



**TESTIMONY
OF THE
NEW YORK PUBLIC INTEREST RESEARCH GROUP
BEFORE THE
SENATE ETHICS AND INTERNAL GOVERNANCE COMMITTEE
REGARDING
NEW YORK STATE'S SYSTEM OF ETHICS OVERSIGHT AND ENFORCEMENT
July 12, 2021
Albany, N.Y.**

Good afternoon. My name is Blair Horner and I am Executive Director of the New York Public Interest Research Group (NYPIRG). NYPIRG is a non-partisan, not-for-profit, research and advocacy organization. Consumer protection, environmental preservation, health care, higher education, mass transit, voting rights and governmental reforms are our principal areas of concern. We appreciate the opportunity to testify on the need for reforming and strengthening oversight of New York State's ethics laws.

In summary, NYPIRG strongly believes that the Joint Commission on Public Ethics (and the Legislative Ethics Commission) should be *replaced* with an independent ethics enforcement agency that would monitor and enforce ethics for the executive and legislative branches. Both entities were established with fatally flawed structures because of political concerns, not the public's best interests. This testimony will go into detail as to why we believe that that action should be taken and how we recommend that you go about this important reform.

At the outset, since JCOPE is the state's current ethics watchdog, the public deserves to know how it operates and how it makes its decisions. We begin our comments by urging that you focus on *how* JCOPE attempts to fulfill its mission. The public has – at best – incomplete information on the inner workings of JCOPE. Some of the secrecy surrounding the Commission is based in state law and some due to decisions made by JCOPE itself.

Despite the secrecy, the media has done extensive reporting on the agency and the best information on JCOPE comes from that coverage – in particular, the work of Albany's *Times Union*, which has contributed significantly to the public understanding of the agency. Given that JCOPE is a public agency doing work on behalf of the public and is funded through the public's taxes, it is critically important that the public have a comprehensive understanding of how JCOPE operates. Your hearing can help fill in those gaps.

Based on our review of the media's reporting on JCOPE, we recommend that the agency's commissioners and senior staff present testimonies to your committee to address, at a minimum, the following questions:

How does JCOPE decide which issues are allowed to be decided by staff versus by the commissioners?
As you know, in both book deals involving the governor approval was granted by the staff without, it appears, full Commission approval. It has been reported that some commissioners believe that such approval should have gone to the full Commission.¹ Exploring how JCOPE handled those decisions

¹ Bragg, C., "JCOPE authorizes 'steps' in unnamed 'investigative matters'" Albany *Times Union*, April 9, 2021, <https://www.timesunion.com/news/article/At-special-meeting-JCOPE-authorizes-steps-in-16089789.php>.

would help better understand the agency's views of where the lines are drawn when it comes to its own staff-decision-making and interpretations of the law. Moreover, if changes are needed, such reforms would remove the issue of precedence that is often the basis of agency decisions.

As noted in the governor's counsel's 2020 letter to the Commission's staff, there is precedent for staff being granted authority to approve such activities. However, in both cases, the governor received significant compensation. We have not seen evidence that the staff were aware of the *amount* of the compensation – which would seem to be important information. Did the staff have additional correspondence that would shed light on these approvals?

Does JCOPE have a small group of commissioners and senior staff that meets informally and makes decisions on its behalf?

There have been public complaints made by commissioners that JCOPE's decision-making hinges on a small number of commissioners working with senior staff.² Digging deeper into the inner workings of the agency will help inform your efforts to develop proposed changes that may be needed to ensure that JCOPE's decision-making is reasonable and appropriate.

Does the staff (or members of the Commission) brief the executive or its legislative appointing authorities in advance of JCOPE decisions? How does the Commission and/or staff monitor, investigate, and enforce the confidentiality requirement in state law?

As you know, JCOPE commissioners have alleged that the governor was told of the private discussions over how the agency was to respond to allegations that a former top aide to the governor misused public resources.³ And it has been confirmed that the governor learned of how the Speaker's Commission appointments voted with respect to a particular matter under review that was related to the governor's activities. What happened? Given that the law requires that such conversations remain secret, how that information became available would inform both policymakers and enforcers of weaknesses in the current system.

How does the Commission set boundaries for the use of public resources by officials?

Related to the issue above, has JCOPE issued clear guidelines regarding the use of public resources for private activities? For example, when the governor sought JCOPE approval for his two book agreements, the Executive Chamber's employees requested such approval on correspondence written on state letterhead. In both cases it appears that the governor's counsels were working on those requests during work hours.

Another issue is whether guidance, if any, was issued regarding executive staff volunteering their time to work on the governor's second book. Where has JCOPE drawn the lines for what it considers appropriate use of public resources?

Of course, there are other questions that could be raised. For this inquiry, the important action is to get top officials in JCOPE to testify on how the agency works. While NYPIRG believes that the agency should be replaced by an independent entity, JCOPE exists now and is charged with an important mission. The public – and policymakers – need to know how JCOPE makes important decisions. Top officials must testify.

In terms of comprehensive reform, JCOPE is fatally flawed and must be replaced. Nowhere is the public's trust more susceptible to harm than when lawmakers act in ways that skirt not only the letter, but

² Ibid.

³ Bragg, C., "Internal rancor continues at JCOPE," *Albany Times Union*, February 25, 2020, <https://www.timesunion.com/news/article/Internal-rancor-continues-at-JCOPE-15083970.php>.

also the spirit, of ethics laws. New York has seen its share of ethical lapses, yet little has been done. Prison sentences, convictions, plea deals, scandals and other allegations of ethical misconduct have been on the front pages of the state's newspapers far too often. As a result, the ways in which the state regulates political ethics has been a front-burner issue. Unfortunately, little is clear when it comes to New York State's ethics laws. The laws are loophole-riddled and poorly—if at all—enforced. Changes are needed to comprehensively reform the state's ethics laws.

The *Public Integrity and Reform Act of 2011* established a new Joint Commission on Public Ethics (“JCOPE”) to oversee executive branch ethics, lobbyist and client reporting and conduct, and empowered to investigate, but not punish, legislators. The legislation also created a new Legislative Ethics Commission (LEC) that would have sole responsibility for issuing punishment for unethical actions by legislators and legislative employees. The LEC's membership totals nine—all appointees of the legislative leaders with four of the nine being currently sitting legislators.

The JCOPE commission members are appointed by the Governor (six of the 14 members with three being enrolled Republicans); the Senate Majority Leader and Speaker each appoint three members; and the Senate and Assembly Minority Leaders each get one appointment. The JCOPE chair is chosen by the Governor; the executive director is chosen by the commissioners and does not have a fixed term, but may only be terminated as specified in statute. Financial penalties were toughened, and courts now can strip corrupt public officials of their pensions. Financial disclosure requirements were beefed up and made public.

Both new ethics oversight entities were fatally flawed: Ethics watchdogs must be independent, not political creatures. Yet, the structure of both agencies indicates their design was driven by fear of real independence.

From the public point of view, ethics watchdogs must be independent of all public officials subject to their jurisdiction, or else its actions will always be suspect, undermining the very purpose of the ethics law to promote the reality and perception of integrity in government. The touchstones of independence may be found in commission members of high integrity, who hold no other government positions, are parties to no government contracts, engage in no lobbying of the government, and do not appear before the government in a representative capacity; similarly, their close relationships are free of even the appearance of conflict of interest.

Including legislators on the LEC destroys the independence of the LEC and discourages legislators and staff from seeking opinions or filing complaints for fear of breaches of confidentiality and retaliation.

Similarly, JCOPE's basic commission structure is flawed. First, the appointment (and removal) process by which three members are appointed (and removable) by the Speaker of the Assembly, three by the Temporary President of the Senate, one by the minority leader of the Assembly, one by the minority leader of the Senate, and six by the Governor, severely undermines the independence and accountability of JCOPE.

Thus, although JCOPE has little actual authority over the Legislature and although the legislative branch constitutes less than two percent of the state's work force, the majority of its membership comes from legislative appointees.

And with 14 members, JCOPE is too big to function smoothly, and even numbered panels are prone to gridlock. Large boards are inherently unwieldy, inhibit substantive discussion, and make decision-making more difficult.

Moreover, these factors are combined with the mandate that at least two of the members of JCOPE voting in favor of a full investigation of a legislative member or staff member must be appointees of a legislative leader or leaders of the same major political party as the subject of the investigation. This makes it virtually impossible to pursue an investigation of a member in the good graces of the leaders of either house.

This appointment process virtually guarantees the factionalizing and politicizing of JCOPE—anathema to an effective ethics system. This gives political leaders an effective veto over investigating or sanctioning any member—or any lobbyist or client—who they want to protect for any reason.

And we have seen that factionalization play out. In a public letter to the editor in the *Times Union*, four JCOPE commissioners bemoaned being out of the loop in the search for a new executive director:

*Designed to be independent, the incessant interference continues. If the next executive director is not hired from outside state government after an exhaustive search, the public trust will be inexorably destroyed.*⁴

JCOPE is unique in another way: It allows elected officials among its members. Typically, ethics boards have explicit prohibitions on the participation of elected officials.

Moreover, allowing elected officials to serve on the board of JCOPE, which has regulatory authority over the lobbying industry, creates an inherent conflict of interest (in fact, the first chairperson was not only an elected official, but one who also served as the head of a lobbying group).

There can be no doubt that the state's ethics watchdogs need a thorough review. Both agencies have been frequently criticized as lacking structural independence and operating in secrecy.⁵ The criticism was at least implicitly validated in JCOPE's policy reform recommendations from February 2015:

“Increasing Transparency and Disclosure. Amend the Executive Law to provide JCOPE with more flexibility to make information public by a vote of the commissioners, including the ability to make investigative findings public if no legal violation is found or if JCOPE determines not to investigate. In addition, consider whether JCOPE's current exemptions from the ‘Freedom of Information Law’ and ‘Open Meetings Law’ should be modified to increase the transparency of JCOPE's operations while still protecting the integrity of JCOPE's sensitive compliance and investigative functions.”⁶

Even when compared to the rest of the nation, New York's ethics enforcement ranks poorly; in a 2015 comparison of state ethics laws, New York's ethics enforcement received a grade of “F.” Not surprisingly, that same group listed New York's oversight of procurement as an “F” as well.⁷

⁴ Albany *Times Union*, <http://www.timesunion.com/tuplus-opinion/article/Letter-Ethics-panel-hire-a-questionable-move-6408151.php>.

⁵ King, H., “Three Years In, New York Ethics Commission Still Looking to Find Footing,” *Gotham Gazette*, <http://www.gothamgazette.com/index.php/government/5479-three-years-in-new-york-ethics-commission-still-looking-to-find-footing>.

⁶ New York State Joint Commission on Public Ethics, “Report From The New York State Joint Commission On Public Ethics February 2015.”

⁷ The Center for Public Integrity, State Integrity Investigation project, New York State ranking available, <https://www.publicintegrity.org/2015/11/09/18477/new-york-gets-d-grade-2015-state-integrity-investigation>.

In addition, the LEC must be abolished, and its powers (except imposition of penalties) transferred to a new state ethics watchdog, which would have full power over the Legislature (except for penalties)—to provide advice and ethics training, to administer and enforce annual disclosure, and to enforce the ethics laws.

Thirty-nine states provide external ethics oversight through an independent ethics commission that has statutory authority and staffing that are independent of the rest of state government. Ethics commissions in only six states, including New York, do not have jurisdiction over state legislators.

Moreover, the new ethics watchdog must be reduced in size from its current unwieldy fourteen members.

One model is New York State's Commission on Judicial Conduct. The Commission is established in the state Constitution, which helps limit political pressures on decision making. Under this model, most of the appointments to this new Ethics Commission would be made by the courts, thus granting it sufficient independence. All its members and staff must be prohibited from *ex parte* communications with their appointing authorities and its budget would be constitutionally protected. It is essential that the law protect the budget of the new ethics watchdog, perhaps as a percentage of the net total expense budget of the state or as a fixed amount with an inflation adjustment.

A constitutional amendment takes time. We thank the Senator for advancing bills that incrementally fix broken processes at JCOPE and better protect state employees from harassment and retaliation while a more comprehensive solution is crafted. NYPIRG has supported the following bills, while recognizing that much more must be done to improve ethics oversight and create a more independent enforcement entity:

- S6261 – simplifies JCOPE voting rules for appointment and removal of the executive director through action by a simple majority of Commission members.
- S6263 – makes a technical change in the financial disclosure form to eliminate an outdated question.
- S6964-A – removes the requirement that legislators, state employees, and statewide officials cannot be found guilty of ethical violations by JCOPE without the votes of at least two members of their own political party and changes the structure of the JCOPE commission by ensuring that each of the legislative conferences have the same number of appointees.
- S1500 – requires legislators and candidates for member of the legislature to provide a link to their financial disclosure statements on their official state and campaign websites.

While not the topic of today's hearing, we also urge that you look at the state's Inspector General. The office reports to the governor's office and we urge you to examine whether the IG is sufficiently independent to conduct its important work.

Thank you for the opportunity to testify.

