Evening the Odds: The Need to Restrict Unfair Incumbent Advantage

New York State Commission on Government Integrity

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New York State Commission On Government Integrity
October 1989
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Unfair Incumbent Advantage

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Commission's office

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I. **INTRODUCTION**

Incumbents campaigning for political office enjoy many advantages over challengers. By virtue of their offices, they are able to award many and varied benefits to their constituents and supporters. They attract campaign contributions with far greater ease than their challengers, particularly from political action committees and those doing business with government.\(^1\) They often employ large official staffs, who in many cases contribute time and money to their reelection efforts. They are constantly in the public eye, making speeches and attending to official and private functions which are reported in the press. They communicate their positions to their constituents through newsletters sent at public expense and enhance their name recognition through public service messages. All of these benefits and privileges go a long way toward securing continued support at the polls. Unquestionably, the playing field in the election game is not level, and for challengers --- especially those who hold no public office --- it is often uphill all the way.

Many of the advantages enjoyed by incumbents result from activities that are appropriate. Elective systems of government require that leaders represent the interests and concerns of the electorate. As part of this process, officeholders must inform their constituents about their activities, votes, and points of view. In this sense, our leaders are, and should be, continuously in communication with their constituents. A strong record is one of the best weapons in an incumbent’s campaign arsenal.

But other activities that help an incumbent’s election have nothing to do with serving the public. In this regard, campaigning for public office is a private activity.\(^2\) And officeholders running for reelection, or election to a different office, must ensure that public resources under their control are not diverted to their campaign efforts.

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\(^2\) In People v. Ohrenstein, 139 Misc. 2d 909, 531 N.Y.S. 2d 942, 958 (1988), appeal docketed, No. 36025 (1st Dept. Jan. 27, 1989), the New York State Supreme Court cited "a clear line of precedent that partisan political activity is a private function, not a public purpose..."
While the New York State Constitution provides that "the money of the state shall not be given to ... or in aid of ... any private undertaking," no New York law expressly regulates the use of public funds for campaign activities. Passage of such a law is long overdue. When public officials and employees use public resources, such as office space and equipment or public employees' services during the workday for campaign purposes, they both misuse the public's resources and unfairly increase incumbents' inherent advantages. When they recruit their official staffs to "volunteer" as campaign workers or to help fund their campaigns, they draw on substantial resources unavailable to challengers and may subject public employees to implicit, if not express, pressures to acquiesce. Even the privilege to send franked mail or to issue public service messages can be abused, with the campaign component overwhelming the legitimate public content. Conduct of this kind amounts to a hidden public subsidy of campaign activity, without scrutiny or control by the electorate, and affords incumbents an unfair advantage.

Commission investigations throughout the State have revealed occasions when incumbents who were candidates have used public monies to pay for staff activities, public service messages and programs that had at least partially a campaign purpose. In addition, public employees were requested to participate in incumbents' campaign efforts. Many of these practices are not, but should be, expressly prohibited.

This report explores the use of public facilities and employees' time for campaign work; the solicitation of official staff to make campaign contributions or to perform campaign work; and the use of publicly-funded mass mailings and other communications to promote a candidacy. In addition to the Commission's factual investigations, the Commission has surveyed the law in New York and other states and reviewed federal regulations. Appendix IV summarizes the laws on point in the several other states which have such laws. The Commission has also studied the Report of the New York State Blue Ribbon Commission to Review Legislative Practices in Relation to Political Campaign Activities of Legislative Employees ("The Wilson Commission Report") which addresses campaign activities affecting members of the New York State Legislature.

Mindful that the public duties and campaign activities of officeholders are often intertwined, the Commission offers proposals designed to prevent the improper use of public resources for campaign purposes, while not restricting public servants from performing their public duties.

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3 New York State Constitution, Article 7, §8.

4 In addition to the Commission's factual investigations, the Commission has surveyed the law in New York and other states and reviewed federal regulations. Appendix IV summarizes the laws on point in the several other states which have such laws. The Commission has also studied the Report of the New York State Blue Ribbon Commission to Review Legislative Practices in Relation to Political Campaign Activities of Legislative Employees ("The Wilson Commission Report") which addresses campaign activities affecting members of the New York State Legislature.

5 Appendix I sets forth the Commission's proposal for a law governing use of public resources for campaign purposes. Appendices II and III discuss in detail the results of Commission investigations into the Queens County District Attorney's Office and the Office of a former Suffolk County Executive, respectively.
II. SUMMARY OF RECOMMENDATIONS

As more fully discussed below, the Commission recommends:

1. A general ban on use of public resources (including on-the-job time of public employees, public facilities, public equipment, and information compiled for government purposes and not generally available to the public) for campaign activities. (Section III below.)

2. A limited exception for incidental and unavoidable use of public resources for campaign activities, with a provision for disclosure and reimbursement to the appropriate agency in such cases. (Section III. B.2. below.)

3. A ban during a defined pre-election period on mass mailings and other communications at public expense, if those communications bear the name, likeness or voice of a candidate for public office. There should be enumerated exceptions for certain communications disseminated in the ordinary course of an officeholder's business. (Section IV below.)

4. A ban on public employees soliciting other public employees to work on campaigns. (Section V below.)

5. Enforcement mechanisms, including filings to record employees' working and holiday times, so that their campaign-related work can be monitored.

6. A strong agency to enforce the law, educate candidates, public employees, and the general public and formulate specific guidelines.
III. USE OF PUBLIC FACILITIES AND EMPLOYEES' TIME FOR CAMPAIGN ACTIVITIES

A. The Problem

No New York State law expressly regulates the use of public funds for campaign-related purposes. Although the State Constitution prohibits using public resources in aid of private activity, and the courts have held that campaigning for political office is private activity, efforts to prosecute such conduct are fraught with problems. Neither New York Civil Service Law Section 107(3), prohibiting the solicitation of campaign contributions in public buildings, nor Public Officers Law Section 74(d), forbidding a public officer or employee from using "his official position to secure unwarranted privileges ... for himself or others," is sufficiently specific or comprehensive to bar the inappropriate conduct we have noted.

Some public officials have promulgated executive orders intended in part to preclude campaign-related activities at public expense. But these orders are difficult to enforce and difficult to implement because of the problem of defining the prohibited conduct when campaign-related and official considerations mingle and because of the absence of an enforcement mechanism.

Commission investigations have revealed examples of campaign activities conducted by state and local officials and employees at public expense. Officials have used lists...
of names compiled in the course of official activities for fund-raising mailings. They have used public copying machines and other office materials for campaign business. They have required or permitted public employees to perform campaign duties during their workdays. None of these activities is, but all of them should be, clearly prohibited by New York State law.

B. Possible Solutions

A number of states expressly regulate the use of public facilities for campaign purposes. In general, their statutes provide that public personnel may not use public facilities for political purposes or perform political work on public time. Violators may incur civil and criminal penalties. These statutes are salutary. However, Commission investigations and analysis reveal that none of them adequately addresses all of the issues discussed below. But adopting the best features of each will produce a fair and effective law for New York.

1. The Definition Of "Campaign Activities"

Some state statutes speak in terms of an outright ban on "campaign activities" performed using public resources. The statutes, however, typically do not define "campaign activities" and overlook the fact that the distinction is not always clear between activities which are part of the proper discharge of public duties and those which are more in the nature of campaigning. In addition, they do not generally address the inevitable situations in which there

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9 See, e.g., The Midas Touch at pp. 51-53.

10 See, e.g., The Midas Touch at pp. 58-59, 63-65.

11 The Alabama and Washington statutes are representative of laws regulating use of public facilities and time for campaign purposes. The Alabama law precludes all state employees from using "any state funds, property or time, for any political activities." Ala. Code §17-1-7 (1975 and Supp. 1987). It specifies that in order to engage in political activities persons must either be "on approved leave" or "on personal time before or after work and on holidays." Id. The Washington law restricts public servants — including elected officials, their employees and persons appointed to or employed by any public office or agency — from us[ing] or authoriz[ing] the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Wash. Rev. Code Ann. §42-17-130 (1972 and Supp. 1980). The word "facilities" is defined by the law to include, among other things, stationery, postage, machines, and equipment; use of office and agency employees during working hours; and use of vehicles and office space. Id.
is some unavoidable intrusion of campaign-related matters into the official workday of public employees.\textsuperscript{12}

Simply prohibiting any campaign activity on state property or by state employees during the workday has a strong initial appeal. Many of the most important parts of running a campaign have no reasonable connection to an official's public duties. Such activities include:

- Fund-raising and related activities
- Recruiting campaign workers
- Petition efforts
- Organizing campaign events
- Campaign strategy meetings
- Creating campaign advertisements
- Buying space or air time for campaign advertisements
- Preparing and distributing campaign literature
- Giving campaign "stump speeches"

These activities are clearly not part of any public official's or public employee's official duties and should be outlawed on public time and in public facilities. In addition, the law should prohibit solicitation of public employees to perform these activities --- even after working hours\textsuperscript{13} --- for their superiors who are running for reelection or election to another office.\textsuperscript{14}

Many other activities which benefit a campaign, however, are less easily distinguished from official activities. Most of these activities involve officials' efforts to communicate their work to their constituents through speeches, newsletters, posters, public

\textsuperscript{12} There are some exceptions. Tennessee, for example, allows use of public facilities for campaign purposes if "reasonably equal access to the buildings or facilities is provided all sides." Tenn. Code Ann. §2-19-206 (1985). And Florida, which precludes the use of "state-owned aircraft or motor vehicle... solely for the purpose" of furthering a candidacy, provides an exception for dual-purpose activities. If candidates use state vehicles to conduct official business and in the process also act to benefit their candidacies, they must "prorate the expenses incurred and reimburse the appropriate agency." Fla. Stat. Ann. §106.15 (West 1982 and Supp. 1988).

The Commission's investigations suggest problems with these provisions. The most common use of public resources involves public employees using their offices, phones, word processors, computers, and reproduction equipment to perform campaign-related tasks at various times during their official working hours. It is virtually inconceivable that persons who are not public officials could ever obtain reasonably equal access to such public resources, as the Tennessee law suggests. Moreover, permitting such use, albeit even-handed, entails a public subsidy of campaign expenses, which should best be accomplished by way of a public funding law, if at all. On the other hand, a law like Florida's, applying only to the use of state vehicles, barely begins to touch on the ways in which public facilities are now used for campaigns.

\textsuperscript{13} This subject, solicitation of employees to campaign on their own time, is discussed at greater length at Section V below.

\textsuperscript{14} As discussed below, a prohibition on the elected officials themselves engaging in these activities while on government premises during traditional working hours is not feasible. There is no practical way to separate their 'public' from their 'private' time.
service messages and ceremonial appearances. Giving speeches and making public appearances are part of incumbent officials’ duties, whether or not they are or intend to be candidates. Using publicly-paid staff to write official speeches and office equipment to copy and disseminate them may not be improper, even if such activity has the incidental effect of enhancing the officeholder’s election chances. Consequently, an absolute ban on any activity which might assist a campaign is simply inappropriate.

What should be banned, in addition to those activities specifically described at page 6 above, are any other activities by public officials or employees that are both campaign-related and not reasonably part of their official duties. Most, if not all, public positions, whether elective or appointive, have job descriptions; most, if not all, departments and agencies have specific duties to perform. Under the Commission’s approach, determinations in a given case will turn on the extent to which a particular activity is related to a person’s job or an agency’s purpose.

The list of activities which fall into the gray area between campaign activity and government work will be so varied and context-dependent, that it is best to leave to an enforcement agency the determination as to whether a particular activity is both campaign-related and not reasonably part of government work. Challengers or other citizens can bring questionable activities before the agency and, if the agency agrees with their arguments, it can compel the incumbent to pay for all or part of the cost of the activity. Incumbents may obtain advisory opinions from the agency in advance of any potentially controversial activity. This system will ensure that incumbents are provided guidance and oversight.

2. An Exception For The Incidental And Unavoidable Intrusion Of Campaign Activities Into Official Time

Incidental use of public facilities for campaign purposes is sometimes unavoidable. For example, there may be occasions when public resources are used for a campaign-related telephone call or for transportation to events that combine official and campaign functions.

The Colorado law allows incumbents who are candidates to use public facilities for campaign purposes if such use is “inadvertent” or “unavoidable.” In those cases, the law

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15 The law states:

If any candidate who is also an incumbent inadvertently or unavoidably makes any expenditure which involves campaign expenses and official expenses, such expenditure (continued...)

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requires the candidate to reimburse the public treasury out of campaign funds for the prorated share of public funds utilized on such campaign activities. For example, if an official travels at public expense to make an official speech and on the same trip also makes a campaign speech, the official must reimburse the state for the prorated cost of travel to the site for campaign-related purposes.\textsuperscript{16}

The Colorado law accommodates public officials' need to both serve the public and campaign for office, and ensures that the public is reimbursed for campaign activities it has involuntarily subsidized. Without such a law, officials are free to reimburse the public for campaign expenditures or not, as they will.\textsuperscript{17}

Also, certain campaign activity that imposes little or no public cost cannot and should not be regulated. If a public employee answers a quick campaign question during the workday, making the campaign reimburse the government for the employee's thirty seconds of lost productivity is a waste of time. As the Wilson Commission proposes for legislative

\begin{footnote}
\textsuperscript{15}(...continued)

\textit{shall be deemed a campaign expense only, unless the candidate, not more than ten working days after such expenditure, files with the appropriate officer such information as the secretary of state may by rule require in order to differentiate between campaign expenses and official expenses. Such information shall be set forth on a form provided by the appropriate officer. In the event that public moneys have been expended for campaign expenses and for official expenses, the candidate shall reimburse the state or political subdivision for the amount of money spent on campaign expenses.}

\textsuperscript{16}\textsuperscript{16} According to the Election Officer at the Colorado Office of the Secretary of State, the law is almost self-enforcing. The Election Officer meets with elected officials to apprise them of their legal obligations. Because the officials must make public disclosure, they are careful to allocate expenses properly. The officials are well aware that they are under the scrutiny of the public and the media, and that failure to comply fully with the law will hurt them politically. If someone presents evidence to challenge the candidate's allocation, the case is heard by an independent official.

In the occasional case of failure to file reports, there are enforcement measures. The Election Officer sends notice of a complaint by certified letter and assesses the offending officials a fine every day they fail to file. If they still do not file, the matter is turned over to a collection agency to collect the penalties and hearing officers to hear the cases. The volume of filings is not large, however. The state receives approximately 20 complaints per year regarding state officials and the county clerk of the state receives approximately 20 to 50 regarding local officials.

At the federal level, the Federal Election Commission has promulgated regulations for the allocation of travel expenses, among others, between those that are campaign-related and those that are not. 11 C.F.R. §106.3

\textsuperscript{17}\textsuperscript{17} In New York City, for example, Manhattan Borough President David N. Dinkins, Comptroller Harrison J. Goldin and Mayor Edward I. Koch — officeholders who all recently were campaigning — each reimbursed the City for different types of campaign expenditures and used different formulas to do so.

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employees, campaign activities that impose little or no cost to the public and are unavoidable and incidental, should be excused from penalty or reimbursement.

3. Campaign Activities Other Than During Working Hours

Government employees appointed to serve officeholders should not be prohibited from being politically active --- apart from fund-raising --- on their own time. These employees are hired by and support particular officeholders and their agendas. They may be the most trusted and qualified to run the candidates’ campaigns. Yet permitting such activities creates additional issues of enforcement, particularly when work time of public employees may be long, and the working hours flexible.

The Wilson Commission Report would permit legislative employees to engage in campaign work only when they are not supposed to be performing their public duties, i.e., on their own time, vacation time or released time. To ensure that employees comply with this provision, the Wilson Commission would require employees to file a declaration with the legislature of their time and attendance obligations with sufficient specificity to enable the [oversight] commission ... to know (1) when the employee is free to engage in campaign work ...; and (2) whether the employee is entitled to released time ....

The Wilson Commission Report also provides that employees who wish to take vacation time must file a declaration in advance which states the amount of time they wish to take.

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18 See p. 2, n. 4.

19 The Commission has already recommended a ban on campaign fund-raising by state employees. The Midas Touch at pp. 27-28.

20 A law barring the campaign activities of high level government employees even on their own time would deter the most highly qualified persons from serving in government. The Commission recognizes that the Hatch Act prohibits most persons employed by the executive branch of the federal government, any federal agency or department and the District of Columbia from participating in campaign-related activities. 5 U.S.C. §7324 (1980). It does not, however, cover employees paid from the appropriations of the Office of the President, heads and assistant heads of executive and military departments, and employees appointed by the President with the consent of the Senate and who determine foreign policy or nationwide domestic policy. Nor does it cover legislative employees.

21 Wilson Commission Report at Guideline Two. "Released time" is defined as time when the employee would normally be required to perform legislative duties but is relieved from some part of his or her employment responsibilities by previously established and publicly announced policies of the particular house of the Legislature. Id. at Guideline Two, Para. II.

22 Id. at Guideline Six.
take. The filing provides proof that the employee has taken released or vacation time and thus protects the employee against a charge of campaigning during time when the employee should be performing official duties.

These rules also should apply to other, non-legislative, public employees. All public employees should be required to file a declaration of intent to take time off, in advance of taking vacation and personal days. This requirement would 1) protect public employees against unjust accusations and suspicions that they are performing campaign-related work while they are being paid to perform public duties; 2) help ensure that public employees do not make post facto decisions regarding their vacation and personal days if they are discovered to have engaged in campaign-related activities during the workday; 3) deter employees from working on campaigns during the time they should be fulfilling their public duties; and 4) permit an enforcement agency to punish violators.

4. Applicability Of The Proposed Law

Any bar on the use of public facilities for campaign purposes should apply to persons at every level of state and local government and should include elected public officials. Using public facilities for campaign purposes is a misuse of public resources no matter who does so. To exempt public officials or any other class of public employees from the restriction would give them or the candidates for whom they were campaigning a significant advantage at public expense.

A ban on use of public time for campaign purposes, however, should not apply equally to elected public officials and other employees. Unlike public employees who

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23 Id. at Guideline Two, Para. III.

24 Id. at Commentary, Para. 4.

25 With certain classes of employees, work hours will be more flexible than with other classes. But even a declaration which outlines the general parameters of the workday, e.g., the workday is seven and one-half hours any time between 7:00 a.m. and 6:00 p.m., will serve to inform the public of the work expectations for various employees. Of course, such a declaration leaves open the question of the circumstances under which the public employee may work on campaign-related matters in the three and one-half hours not included in the seven and one-half hour period between 7:00 a.m. and 6:00 p.m.. The enforcement agency should be authorized to promulgate regulations on this subject.

26 There is no principled reason that such a bar would be more appropriate for public employees and officials at one level of government than at another.

27 Of course, as discussed above, any law barring such conduct must give alleged offenders the opportunity to defend their conduct on the ground that it was incidental and unavoidable and imposed little or no cost on the State.

28 By "elected public officials," the Commission refers to all public officials holding elective positions, including officials appointed to fill interim vacancies of elective positions.
generally have a fixed workday during which they are expected to perform their duties, elected officials have no such defined work period. They are called upon to perform their official duties as the need arises and are answerable to the voters for neglect of those duties. Elected public officials should be allowed to define the time they spend performing their official duties. A restriction on the time that elected public officials can campaign for reelection would be unworkable and would penalize them for holding public office. They might not be able to campaign as effectively as their opponents who do not hold public office.²⁹

C. **Proposed Legislation**³⁰

The Commission proposes:

2(a). No person may use or authorize the use of public resources, including public funds, facilities, time or information compiled for government purposes and not generally available to the public, for a campaign-related purpose or to influence the outcome of a primary, general or special election, except where such use is unavoidable and incidental to the use of such resources for public purposes. This subdivision shall not be deemed to prohibit an elected official from personally conducting business related to his or her campaign at any time.

2(b). If a candidate for public office uses or authorizes the use of public resources for a campaign-related purpose, which use imposes a cost upon the State or one of its political subdivisions, and such use is unavoidable and incidental to the use of such resources for public purposes, the candidate shall:

i. disclose such use in writing to the enforcement agency within ten business days of its occurrence; and

ii. reimburse the enforcement agency for the fair market value of the

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²⁹ Such considerations have prompted a number of states, including Colorado, Delaware, Florida, Maine, Oregon, Tennessee and Washington to exempt candidates/officials from their laws barring use of public time for campaign purposes. For a synopsis of such provisions, see Appendix IV.

³⁰ See Appendix I for the full text of the proposed legislation, including definitions of material terms.
public resources used for campaign-related purposes.

In the event that a candidate who has used or authorized the use of public resources for a combination of a public and campaign-related purpose fails to timely comply with the requirements of this subdivision, all costs shall be deemed to have been used for campaign-related purposes for the purposes of reimbursement under paragraph (ii) of this subdivision.

2(c). Every public employee whose working hours are not established by law, regulation or collective bargaining agreement must file with the enforcement agency, not more than ten business days after the employee assumes his or her position, a statement of working hours, the manner of accrual and the number of vacation and personal days allowed to them by law.

2(d). A declaration of intent to use vacation or personal days for campaign-related purposes must be filed with a designated authority not less than one working day prior to any public employee's using such vacation and personal days for such purpose.

These provisions should serve as an effective deterrent and prompt officials to consult with the enforcement agency before undertaking questionable activities. As Section 4 of the Commission's proposed legislation provides, the enforcement agency can make an oral or written ruling on the propriety of the activity, and issue regulations to clarify or embellish as needed.

31 See Appendix I.
IV. COMMUNICATIONS PAID FOR WITH PUBLIC FUNDS

A. The Problem

Another way incumbents can enhance their election chances is through communications paid for with public funds. The rules proposed in Section III barring use of public resources for a campaign-related purpose will prevent communications not reasonably related to an official's public duties. Shortly before an election, however, public officials may issue a variety of communications at public expense which may be reasonably related to their official duties, but which also afford them an unfair campaign advantage. New York needs a law to prevent this.

Incumbents, unlike their opponents who do not hold office, enjoy the privilege of distributing newsletters, flyers, brochures and the like at public expense. These communications often prominently feature the officeholder's name and photograph and help to lodge the officeholder firmly in the voters' minds in connection with all kinds of praiseworthy efforts. Commission investigations reveal that this privilege is abused.

The Commission has documented instances in which public officials used public funds to disseminate communications which promoted their candidacies. These communications could be deemed public service messages, reasonably related to the officeholder's duties and therefore a ban on campaign-related activities at public expense would not affect them. Yet, at least some of them so heavily favor incumbents and disadvantage challengers that they should be regulated during an election campaign.

For example, from the time that Michael LoGrande became Acting County Executive of Suffolk County in late 1986, until Election Day of 1987, the Office of the County Executive issued scores of communications at considerable public expense prominently featuring LoGrande, who was in the middle of an election campaign for a full term. The communications included bumper stickers, three-color posters, newsletters directed to elderly, handicapped, youth, women and veterans in Suffolk County, and advertisements in Newsday, Grand Central Station and on Long Island Railroad trains. The messages always concerned some issue of public importance, such as drug abuse, drunk driving, a senior citizens fair or industrial development. But the public cost of these communications, coupled with the distinct campaign advantage in terms of name recognition they afforded LoGrande, render their use questionable during an election campaign.32

32 See Appendix III for a detailed discussion of the Commission's investigation of this matter.
In another example, the New York City Comptroller, Harrison J. Goldin, a recent New York City mayoral candidate, distributed at public expense during that race a series of pamphlets entitled Health and Safety Tips for Children. The pamphlet bears Goldin’s picture and a message from him inside the cover page. In 1985, when he was running for reelection, Goldin distributed at public expense another pamphlet in this series, Sexual Abuse: A Child in Trouble. This pamphlet bears a message from Goldin inside the cover page. The first pamphlet in this series, Crime Prevention for Children, was produced at public expense in 1983 --- not an election year --- and bears neither a photograph nor a message from Goldin.33

According to his staff, New York City Mayor Edward I. Koch regulated some of his communications to avoid the perception that public funds were being used to promote his candidacy. For example, although the Mayor had previously announced City auctions in radio advertisements paid for by the City, New York City hired a professional for the voice-over from the time the Mayor announced his candidacy for reelection until the election. While such voluntary action is a step in the right direction, a clear law would be preferable to insure uniformity and fairness in the case of competing incumbents.

33 According to the Counsel to the Comptroller, his office has printed more than three million copies of these pamphlets in six years at a cost of 1.8 cents apiece or a total cost to New York City taxpayers of more than $54,000 for printing expenses alone. Whether or not these publications relate to the Comptroller’s official duties — a subject on which the Commission expresses no view — they should be prohibited during an election campaign.
B. Possible Solutions

Three states, Connecticut, Wisconsin and California, have laws expressly regulating communications at public expense; they restrict an incumbent's ability to charge the public to distribute materials which serve their campaign purposes. Officials in these states informed the Commission that no one has successfully challenged the laws as impeding the proper functioning of government.

New York has no such clear-cut statute. In its effort to formulate proposed legislation for New York, the Commission has studied the three other states' laws --- each of which suffers from some weaknesses --- as well as the Wilson Commission proposals for the New York State Legislature. Any law in this area must be broad enough to cover the kinds of communications which lend themselves to possible abuse, flexible enough to permit necessary communications, and must take into account the reality that the advantages enjoyed by

34 The Connecticut law provides that incumbents holding office may not use public funds to mail or print flyers or other promotional materials intended to benefit their candidacies in the three months preceding a general election. In pertinent part, it states that:

[n]o incumbent holding office shall, during the three months preceding an election in which he is a candidate for reelection or election to another office, use public funds to mail or print flyers or other promotional materials intended to bring about his election or reelection.


35 The Wisconsin law is even broader. It prohibits the printing and distribution of mass-produced documents by incumbents once they have circulated nomination papers, regardless of whether these documents are intended to benefit their candidacies. In pertinent part, it provides that:

[n]o person elected to state or local office who becomes a candidate for national, state or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after the first day for circulation of nomination papers as a candidate, until after the date of the election....


36 The California law is the most comprehensive. It bars all persons — incumbents or not — from using public resources to distribute mass mailings and newsletters at any time:

No newsletter or other mass mailing shall be sent at public expense.


37 Commission staff has spoken with officials who serve on enforcement commissions in Connecticut, Wisconsin and California. These officials routinely receive calls requesting advice on the propriety of various public service activities.

38 Guideline Five, Paragraph I, of the Wilson Commission Report provides that:

During the 30 days prior to any general, primary or special election, a legislative employee may not (A) participate in mass efforts to communicate with constituents on behalf of a candidate in such election; or (B) use, or make available for use by another, state property or resources in connection with mass efforts to communicate with constituents on behalf of a candidate in such election.
incumbent candidates are most disproportionate in the period of time immediately preceding an election.\(^{39}\)

First, the law should cover not only mass mailings and newsletters, but all communications, including newspaper, radio and television announcements and advertisements. The Wisconsin and Connecticut laws on their face fail to do so,\(^{40}\) and the California law appears only to cover mass mailings and newsletters.\(^{41}\) There is no principled reason for this narrowness of scope.\(^{42}\)

Second, the law should provide a bright-line rule, prohibiting communications paid for with public funds during the period immediately preceding an election regardless of whether evidence exists that the privilege is being intentionally abused.\(^{43}\) A ban which depends on the subjective intent of the incumbent candidate raises difficult questions of proof.

At the same time, there should be an exception which allows for non-promotional communications --- i.e., communications which do not bear the incumbent's name, voice or photograph --- even in the pre-election period.\(^{44}\)

\(^{39}\) The California law, which bars not only dissemination of necessary and non-promotional materials in a designated period prior to the election, but all publicly-financed mass mailings and mailings of newsletters at any time, sweeps too broadly. Although the law effectively prevents people from ever promoting their own or anyone else's candidacies through such communications, it goes too far. On its face, it bars spending public monies to send constituents helpful, or necessary, information through a mass mailing or newsletter even if the text in no way promotes anyone's candidacy.


\(^{41}\) Although regulations recently enacted clarify that the California law is intended to cover all communications paid for with public moneys and distributed by the United States Postal Service, commercial and volunteer delivery services, electronic mail or paid advertisement in any subscription publication, the law does not cover radio and television advertisements. The California Fair Political Practices Commission indicated to Commission staff that there have been no abuses in the area of radio and television communications at public expense.

\(^{42}\) Commission investigations have revealed that public monies have been spent on radio and television messages which serve a campaign purpose. See, e.g., Appendix III at p. 4.

\(^{43}\) The Connecticut law applies only to distributions which are intended to benefit an incumbent's candidacy. The Wisconsin law is drafted to avoid the problem of determining intent. It provides for an objective rule, barring candidates from certain written communications with their constituents once they begin circulating nominating petitions.

\(^{44}\) The Wisconsin law bars even non-promotional communications by incumbents from the time they begin circulating nominating petitions. It would effectively block incumbent leadership through non-promotional communications in the several months prior to a general election, even if there were some public emergency affecting the health, safety or welfare of constituents.
Third, the prohibition should apply not only to the elected officials themselves, but to anyone with discretion over public spending. Applying these laws only to incumbents might allow their subordinates who are not candidates to misuse public funds to benefit incumbents who are running for reelection. The New York State Assembly rules preclude mailings "from a member who is a candidate [or which] make reference to a candidate," in the 30 days prior to an election. This rule prevents officials who are not candidates for public office from assisting the candidacies of other officials with public money. Similar rules should be in force outside the legislature.

Fourth, stringent controls on mass communications should cover only the period of time in which an incumbent is running for election. Although the California law applies year round, the Wisconsin and Connecticut laws apply, respectively, from the date on which a candidate begins circulating nominating petitions and in the three months before a general election. Wilson Commission Guideline Five similarly defines a 30-day blackout period prior to any general, primary or special election, during which, it is proposed, legislative employees may not assist in, use or allow anyone else to use state property or resources in connection with "mass efforts to communicate" with constituents on behalf of a candidate in such election. The campaign effect of the communication during this 30-day period is presumed to "substantially outweigh[ ] any legitimate legislative purpose it may have."
Stringent regulations governing use of public funds for communications are needed and appropriate in the preelection period. During this period, the motive and opportunity for abuse and the potential damage to challengers are greatest. A provision barring mass communications which bear the names, voices or likenesses of candidates from the first day of circulating nominating petitions\(^{51}\) would avoid the problems with the Connecticut, Wisconsin and California laws. Moreover, its enforcement would not depend upon the test of establishing subjective intent.\(^{52}\)

As a further deterrent and an aid to enforcement, the law should also require public officials or their designated agents to file with the enforcement agency copies of all mass communications, their cost and dates of issuance and the class of persons to whom they are directed.\(^{53}\) In addition, all such mailings or communications should bear the legend, "Prepared and distributed at taxpayer expense."

C. Proposed Legislation\(^{54}\)

The Commission proposes:

3(a). No person may use or authorize the use of public funds, facilities or time to produce, print, distribute,

\(^{51}\) Virtually all candidates for public office in New York State circulate nominating petitions. In cases in which they do not do so, the restriction should apply from the time they are nominated for public office.

\(^{52}\) Regulating messages outside of the preelection period is much more complicated. Part of a public official's duties is communicating regularly with his or her constituents. People must be kept informed about the activities of their representatives.

It is impossible to formulate a general rule that permits sharp distinctions between those communications intended to inform and those intended to promote. Such a judgment depends on the context in which the message appears and other specific and variable circumstances. Any attempt to spell out in detail what is unacceptably campaign-related will be at best frustrating and at worst damaging to the political system. The resulting standard would either be too lenient and bolster incumbents unfairly or be too stern and hinder public servants from doing their jobs. In the egregious case, where the communications sent at public expense outside the immediate pre-election period appear to be blatant efforts to abuse the privilege of communicating with constituents at public expense, the enforcement agency could review them and could well conclude that these attempts constituted the "use of public resources for campaign purposes." See Section III above.

\(^{53}\) The Wilson Commission Guidelines contain an enforcement provision requiring legislative employees to file copies of all documents prepared for mass mailings at any time. Guideline Four, Para. 1. This is a valuable enforcement mechanism, since it would permit monitoring the communications sent before and during the election period.

In the last session, there was a bill before the New York State Assembly's Committee on Election Law, Assembly 2280, which would require all persons and political committees responsible for the distribution of any campaign literature during the fifteen day period prior to an election to "contemporaneously, deposit that literature in the postal service" for delivery to the Secretary of State if the literature has reference to a candidate for statewide office or to the county clerk if the literature has reference to a candidate for any other office, other than a federal office.

\(^{54}\) See Appendix I for the full text of the proposed legislation, including definitions of material terms.
broadcast or otherwise disseminate a mass communication bearing the name, voice or likeness of a candidate for local, state or national office during his or her candidacy.

3(b). If an elected official or public employee uses or authorizes the use of public funds, facilities or time to produce, print, distribute, broadcast or otherwise disseminate a mass communication, the elected official or public employee must file with the enforcement agency:

i. a copy of such mass communication;

ii. the cost of such mass communication;

iii. the date of issuance of such mass communication, or, if the mass communication was not issued, the date on which it was produced or printed; and,

iv. a description of the class of persons to whom such mass communication was distributed.
V. SOLICITATIONS OF CAMPAIGN ASSISTANCE FROM PUBLIC EMPLOYEES

Clearly it is a misuse of public funds and an unfair incumbent advantage for public employees to engage in campaign work when they should be performing their public duties. Yet another means by which incumbents can achieve unfair campaign advantage is by soliciting public employees to work on their campaigns during off-hours. While such solicitation is not now illegal, the Commission has determined through several investigations that it is undesirable and should be prohibited.

In a prior report on municipal ethical standards the Commission has evaluated the pressure brought to bear on a public servant when he or she is asked by another public servant to give time or money to a campaign — pressure that is heightened if a superior with power over career matters is doing the asking. The Commission recommended that throughout New York State municipal employees and officers be prohibited from soliciting other municipal employees and officers to work on election campaigns.

In New York City, the Charter already prohibits City public officials and employees from asking their subordinates to participate in or contribute money to campaigns. These provisions, however, do not apply to solicitations of peers or to the employees of the District Attorneys of the counties of New York City. Moreover, even if the Commission's proposed Municipal Ethics Act is enacted into law, state officials and employees would still be allowed to solicit campaign assistance from other public servants. There is no New York State law prohibiting solicitation of public employees to work on campaigns after working hours.

A Commission investigation into certain events that occurred in the Office of the Queens County District Attorney during the 1984 State Senate campaign of the District

55 "In the absence of any restrictions on the solicitation of participation in election campaigns or political contributions, municipal employees may find themselves subject to pressures which do not belong in the workplace ... If someone involved in hiring or firing decisions, or other career matters, solicits campaign contributions from current employees, the request for support is far from casual. The employees' fear that jobs or promotions may be affected by failure to contribute makes the practice of elected officials soliciting campaign contributions from public employees unacceptable, whether or not the fear is justified." "Municipal Ethical Standards: The Need For A New Approach," New York State Commission on Government Integrity, December 1988, at pp. 26-27 ("Municipal Ethical Standards").


57 New York City Code of Ethics §2604.b.9.

58 New York Civil Service Law section 107(3) bars solicitation of campaign contributions on state property. The New York State Constitution, Article 7, §8 prohibits public employees from working on private matters during the workday.
Attorney's son and during the District Attorney's 1985 reelection campaign emphasize the need for a restriction at all levels of government.\(^{59}\) Testimony from witnesses at the Commission's public hearing made plain that no matter how the solicitation is phrased, many public employees, particularly those who serve at will, may feel that they must comply in order to maintain or improve their standing in the office. Such solicitations often breed a feeling of resentment and demoralization from both those who comply and those who resist. The "volunteers" may not want to work on the campaign. Those who refuse to volunteer feel that their employment may be in jeopardy because they do not comply.

For example, current and former Queens Assistant District Attorneys testified that the District Attorney's three personal secretaries and the Chief Detective Investigator (a close friend of the District Attorney) repeatedly solicited their assistance on the 1984 State Senate campaign of the District Attorney's son, Thomas Santucci.\(^{60}\) A large number of employees testified that they believed it was in their best interest to work on that campaign in terms of their advancement in the office.\(^{61}\) They further testified that the persistent requests demoralized many of the ADAs and jeopardized the integrity of the office. A former Assistant District Attorney testified as to the effect of the requests:

\[
\text{We just became disenchanted. We had just started, we were ready to prosecute all those criminals and put them in jails, and here we are just starting and we are being requested to do exactly what we were told we couldn't do.}^{62}\]

A former Criminal Court Bureau Chief offered similar testimony:

\[
\text{There was this undercurrent of politicization, for lack of a better word.}
\]

\[
\cdot \cdot \cdot \cdot
\]

\[
\text{The tragedy was, from my perspective, I had a lot of young, fire-in-the-belly Assistant District Attorneys right out of law school, who really wanted to get out there and do a job, and act like professionals. Then they were exposed to this kind of thing. It}
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\(^{59}\) See Appendix II for a detailed discussion of this investigation, which was referred to the Commission by the New York County District Attorney's Office. The Commission also held a public hearing on this subject on July 26, 1989.

\(^{60}\) See Appendix II.

\(^{61}\) Id.

\(^{62}\) Shapiro Public Hearing Tr. at 69.
caused terrible morale problems. I think they stopped seeing themselves as upholders of the law. 63

Moreover, because of the requests, at least some of the District Attorney’s employees assisted or contributed to Thomas Santucci’s 1984 campaign when they otherwise would not have. In sum, simply because his father was the District Attorney, Thomas Santucci obtained campaign assistance he otherwise would not have received. He was afforded an unfair campaign advantage. 64

New York State needs a law barring public employees at every level of government from soliciting assistance on political campaigns from other public employees. 65 Solicitations of any public employee should not be tolerated for several reasons. First, public employees should not have to concern themselves that their assistance may affect their position in the office. Such solicitations can be viewed as commands. 66

Second, solicitations for assistance tend to politicize a public agency, thus threatening the public’s confidence in the agency’s neutrality and commitment to serve the public interest rather than private, political interests.

Third, solicitations are demoralizing to public employees. They may not only question the importance of their duties and responsibilities, but may also come to resent their employment conditions altogether.

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63 Everett Public Hearing Tr. at 56.

64 As discussed in an earlier Commission report, a different Commission investigation into Governor Cuomo’s campaign finance practices revealed that the 1986 Cuomo campaign staff asked some state workers to volunteer their time to work on campaign matters. Governor Cuomo has established a policy which prohibits his executive staff from soliciting monetary contributions on his behalf but it does not extend to soliciting campaign assistance. The problem with such solicitations, however, is that employees may feel pressure to volunteer, especially if the solicitation is from a high level executive staff member. And at least a few state employees have felt such pressure. See The Midas Touch at pp. 38-39.

65 Federal law bars similar conduct. Indeed, public employees in New York State whose principal employment is in connection with an activity which is financed...by the United States or a Federal agency’ cannot even advise another employee to contribute anything of value to anyone or any agency for a political purpose. 5 U.S.C. §§1501 and 1502(a)(2).


66 They are particularly difficult to refuse when a high level employee makes them of a subordinate employee. But so long as the person making the request is perceived to have the imprimatur of someone in an authoritative position, it does not matter if that person is a peer or even a subordinate. For example, in the Queens District Attorney’s office, Assistant District Attorneys testified that they complied with requests from secretaries and an investigator who, they understood, were speaking for the District Attorney.
Finally, there is no compelling reason why public employees should be permitted to ask other public employees to work on or contribute to a candidate’s campaign.\textsuperscript{67} Campaigning is not and should not be a part of the responsibilities of a public employee to his or her boss.

An exception should be made to permit solicitation of campaign participation (but not contributions) from an officeholder’s direct and immediate subordinates who are exempt from civil service requirements.\textsuperscript{68} This exception is in recognition of the necessary and appropriate role of politics in government and the unlikelihood that the solicitation of assistance from such close advisors would constitute a \textit{quid pro quo} for employment or promotion.

A law in this area, with an enforcement body to oversee compliance and to impose penalties for non-compliance, would serve as an effective tool in preserving the integrity of government.

\textbf{Proposed Legislation}\textsuperscript{69}

The Commission recommends:

4(a). No public official or employee shall solicit any other public official or employee to participate in or make a contribution to any election campaign. This paragraph shall not prohibit a general solicitation for contributions of a class of persons, other than those expressly prohibited, of which such solicited official or employee happens to be a member.

4(b). Notwithstanding paragraph 4(a), public officials and employees are not prohibited from soliciting campaign participation in their own election campaigns from officials and employees who are appointed by, and directly subordinate to, such public employees and who serve in positions which are in the exempt classification or the unclassified service under the civil service law.

\textsuperscript{67} General solicitations for contributions from a class of persons, of which the officer or employee happens to be a member, should not be prohibited. \textit{See Municipal Ethical Standards} \$4.1(h)(l).

\textsuperscript{68} This exception is consistent with the Commission’s proposal for municipalities contained in Municipal Ethical Standards. \textit{See Municipal Ethical Standards} at p. 28 and \$4.1(g).

\textsuperscript{69} \textit{See} Appendix I for the full text of the proposed legislation, including definitions of material terms.
CONCLUSION

Unfair incumbent advantage is a difficult and complicated area to regulate. Incumbents almost always will have an advantage over their challengers, and with good reason. They are generally better known, they have a public record, and if they are effective, they have been giving the voters reasons to reelect them throughout their terms in office. Legislating a completely level "playing field" would be impossible.

Nevertheless, regulation can effectively prevent some misuses of public resources that further advantage incumbents without hampering public servants from doing their jobs. During an election, there is no good reason the public should be required to subsidize self-promoting communications from an incumbent. There is no good reason to allow public employees to work on political campaigns at public expense. There is no good reason not to insist that the public be reimbursed when public resources are used for campaign purposes.

These proposed rules undeniably impose additional obligations and responsibilities on public officials, and they depend on these very same officials for their passage. Incumbents must and should give up their unfair advantages to enhance the public good.

Dated: New York, New York
October, 1989

STATE OF NEW YORK
COMMISSION ON GOVERNMENT INTEGRITY

John D. Feerick
Chairman

Richard D. Emery
Patricia M. Hynes
James L. Magavern
Bernard S. Meyer
Bishop Emerson J. Moore
Cyrus R. Vance

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Appendix I
APPENDIX I

PROPOSED LEGISLATION

1. For the purposes of this section:

1(a). "During his or her candidacy" shall mean the time period commencing with the first date of circulation of nominating petitions, or, in the case of candidacies which are not commenced by nominating petition, the date on which the candidate is nominated or designated, and ending when the candidate is no longer a candidate for public office.

1(b). "Mass communication" shall mean: any electronically produced materials or 100 or more mass-produced, substantially similar documents bearing the name, voice or likeness of an elected official or candidate for public office, but shall not include:

i. responses to specific, unsolicited requests;

ii. press releases to the media in the ordinary course of public business;

iii. distributions in the normal course of public business within or between governmental agencies;

iv. distributions in the ordinary course of public business in connection with the payment or collection of funds in which the use of the official’s name or signature is necessary to such payment or collection; or

v. distributions required by statute or court order in which the official’s name or signature is necessary.

1(c). "Elected official" shall mean a person who holds elective office, whether by election or by appointment for an unexpired portion of a term.
1(d). "Enforcement agency" shall mean the Campaign Finance Enforcement Agency.¹

2(a). No person may use or authorize the use of public resources, including public funds, facilities, time or information compiled for government purposes and not generally available to the public, for a campaign-related purpose or to influence the outcome of a primary, general or special election, except where such use is unavoidable and incidental to the use of such resources for public purposes. This subdivision shall not be deemed to prohibit an elected official from personally conducting business related to his or her campaign at any time.

2(b). If a candidate for public office uses or authorizes the use of public resources for a campaign-related purpose, which use imposes a cost upon the State or one of its political subdivisions, and such use is unavoidable and incidental to the use of such resources for public purposes, the candidate shall:

i. disclose such use in writing to the enforcement agency within ten working days of its occurrence; and

ii. reimburse the enforcement agency for the fair market value of the public resources used for campaign-related purposes.

In the event that a candidate who has used or authorized the use of public resources for a combination of a public and campaign-related purpose fails to timely comply with the requirements of this subdivision, all costs shall be deemed to have been used for campaign-related purposes for the purposes of reimbursement under paragraph (ii) of this subdivision.

2(c). Every public employee whose working hours are not established by law, regulation or collective bargaining agreement must file with the enforcement agency, not more than ten working days after the employee assumes his or her position, a statement of working hours, the manner of accrual and the number of vacation and personal days allowed to them by law.

2(d). A declaration of intent to use vacation or personal days for campaign-related purposes must be filed with a designated authority not less than one working day prior to any public employee's using such vacation and personal days for such purpose.

3(a). No person may use or authorize the use of public funds, facilities or time to produce, print, distribute, broadcast or otherwise disseminate a mass communication bearing the name, voice or likeness of a candidate for local, state or national office during his or her candidacy.

3(b). If an elected official or public employee uses or authorizes the use of public funds, facilities or time to produce, print, distribute, broadcast or otherwise disseminate a mass communication, the elected official or public employee must file with the enforcement agency:

   i. a copy of such mass communication;
   
   ii. the cost of such mass communication;
   
   iii. the date of issuance of such mass communication, or, if the mass communication was not issued, the date on which it was produced or printed; and,
   
   iv. a description of the class of persons to whom such mass communication was distributed.

4(a). No public official or employee shall solicit any other public official or employee to participate in or make a contribution to any election campaign. This paragraph shall not prohibit a general solicitation for contributions of a class of persons, other than those expressly prohibited, of which such solicited official or employee happens to be a member.

4(b). Notwithstanding paragraph 4(a), public officials and employees are not prohibited from soliciting campaign participation in their own election campaigns from officials and employees who are appointed by, and directly subordinate to, such employees and officials and who serve in positions which are in the exempt classification or the unclassified service under the civil service law.

5. The enforcement agency shall have the following powers and duties:
5(a). to prescribe and promulgate rules and regulations governing the interpretation and application of this law;

5(b). to render advisory opinions regarding the interpretation and application of this law;

5(c). to receive and maintain on file as public records all disclosures made pursuant to subdivisions 2(b)(i), 2(c) and 3(b) of this law;

5(d). to receive and remit to the general fund of the state or political subdivision reimbursements made under subdivision 2(b)(ii) of this law; and

5(e). to conduct hearings and assess civil penalties for violation of this section.²

6. A person who knowingly violates any provision of this section shall be guilty of a class A misdemeanor.

7. A person who violates any provision of this section may be subject to a civil fine of up to one thousand five hundred dollars for each violation, as may be determined by the enforcement agency. A civil fine may be imposed in addition to any other penalty contained in any other provision of law.

² The Commission does not address the procedural issues connected with a hearing.
Appendix II
APPENDIX II

THE QUEENS COUNTY DISTRICT ATTORNEY'S OFFICE

The Commission investigated certain allegations related to the conduct of employees of the Queens County District Attorney's Office ("QDAO") during the 1984 State Senate campaign of Thomas Santucci, the son of District Attorney John Santucci, and during the District Attorney's own 1985 reelection campaign. The Commission found that, despite a QDAO written office policy prohibiting professional staff involvement in political campaigns, during the 1984 Thomas Santucci campaign, QDAO employees close to the District Attorney solicited after-hours campaign assistance and monetary contributions from numerous QDAO staff members, including Assistant District Attorneys ("ADAs"), and many staff members supplied the assistance and the contributions. During the 1985 John Santucci campaign, there was a proposal, discussed but not implemented, to solicit substantial campaign contributions from all Assistant District Attorneys.

I. OFFICE POLICY PROHIBITS INVOLVEMENT IN POLITICAL CAMPAIGNS

For many years, prospective ADAs and Criminal Law Associates ("CLAs") in the QDAO have been required to sign a document agreeing to several conditions of employment, including the following:

There is a limitation on political involvement. ADAs are not permitted to participate in political activities beyond membership in an organization. They may not be officers or directors of a club or involved in any campaign.

1 Some of the allegations were referred to the Commission by the New York County District Attorney's Office.

2 CLAs are law school graduates who have not yet passed the bar examination or been admitted to the bar and who, as a result, do not have the same authority to prosecute cases as ADAs.

3 Paragraph 2 of the form in use in 1982. Since then, the text of this paragraph has changed slightly to reflect more recent bar association ethics opinions which govern the conduct of QDAO staff members who are attorneys.

The New York State Bar Association opinions, taken together, generally prohibit District Attorneys, or their assistants who are attorneys, from campaigning actively for candidates for public office because "it would give the appearance of impropriety...and could be considered by the public as a misuse of power of his office." Opinion Number 272 of the New York State Bar Association (November 17, 1972). This opinion is not explicit about the precise conduct which is proscribed but refers to language in several (continued...)
As discussed below, although this prohibition on political activity is phrased in absolute terms ("they may not be...involved in any campaign"), it has been applied loosely and unevenly, if at all.

II. SOLICITATION OF QDAO STAFF MEMBERS, INCLUDING ASSISTANT DISTRICT ATTORNEYS

A. Thomas Santucci's 1984 State Senate Campaign

During 1984, numerous QDAO staff members, including ADAs, were recruited to work on the State Senate campaign of the District Attorney's son, Thomas Santucci. Typically, requests came during the workday from one of the District Attorney's three personal secretaries, Joan Beilenson, Carrol Williams or Rose Cipolla, or the office's Chief Detective Investigator, John Mahoney. On occasion, these requests were accompanied by statements indicating that the District Attorney would be made aware of and appreciate the assistance to his son's campaign. On one occasion, an ADA was faulted by one of the secretaries for not

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3 (...continued)

Ethical Considerations and Canon 9 pertaining to avoiding even the "appearance of impropriety."

Opinion Number 537 (September 30, 1981) states that prosecutors may not campaign for other candidates for public office during their own reelection campaigns. Opinions Number 568 (February 7, 1985) and 573 (January 7, 1986) restrict prosecutors' ability to attend political and social functions of a political party. The District Attorney relies on a July 27, 1977 informal opinion of the State Bar Association's Committee on Professional Ethics reported in the August 24, 1977 New York Law Journal. The Committee stated in a letter that it would be proper for an ADA to campaign on behalf of the District Attorney who employs him, but not on behalf of the District Attorney of a neighboring county.

4 The following present and former Assistant District Attorneys are among those who testified under oath that such requests were made by one of the three secretaries or by the Chief Detective Investigator: Bureau Chief Andrew Worgan, Assistant District Attorneys Anthony Comuniello and Robert Arena, Former Bureau Chief David Everett, Former Assistant District Attorneys Stanley Pruszynski, Joseph Girardi, Andrea Shapiro, Richard Rosenfeld, and Richard Valovage. In private testimony, Beilenson, Williams, Cipolla, and Mahoney either denied or did not recall seeking assistance from QDAO staff members during the 1984 campaign. The District Attorney testified that he was unaware of any such requests. Santucci Public Hearing Tr. at 256.

5 Former ADA Pruszynski testified that Williams kept a log of names and informed him at least once that "the District Attorney would be made aware of the people that would be working on the campaign." Pruszynski Private Hearing Tr. at 10. Former Bureau Chief Everett testified that, during one conversation seeking staff assistance on the campaign, Cipolla said that "[w]e really want to look good for the D.A., you should really try to get people to come down tonight." Everett Public Hearing Tr. at 47. Former ADA Girardi testified that "She [Beilenson] stated they were going to have people help on the campaign, meaning Assistant D.A.s. She stated that it would be a good thing for us to do because it would show our loyalty to the District Attorney, it would show that we were a team player, and it would help our advancement in the office. She stated to me that the District Attorney appreciated loyalty." Girardi Public Hearing Tr. at 123. Former ADA Shapiro testified that she was told that it would be in her "best interest" to work on the campaign. Shapiro Public Hearing Tr. at 67.
going to the correct campaign location after he had waited over an hour, by mistake at the wrong location.\(^6\)

Coming as they did from individuals perceived to be close to the District Attorney, these requests carried the District Attorney's imprimatur.\(^7\) A current ADA testified that, on one occasion, the District Attorney arrived at the campaign worksite and thanked him and other ADAs for assisting on the campaign.\(^8\)

By and large, the requests were made during the workday seeking assistance on the campaign in the evenings which, in most cases, was after regular working hours. In one instance, however, one Bureau Chief announced to his staff working the night shift that, since things were slow that evening, it would be appreciated if they would leave work to assist on Thomas Santucci's campaign. At least two of them did so.\(^9\)

Largely as a result of these requests, at least 48 QDAO staff members, including at least 27 ADAs, worked on Thomas Santucci's 1984 State Senate campaign.

Requests for assistance were not limited to working on the campaign; monetary contributions were also sought. A secretary in the Appeals Bureau who was friendly with Thomas Santucci solicited many Appeals Bureau staff members to buy tickets to a 1984 fund-raiser for him.\(^10\) A former Bureau Chief testified that one of the detective investigators in the office solicited him for a contribution to a Thomas Santucci fund-raiser.\(^11\)

\(^6\) One of the District Attorney's secretaries said to ADA Arena: "once you found out the correct location, why didn't you come down anyway." Arena Public Hearing Tr. at 27-28.

\(^7\) The ADAs, including Bureau Chiefs, considered Beilenson, Williams, Cipolla and Mahoney "influential" and "very powerful" in the office. Girardi Public Hearing Tr. at 124; Everett Public Hearing Tr. at 45. As one current Bureau Chief put it, "you really don't question the bosses' secretaries." Worgan Public Hearing Tr. at 12.

\(^8\) Arena Public Hearing Tr. at 29-30.

\(^9\) Valovage Public Hearing Tr. at 165; Rosenfeld Private Hearing Tr. at 4-6.

\(^10\) Fidel Private Hearing Tr. at 21, 23, 34-35.

\(^11\) Marshak Private Hearing Tr. at 5.
B. John Santucci's 1985 Reelection Campaign

District Attorney Santucci ran unopposed for reelection in 1985. However, early that year it was not known whether or not others would run and tentative plans were being discussed in case there was a real race. As part of those plans, senior QDAO staff members discussed a campaign fund-raising program involving solicitations for contributions from ADAs.

Meeting at lunch, the District Attorney's Executive Assistants and his old friend and recently hired employee, Michael Sganga, proposed a $2500 a table fund-raising dinner for which ADAs would be requested to buy or sell enough tickets to fill one table each. Each of the Executive Assistants then met with the Bureau Chiefs who reported to them and discussed the idea. One Executive Assistant, James Robinson, held a meeting with approximately 12 of his Bureau Chiefs, in a public courtroom. The Bureau Chiefs did not like the idea: some questioned the propriety of the request and many objected to the amount of the suggested contribution.

No campaign opposition to the District Attorney materialized and this fund-raising program was never carried out.

III. APPLICATION OF THE OFFICE POLICY ON POLITICAL ACTIVITY

The District Attorney testified that he was unaware of any solicitations from his secretaries or Chief Detective Investigator to ADAs for campaign assistance for his son's State Senate campaign. The District Attorney's testimony, however, concerning the application and enforcement of his written policy against staff involvement in political campaigns makes clear how such solicitations could have occurred. Voluntary office policies, even when reduced to writing, permit the officeholder to make informal exceptions and amendments which may or

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12 Sganga had also served as a district leader from the political club in which the District Attorney was active.

13 Everett Public Hearing Tr. at 50-53; Communiello Private Hearing Tr. at 27.

14 According to ADA Communiello, "all hell broke loose." Communiello Private Hearing Tr. at 30-31. In addition, a memorandum announcing this campaign fund-raising program was briefly distributed to ADAs in the Criminal Court Bureau and then collected because it was a "mistake." Navas Public Hearing Tr. at 81-82.

15 Santucci Public Hearing Tr. at 257.
may not be communicated effectively to the entire office. In this case, the District Attorney loosely interpreted his written policy prohibiting staff political activity and did not clearly communicate its meaning to the ADAs.

First, the District Attorney does not apply the prohibition to ADA assistance to his own reelection campaign. He testified that he believes it proper to request his ADAs to assist him both financially and by offering their volunteer services in his reelection efforts.17

Second, the District Attorney admitted that he does not enforce the prohibition even with regard to the campaigns of others.18 Former Executive Assistant Norman Rosen confirmed that no one in the office is responsible for enforcing the policy.19

Third, the prohibition does not apply to CLAs even when they have subscribed to the same conditions of employment as ADAs.20

Fourth, the District Attorney may waive application of the prohibition. For example, in his son's 1984 State Senate campaign, he permitted an ADA who was his son's close friend to accompany him on the campaign trail.21

Finally, the District Attorney testified that the prohibition only bars "active" campaigning as he defines it. That definition permits all sorts of campaign activity, including development of campaign literature, mailing of that literature, and telephone canvassing. In fact, all that it prohibits, according to the District Attorney's testimony, is a staff member

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16 The District Attorney testified that "many of the things that were in the form [the conditions of employment] at the outset were not lived by. They were there just to show the people there that we meant business, we were going to try to change things." Santucci Public Hearing Tr. at 237-38.

17 Santucci Public Hearing Tr. at 264-65.

18 Id. at 269-70.

19 Rosen Public Hearing Tr. at 184. Indeed, Rosen, the Executive Assistant in charge of personnel in 1984, testified that he saw at least three ADAs at Thomas Santucci's campaign headquarters but did not believe it was possible they were working on the campaign because he did not see them working. Id. at 185. Moreover, he did not believe it was his place to question them. Id. at 184.

20 Santucci Public Hearing Tr. at 249-50. The District Attorney testified that he knew that two attorneys who were friends of his son were campaigning, but asserted that that did not violate the prohibition because, he thought, they were CLAs at the time. Id. In fact, they were ADAs.

21 Id. at 245-46.
holding himself or herself out as a representative of the QDAO while campaigning.\textsuperscript{22} Notwithstanding this interpretation, the District Attorney also testified that he told "several" ADAs to "go home" when he saw them at his son's campaign headquarters.\textsuperscript{23}

IV. THE DAMAGE TO OFFICE MORALE

The requests for political campaign assistance and contributions from QDAO staff damaged office morale. While few employees testified that they felt pressure to work on or contribute to the political campaigns\textsuperscript{24}, many ADAs stated that they resented being asked. Bureau Chief Worgan testified that when, at Chief Detective Investigator Mahoney's request, he asked his assistants if they wanted to work on the campaign, some responded with expletives.\textsuperscript{25} Other ADAs stated that they worked on Thomas Santucci's 1984 campaign because "it could only help," \textsuperscript{26} or "would not...hurt,"\textsuperscript{27} or because they believed the District Attorney was "taking notice"\textsuperscript{28} or because they thought it might help their advancement in the office.\textsuperscript{29}

\textsuperscript{22} District Attorney Santucci testified:

"Q. Mr. Santucci, would you consider the development of campaign material, mailing out of campaign material, the using of telephones to call to endorse a candidate, would you consider that active political involvement, or passive political involvement?

A. Totally passive, unless you pick up the phone and say, my name is Bellinger, I work for the Committee on Ethics, I'm supporting Santucci. That is active.

If you're just a voice on the telephone and you're saying I'm calling from the Santucci campaign headquarters, will you vote for Santucci; that, to me, is passive." Santucci Public Hearing Tr. at 240-41.

\textsuperscript{23} Id. at 252.

\textsuperscript{24} Former ADA Andrea Shapiro testified that she felt pressure to work on Thomas Santucci's 1984 campaign. Shapiro Public Hearing Tr. at 70.

\textsuperscript{25} Worgan Public Hearing Tr. at 13.

\textsuperscript{26} Arena Public Hearing Tr. at 31-32.

\textsuperscript{27} Pruszynski Public Hearing Tr. at 112.

\textsuperscript{28} Girardi Private Hearing Tr. at 43.

\textsuperscript{29} Pruszynski Public Hearing Tr. at 112; see also Girardi Public Hearing Tr. at 123.
In short, many ADAs who worked on or contributed to Thomas Santucci’s 1984 campaign would not have done so had their fellow employees not asked them to do so. The unfortunate result was that talented ADAs left the QDAO because they did not believe that their success in the office would be based on merit alone.\textsuperscript{30}

\textsuperscript{30} Everett Public Hearing Tr. at 57; Pruszynski Public Hearing Tr. at 111-12; Girardi Public Hearing Tr. at 133; Shapiro Public Hearing Tr. at 64, 73-74.
Appendix III
I. INTRODUCTION

During 1987, while Suffolk County Executive Michael LoGrande was facing a hotly contested election campaign, Suffolk County spent hundreds of thousands of dollars in public funds on a variety of communications bearing his name or picture. While LoGrande is hardly the only public official who has used tax dollars to enhance the visibility of his office and thereby enhance his election prospects, his conduct --- as an example of the conduct of many others --- demonstrates why the recommended changes in the law are imperative.

Although none of the communications was overtly campaign-related, they increased LoGrande’s visibility and thereby enhanced his chances for election. The communications included one special letter announcing an executive appointment made several months earlier; seven newsletters to constituents from various county agencies; an intensive campaign against drunken driving; an intensive anti-drug campaign; flyers and roadside signs; and thousands of trick-or-treat bags which were to have been distributed at Halloween, days before the election. Most of these communications were disseminated by the County in a cluster during the few months prior to the election. Although many if not most of the communications did serve some legitimate public purpose, they also effectively provided a degree of taxpayer subsidy for LoGrande’s campaign.

II. THE SPECIAL LETTER TO VETERANS

In late August 1987, at a cost of $8,000, LoGrande sent a letter to 81,000 veterans announcing the appointment of a new veterans service director. This appointment had been made four months earlier, in April 1987, and had already been featured on the front page of a May 1987 newsletter distributed by the County to the elderly. A special announcement

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1 LoGrande was originally appointed County Executive in December, 1986 to fill a vacancy created when the previous County Executive became a judge. LoGrande lost the November, 1987 election to Assemblyman Patrick Halpin.

2 The trick-or-treat bags were printed at county expense but never distributed.
could have been incorporated into the regularly scheduled Vietnam Veterans Memorial Commission ("VVMC") Newsletter. See Point III below. Whatever the reason for sending this letter in August, its timing clearly helped LoGrande's name recognition in the veterans' community.

III. AGENCY NEWSLETTERS

A number of County agencies circulated newsletters featuring front-page photographs of and messages from LoGrande during the pre-election period. Issues Numbers 2, 3 and 4 of the VVMC Newsletter were published in May, July and November 1987 respectively, at a total cost of approximately $3,000. The Spring and Autumn issues of The Clipper, a newsletter sent to approximately 150,000 elderly Suffolk County residents, cost more than $40,000. The Office of Handicapped Services published two issues of its Independence Newsletter in May and late September, 1987; each issue cost more than $2,500 and was distributed to 40,000 handicapped residents. In addition, The Resourceful Woman newsletter, was produced for the first time by the Office of the County Executive in the Fall of 1987, and the Youth Board News was produced in the Spring of 1987.3

These newsletters may well have served a legitimate public purpose. And LoGrande's name and message on them may well have lent them credibility and imposed no additional cost on the County. But they also clearly provided LoGrande added public exposure unavailable to his opponent.

IV. THE DWI AND ANTI-DRUG CAMPAIGNS

LoGrande also put himself in the public eye through a high profile Stop Driving While Intoxicated (DWI) campaign. Beginning in January 1987, the Stop DWI campaign posted large bus placards saying:

STOP DWI
COUNTY EXECUTIVE MICHAEL LOGRANDE

at a cost of $1132 per month. During the summer of 1987, the Office of the County Executive

3 Despite numerous requests, the Commission was unable to obtain accurate totals for the cost and number of recipients of these newsletters.
$11,637.40), featuring a picture of LoGrande standing before a number of policemen, with the caption "If you drink, ask a friend to pick you up, don't make us do it." The County also distributed 50,000 bumper stickers (cost: $3,295) with LoGrande's name and the message "Stop DWI: Keep the Keys, Keep a Friend." In addition, it distributed 80,000 pamphlets (cost: $9,970) with LoGrande's photograph and another anti-drunken driving message from him. Finally, "Stop DWI" 60-second radio spots, which aired hundreds of times over the Memorial Day, 4th of July and Labor Day weekends at a cost of approximately $25,000, each mentioned LoGrande twice.\footnote{According to the head of the Stop DWI campaign, LoGrande's name and photograph afforded the advertising campaign a higher profile. She was of the view that the message would have been considerably weaker without LoGrande's visible support.}

The drug fight was another issue to which LoGrande lent his name and support. He was twice mentioned in radio spots against drugs which aired more than 200 times during the end of July and again during the final days of August into early September, costing the County more than $12,000. Also in late July, LoGrande sent a letter to 500,000 Suffolk County residents informing them of the County's drug hotline. This letter cost approximately $45,000. In early September he twice appeared on a cable television network and sent postcards to all cable television subscribers informing them of his appearances and asking them to tune in.\footnote{Despite several inquiries, the Office of the County Executive was unable to provide the Commission with the cost of printing and distributing these notices or the number distributed.}

Finally, he commissioned the Department of Public Works to create and post 42 road signs at heavily travelled intersections, during the period from August 20 through September 4, 1987. The signs conveyed an anti-drug message with the hotline phone number and LoGrande's name. The bill for this was $2,929.50.

V. OTHER PUBLIC COMMUNICATIONS

During the three months before the election, more than $71,000 was spent on a Newsday advertisement and a letter from LoGrande to residents asking them to fight the Shoreham nuclear power plant; nearly $1100 was spent to produce 10,000 Halloween trick-or-treat bags; a number of "educational" books were printed.\footnote{These included a 'Fireman Gus' comic book, Child Care Handbooks and a 'Kit Goes to the Dentist' coloring book.} Although the trick-or-treat bags and comic books did not prominently highlight LoGrande's name, and the cost involved seems nominal, the timing of their dissemination is questionable, particularly against the backdrop of other communications LoGrande was sending at the same time.
VI. COMMUNICATIONS PROMOTING OTHER CANDIDATES

LoGrande also used the resources at his command in a manner which had the effect of helping increase the visibility of at least two other candidates, a Suffolk County legislator, Gerard J. Glass, and the Nassau County Executive, Thomas S. Gulotta. At public expense, during the weeks just preceding the election, he distributed flyers and posters featuring photographs of and messages from himself and these other candidates. This was of particular help to the Suffolk County legislator, who could not have issued the flyer at County expense because, under the rules of the Suffolk County Legislature, legislators cannot send mass mailings during the 30-day preelection period.

VII. CONCLUSION

The Commission is able to document that Suffolk County spent at least $300,000 on communications between May and November 1987. Not all the documentation requested by the Commission could be provided by Suffolk County: therefore, we are unable to calculate how much more was spent during that period or how much was spent in 1987 prior to May.

These facts raise questions concerning both the necessity and propriety of these expenditures of Suffolk County taxpayers’ funds. Taken as a whole, they appear to provide substantial campaign publicity. It is not clear that the County would have spent so much on such communications if they were not thought to benefit LoGrande’s candidacy, or if the public had been aware of their cost.
Appendix IV
APPENDIX IV

SUMMARY OF CERTAIN LAWS IN OTHER STATES

1. States which have enacted laws prohibiting use of public resources for campaign-related purposes include:


   Maine law prohibits officers or employees of the state classified service from donating time or services if during the employee's working hours or upon property/premises of the state or using state facilities/services. Me. Rev. Stat. tit. 5, §14 (1964 and Rep. Vol. 1979).

   Tennessee law bars state employees (with some exceptions) from performing political duties of any kind not directly a part of their employment when they are required to be conducting state business. Tenn. Code Ann. §2-19-207 (1985). It further bars the use of public buildings and facilities for campaign purposes unless reasonably equal access to the buildings or facilities is provided all sides. Id. at §2-19-206.

2. State statutes which exempt candidates from provisions barring campaign work during official working hours include:


   Florida law simply precludes candidates in the furtherance of their candidacies for nomination or election to public office in any election from using the services of any officer


Oregon law only precludes public employees from assisting a person’s candidacy while on the job during working hours. Or. Rev. Stat. §260.432 (1986).

Tennessee law expressly exempts elected officials and duly qualified candidates for public office from a bar on state employees prohibiting them from engaging actively in a political campaign when they are required to be conducting state business. Tenn. Code Ann. §2-19-206 (1985).

Washington law bars elected officials from using or authorizing the use of any employees during working hours for the purpose of assisting a campaign but does not appear to bar the elected officials themselves from assisting a campaign. Wash. Rev. Code Ann. §42.17.130 (1972 and Supp. 1988).