.

8 MR. MCCANN: Which they do. It's my understanding
9 they do do that.

10 MR. CASTLEMAN: So just to be clear, if you get an
11 allegation anonymously, you are not going to look at that.

12 MR. MCCANN: That's the Board's policy.

13 MR. CASTLEMAN: If you get the same exact allegation
14 with a name and a street address, you will look at that.

15 MR. MCCANN: Correct.

16 MR. CASTLEMAN: I take it then that you verify the
17 identity of the sender and address?

18 MR. MCCANN: No. Well, we correspond with them.

19 MR. CASTLEMAN: But you don't ever go in to see
20 whether or not the person whose name appears on the
21 complaint actually exists?

22 MR. MCCANN: That would be correct.

23 MR. CASTLEMAN: And you don't ever go in and see
24 whether or not the address actually exists?

25 MR. MCCANN: That would be correct.

1 MR. CASTLEMAN: And it would be -- I understand you
2 are strapped for resources. I get that. But you have got
3 access to the internet?

4 MR. MCCANN: Certainly.

5 MR. CASTLEMAN: And you have heard of White Pages
6 dot com? It wouldn't take very much to see whether or not
7 the sender of that was the real person or not a real person.
8 But the Board doesn't do that?

9 MR. MCCANN: That's correct.

10 SPEAKER: Do the DAs?

11 MR. CASTLEMAN: Very often, ma'am.

12 SPEAKER: Can you back it up with evidence?

13 MR. CASTLEMAN: The purpose of the policy is so
14 that you won't interfere in the electoral process, if I
15 understand your explanation?

16 MR. MCCANN: Well, as it was conveyed to me, yes.

17 MR. CASTLEMAN: But you can conduct an
18 investigation, or at least a preliminary investigation,
19 without telling anybody; isn't that right?

20 MR. MCCANN: Well, we have lots of authority under
21 the Election Law.

22 MR. CASTLEMAN: You can conduct a confidential
23 investigation in which it's not made public?

24 MR. MCCANN: That's correct.

25 MR. CASTLEMAN: So the fact is that if an allegation

1 is made anonymously, your reasoning is that it's all
2 partisan politics, but you don't have to make it public. So
3 what is the real explanation?

4 MR. MCCANN: I can only speak to the policy that was
5 conveyed to me, sir.

6 MR. CASTLEMAN: I want to talk to you about
7 Exhibit-18, CMP 09 dash 16. This was an anonymous complaint
8 received in April of 2009, and I note that there was no
9 preliminary determination made, and of course there wouldn't
10 be because it was anonymous and therefore you didn't look
11 into it at all. Would that be accurate?

12 MR. MCCANN: Correct.

13 MR. CASTLEMAN: And the final determination was made
14 by the Board in July of '09; is that correct? Our review of
15 your records indicate that the final determination was made
16 July 24 of '09.

17 MR. MCCANN: Okay.

18 MR. CASTLEMAN: So three months passed before you
19 made a final determination of that anonymous complaint, and
20 I assume, because we have heard it from a lot of times now,
21 that that's probably the result of where it fell on the
22 queue.

23 MR. MCCANN: Well, frankly, an anonymous complaint,
24 if it's anonymous, you can bring it right away. Again, I
25 can't speak to, you know, how it was processed, but

1 certainly --

2 MR. CASTLEMAN: So an anonymous complaint could be
3 closed the day it's received?

4 MR. MCCANN: Well, no. Only the Board can close it,
5 but it could go to the next Board meeting. But when it
6 comes in, it goes for review --

7 MR. CASTLEMAN: And the Board meets monthly, I
8 assume?

9 MR. MCCANN: Approximately.

10 MR. CASTLEMAN: So it would take probably a month,
11 but this took three months. I am not -- that's fine. I am
12 not concerned so much about the amount of time. Let me just
13 describe the complaint for you. This was a complaint about
14 a staff member of the legislature, was it not? And that
15 staff member of the legislature was standing as a candidate
16 in the primary in upstate New York, and he and another
17 candidate in that election made some comments which resulted
18 in a lawsuit against both men. And that lawsuit was the
19 subject of news reports. And, in fact, what the Board
20 received was a copy of the Times Union article on that case.
21 The Board received some other documents on that case, and
22 the documents -- what happened, apparently, is that the two
23 individuals who were being sued, one of whom was a
24 legislative staff member, engaged one of the prominent law
25 firms in Albany. And among the things that the Board was

1 provided with were billing records from that law firm that
2 showed that the cost of the defense of this lawsuit was
3 being split between the legislative staff member, who was a
4 candidate, and his fellow candidate. Isn't that what it
5 showed?

6 MR. MCCANN: Generally, yes.

7 MR. CASTLEMAN: And there are three billings from
8 this prominent Albany law firm and for each billing they
9 were split in half. So the legislative staff member is
10 responsible for half of that bill; is that correct?

11 MR. MCCANN: Presumably, yes.

12 MR. CASTLEMAN: And the total amount of the bill
13 that the legislative staff member was responsible for, I've
14 don't math, is \$32,536.23, correct?

15 MR. MCCANN: Okay.

16 MR. CASTLEMAN: And not only did you receive the
17 Times Union article and the three billing cycles from the
18 law firm in Albany, you also received a handwritten note on
19 the stationery of the Assembly of the State of New York. Do
20 you see that handwritten note, or a copy of it?

21 MR. MCCANN: I do.

22 MR. CASTLEMAN: And it was dated July 17, '08. And
23 I'm not going to name the names, but it says "dear -- a
24 woman's name and a man's name -- enclosed is a check -- now,
25 this is on legislative stationery. "Enclosed is a check for

1 \$32,536.23 for my half of the legal fees," and then it
2 references the name of the case. "Please credit my account
3 this amount." And then he goes on to write, and this is
4 handwritten in his own handwriting, "as we have previously
5 discussed, my payment is to be held in the strictest of
6 confidence. If you have any questions or concerns, please
7 contact me directly," and then it lists a phone number, and
8 the legislative staff member signs it. Correct?

9 And then, among the other evidence that you received
10 anonymously, is a check with a particular number, a date,
11 and it's written from one of the party's housekeeping
12 accounts mand from this housekeeping account is a check to
13 the law firm in the amount of \$32,536.23; is that right?

14 MR. MCCANN: Correct.

15 MR. CASTLEMAN: So what this legislative staff
16 member has done is he has had a party housekeeping account
17 pay for his personal legal bills. That's the only
18 conclusion that can be reached; isn't that right?

19 MR. MCCANN: Well, again, I don't know if it related
20 to a campaign or some such other thing.

21 MR. CASTLEMAN: Well, it related to the lawsuit,
22 because the handwritten note says it's related to the
23 lawsuit, and the handwritten note makes the comment that
24 it's the same exact amount of money, which just happens to
25 add up to his share of the three bills from the law firm.

1 You would agree that this is an expenditure from a
2 housekeeping campaign account for his personal bill on a
3 lawsuit where he is being sued individually?

4 MR. MCCANN: That appears to be what it says.

5 MR. CASTLEMAN: And that would be a violation of the
6 Election Law, is it not?

7 MR. MCCANN: It could be.

8 MR. CASTLEMAN: Could be. But you didn't determine
9 that because it was received anonymously and so you and the
10 Board, well, you and Ms. Hogan, whoever reviewed this,
11 determined that it would not be investigated because it had
12 been received anonymously?

13 MR. MCCANN: Well, I would say that the Board
14 determined that. Again, the Board --

15 MR. CASTLEMAN: Well, someone made a recommendation,
16 right? That recommendation was either you or Ms. Hogan.

17 MR. MCCANN: It was the policy of the Board.

18 MR. CASTLEMAN: Policy of the Board. And yet, on
19 its face, this appears to be information that could, in
20 fact, be quite reliable. In fact, it appears that it's been
21 sent by someone close to this candidate, because only
22 someone who is close to this candidate would have access to
23 the attorney's bills, the personally handwritten note and a
24 copy of the check from the housekeeping account, right? But
25 because it's received anonymously, you ignored it. Do you

1 have any idea how many other such anonymous complaints you
2 may have received over the years that had this type of
3 specific detailed information?

4 MR. MCCANN: I could not speculate.

5 MR. CASTLEMAN: Is that because you do absolutely no
6 prioritization of complaints when they come in?

7 MR. MCCANN: Again, they go on the list. And it's
8 anonymous. It's not --

9 MR. CASTLEMAN: The Board can change that policy at
10 any time, correct?

11 MR. MCCANN: Correct.

12 MR. CASTLEMAN: Would you now be in a position to
13 recommend to the Board that it revisit its policy on
14 acceptance of anonymous complaints?

15 MR. MCCANN: Well, certainly we would discuss it.
16 I'm sure --

17 MR. CASTLEMAN: And will you make that
18 recommendation, Mr. McCann?

19 MR. MCCANN: Well, again, I will speak to the Board,
20 certainly, about the issue. I mean, the Board has discussed
21 this. I --

22 MR. CASTLEMAN: You do make recommendations to the
23 Board?

24 MR. MCCANN: Certainly.

25 MR. CASTLEMAN: On cases?

1 MR. MCCANN: Yes.

2 MR. CASTLEMAN: And would you take Exhibit-18 back
3 with you to the Board and ask if they'll revisit that
4 policy?

5 MR. MCCANN: Yes.

6 MR. CASTLEMAN: Great. Now, how does the Board
7 address complaints filed in the time leading up to an
8 election?

9 MR. MCCANN: In what regard, sir?

10 MR. CASTLEMAN: Well, is there a period of time
11 before an election, election day, that the Board has
12 determined, by policy or otherwise, that it will take no
13 action on a complaint made about that election?

14 MR. MCCANN: Well, generally prior to the election,
15 that's correct.

16 MR. CASTLEMAN: And what is the time period that --
17 what is that window where you won't take any action?

18 MR. MCCANN: I don't believe there is an exact
19 window.

20 MR. CASTLEMAN: Well, about what?

21 MR. MCCANN: Again, I -- I wouldn't speculate.

22 MR. CASTLEMAN: How long has that policy been in
23 place, if you know?

24 MR. MCCANN: It's been any number of years, but I
25 don't recall specifically when it came --

1 MR. CASTLEMAN: Has it been the policy since you've
2 been there?

3 MR. MCCANN: I don't recall that either.

4 MR. CASTLEMAN: Can you tell us what the reason is
5 for that policy?

6 MR. MCCANN: Because, again, the issue is -- it's
7 much along the lines of the anonymous complaints. It goes
8 to the issue of complaints being used for political
9 purposes, just like when someone calls our press office and
10 they say do you have a complaint, we do not acknowledge
11 receipt or existence of complaints.

12 MR. CASTLEMAN: But you don't prioritize them
13 either, so it doesn't matter. What if the complaint has
14 been made public already?

15 MR. MCCANN: That's still the policy of the Board.
16 Because people can certainly just say I filed a complaint
17 with the Board.

18 MR. CASTLEMAN: If it's been made public, why would
19 you not then look into it confidentially?

20 MR. MCCANN: Well, I don't know that's an issue of
21 looking at it confidently. I believe the issue is that if I
22 can go to the Board and say I filed a complaint and I go to
23 the press and say I just filed a complaint with the Board,
24 again, I am now using a complaint as potentially a political
25 club.

1 MR. CASTLEMAN: I guess my question is: You applied
2 the same policy to these complaints as you do to any other
3 complaint -- you don't prioritize among them?

4 MR. MCCANN: I guess to that extent, the answer is
5 no.

6 MR. CASTLEMAN: Because you ignored them all.

7 MR. MCCANN: I wouldn't say we ignore them all.

8 MR. CASTLEMAN: Well, you wait until after the
9 election. To be fair, you wait until after the election and
10 then you take some action?

11 MR. MCCANN: Well, again, they're in the queue and
12 we get to them as we get to them.

13 MR. CASTLEMAN: So they're in the queue, which means
14 the ones that are most serious stay in that queue with the
15 ones that are least serious, until someone happens to get to
16 it. So even if a complaint includes supporting
17 documentation that proves that a violation has occurred or
18 is about to occur in an election that is to take place in
19 the upcoming weeks, you will take no action on that
20 complaint?

21 MR. MCCANN: Well, again, A, number one, we get lots
22 of complaints, and B, number two, it's still an issue of
23 addressing them.

24 MR. CASTLEMAN: If your concern is with lending
25 legitimacy to complaints in the lead-up to an election, how

1 does your policy impact that when you don't have to make
2 what you are doing public?

3 MR. MCCANN: I don't know that I understand your
4 question.

5 MR. CASTLEMAN: Well, you can conduct confidential
6 investigations. You don't make public everything you do.
7 But your explanation for not taking any action in the
8 lead-up to an election is you don't want it to lend
9 legitimacy to one side or the other, but that's not an issue
10 if you do it confidently without making a public statement.

11 MR. MCCANN: But again, it's still going to go
12 back -- all be it, you are not accepting it as a response,
13 but it's still going to go back to the resources that we
14 have to provide that.

15 MR. CASTLEMAN: Isn't one of the primary purposes of
16 the Election Law to protect the fairness of elections?

17 MR. MCCANN: Certainly.

18 MR. CASTLEMAN: And the Board of Election is the
19 agency principally charged with doing that?

20 MR. MCCANN: Correct.

21 MR. CASTLEMAN: Aren't you concerned that by
22 eliminating any possibility of preelection enforcement
23 activities with regard to violations occurring in the time
24 leading up to the election may lead to unfair elections? I
25 mean, let's put it this way: Let's make it more concrete.

1 There is a limit on corporate contributions, correct?

2 MR. MCCANN: Correct.

3 MR. CASTLEMAN: It's \$5,000 per year. That's right?

4 MR. MCCANN: Correct.

5 MR. CASTLEMAN: So if you were to receive
6 information that in the 30 days before an election, you
7 received copies of checks, for example, that showed that a
8 corporation was making campaign contributions of \$150,000,
9 you would take no action based on that?

10 MR. MCCANN: Well, again, the issue is you are
11 getting that complaint in the context of all kinds of
12 complaints, and as much as people don't want to hear it,
13 it's still an issue of resources.

14 MR. CASTLEMAN: But if you get a copy of the check
15 showing you that, you just put it aside until after the
16 election?

17 MR. MCCANN: We put it aside until we could address
18 it.

19 MR. CASTLEMAN: And \$150,000 in some elections could
20 probably be the difference between winning and losing, if
21 spent well by a candidate. Wouldn't you agree?

22 MR. MCCANN: I guess there is the potential.

23 MR. CASTLEMAN: So wouldn't you agree that the most
24 impact-ful violations of the Election Law often will occur
25 in the heat of the battle running right up to the election

1 date?

2 MR. MCCANN: It could.

3 MR. CASTLEMAN: And yet the policy of the Board is
4 to do nothing about them until after the damage is done?

5 MR. BREHM: If I might, for a moment, and I don't
6 mean to interrupt your conversation, but on that point, the
7 difficulty we have is, unfortunately, a resource, but if we
8 get an allegation that close to an election and we don't
9 have the resources to bring it to fruition, we tend not to
10 speak about it because we don't think it's fair to both the
11 complainant -- because we won't have the opportunity to get
12 to the person making the complaint or to the person that the
13 complaint is against. So it's a window around that period
14 of time that we feel, if we don't have the resource to give
15 the right amount of attention to it -- you know, and,
16 therefore, it's not fair to either side, in that kind of a
17 situation, as we get close to an election, and that's a
18 general problem because of the timing, you know. If we had
19 enough resources that we could get it to fruition and do
20 that level, you know, maybe -- that's just not been a world
21 that I've experienced in my period of time at the State
22 Board and from anything I've looked at since I've been at
23 the State Board, above recent or the long history of the
24 State Board.

25 So it's difficult to be fair -- how do you give

1 fairness when somebody makes a political allegation,
2 depending on what level of information they give you at the
3 time of that. I wish we could triage. I wish we had the
4 resources to do that. I don't disagree that what you are
5 saying is very important, and I understand that.

6 MR. CASTLEMAN: You don't have the resources, so
7 you just presume that you won't be able to conclude the
8 investigation before the election, whether or not you can or
9 not?

10 MR. BREHM: It gets into that period of time as you
11 get close -- and clearly, from what you have described and
12 what we see, knowing what the period of time is that we have
13 these open cases, I think you have described what we know.
14 And we go to work every day knowing that, and that's tough,
15 and that's why we have asked people for the resources. Some
16 of the other recommendations -- you know, certainly as a
17 district attorney you've got a lot more experience, and all
18 of you do, and we look to that insight also, as far as what
19 can we do to improve our operation without the addition of
20 resources, because I think in some of our conversations,
21 that's just apparent every day.

22 MR. CASTLEMAN: Well, wouldn't you agree that a very
23 simple thing to do would to start prioritizing the
24 complaints? I mean, you have got smart people at the Board
25 of Elections. How come no one's ever come up with that

1 solution to your backlog? I mean, it's just common sense.
2 How can you not prioritize your complaints? Mr. McCann, you
3 see these complaints daily.

4 MR. MCCANN: I do.

5 MR. CASTLEMAN: And you know, because you're an
6 experienced attorney with a great deal of experience in
7 enforcing the Election Law.

8 MR. MCCANN: Well, again --

9 MR. CASTLEMAN: How can you not look at something
10 and say this one goes to the back of the pile but this one
11 goes to the front of the pile?

12 MR. MCCANN: Well, I would say, to the extent that,
13 for instance, on those matters that are Article 14 matters
14 or related matters that we might send to audit, I mean, that
15 is a prioritization in some regard, or things that we can
16 close as we call a complaint not requiring a preliminary
17 determination where on its face is not a violation or that
18 violation has been resolved as some other thing. There is,
19 in essence, a prioritization. But I don't disagree that the
20 Board can certainly do more and could do better with those
21 things. I am not disputing that.

22 MR. CASTLEMAN: It doesn't take a Commission to tell
23 you that there are some complaints that are more serious
24 than others, does it?

25 MR. MCCANN: I don't disagree.

1 MR. CASTLEMAN: So why is it that that has never
2 been implemented by the Board of Elections?

3 MR. MCCANN: Again, I think the issue is, as we've
4 said, and I know people don't want to hear it, but again,
5 the enforcement counsel or the deputy enforcement counsel --
6 investigations in that aspect of our job is just one -- and
7 I am not saying it's not important, but again, it's just one
8 portion of what we do. We do other things that are
9 successful. We sue people to --

10 MR. CASTLEMAN: Your view is that your role is to be
11 a compliance agency and not a law enforcement agency --

12 MR. MCCANN: Because based upon the resources that
13 we have, that's the most effective that we can do. We --

14 MR. CASTLEMAN: But your Board can change that in an
15 instant.

16 MR. MCCANN: Well, but then where do we win. If we
17 don't sue people for failure to file, which we do
18 successfully, and we refer those people to the district
19 attorney for failure to file, we get criticized for that.

20 MR. CASTLEMAN: But you have cases that are actual
21 crimes that are not being investigated. Wouldn't you agree?

22 MR. MCCANN: But again, it's not an issue of --

23 MR. CASTLEMAN: I understand the resources again.

24 MR. MCCANN: Well, again, if I have to -- look.

25 There's no question that the Board of Elections has not been

1 appropriately equipped. You can cite --

2 MR. CASTLEMAN: I'm sorry, Mr. McCann. The truth is
3 we all do with our resources what we can --

4 MR. MCCANN: Right.

5 MR. CASTLEMAN: -- and the problem is that the Board
6 of Elections, it seems to me, has never done the best job
7 with the minimal resources that you have, and the simplest
8 proof of that is that you don't prioritize cases based on
9 the seriousness, which you have admitted. Ms. Hogan?

10 MS. HOGAN: Professor?

11 MR. BRIFFAULT: Sure. Good evening. I'm going to
12 ask you a handful of -- I am going to change the subject
13 quite a bit and ask you a handful of questions on the
14 subject of the limited liability companies, LLCs. It may
15 give a chance in a change who the answerers are going to be
16 to these questions. So let's talk a little bit about
17 limited liability companies, LLCs. I think you will agree
18 that these are business entities that have some of the
19 features of partnerships and some of the features of
20 corporations; is that right? Mr. Brehm or Mr. Valentine?

21 MR. VALENTINE: Yes.

22 MR. BRIFFAULT: Okay, great. In particular, like
23 corporations, they have the ability to accumulate capital,
24 interests in LLCs are transferrable, and, of course, there's
25 limited liability, as the name implies, for the members. Is

1 that right, as far as you know?

2 MR. VALENTINE: Well, as far as we know, but
3 they're also defined as unincorporated business
4 organizations and --

5 MR. BRIFFAULT: We will get to that in a second.
6 But we are talking about how they are as a practical matter,
7 how they function. As a reminder to the members of the
8 Commission and particularly to the audience, under the New
9 York Campaign Finance Law, and I think this was just eluded
10 to, corporations are subject to an aggregate cap of just
11 \$5,000 in contributions per year, while individuals are
12 subject to a much higher aggregate of \$150,000 in a calendar
13 year, right? I got that right?

14 MR. VALENTINE: That's correct.

15 MR. BRIFFAULT: So it does matter, it matters a lot
16 whether an LLC is treated as a corporation or as an
17 individual. Now, in terms of how the Board actually treats
18 LLCs, there is a 1996 Board of Elections opinion treating
19 LLCs as individuals. You have actually got that in your
20 binder, although I'm sure you know them without them, with
21 the binder it's Exhibit-29, and that opinion relies, at least
22 in part, on a 1995 Federal Election Commission opinion which
23 has the similar, same thing, treating LLCs as individuals,
24 and we have got that. The FEC's opinion -- it's an Advisory
25 opinion on Exhibit-30. Then the FEC did something

1 interesting. In 1999 they adopted a regulation providing
2 that LLCs be treated sometimes as partnerships and sometimes
3 as corporations, depending on the tax status they had chosen
4 for themselves, and you have got that at Exhibit-31,
5 although I am sure you're aware of it as well. Did the
6 Board of Elections ever reconsider its treatment of LLCs, in
7 light of the FEC's change of position?

8 MR. VALENTINE: Well, we did in 2001, after that was
9 adopted, we did look at that again --

10 MR. BRIFFAULT: What did you do?

11 MR. VALENTINE: -- and saw that that State statute
12 had not been -- or State statute defining them as not a
13 corporation had not been changed.

14 MR. BRIFFAULT: Was that in the Election Law, State
15 statute that does that?

16 MR. VALENTINE: It's the Limited Liability
17 Corporation Law.

18 MR. BRIFFAULT: Right. It's not an Election Law?

19 MR. VALENTINE: No.

20 MR. BRIFFAULT: And it doesn't say anything about
21 how they should be treated for purposes of the Election Law
22 restrictions on corporations, right?

23 MR. VALENTINE: It defines how corporations are
24 treated.

25 MR. BRIFFAULT: Well, it defines what a corporation

1 is and what an LLC is, but it doesn't say anything about
2 how, given the hybrid nature of LLCs, they ought to be
3 treated, for Election Law purposes, given the radically
4 different treatment that corporations and individuals are
5 given under the Election Law, right?

6 MR. VALENTINE: The Election Law defines
7 corporation, and under the Business Laws of New York,
8 they're not a corporation.

9 MR. BRIFFAULT: Right. Now, have you ever thought
10 about adopting a rule on this? I mean, the FEC adopted a
11 rule, New York City did it by local law, but they treat LLCs
12 just like corporations for election purposes. You have the
13 power to adopt those -- or by not doing an investigation
14 where the limited resources aren't an issue, and it's not
15 even an enforcement matter, which I understand you are not
16 an enforcement agency, but you actually have broad rule
17 making authority under section three dash 102, sub one, of
18 the Election Law. This is an area where you could have
19 written a rule, right? You didn't need a formal opinion or
20 even need to amend the law. You could have written a rule
21 on this.

22 MR. VALENTINE: Well, even regulations can only be
23 adopted within the structure of the State statute. They
24 can't go beyond State statute.

25 MR. BRIFFAULT: Right. But they can carry out the

1 purposes of a statute if they are not inconsistent with the
2 statute. Have you seen evidence that suggests that the LLC
3 device has been abused, that individuals or firms often
4 create multiple LLCs and then run contributions through them
5 as a way of avoiding the limits on corporations or even as a
6 way of avoiding limits on individuals? Have you seen any
7 evidence on that?

8 MR. VALENTINE: Well, statute still requires that
9 any entity making the contribution, that the funds be their
10 own funds, so if they're structured separately with their
11 own funds --

12 MR. BRIFFAULT: But if an LLC gets all of its funds
13 from a parent corporation, whose funds is it?

14 MR. VALENTINE: Well, it would still have to be the
15 funds of the LLC.

16 MR. BRIFFAULT: Right. But if it came initially
17 from a parent corporation -- just look briefly at
18 Exhibit-32, although again, you are probably aware of the
19 contents. This is an article from Cranes New York, which
20 appeared last summer, and it also appeared in other media,
21 which reported that three major real estate companies;
22 Glenwood Management, SL Green and the Tryst Organization,
23 each took advantage of the LLC loophole. And in fact, in
24 your testimony today you even refer to the LLC situation as
25 the LLC loophole, on page 16, and indeed you actually refer

1 to them as limited liability corporations, a Freudian slip,
2 rather than limited liability companies.

3 The Cranes piece notes that each of these three real
4 estate organizations took advantage of the LLC loophole to
5 contribute \$425,000 each, or nearly triple the individual
6 limit, let alone, I can barely do the math, I think it's 85
7 times the corporate limit in the 2012 election year. Are
8 you aware that individuals and firms have been manipulating
9 the LLC device to make contributions that are not only above
10 the corporate limit but in some cases above the very high
11 individual limit? That's not a hard question.

12 MR. MCCANN: Well, there's no question that people
13 have raised the issue of limited liability companies, and as
14 the Governor has said, it's not a loophole. It's the law.
15 The Limited Liability Company Law says specifically that
16 they're only unincorporated business organizations. So
17 again, we have looked at that, and again, our opinion is
18 that it would require a legislative adoption, and there have
19 been, frankly, many bills in the legislature to do that, so
20 that's the position of the Board.

21 MR. BRIFFAULT: Well, position of the Board, yes,
22 but actually the Election Law doesn't address the issue.
23 The Election Law doesn't close off the issue. The issue was
24 resolved by the Board through an opinion, which relied in
25 part on a federal law which has since changed to take into

1 account of the hybrid nature of LLCs, which are at least
2 half corporations. Your report refers to them as
3 corporations, the testimony you submitted today on page 16.
4 And doesn't the sense -- again, the term urgency was used
5 earlier today. The sense that this device is being
6 extremely manipulated and abused, doesn't the combination of
7 the ambiguity in the law, the ease with which it can be
8 manipulated and the impact it's having on the effectiveness
9 of contribution, doesn't that suggest that this would be an
10 appropriate subject for a rule making?

11 MR. MCCANN: Well, again, if it's clear under the
12 LLC laws that they are specifically unincorporated business
13 organizations, then by the very nature of that statute they
14 are unincorporated business organizations. The \$5,000 limit
15 applies to corporations. So again, I -- my understanding
16 is, and I think the legislature has been in agreement
17 because they have put forth many bills, the Governor in his
18 own Campaign Reform Finance Act had put forward provisions
19 to address LLCs, and so certainly having seen that, the
20 Board is aware of the issue in general terms but has taken
21 the position that it would require a legislative mandate to
22 adopt.

23 MR. BRIFFAULT: One last thing. I hear you. I am
24 probing why that is, both given the ambiguity in the law and
25 the hybrid nature of the LLC and the urgency of the problem.

1 But let me ask you one last question, and it really grows
2 out of Exhibit-33, which is actually the form that an entity
3 has to fill out in order to become an LLC. It's what the
4 Department of State requires under as articles of
5 organization. As you can see, they don't require a lot to
6 create an LLC. You have got to have a name, there's got to
7 be a county, there's got to be the signature of an organizer
8 and the printed name, and then there is a filer name, a
9 mailing address with city, state and zip code. It's really
10 easy to create them, so it would seem, and certainly the
11 media counts suggest it's easy for the firm or an individual
12 to create lots of them, each one of which takes advantage of
13 the LLC loopholes. So put together, you have a massive
14 advantage. Again, there's no sense that, given that this is
15 a really serious problem, that the Board has powers to try
16 and address this? That's the question. And then I'm done.

17 MR. VALENTINE: No. We still think that it's a
18 legislator's evidence that is still in the legislative
19 arena, not in the regulatory arena.

20 MR. BRIFFAULT: Thank you.

21 MS. CALCATERRA: This concludes the New York State
22 Board of Elections aspect of our hearing. I'm sorry.
23 Actually, I spoke too soon.

24 MR. FITZPATRICK: Just one question. I just want
25 to see if I can sum up the last three hours of what we've

1 been listening to with this question, and ask Mr. Brehm, Mr.
2 Valentine and Mr. McCann, if you can answer in sequence, and
3 it's pretty simple. It's just yes or no. Would you agree,
4 for whatever reason, whether it's underfunding, lack of
5 staff, indifference, any other reason that you can think of,
6 political influence, doesn't matter, and notwithstanding the
7 other good things that you suggest that you do, that the
8 investigative wing of the Board of Elections is completely
9 and woefully inadequate to enforce its statutory duties to
10 investigate violations of the Election Law? Do you agree
11 with that, yes or no?

12 MR. BREHM: If I can just, short, because that's an
13 important question. I think if you are recommending how to
14 structure from scratch a unit, you would not give them the
15 few positions and the financial resources. So from that
16 perspective, I unfortunately agree with you, that we just
17 have never, for a very long time have never had to get to
18 that investigatory framework. So because of that, for such
19 a long time they have prioritized to be a compliance unit
20 who work with the people, and we have over a 97 percent
21 compliance, getting people through the door to report, and
22 that takes such a great effort every day. And,
23 unfortunately, if we had the resources to take it to the
24 next step, I wish we did. I wish I could say that you were
25 wrong, but I can't.

1 MR. FITZPATRICK: Before we get to Mr. Valentine
2 and Mr. McCann, I just want to repeat my admonition that I
3 am leaving out for whatever reason, and I appreciate that --
4 Mr. Brehm, so your answer is yes. You agree with the
5 statement that I made.

6 MR. BREHM: I agree that we wish we weren't in this
7 position and that yes, it could be much more effective if we
8 didn't have the issues that we do.

9 MR. FITZPATRICK: Mr. Valentine, do you agree?

10 MR. VALENTINE: I don't disagree with Mr. Brehm's
11 analysis. I wish we were better at that.

12 MR. FITZPATRICK: But what about Mr. Fitzpatrick's
13 analysis?

14 MR. VALENTINE: As Mr. Brehm said, it has to be
15 taken in context with compliance with the agency --

16 MR. FITZPATRICK: I don't mean to be rude, but I
17 want to wrap this up. I am trying to summarize the last
18 three hours, and again, I am not asking for excuses about
19 funding, resources, etcetera, etcetera. Do you agree that
20 the enforcement wing is woefully inadequate in enforcing the
21 Election Law as it currently stands?

22 MR. MCCANN: I would say based upon the limitations
23 that we have, the answer would be yes, but with that caveat.

24 MR. FITZPATRICK: Mr. Valentine, do I have a yes
25 from you?

1 MR. VALENTINE: Yes. We would not be --

2 MR. FITZPATRICK: So I have three yes's. Thank
3 you, gentlemen.

4 MS. CALCATERRA: Dean Mutua.

5 MR. MUTUA: Gentlemen, you have testified for a
6 long time this evening. I just want to make one comment and
7 ask a question. I think most of us would agree that in a
8 free society that didn't work, that we take pride in what we
9 do. If you agree with that, would you say to us that you
10 are proud of the work that you do at the Board of Elections?

11 MR. BREHM: You know, I think each of us goes to
12 work every day trying to face the challenges that are many,
13 and I think as public policy we have spoken out to Senate,
14 Assembly, Governor, advocacy groups, people sitting in this
15 room, sitting at your dais, we have had those
16 conversations -- I know I have had them with Barbara
17 myself -- and we've enjoyed the support of many advocacy
18 groups during the budget, that we don't have the resources.
19 And I think it's important that we say that, and we have
20 said that over time, because yes, we are told to put a
21 budget in based on when we have, but at least we identified
22 that which we can't do because we don't have. And I think
23 that's important for us to do, and we have done it over the
24 last -- and I think you have the budget side letters.

25 We have gone to speak to representatives of any group

1 that will invite us to come talk to them. I wish that
2 answer was different. I hope that through as many efforts
3 as are out there that the resource come to bare that
4 whatever your recommendations are, wherever, you know, you
5 follow that path, that the resources and the clear statutory
6 definition are there, that they match each other. So I go
7 to work every day thinking it's an important issue. I take
8 it seriously. I wish we could do a lot more than we do, and
9 I'm frank with you. I don't disagree with that at all. But
10 I think the work that we do do is important and I think I
11 take pride in that effort.

12 MR. VALENTINE: I would echo that as well. You
13 know, the staff works hard to make sure that the
14 information's available for the public, at least in campaign
15 finance, but the Board does other things as well. And, you
16 know, certainly certifying voting systems and ensuring the
17 candidates are on the ballot, ballots are produced out for
18 voters in a timely manner, all of that happens, you know,
19 and it is a rare occasion that an election gets called into
20 question. It's very rare.

21 MS. RICE: Mr. McCann, do you have an answer to that
22 question?

23 MR. MCCANN: Well, again, I think based on our
24 discussion for the past three hours -- I will first say that
25 I object to the premise, because your premise is, for the

1 last three hours, we have had to defend our actions for any
2 number of things, and by the question you are implying that
3 I have a reason not to be proud of my work. So I will say
4 first and foremost I am offended by the premise of the
5 question. I will also say that the Board of Elections has a
6 staff that every day gets excoriated for the work that it
7 allegedly doesn't do, but we do a lot of work. And I know
8 people don't want to hear about resources, but again, I
9 think it's very important, and I am just going to take a
10 moment, please, to highlight some things --

11 MS. RICE: Mr. McCann, I am so sorry, but we have
12 to move on. There are other people that have to testify,
13 and I want to thank you three gentlemen for coming, and if
14 there's anything you would like to add, you are welcome to
15 do it in writing. We really appreciate you being here.
16 Thank you so much.

17 So at this time we are going to call Amy Loprest --
18 gentlemen, if you can just leave the binders here, that
19 would be great. We are calling the next person to testify,
20 Amy Loprest, New York City Campaign Finance Board, Executive
21 Director. And I believe seated with her are going to be
22 four Campaign Finance Board members, Sue Ellen Dodell, Peri
23 Horowitz, Eric Friedman and Matt Sollars. Ms. Loprest,
24 would you like to make a statement.

25 MS. LOPREST: Yes. You are very dedicated, not

1 taking a two second break. Good evening, Commissioners. I
2 am Amy Loprest, Executive Director of the New York City
3 Campaign Finance Board. I appreciate this opportunity to
4 appear before you to discuss our work. As you consider
5 proposals to address the actuality and appearance of
6 corruption in State politics and government, we are happy to
7 be able to discuss some of the reasons we believe our
8 campaign finance program has been successful here in New
9 York City.

10 As we review New York City's campaign finance
11 program, it's important to recall the events that led to its
12 creation. More than 25 years ago, the city faced a series
13 of corruption scandals that drove public confidence in
14 government to historic lows. In response, Mayor Edward I.
15 Koch, with Corporation Counsel and Commissioner member Peter
16 Zimroth, proposed comprehensive reforms aimed at restricting
17 the influence of private money in city elections. After
18 passage by the City Council in February 1988, Mayor Koch
19 signed the city's Campaign Finance Act into law, providing
20 public matching funds to candidates for five city offices.
21 A city charter referendum approved by the public that
22 November established the Campaign Finance Board, which is
23 charged with administering the program and enforcing its
24 rules.

25 The CFB's mandate includes providing public

1 disclosure of campaign finance information, publishing a
2 voter guide and encouraging of voter engagement. A new
3 mandate to provide disclosure of spending has given voters a
4 clear understanding of the roles these activities play in
5 city elections for the first time. As established in the
6 charter, the Board is independent and nonpartisan and has
7 five members who serve staggered terms. Two each are
8 appointed by the Mayor and the Speaker of the City Council.
9 The two appointees may not be enrolled in the same political
10 party. The chair is appointed by the Mayor in consultation
11 with the Speaker. The nonpartisan makeup of the Board has
12 enabled an effective and independent administration of the
13 agency's work. In addition, Board members and CFB staff are
14 prohibited from making campaign contributions or engaging in
15 other political activities.

16 Thanks to these policies and the Board's history of
17 rigorous enforcement, the CFB has won a reputation of
18 independence. The city's voluntary public matching funds
19 program is designed to increase the role of small dollar
20 contributions and to increase public confidence in
21 government by limiting the impact of large contributions in
22 city elections. The program provides a six to one match for
23 the first \$175 contributed by New York City residents. This
24 means that an individual's \$10 contribution is worth \$70 to
25 the candidate. Contributions from non-city residents,

1 political committees and unions are allowed but are not
2 matched by public funds. Candidates who accept public funds
3 must also agree to limit their spending. In the 2013
4 elections, for example, the spending limit for mayoral
5 candidates is \$6.4 million each for the primary and general
6 elections.

7 In order to receive public matching funds, candidates
8 must satisfy a two-part contribution threshold demonstrating
9 the viability of their campaign. For example, City Council
10 candidates must collect 75 contributions from the district
11 they hope to represent. Candidates must also raise \$5,000
12 in matchable contributions. In addition, candidates must
13 appear on the ballot for the election, have an opponent on
14 the ballot and maintain compliance with the Campaign Finance
15 Law. Public funds to any campaign are kept at 55 percent of
16 the spending limit established for that office, ensuring
17 that campaigns receiving payment rely on a mix of private
18 and public funds.

19 In the 2013 elections, the maximum public funds
20 payment available to mayoral candidates is \$3.5 million per
21 election. For City Council candidates, the maximum public
22 funds payment is \$92,400 per election. The spending and
23 contribution limits are index to inflation. These modest
24 increases after each city-wide election have helped the
25 program continue to meet the evolving needs of candidates

1 and have ensured consistently high rates of participation.
2 Indeed, the matching funds program remains a popular option
3 among New York City candidates. Nearly 79 percent of
4 candidates on either the 2013 primary general election
5 ballot opted into the program. That rate equals an all-time
6 high for the program last achieved in the 2001 elections.

7 Of the candidates who are not participating in the
8 program, many are not running active campaigns. The program
9 succeeds because it encourages more individuals to get
10 involved in the political process as contributors. Of more
11 than \$77 million candidates for city office have collected
12 to date in the 2013 elections 93 percent were contributed by
13 individuals. By contrast, 69 percent of the contributions
14 raised by candidates for New York State legislative offices
15 in the 2012 elections came from special interest
16 organizations, including corporations. New Yorkers know
17 their voice matters in their city elections.

18 Certain prohibitions and the contribution limits in
19 the New York City system apply to all candidates, whether or
20 not they choose to participate in the public matching funds
21 program. Contributions from corporations, LLCs and
22 partnerships are prohibited. Contributions from individuals
23 who are doing business with city government are strictly
24 limited. The contribution limit for 2013 mayoral candidates
25 is \$4,950. By contrast, the doing business limit for

1 mayoral candidates is \$400. In addition, all candidates are
2 required to submit regular disclosures of their
3 contributions and expenditures to the CFB. These are
4 available to the search on our website via our interactive
5 on-line database and to download in easily accessible
6 formats.

7 Disclosure is an important requirement in our system.
8 Regular disclosures provide transparency that enables
9 detailed oversight by the CFB and the public. Candidates
10 who fail to file timely disclosures are penalized. Strong
11 enforcement is a key component of our program. The Board
12 takes its responsibility to safeguard the public's
13 investment in the political process very seriously.
14 Candidates are expected to treat the public funds
15 responsibly and to make complete and accurate disclosures of
16 their finances. CFB staff carefully review each claim for
17 public funds and conduct a thorough audit of every campaign,
18 which is completed after the election. Roughly half of the
19 CFB's 91 staff members play a role in the enforcement
20 functions of the agency. These include auditors, lawyers
21 and other staff members who assess compliance, investigate
22 complaints and make recommendations for payments. It also
23 includes candidate service liaisons who work directly with
24 candidates to provide detailed guidance on complying with
25 the Act and rules.

1 Prior to the election, the primary focus of our
2 auditing is to conduct a thorough review of contributions
3 claimed by campaigns for matching funds to ensure that
4 candidates who qualify for public financing do so honestly.
5 The CFB's audit work during this period includes a review of
6 all statements as they are filed and of the backup
7 documentation for each claim for matching funds. Post
8 election the staff carries out a thorough audit of every
9 campaign's expenditures and contributions. Candidates must
10 demonstrate the public's funds received for their election
11 campaign were spent for qualified purposes. If they do not
12 account for the public funds, they must be paid back.
13 Example of spending that are not qualified use of public
14 funds include payments to spouses, children or other family
15 members, and contributions to candidates. In addition, any
16 funds remaining at the end of the campaign are presumed to
17 be public funds and must be repaid.

18 Candidates in New York City know that their campaign
19 will be held to strict standards and that their opponent's
20 campaign will be held to the same standards. Uniform
21 enforcement and universal audits increase participation by
22 reassuring candidates that the rules will be applied evenly.
23 Before the elections, candidates who have committed serious
24 violations, who cannot clearly demonstrate compliance with
25 the law, do not receive public funds. When serious

1 violations are uncovered in the post election audit,
2 candidates face significant penalties, a maximum of \$10,000
3 per violation, and can be required to repay misused public
4 funds.

5 To ensure the independence of the Campaign Finance
6 Program, the city charter specifically protects the public's
7 funds and the CFB's operating budget, obliging the Mayor to
8 include the CFB's requests in his executive budget. The CFB
9 takes a cautious approach to setting the public's funds each
10 year, and funds that are not paid to candidates are returned
11 to the city's general fund. The CFB requested \$51 million
12 for the public fund's payments for the 2013 election. To
13 date, the CFB has authorized payments totaling \$36 million
14 to 145 candidates. Since its beginning, covering nine
15 city-wide elections and 28 special elections, the net cost
16 in public matching funds program is \$148 million over 25
17 years. In its peak election year, 2001, the CFB paid \$42
18 million to 205 candidates. The CFB's operating budget for
19 fiscal year 2014, the year that covers this election, is
20 \$10.9 million.

21 I hope this brief overview of the program has been
22 helpful. Again, I appreciate the opportunity to testify and
23 look forward to discussing any questions you may have.

24 MS. RICE: Thank you, Ms. Loprest. I have a quick
25 question. So you said that in 2013 79 percent of candidates

1 participated in the public funding system; is that correct?

2 MS. LOPREST: Yes.

3 MS. RICE: Does that include candidates in both
4 major parties participating?

5 MS. LOPREST: That's all the candidates on the
6 ballot. 79 percent of the candidates who will appear on the
7 ballot, either the primary or the general election,
8 participated in the public funding.

9 MS. HOGAN: So Democrats, Republicans?

10 MS. LOPREST: Yes.

11 MS. RICE: Why do you think so many candidates
12 participate?

13 MS. LOPREST: I think, one, the ability to free
14 themselves from rigorous fund-raising, because of the public
15 matching funds program, but also because the encouragement
16 of small donors and the ability to talk to their
17 constituents as part of their fund-raising helps. And the
18 rigorous enforcement that is universal makes them know that
19 by participating in the program they are not at any
20 disadvantage in the enforcement.

21 MS. RICE: Thank you. Any other Commissioners have
22 questions?

23 MR. FITZPATRICK: Just a quick question, Amy.
24 Thanks again for being -- I think this is the second time
25 you have been in front of us, and I thank you for that.

1 This recent court case, I am sorry I don't know the name of
2 it, the one overruling the limits on PAC contributions, how
3 is that going to effect your job?

4 MS. LOPREST: Well, the city has never had a cap,
5 such as it appears in State law, but obviously our
6 candidates are obliged to abide by State law. But we did
7 some math, and our low contribution limits help to deal with
8 the issue. Contributors are limited to \$2,750 to City
9 Council candidates and \$4,950 for city-wide offices. So if
10 a contributor chose to make a single contribution in each of
11 the 51 Council races and the three city-wide elections, they
12 would barely reach the \$150,000 aggregate limit that was in
13 the law before. So they could have already done -- they
14 could have contributed to every single candidate practically
15 already under the original cap, so the lawsuit doesn't
16 really effect it that much.

17 MR. FITZPATRICK: Richard.

18 MR. BRIFFAULT: I think it piggybacks on that, but
19 I think you were answering a slightly different question
20 than the one that was asked. I think you were answering a
21 McCutchen question, but I think the question that was asked
22 was more of what I would call the Lhota PAC case.

23 MS. LOPREST: I'm sorry.

24 MR. BRIFFAULT: So maybe just to rephrase that,
25 given the changing nature of the background law, going

1 forward would you recommend that, in a public funding
2 system, that there no longer will be spending limits even
3 for the candidates, given the possibilities of super PAC
4 spending? Or if you frame it more openly, how should the
5 design of a public funding system take into account the
6 ability of unlimited super PAC donations in spending?

7 MS. LOPREST: What we have seen, and this is again
8 the first year that there's been disclosure of independent
9 spending in the New York City elections, and there has been
10 a lot of spending and we received not only disclosure of the
11 spending but also the contributions which this lawsuit would
12 allow, you know, unlimited contributions to PACs that to
13 only make independent spending. We, after every election,
14 the city charter and the Campaign Finance Act wisely require
15 the Campaign Finance Board to review what happened in that
16 past election and make recommendations for changes. And so
17 we are just beginning the process to analyze the effect of
18 large independent spending on city elections and in the
19 process of making determinations what our recommendations
20 are, so I don't have any specific recommendations right now.

21 MR. BRIFFAULT: Just a second. Last question. I
22 know the hour is late, but I have one more question. Going
23 forward and thinking about what would you recommend in
24 another jurisdiction, perhaps the State. You are separate
25 from the New York City Board of Elections, the campaign

1 finance function in New York City is given to a distinct
2 body. Currently at the State level it's folded into the
3 Board of Elections. Some states do it one way, some states
4 do it the other. What are the advantages of doing it the
5 New York City way and are there any disadvantages?

6 MS. LOPREST: I think one of the things that's
7 happened and makes what we do successful is the nonpartisan
8 independent nature of the agency. I'm not sure that that
9 necessarily is, you know -- that had to be done to make it a
10 separate agency in New York City, but I don't know if that
11 necessarily is -- if we ran elections, nonpartisan
12 independent, would that be -- would we have the same
13 advantage. I'm not sure. I mean, some states, again, do it
14 that way and some states don't. I think that if you were to
15 decide, I think that one of the advantages is that we are
16 not -- we have one mandate we administer the public
17 financing program. I mean, we have several voter education
18 mandates, but those -- you know, running the elections is a
19 huge responsibility and a huge challenge, and it occurs,
20 obviously, at the same time the campaign financing issues
21 arise, so I think there is some advantage to having the two
22 functions separate. But again, as you point out, there are
23 many states that have both, you know, successfully merged
24 together.

25 MR. BRIFFAULT: Any downside that you have

1 encountered in your time?

2 MS. LOPREST: I don't really think that there's
3 really been any particular downside that I can think of. I
4 mean, I guess, you know, you have perfect information about
5 the balloting process but we have a very, very good
6 relationship with the City Board of elections, and obviously
7 we need to know the ballot status information to produce a
8 guide and to make our public funding recommendations, but
9 since we have a good working relationship with the city
10 Board of Elections, we get that information almost
11 instantaneously anyway.

12 MR. ZIMROTH: You made a distinction between -- you
13 said nonpartisan. We just heard from the Board of Election
14 over and over talking about bipartisan. So what's the
15 difference in your view and how does that work?

16 MS. LOPREST: I think that the statute's specific
17 statement that requires the agency be nonpartisan, the idea
18 in the actual legislation is that the Board is taking
19 politics out of all their decision making. So while the
20 Board members are appointed by various elected officials,
21 the 25 year history and the wise appointments by Mayor Koch
22 and others at the beginning really made us have a culture of
23 independence. And so I think that that being nonpartisan
24 really helps establish that culture of independence and
25 ability to enforce the law rigorously.

1 MR. ROMANO: Is it a matter of just selecting the
2 right people to implicate the right culture or are there
3 conventions or processes or protocols or other internal
4 mechanisms that have to promote a nonpartisan atmosphere?

5 MS. LOPREST: Well, I guess -- you know, it's hard
6 to go back in history and know what would have happened if
7 different people had been appointed. We were very
8 fortunate, Father Joseph O'Hare, the former president of
9 Fordham University, was first chairman of the Board; Nicole
10 Gordon, who was my predecessor and executive director, and
11 on the first Board was now Supreme Court Justice Sonya
12 Sotomayor. So it's hard to go back and know whether there
13 is a difference, but I think that we have setup some
14 protocols. The Board adopts a strict ethical guidelines.
15 Which limit their, the Board and the staff member's ability
16 to make political contributions, from serving as officers in
17 political parties and in general from participating in
18 political activities. So that helps.

19 MR. ZIMROTH: There's also something in the statute
20 itself, isn't there? I mean, my recollection could be
21 faulty on this and yours would be better, but isn't it the
22 case that, for example, the Mayor has -- how many appointees
23 does the Mayor have?

24 MS. LOPREST: Well, yes. The appointment process
25 also helps, yes. The Mayor has two appointments --

1 MR. ZIMROTH: And they can't be from the same
2 political party, right?

3 MS. LOPREST: Yes. And the Speaker has two
4 appointments that can't be of the same political parties,
5 and the chair is chosen by the Mayor and the Speaker -- by
6 the Mayor in consultation with the Speaker. Also having
7 staggered terms for those people and lengthy terms, they
8 have five-year terms, helps build that culture.

9 DEAN MUTUA: But isn't New York City really a bad
10 example? Because it is so overwhelmingly Democratic. I
11 mean, what if you got a state that was divided evenly
12 between Democrats and Republicans, would there be more
13 rancor?

14 MS. LOPREST: I mean, all the Board members are
15 different political parties, so have some have been
16 Democrats, some Republicans, some have been Independent, and
17 I think that having the staggered terms, having the culture
18 has made them leave those party affiliations at the door
19 when making their determinations in enforcement matters and
20 in writing the rules and in generally running the agency.

21 MS. BARTOLETTI: The only complaint that we, in
22 Albany, have heard from legislators who previously worked
23 within the campaign financing system in New York City is
24 that that the auditing process takes too long. Could you
25 comment about that?

1 MS. LOPREST: Well, I mean, you talked a lot before
2 about prioritization with the State Board of Elections, and
3 we spend a lot of time re-prioritizing audits and making
4 determinations. Obviously we like to -- the way the audit
5 process works is we ask for documentation from candidates,
6 they respond, we prepare a draft audit, they are given an
7 opportunity to respond, and then, if warranted, an
8 enforcement process occurs, you know, where the staff
9 recommends that the Board assess violations and penalties.
10 That process, you know, takes sometime. Some audits are
11 easier to complete, simpler, and some are more complex.
12 Some campaigns rightly, for personal reasons and just
13 because they have more complex audits, ask for more time.
14 So, you know, there is a lot of back and forth and we are
15 generous in giving people the amount of time they need to
16 actually respond to their audit requests. But there's
17 always room for improvement and we are always striving in
18 this prioritization process to do the audits faster.

19 MS. RICE: Any other questions? Amy, thank you
20 very much.

21 MS. LOPREST: Thank you.

22 MS. RICE: We now call up Connecticut Deputy
23 Secretary of State James Spallone, and Demos President,
24 Miles Rapaport. I'm sorry, was I given -- Miles is not
25 here?

1 MS. CHA: Unfortunately, Miles Rapaport couldn't
2 make it. My name is Mijin Cha. I am a Senior Policy
3 Analyst at Demos and the primary author of Fresh Start, the
4 report on public financing.

5 MS. RICE: Terrific. Welcome. Why don't we start
6 with Mr. Spallone.

7 MR. SPALLONE: Thank you, Co-Chairs and Commission
8 members and Special Advisors. My name is James Spallone. I
9 am the Deputy Secretary of the State in Connecticut, and I
10 thank you for the opportunity to speak about Connecticut's
11 experience with our public financing law, and I will just
12 give you a little background as -- I will give you some
13 highlights from my written testimony and look forward to
14 answering any questions you might have. I spent 10 years as
15 a member of the Connecticut General Assembly and the House
16 of Representatives, and I've -- for the entire time, I was
17 on the Government Administration Election Committee. I
18 served as a vice chair for a term and as its chair for a
19 term. I did work for passage of the original 2005 bill. I
20 was elected in 2000 promising to work on this issue, and at
21 that time I refused PAC and lobbyist contributions as a show
22 of my commitment to this issue.

23 As the chairman of the committee, later in my tenure,
24 the initial response to the Citizens United case, which of
25 course impacted our system, and a court case called Green

1 Party versus Garfield, which struck down part of our law.
2 In 2005 we became the third state in the nation to enact
3 public financing for state elections, and we did this by
4 legislative action, not by referendum or initiative, and we
5 were proud of that. In fact, the passage of the law was one
6 of the proudest moments of my legislative career. But it
7 was a long time in coming, and people worked on it long
8 before I was a member of the legislature. But it did take,
9 as it does in some other instances, a scandal involving a
10 sitting Governor, who then faced an impeachment inquiry, to
11 precipitate the final enactment of the law.

12 There are some keys to the success of our law in my
13 opinion. It's voluntary. Obviously, it has to pass
14 Constitutional muster. In exchange for receipt of public
15 dollars to run the campaign, the candidates agree to limit
16 spending and abide by other restrictions in the law, such as
17 the contractor ban and limitation on lobbyist contributions.
18 The qualifying contributions must be in the amount of no
19 less than five nor more than \$100, and the vast majority
20 have to be in, for a legislative race, the legislator's
21 district and for statewide office, within the state, 90
22 percent. While there is a ban on contractor contributions,
23 state contractor contributions, there is a limit on
24 lobbyists. We had a straight lobbyist ban, but that was
25 overturned by the second circuit in 2010 and replaced with a

1 restriction of \$100 for lobbyist contribution and a ban on
2 their soliciting clients or bundling contributions.

3 The grants, and this is important, are high enough to
4 run a credible campaign in the judgment of the framers of
5 the law. So there's levels for state representative, for
6 state senate and for statewide office, Governor being the
7 highest and other statewide offices being equal, and these
8 are adjusted for inflation at the start of each cycle. It
9 will next be adjusted in January 2014.

10 So far I would say that while the program has faced
11 challenges, it's been a success. All statewide elected
12 officials in 2010, who are now sitting, participated in the
13 program and some faced primaries. The vast majority of
14 members of the General Assembly from both parties were
15 participating candidates. There's been an increase in
16 contested races, an increase in primaries. We have widened
17 the pool of candidates who run for office in Connecticut as
18 a result of this, and it's provided more time, of course
19 once the fund-raising is over, for candidates to connect
20 with voters and spend less time raising money. Encouraging
21 door-to-door campaigning, campaigning at local events and
22 candidates -- I ran under the program myself in 2008, its
23 first year, in 2010 in reelection campaigns. And of course
24 no one goes into public service to dial for dollars or to
25 persuade high-end donors to donate to their campaigns. Even

1 the skeptics, who were opponents of the bill at the time of
2 its passage, have come to like it in general, and critics of
3 it generally participate regularly. Prior to reform, the a
4 program -- not the program -- the system, especially for
5 incumbents, entailed, in addition to reaching out to friends
6 and family and so forth, holding fund-raisers in Hartford
7 near the capital, attended by lobbyists and their clients,
8 state contractors, PACs, there was a large loophole for
9 certain types of PACs to contribute, and those same people
10 who would attend those fund-raisers, not in someone's
11 district but in the shadow of the capital, three or four
12 months later would then be there lobbying on legislation,
13 asking for legal changes.

14 There's been a cultural shift at our capital. The
15 legislators by and large feel a change, they feel unfettered
16 by the campaign finance system, and the influence of special
17 interests has been lessened. The qualifying contributions,
18 I would suggest, create an incentive for candidates to go
19 into the community and perhaps ask people for contributions
20 that may not have been asked before. And a person who gives
21 a \$5 contribution, their contribution is very meaningful in
22 reaching the numerical threshold that you have to reach, in
23 addition to the financial threshold you have to reach to
24 qualify for a grant.

25 We face some tests in Connecticut, and the program

1 has survived now a fiscal crisis where it would have been
2 very easy to argue that it was a luxury we couldn't afford.
3 It survived the court challenge I mentioned, in Green Party
4 V Garfield. We made some adjustments to keep it going. It
5 survived at least the first cycle under Citizens United.
6 And I hope it will continue to thrive as long as everyone is
7 vigilant. And I think that if a state with the size and
8 influence of New York were to adopt a similar program, it
9 would send a big message to other states and to our Congress
10 in Washington that it's time for a cultural change in the
11 way we fund campaigns.

12 And if you have a few moments, Ms. Cha had a few
13 remarks about her report about Connecticut's system, if you
14 would like to hear from her.

15 MS. RICE: Sure. Please. Thank you.

16 MS. CHA: Thank you very much. Again, my name is
17 Mijin Cha. I am a Senior Policy Analyst at Demose and the
18 the primary author of Fresh Start, which is a report that
19 looked at Connecticut's public financing system, and was
20 mailed to the Commission earlier this summer. For those of
21 you new to Demos, we are a onnpartisan public policy
22 organization that is dedicated to building an economy where
23 everyone has an equal chance and in a democracy where
24 everyone has equal say. I am here mainly to answer any
25 questions you have about our report and also to reiterate

1 our support for a robust statewide public financing system.

2 In addition to all the benefits that Deputy Secretary
3 of State mentioned, we found that the public financing is
4 the fundamental first step to building an electoral system
5 that is more responsive to constituents. It brings more
6 people into the electoral system, it strengthens our
7 democracy, and it's beneficial to citizens, legislatures and
8 results in a better legislative process. The big finding
9 that we found is that after public financing was
10 implemented, the things that came out of the legislature
11 were much more responsive and much more to the will of the
12 public, things like earning income tax credits, increasing
13 the minimum wage, and, nationwide, the first statewide paid
14 sick days. We fully support a statewide robust public
15 financing system, and I am very happy to answer any
16 questions you may have about our report. Thank you.

17 MS. RICE: Thank you both. Any questions?

18 MR. FITZPATRICK: One of the reasons this
19 Commission was formed approximate was because of a number of
20 prosecutions of legislators. I was wondering if you have
21 that problem in Connecticut and have you had it in the past?
22 Has there been a change since this public financing has gone
23 into effect? Can you comment on that?

24 MR. SPALLONE: Well, I would go back. We do have
25 an active State Election Enforcement Commission which does

1 accept complaints and pursue those, and then, if necessary,
2 refer them to the State's Attorney's Office. And I would
3 say that you cannot legislate away all forms of corruption,
4 unfortunately. If people are going to be bad actors, they
5 will. Our system, I believe, has eliminated some of the
6 incentives and opportunities for corruption to occur. And
7 the one high profile case that we've had in Connecticut
8 since this came into effect, really while it impacted the
9 legislature, really had to do with a federal fisc and a
10 chase for dollars in those type of races. So it's a
11 little -- I don't know -- we certainly haven't had anything
12 of the magnitude that we had that led to the adoption of
13 this law.

14 MR. ZIMROTH: So I've heard you both say that one
15 of the positive effects of your Campaign Financing Law is
16 the incentive for candidates to go into the community, on
17 the one hand, and the flip side of that, incentive for
18 members of the community who are not rich to participate in
19 the political process, and I'm wondering -- I'm sure you
20 have read and seen the data on the New York City system,
21 which speaking for myself is pretty stunning, about how much
22 more small donors participate in the system. And I'm
23 wondering whether you have any data like that in
24 Connecticut?

25 MR. SPALLONE: We certainly do. I don't -- I

1 attached some information to my written testimony concerning
2 participation rates, cost of the program, qualifying
3 contribution amounts. I don't have data on the increase in
4 the pool of donors. If you would like me to come back, not
5 come back but to provide that, I would be happy to provide
6 more information as needed.

7 MR. ZIMROTH: Well, I would very much like it,
8 although obviously I don't want to burden you, and if that's
9 a burden, then I understand that. But if you do have such
10 data, I think it would be very helpful.

11 MS. CHA: We do in our report actually cite a study
12 that analyzed the donors in Connecticut and found that it
13 does increase the number of small donors. And then when you
14 have a program like New York City's that has a continual
15 matching program, you actually bring in more diverse
16 socioeconomic donors as well. It's cited in the back of our
17 report, which I have some copies of here.

18 MR. ZIMROTH: We have the report. You are saying
19 those data are cited in the footnotes of the report?

20 MS. CHA: It is.

21 MR. ZIMROTH: Thank you.

22 MR. BRIFFAULT: Again, continuing with the theme of
23 the evening, could you tell a little bit about the
24 administrative structure for implementation and enforcement
25 of your law and any changes that you have learned that may

1 need it as you have been working with it and what insights
2 or guidance you can give to a neighboring and larger state
3 in terms of how it might design an enforcement structure for
4 a public campaign financing system?

5 MR. SPALLONE: Certainly I would. I should make it
6 clear that my office, the Office of the Secretary of State
7 where I now work does not administer the Citizen Election
8 Program. We do the election administration side of things,
9 and the State Election Enforcement Commission handles
10 enforcement matters and the Citizen Election Program. In
11 2005 when this bill was passed, prior to that campaign
12 finance, filings were made with the Secretary of the State's
13 office, and they had been since the late 19th century. One
14 of the elements of the new law was to move that out of an
15 office where there's an elected official and into the
16 nonpartisan office of State Election Enforcement.

17 The Election Enforcement Commission staff did grow
18 significantly at the time this was passed from, I think it
19 may have doubled from something in the 20s or 30s to the 50s
20 in staff. They hired more attorneys, they really beefed up
21 their IT staff so that they could accept and build a better
22 electronic filing system for campaign finance reports. I
23 think eventually it will be mandatory to file statewide,
24 candidates have to file electronically, and so -- and then
25 there is an audit system. Initially, after the first go

1 round or two, everyone's reports were audited, and that was
2 important to get a baseline of what is acceptable and what
3 isn't to set standards, but after that it took a lot of
4 resources to do that and a lot of time for people to comply.
5 So now they do a random drawing, and I can't remember the
6 percentage, but pretty hefty percentage are audited to make
7 sure that the law is being complied with and public fisc is
8 being protected with respect to public financing. So it
9 would require an allocation of resources, an increase to
10 whatever body administers this.

11 MR. BRIFFAULT: Who sits on the Commission, how do
12 they get there? And what's the role of nonpartisan versus
13 bipartisan and how it's structured?

14 MR. SPALLONE: If memory serves me correctly, there
15 are five individuals. They are appointed by the Governor
16 and legislative leaders, and they -- there can be no more
17 than, I think, two from one party, is how it's phrased. The
18 terms Democrat and Republican are not mentioned in the law.
19 And then one of them has to be unaffiliated. And in
20 Connecticut, as in many states now, there are more Democrats
21 than -- well, there are more unaffiliated voters than any.
22 They lead with the plurality. Then you have Democrats and
23 then Republicans, just for background on that.

24 MS. CALCATERRA: I have a question. The law that
25 you are referencing was passed in 2005, but I understand

1 this past summer the legislature passed, and Governor Malloy
2 signed, a new Campaign Finance Law. And basically what the
3 005 law did was place limitations on what State parties
4 could give to candidates. It was \$10,000 for candidates
5 that participated in the public financing, it was \$10,000
6 for Senate races and \$3,500 for representative races. There
7 was also limits on the contributions that donors were able
8 to make to state and town parties, and they were 1,000 and
9 2,000 respectively.

10 We know by way of this new law that those caps of
11 1,000 and \$2,000 as a donor would make to a State party was
12 lifted to \$5,000 and \$10,000 respectively. And those -- the
13 caps where the State parties could only give \$10,000 for a
14 Senator or Senate candidate that participated in public
15 financing, and 3,500 for a House of Representatives race,
16 that cap was completely lifted. So there were some steps
17 that were reversed, a little reverse engineering from the
18 2005 law. Can you tell us what exactly prompted that?

19 MR. SPALLONE: I will do the best I can. No longer
20 being a member of the legislature, I will try and give you
21 kind of an objective analysis of what I think happened. I
22 did follow it very closely, obviously, having had
23 involvement in the creation of the original law and its
24 adjustments over time. One quick thing to make clear is
25 that the original law allowed for what I will call

1 organizational expenditures that could be made by a caucus
2 PACs. So the House Democrats, for example, could spend an
3 in-kind contributions, like providing a staff member or a
4 mailing or consulting services, up to \$3,500 per candidate,
5 and the State Senate Republicans or Democrats could do
6 similar with a higher amount. The focus of these changes,
7 and I think it was done really in response to Citizens
8 United and to the striking down of what we had, we had
9 something called supplemental grants in the original law.

10 So I think the effort was to try and deal with the
11 onslaught of independent expenditures that's anticipated in
12 the Governor's race, statewide races and the legislative
13 races, and the main change, I think, was to give the party,
14 the State parties more ability to participate in those
15 races. And personally I think it will be more in the
16 Governor's races than in anything else. And that's a
17 philosophical decision to be made by policymakers as to, in
18 the absence of supplemental grants, struck down by the
19 second circuit and in the presence of Citizens United, how
20 do you best provide -- to keep a viable system of public
21 financing in that climate. So some of the adjustments in
22 individual contributions to these party entities, I believe,
23 hadn't been touched in quite a while, so there is an
24 inflationary issue there too.

25 MS. CALCATERRA: I know you didn't participate in

1 the drafting of the legislation, but were they following
2 other states that were doing the same thing that may have
3 passed public financing in the past and now have to reverse
4 engineer after Citizen United? And, Ms. Cha, I saw you
5 shaking your head, so please.

6 MS. CHA: I actually don't think so. There are
7 only two other states that have it, Arizona and Maine, and
8 their programs are not nearly as successful as
9 Connecticut's. They don't have nearly the same rates of
10 participation. I think that it is an attempt to kind of
11 equalize, I guess, the playing field in the wake of Citizens
12 United, but I think ultimately a strong public financing
13 system is the best we have against Citizens United. It's
14 the only thing that gives candidates a chance -- I mean, it
15 gives them more exposure to our constituents, it helps
16 equalize the playing field in terms of finances. Apart from
17 a Constitutional amendment or legal rethinking of
18 jurisprudence, I think it's the best we have.

19 MS. CALCATERRA: So for all the work you did in
20 putting together the report, that was distributed to all the
21 Commissioners here so they did see it in advance, and in
22 supporting this program, are you in support of the new
23 changes that came out in June?

24 MS. CHA: I think we will have to wait to see what
25 happens. I am generally not in favor of watering down

1 public financing systems. I think it starts to open the
2 door for then money to reenter into the electoral system. I
3 really think a very strong public financing system is the
4 best that we have, and the more you start to make
5 exceptions, the weaker the system becomes. I think that's
6 part of the problem in other public financing systems,
7 whether or not they're successful.

8 MR. ZIMROTH: So is it the case that you would say a
9 better way of dealing with this problem of independent
10 expenditures is increasing the matching funds, for example?

11 MS. CHA: I think increasing the match is helpful.
12 I think having a continual match like New York City is also
13 helpful, so candidates can continue to fund-raise.
14 Connecticut is a little bit unique that they have a lump sum
15 program, which I think works very well for their state, but
16 I think that there are other options you can look at.

17 MR. SPALLONE: One of the benefits of the lump sum
18 program is that once the grant is applied for and the money
19 is received, fund-raising ceases completely. Now, whether
20 that's sustainable in the long-run with the advent of more
21 independent expenditures is unknown. When we had to
22 consider changes in the wake of Citizens United and the
23 Garfield case that I mentioned, we considered all kinds of
24 things. In the end, we felt our grants were pretty solid,
25 at least for the time being. We did end up increasing the

1 grant for the Governor's race because that one seemed to be
2 the one impacted the most by the change.

3 MR. ZIMROTH: You have a one-to-one match there?
4 How does it work?

5 MR. SPALLONE: No. When you are running for
6 Governor, for example, you have to raise \$250,000 in
7 contributions of no greater than the \$100 restrictions that
8 I mentioned, and then the grant for a general election
9 campaign is \$6 million under current law and smaller for
10 primary. That's just one example.

11 MS. CALCATERRA: So you have to raise \$250,000
12 worth of \$100 contributions and then you get a grant for six
13 million?

14 MR. SPALLONE: Right. And you qualify only one
15 time, so if there happens to be a primary, you would receive
16 1.25 million under current law.

17 MS. RICE: Any other questions? Thank you both
18 very much for coming.

19 MS. CALCATERRA: Thank you.

20 MR. SPALLONE: Thank you. If we can be of any
21 further assistance, please let us know.

22 MS. RICE: Thank you. We will. So I call now up
23 to the table, New York City Council members Brad Lander and
24 Carlos Menchaca. Welcome, gentlemen, and I guess you can
25 decide between the two of you who will go first.

1 MR. MENCHACA: I will go first. My name is Carlos
2 Menchaca. I am a candidate for City Council, and I am in
3 the 38th District, Red Hook in Brooklyn. Very excited to be
4 here. Thank you for having us both here. The reason we are
5 here is very simple, to make it illegal for the Real Estate
6 Board of New York, or anyone else, to try and buy our
7 elections the way they have this cycle. Now, I am a
8 first-time candidate and I only started running really in
9 February of this year. And everything you just heard about
10 the kind of CFB opportunities were there for me. There
11 would be no way for me to do what I did and win, by the way,
12 we were successful, if it wasn't for that kind of program
13 and that kind of system. So I'm very excited to be here for
14 that reason. And I was a community -- I am a community
15 organizer, public servant without much of the ability to
16 self-finance, I am not a billionaire or have parents that
17 are billionaires. I come from very humble beginnings and
18 home, and so I would not be able to do what I did.

19 And the average, really the average donor in our
20 campaign was at \$100 level. Majority of - 90 percent of my
21 contributions came at that level, between 100 and \$175. So
22 I am really a product of that, that opportunity, and I
23 believe that the elections are supposed to be great
24 equalizers in our city and in our State and our country, and
25 whether you own property or don't, you get one vote and you

1 shouldn't be allowed to buy more. But last year, in
2 exchange for campaign contricutions from REBNY, the Real
3 Estate Board of New York, New York State law makers gave
4 real estate developers massive tax breaks to build luxury
5 condos for the wealthy. In this election cycle alone, REBNY
6 flooded New York City Council races with more than \$7
7 million, including my opponent in Brooklyn, and we were
8 outspent. All the PACs, and most of this came from REBNY,
9 were about 500,000, half a million dollars, against me, and
10 that just kind of shows the power. Jobs for New York, the
11 face of the IE, in the Twitter handle they are described as
12 a committee supporting City Council candidates who are
13 creating good jobs, affordable housing, strengthening the
14 middle class, yet the first time I saw their negative
15 campaign was at a door when someone came to me, a voter that
16 was very interested in my campaign and got even more
17 interested after seeing this negative piece, found it
18 xenophobic, racist. They pointed to the fact that I wasn't
19 born in New York City, that I was born in El Paso with a
20 cowboy hat and a suitcase, that I had just arrived and I
21 have no idea how Brooklyn worked.

22 Again, lies, and whatever, but they had the
23 opportunity to do this with this amount of money and they
24 flooded the community with it. If we want New York City to
25 remain a model campaign finance system for cities and across

1 the country, we need to close the gaps, like the LLC
2 loophole, and ensure that all candidates and business
3 leaders are sticking to the spirit and letter of our
4 Election Laws, like I did and Council member Lander did in
5 our campaigns. The bottom line is that the shady political
6 action committee should not get to buy our elections, and
7 that's why we're here today. This is about the soul of our
8 democracy and ensuring our cities live up to our basic
9 American ideals. Thank you.

10 MS. RICE: Thank you.

11 MR. LANDER: Chair Rice, other members of the
12 Commission, it's wonderful to be with you. Thank you so
13 much for the invitation to testify. My name is Brad Lander.
14 I represent the 39th District, the neighboring district to
15 Democratic nominee Menchaca in Brooklyn. I was elected in
16 2009 and I am currently seeking reelection. That was a
17 competitive primary. I was one of five candidates in the
18 primary. I was one of five candidates in the general. The
19 campaign finance system that you heard about and talked
20 about tonight, similarly to Carlos, essential in my
21 campaign, hundreds of small dollar contributions, a good
22 robust campaign, no IEs in it at all. Some still negative
23 attacks, of course, but really a campaign had on the merits,
24 one I was proud to take part in and I felt was just a strong
25 example of what local democracy is supposed to be. I have

1 become a very strong supporter of the system. I filed an
2 amicus brief in *Agnoman V Parks* to support the campaign
3 finance system and was pleased that the key features of New
4 York City's campaign system survived that court challenge,
5 even now after both *Arizona* and *Citizens United*. And I
6 sponsored the resolution in the New York City Council
7 condemning *Citizens United*. Unfortunately, the supreme
8 court is not, at least in this case, moved by New York City
9 Council resolutions, and that's what brings us here today.

10 You know, as you have heard, we have this great
11 system that enables people to move forward, and I will talk
12 a little more about this, free from concern that individual
13 or collective outside interests are going to dominate
14 campaign spending. And it's a great luxury to be able to
15 move in and know you can achieve your goals, participate in
16 a system, which as you have heard has an expenditure cap, a
17 level playing field. I will talk in a minute about the
18 doing business limitations, which I believe are absolutely a
19 fundamental part of our system. As you have heard and
20 sounds like at least some of you are convinced, the New York
21 City model shows that encouraging small donors works for
22 elected officials whose goal is the simple public interest
23 of representing their constituents. Unfortunately, as you
24 have heard this year -- in 2009 there were essentially no
25 independent expenditures in City Council races. Fast

1 forward, Citizens United, move forward to 2013, and
2 essentially massive independent expenditures. And a lot has
3 been said about the ones in the news media in the city-wide
4 races, in the Mayor's race, in the Comptroller's race. Less
5 attention upon them in the down ballot and the City Council
6 races, but they had, in some ways, an even more outsize
7 effect relative to dollar amount. So in the City Council
8 primaries mthere were \$6.2 million spent by IEs, most of it
9 by the Jobs for New York PAC that Carlos discussed. That's
10 compared to \$16.8 million spent directly by candidates. But
11 since the IEs were concentrated in fewer than two dozen
12 districts and really even more targeted than that, there
13 were 20 races where IE efforts together outspent more than
14 one of the leading candidates in the primaries, as much as
15 \$80 a vote mand in a few cases, like Carlos's and several
16 others in New York City, where the independent expenditure
17 spent more than twice as much as the expenditure cap. So
18 that's what candidates participating in the system were up
19 against. And, of course, this is only the beginning as a
20 result of last week's court ruling, you know, there's no
21 limits on independent expenditures next time. And really,
22 truthfully, relatively cheaply could spend five, 10, 15
23 times more than a Council member could under their
24 expenditure cap. And as Carlos mentioned, at least in this
25 instance, by far the leading independent spender in City

1 Council races was Jobs for New York, organized quite
2 explicitly by REBNY.

3 One great feature of our disclosure law, if you
4 haven't gone to see it, is that the New York City Campaign
5 Finance Board website page for independent expenditures is a
6 treasure trove of information. You see the Board members,
7 you see every contributor, you see every mail piece. You
8 can go see that xenophobic piece trying to make sure all the
9 Puerto Ricans in Sunset Park know that Carlos is Mexican.
10 You see who paid for it. Unfortunately, you have to go to
11 their website to do that, and most voters are unlikely to go
12 on the website and do it. So we have been thinking a lot
13 about this, what are we do going to do. We have a great
14 system, we have a lousy supreme court decision. How can we
15 protect our Campaign Finance Law against this flood of
16 corporate cash, mindful both of the specific risks of
17 corruption, which you guys are assigned to investigate, and
18 also the less specific individual purchase of legislation
19 and the broader risks of the destruction of a campaign
20 finance system that enables people really to simply
21 represent their constituents.

22 So I will go over the best we have got. We hope you
23 are continuing to help gather other ideas, because this
24 really is a crisis that will take some steps to address in
25 New York City, but we need your help. So first, I am

1 introducing legislation in the City Council that would
2 require any independent expenditure communications to list
3 the identity of the top five donors to the political
4 committee, so at least the voters who receive it will know
5 who the people are behind the expenditure. It's called On
6 Communication Disclosure. California, Connecticut and now
7 Rhode Island have laws in place that require this.
8 Connecticut's recent law, Public Act 13 180, which Governor
9 Malloy signed into law earlier this year, also includes
10 additional reporting. They create this new category called
11 covered transfers to try to make sure they get at whose
12 money it actually is so you can't put a bunch of
13 contributions in one account and then move them to another
14 account and just disclose the jazzy well-branded name you
15 picked for the middle account. But that tracks it back to
16 who gave the money at essentially each covered transfer.

17 Communications would also be required to clearly
18 identify that this is an independent expenditure, so you
19 could distinguish it from mailings that the candidates
20 spend. I have also heard candidates on whose behalf the
21 expenditures were made who were deeply distressed and who
22 were worried they were going to lose the election because an
23 independent expenditure essentially misrepresented a
24 candidate that it was supporting. Again, if you saw who
25 paid for it and if it was clearly identified as an

1 independent expenditure, at least voters would be able to
2 better judge what was in front of them. We're going to, I
3 hope, do that at the City Council level, but it would be
4 much more comprehensive if it were done at the State level.
5 Usually I am a big opponent of the State preempting us, but
6 in this case, if New York State will pass a good law, I
7 would be thrilled that we don't need to legislate it at the
8 city level.

9 Second, I really hope you will take seriously the
10 need to close the LLC loophole, both for independent
11 expenditures, to the extent possible after last week's court
12 case, and for, obviously, direct contributions as well. As
13 you know, under New York State Election Law, individuals can
14 give up to \$150,000 annually, while corporations are limited
15 to \$5,000. But since LLCs are considered individuals, a
16 single firm can funnel up to \$150,000 through each of its
17 LLCs. That's, again go on the CFB web page and see for
18 yourself, how almost all of the money in Jobs for New York
19 was raised, not in \$5,000 a pop from individual developers,
20 who at least would be acting as individuals, but up in 50,
21 100 to \$150,000 in contributions from real estate LLCs.
22 That's where the \$7 million came from that was spent telling
23 those voters in Sunset Park what they tried to in Carlos's
24 case.

25 And while, unfortunately, there are other legal

1 challenges, and if the contribution limits for IEs fall in
2 their entirety, obviously it doesn't make a difference
3 whether you close the LLC loophole. We have got it closed
4 already at the city level for direct contributions. We
5 don't allow LLCs to contribute at all. But at least at the
6 State -- and I would urge that as well, I mean, do the same
7 as we do in New York City and don't allow LLC contributions.
8 Just allow individuals to give. But at a minimum, close the
9 loophole so that they're treated as the corporations they
10 are and not as the individuals they aren't.

11 Third, restrict direct donations to candidates for
12 those that have business dealing with State and local
13 governments. This is, in many ways, one of the strongest
14 features of the New York City system. As you know,
15 participating candidates, you can take contributions from
16 interests doing business with the city, contracts,
17 concessions, pension fund investments and land use actions,
18 but you are severely restricted. Rather than a \$2,750 cap
19 that an average individual has, with the first \$175 being
20 matched six to one, if you are, not just a lobbyist, but
21 someone who does business with the city, your contribution
22 in a City Council race is capped at \$250 and it is not
23 matchable at all. And these rules have dramatically reduced
24 the amount of doing business contributions from \$15.6
25 million in the 2001 election cycle to \$1.3 million in the

1 current cycle. I don't know that there's anything you could
2 do to reduce public corruption more than simply make it
3 impossible for people who are doing business and looking to
4 do business with the city to flood the election with their
5 campaign cash. It has survived challenge in New York City.
6 It would be a big difference to do in New York State.

7 Now, to do that, and this is my last but in so many
8 ways most important recommendation, that's got to be built
9 into a New York State public finance campaigning system with
10 expenditure caps that uses matching funds to incentivize
11 small dollar donations from district residents. The city
12 system is working relative to so much around the country.
13 The State deserves no less. Thank you so much for the
14 chance to testify. We both enjoyed it. And we would be
15 happy to answer questions.

16 MS. RICE: Yes?

17 MR. JONES: So Brad, what happened Citizens United
18 impacted on the doing business issue? Isn't the way to
19 circumvent this whole thing is to say don't give directly to
20 the candidate, they are going to give to these -- isn't the
21 same thing in place?

22 MR. LANDER: Well, yes. I mean, at some level,
23 obviously what motivated the revenue to create Jobs for New
24 York, was the 15 memos, the 15 million from 2001 to 1.3
25 million, it was largely developers, although in some cases

1 folks with other kinds of contracts in business. Not being
2 able to give directly there, giving it through the side
3 door. But I do think it makes a substantial difference,
4 nonetheless, for a couple of reasons, and I've been talking
5 to candidates -- you know, Carlos for the most part had a
6 corporate IE spending against him, but I've talked to
7 several of our incoming colleagues who had it on their
8 behalf, and I will tell you that they actually feel the need
9 to distinguish themselves from it. Now, that wouldn't
10 always be the case. But if you take away the ability for
11 people to hide it, and it's clear whose fingerprints are on
12 it, and you say -- then candidates are going to get
13 challenged, you say, I didn't take that money, but they just
14 spent it on my behalf.

15 And I think when the first tests come, it will be far
16 easier for voters in those districts and the press and the
17 media and others to hold candidates accountable for their
18 actions and that the idea of outside interests seeking to
19 buy the election, as opposed to donors to campaigns, is a
20 powerful one. So it's not going to solve all the problems
21 to create a doing business system for contributions, but
22 even with Citizens United, I still think it's worth it.

23 MR. CASTLEMAN: Mr. Menchaca, just to put it in
24 concrete terms, can you tell us how much money Jobs for New
25 York put into your race?

1 MR. MENCHACA: 340 --

2 MR. CASTLEMAN: It doesn't have to be to the penny.

3 MR. MENCHACA: It was three or \$400,000.

4 MR. CASTLEMAN: How much did you get from the CFB?

5 MR. MENCHACA: The CFB, it was about 80 something

6 thousand, and I maxed out my spending to 168,000. 92,000

7 was the total? Okay. It was 92,000. But the total

8 spending was 168,000 for this race for my campaign.

9 MR. CASTLEMAN: Thank you.

10 MR. MENCHACA: Yeah.

11 MS. RICE: Any other questions? Gentlemen, thank

12 you very much for coming and for waiting this long. I

13 appreciate that. This concludes our hearing. Thank you all

14 so much for coming. Have a good evening.

15 (TIME NOTED: 9:08 P.M.)

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CERTIFICATION

I, STEFANIE KRUT, a Notary
Public in and for the State of New
York, do hereby certify:

THAT the foregoing is a true and
accurate transcript of my stenographic
notes.

IN WITNESS WHEREOF, I have
hereunto set my hand this 4th day of November
2013.

Stefanie Krut

STEFANIE KRUT