



**TESTIMONY
OF THE
NEW YORK PUBLIC INTEREST RESEARCH GROUP
BEFORE THE
MORELAND COMMISSION ON PUBLIC CORRUPTION
OCTOBER 28, 2013
New York, New York**

Good evening. My name is Bill Mahoney and I am the Research Coordinator for the New York Public Interest Research Group (NYPIRG). As you know, NYPIRG has been deeply involved in the issues of governmental ethics, most prominently in New York State and New York City. Our organization was involved in the activities of the Moreland Act Commission in the 1980s, and was involved in the New York City Charter changes in the 1980s and the subsequent improvements in those laws, as well as the 1994 Nassau County Charter reforms.

We applaud the governor for establishing the Commission. It is our hope that your work will change the course of New York State history and help restore public confidence in Albany.

We have been told that each of the Commission's hearings will focus on one aspect of your mandate and that tonight's hearing is designed to generate public comment on proposals to strengthen the enforcement of public integrity laws.

Public Trust Act

Governor Cuomo's proposed Public Trust Act contains several interesting ideas. Since the governor's bill has not yet been introduced in the legislature, NYPIRG has not taken a position on the plan, but his concepts are worthy of consideration. His call for increased penalties for violation of public corruption statutes might deter officials from engaging in illegal behavior, and granting District Attorneys additional powers to pursue violations of the public trust by public officials should create additional opportunities for enforcement.

These proposals are only a small part of what needs to be done to improve New York's woeful track record of enforcing the campaign finance and ethics laws, however. Existing punishments have not deterred 32 state-level elected officials who have been caught up in scandal in the past seven years. Empowering District Attorneys could help, but their resources are limited. DAs would need substantial resources to ensure they can invest the time to investigate and prosecute cases that traditionally have not been a focus for their offices. This has been evident in enforcement of the state's campaign finance law. While District Attorneys have existing power to enforce many violations of the campaign finance law, the lack of resources has led to few recent prosecutions in this area.

A weakness of the governor's plan is that its reliance on the District Attorneys to aggressively enforce the laws, without adding resources, could create a hodgepodge system of enforcement in which questionable acts could be more aggressively investigated in some parts of the state than the same conduct in other areas of the state. Overall, empowering District Attorneys could help to deter official misconduct, but in order to truly fix New York's government comprehensive reform that ensures there are dedicated, independent enforcement and regulatory agencies is desperately needed.

New York's enforcement system fails.

The New York State Board of Elections is the best place to start. In recent decades, the Board has failed to fulfill its mandate to enforce the state's existing laws. Moreover, it has managed to weaken the state's already deplorable campaign finance regulations by creating new loopholes. Much of this is due to the Board's makeup. The Board consists of two Democrats and two Republicans, and the resulting partisan gridlock ensures that enforcement actions are rarely taken.

It's important to note that while the state Constitution requires that qualifying voters and overseeing the voting process be overseen by bipartisan boards, there's no reason that the campaign finance system and Election Law enforcement issues could not be handled by an independent agency without amending the Constitution.

Too many violations go unpunished.

The most obvious failures of the Board of Elections have been in its failure to enforce election law. In filings submitted between January 2011 and January 2013, we have identified over 103,805 violations of election law.¹

Many of these violations were minor. 18,156 donations were reported without including the addresses of the donors as is legally required and 454 donations did not include a date. However, this information is required for a reason. How can the Board hope to find, for example, if a donor has given more than the legal limit in a calendar year if it cannot tell which calendar year a donation was made in? It would be absurdly simple for the Board to automatically e-mail campaign treasurers to let them know key information was missing, yet many of the campaign committees identified in our analysis of these violations claimed to have no idea to have violated the law. While most of these violations were clearly innocent mistakes, it is entirely possible that some candidates were intentionally trying to mask more serious improprieties. The Board, however, has shown no interest in even this basic step of enforcement.

The Board has repeatedly shown that it is equally unwilling to deal with more serious violations of the law. Most corporations have aggregate contribution limits of \$5,000 per calendar year. On several occasions, NYPIRG has compiled lists of hundreds of clear violators of this limit and sent them to the Board. In each case, they have thanked us for the information, and then commenced a multi-year "investigation." In the end, the Board has notified us that most of these corporations have been notified of their failure to obey the law, and stated that no action could be taken, since those corporations stated that they were unaware of the limit. Each time a

¹ NYPIRG, *Malignant Neglect: The Abject Failure of the State's Campaign Finance Laws*, May 7, 2013.

subsequent outside review has been completed and dozens of corporations that had been purportedly notified by the Board were again found in violation, yet the Board used the same excuse for its inaction.²

The one enforcement activity that the Board of Elections has claimed success in is identifying candidates that do not file on time. In its 2011 annual report, the Board claimed to have mailed 9,848 letters to treasurers letting them know their filings were late.³ It imposed small fines on 792 of them.⁴ Unfortunately, this practice of enforcement-by-letter has not stopped candidates from failing to file. An August 2012 report by NYPIRG found that over \$31 million in campaign funds has gone “missing in action.” 2,328 active committees had not disclosed any transactions in the July filing period, including 622 committees with over \$12 million in the bank appear to have fallen off of the grid and simply stopped filing.⁵ How can the Board fail to act when \$12 million in donations is unaccounted for?

The Board has weakened New York State’s already too weak campaign finance law.

Many of the problems in the state’s current campaign finance system have been created by the Board. For example, the “LLC Loophole,” which treats each Limited Liability Company as an individual human being for purposes of how much may be donated, has allowed some donors to give well over a million dollars each year. Yet, this exemption is not found in New York State’s Election Law. Rather, a 1996 opinion from the Board determined that these business entities – creatures of state statute – should be treated as humans, not corporations, for the purposes of calculating contribution limits.

Since the Board’s administrative decision, the role of LLCs in New York’s political system has skyrocketed. In the first six months of 2013, they accounted for 14% of all money raised by state-level candidates and party committees, giving more than three times as much as actual humans who wrote checks smaller than \$1,000. While the Board in 1996 claimed the power to interpret this area of election law, when petitioned by NYPIRG and other reform groups to reconsider their opinion, they have claimed that they do not have this power, and refuse to revisit the issue. This is true despite the fact that the FEC - which the Board used to justify its 1996 decision - has reversed course.⁶

A more recent regulation issued by the Board has the potential to wreak more havoc on the state’s democracy. In an attempt to deal with the U.S. Supreme Court decision in *Citizens United*, the Public Integrity Reform Act of 2011 mandated that the Board create regulations for the disclosure of “independent expenditures” by January 1, 2012. The Board was over nine months late in finalizing these regulations and the end result left disclosure requirements unchanged from those that had been required for decades.⁷ Super PACs only need to disclose

² See, e.g., November 5, 2009 complaint from Citizens Union, Common Cause/NY, League of Women Voters/N.Y.S., and New York Public Interest Research Group filed with the Board of Elections.

³ New York State Board of Elections 2011 Annual Report, p 28:

<http://www.elections.ny.gov/NYSBOE/download/AnnualReport2011.pdf>

⁴ Ibid.

⁵ NYPIRG, *Campaign Finance Laws Routinely Flouted; Over \$30 Million in Candidate Funds Missing in Action*, August 22, 2012.

⁶ Federal Register, Vol. 64, No. 132, Monday July 12, 1999 (pp. 37397-37400).

⁷ New York State Register, October 24, 2012; Volume XXXIV, Issue 43, p. 1.

how they raise and spend their money if they explicitly tell voters whom they should vote for. In the 2012 elections, several issued mailings informing recipients that particular candidates like raising taxes or would vote to take rights away from women.⁸ While these mailings were sent mere days before the election, the Board's regulations let them avoid disclosure.

Further, the Board's informal approval of the permissible use of campaign funds has given campaign committees *carte blanche* to spend money however they want. One of the Board's spokesmen let candidates know unless they "out-and-out stick it in [their] pocket and walk away, everything's legal."⁹ Candidates have taken full advantage of this. Most notoriously, former Senator Bruno used his campaign funds to purchase an in-ground pool cover, ostensibly because he held campaign meetings at pool side.¹⁰ In a typical year, legislators spend around half a million dollars (\$500,000) on golf, \$200,000 on new cars, \$70,000 on flowers, and \$30,000 on cigars.¹¹ Lawmakers have even spent \$7 million since 2004 on lawyers for their personal criminal defense.¹² Effectively, this means that legislators who are elected in districts that rarely see serious electoral challenges can essentially treat their campaign donations as a way to boost their personal income.

Even more troubling than the Board's generous interpretation of personal use restrictions is its lax oversight of political parties' housekeeping accounts. Election law limits these committees' expenditures to non-electoral party-building purposes. The Board's lack of enforcement has led to a tacit approval of housekeeping money spent for nearly *any* purpose. Recently, many of these committees have been paying for things such as campaign headquarters, campaign mailings, and campaign staff, all while managing to stay within the Board's informal definition of non-campaign expenditures.¹³

This lax interpretation has led to even more "creative" uses of housekeeping funds. For example, in 2012 the Senate Republican Campaign Committee's housekeeping account transferred over \$200,000 to the Independence Party, which was used to pay for campaign mailings.¹⁴ This certainly circumvents any reasonable definition of non-campaign expenses. Further, the idea that "party-building expenses" can involve sending money to different political parties is *prima facie* ludicrous. How can funding a competing political party be part of building the party making the donation? This expansion of permissible uses means that candidates can now raise unlimited donations on behalf of parties with the expectation this money could be used to benefit their reelection efforts. Contribution limits effectively have been rendered meaningless.

⁸ For an example of this activity in the 2012 elections, see Jimmy Vielkind, Senate GOP is Paying Super PAC Founder, *Albany Times-Union: Capitol Confidential*, October 22, 2012.

⁹ Jennifer Medina, "State Campaign Finance Rules Need Tightening, Study Says," *The New York Times*, May 26, 2006.

¹⁰ "Gov. Cuomo's Next Big Task," *The New York Times*, December 23, 2011.

¹¹ Information compiled by NYPIRG with information obtained from the Board of Elections.

¹² Kenneth Lovett, "State Officials Spend a 'Startling' Near-\$7 Million of Campaign Cash on Legal Fees in Nine Years Amid Cavalcade of Corruption scandals," *The New York Daily News*, April 17, 2013.

¹³ Information compiled by NYPIRG with information obtained from the Board of Elections.

¹⁴ Kenneth Lovett, "Independence Party Goes Along with GOP Scheme to Dodge Campaign Finance Laws, Insiders Allege," *The New York Daily News*, March 4, 2013.

New York State needs a new, independent campaign finance enforcement agency.

Clearly, the decision to leave campaign finance oversight with the Board of Elections has failed. Fortunately, you do not need to look far to find an example of a much better way to regulate and oversee campaign fundraising and spending. Over the course of 25 years the New York City Campaign Finance Board has established a well-deserved reputation as an independent, vigorous watchdog entity that has ensured that both the spirit and letter of New York City's election regulations are followed. It is worth comparing the recent performance of these two enforcement entities:

In the 2009 election cycle, the New York City Campaign Finance Board imposed 128 penalties on 31 candidates for over-the-limit contributions.¹⁵ When the Board of Elections has received complaints about similar violations at the state level – in 2009, for example, NYPIRG identified 346 corporations that donated more than the state's \$5,000 aggregate annual limit – letters were sent to the donors, but no penalties were ultimately levied.¹⁶

In the 2009 election cycle, the New York City Campaign Finance Board imposed 95 penalties on 20 candidates for reporting donations from unregistered political committees.¹⁷ Earlier this year, the civic organization Citizens Union of the City of New York identified 224 political clubs in New York City that had donated to or received funds from state candidates while failing to register as committees.¹⁸ Clearly, the Board is not attempting to identify these non-registrants with the same vigor as the Campaign Finance Board.

In the 2009 election cycle, the New York City Campaign Finance Board completed 219 audits as of April 2013.¹⁹ During this period, the Board of Elections completed 0.²⁰ Recent news that their enforcement unit has no staffers indicates this is unlikely to change anytime soon.²¹

Lastly, the New York City Campaign Finance Board has a long history of holding public meetings to ensure that regulations governing their system are modern and fair.

Recommendation: Urge the creation of a new, independent campaign finance enforcement entity modeled on the New York City Campaign Finance Board.

We strongly encourage you to recommend an improved, independent enforcement and oversight entity that will make a tremendous difference in the functionality of New York State's campaign finance system. The following recommendations should help ensure success:

- The enforcement and regulatory board must have an odd number of members appointed by a variety of officials. Such a model could include that each of the four legislative leaders and the governor appoint a total of five commissioners. The governor's

¹⁵ Ibid.

¹⁶ Complaint from Citizens Union, Common Cause/NY, League of Women Voters/N.Y.S., and New York Public Interest Research Group filed with the Board of Elections on November 5, 2009.

¹⁷ Information obtained from e-mails from the New York City Campaign Finance Board.

¹⁸ Citizens Union of the City of New York, *Hidden from View: The Undisclosed Campaign Activity of Political Clubs in New York State*, May 2013.

¹⁹ Information obtained from e-mails from the New York City Campaign Finance Board.

²⁰ Information obtained from a FOIL request submitted October 19, 2011.

²¹ Rick Karlin, "Election Rules a Casualty," *Albany Times-Union*, January 8, 2013.

appointment should have no partisan affiliation and not have served in the executive branch or been an employee of the governor or his campaign for the previous five years. We recommend that none of the commissioners should have been employed by state or local government, except through SUNY or CUNY, worked as a lobbyist, had an active campaign committee, served as the treasurer of a campaign committee, been paid by a campaign committee directly, or served as an executive or principal of an incorporated entity which has been paid by a campaign committee during the five years prior to appointment.

- The new enforcement agency must exist outside of the Board of Elections, but the Board must still be required to regularly update the enforcement board with information pertaining to the occurrence of elections and candidates that have declared their candidacy for these races.
- This independent board must have full regulatory power of all aspects of campaign finance law. Within six months of its creation, they must hold a public hearing to solicit input on existing regulations and advisory opinions that need review.
- Any votes to change state regulations shall require a simple majority, and all vote results will be made public. Such decisions must be discussed in full compliance with the state's open meetings and freedom of information laws.
- Random audits must be performed each year on at least 5% of state-level committees and 5% of local committees that are not already subjected to auditing by the New York City Campaign Finance Board. Any findings resulting from these audits will be subjected to the penalties that are described below.
- Staffing. At least one full-time staff member should be dedicated exclusively to identifying committees belonging to candidates, local parties, independent expenditure organizations, and any other group involved in electioneering that appear to have crossed thresholds of spending that would obligate them to register, yet have not done so.
- For minor violations, such as a committee's failure to disclose all of the required information for a donor or their misuse of labels designed to clarify the purposes of expenditures, regulatory actions should be handled at the staff level. Enforcement staff should notify treasurers about updates that are needed on their forms, and have the power to issue minor fines for a failure to comply.
- More serious violations, such as a failure to submit disclosure forms in a timely fashion, a refusal to correct minor violations identified by the enforcement staff, or donations made over the legal limits, should be left to actions by the newly-created board. The board would also handle every complaint made by a member of the public. It should be required to meet and vote on all complaints for which the staff has completed investigatory work at least once every two months between December and July, twice between the beginning of August and the date of the primary, and thrice between the primary and general elections. The result of every vote shall be made public. If the

agency's staff requires more than two months to complete an investigation designed to provide background information to the members of the board before a vote on a complaint, the nature of the complaint will be posted on the board's website. A simple majority vote of the board shall be needed to find that a committee has committed a violation. The results of all votes shall be made public and posted on the board's website.

- The most serious violations, including intentional attempts to mislead the source of a committee's donations and refusal to remit fines or submit information after being penalized by the board or its staff, should be referred to the Attorney General. The full list of these referrals must be posted on the new board's website to ensure that political allegiances do not lead to partisan-driven prosecutions. District Attorneys will retain the freedom to prosecute any campaign finance violations they choose. The Attorney General and District Attorneys will also have original jurisdiction over any campaign finance law violations not acted on by the board.
- Once an initial budget for enforcement staff is established, it should be indexed to ensure adequate funding in the future. One methodology would be to adjust for the rising cost of political campaigns by averaging the total money spent in the previous two election cycles by or on behalf of state legislative candidates in New York. As a starting point, the new board should have enough funding to guarantee a proportional number of enforcement staff as are currently employed by the Campaign Finance Board.

Thank you for the opportunity to testify.