

GOVERNMENT AND ELECTION LAW

Expert Analysis

The Cuomo-Schneiderman Moreland Commission

Governor Andrew M. Cuomo's appointment of a Moreland commission¹ is meant as a response to political corruption and a deterrent to future wrongdoing.

Its members have a weighty set of tasks—uncovering wrongdoing, referring matters to prosecutors and recommending reforms of our electoral system. This will sound familiar to some. In March 1986, in response to the Parking Violations Bureau scandal that rocked New York City, Mayor Ed Koch and Governor Mario Cuomo appointed the State-City Commission on Integrity in Government, headed by Columbia University President Michael I. Sovern. Among the recommendations of this 16-member panel were limits on campaign contributions, tough ethics rules and protection of workers who report wrongdoing. It also called upon the governor to appoint another commission, one with subpoena power to investigate corruption more effectively. The following year Cuomo appointed a Moreland commission, the New York State Commission on Government Integrity, led



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The Feerick commission could and did subpoena witnesses; it held public hearings throughout the state; and issued 20 reports prior to its final set of recommendations. Looking to have as broad an impact as possible, the seven-person panel tackled a wide swath of issues. These included campaign finance reform; election of judges; fairer personnel practices; liberalized ballot access rules; neutral contracting procedures; protection for whistleblowers; and forfeitures of pensions.² After a 40-month, comprehensive and thorough investigation, including scrutiny of campaign finance filings of Cuomo and other statewide officials, a unanimous panel concluded in 1990 that New York's campaign finance laws were a "disgrace and embarrassment" and the state had "not yet demonstrated a real commitment to ethical reform in government."

Its work was limited, however, by an inability to grant immunity to witnesses.

Nor could the commission prosecute wrongdoing on its own. Moreover, the Legislature was downright hostile, withholding funding until it was excluded from any investigation (the Moreland Act did not allow for that anyway) and forcing two original members off the panel because they were not New York residents.³ Once the turmoil subsided, however, the Feerick panel was hailed universally for its thorough and thoughtful work.

The new Moreland commission starts out with a distinct advantage over prior panels. The governor has teamed up with Attorney General Eric Schneiderman to appoint the commission,⁴ and, acting together, they have selected several sitting district attorneys to serve on the panel and as its cochairs. Perhaps even more significantly, all commission members who are lawyers have been appointed special deputy attorneys general. This, according to Schneiderman, broadens the reach of the commission beyond a garden-variety Moreland commission, giving it broad statutory jurisdiction to investigate all of state government, including, presumably the legislative branch. Although neither the governor nor the attorney general has mentioned it yet, there is no reason to think that the commission does not also include jurisdiction over the judiciary as well,⁵ not to mention the 700-plus public authorities that control almost every facet of our lives.⁶

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Board of Elections

One central focus of the commission is to scrutinize how New York conducts its elections. It will undoubtedly conclude, among other findings, that contribution limits in New York are sky-high; political parties' housekeeping accounts can be easily abused; retired lawmakers often have active campaign accounts; and candidate committees sometimes spend money for items only tenuously related to a campaign. It will also find that there are serious impediments to voting and running for office: ballot access laws, though liberalized over the last two decades, remain onerous; registration and enrollment requirements are frustrating; absentee voting is limited.

A key component of the administration of elections in New York is, of course, the state Board of Elections. The commission must study whether to reform or replace it. Pursuant to the state constitution, the state Board of Elections and all the county boards are bipartisan bodies.⁷ This means that the four commissioners of the state board and its staff are appointed, in equal numbers, by either the Democratic or Republican Party.⁸ In theory, the goal was to take partisanship out of regulation and enforcement. In practice, this formula has produced either gridlock or bipartisan stasis—protecting the status quo.

For most of the 20th century, however, it was the Attorney General who had jurisdiction over campaigns in New York. From 1922-1974, the Department of Law had sweeping powers to investigate election law offenses. After the Watergate scandal, the bipartisan board as we know it was created; New York's then-Attorney General Louis Lefkowitz was happy to have his office divested of investigating fellow politicians.

Assuming the commission does investigate the state board, it will find the following. From 2002 through 2012, the board received 1,016 complaints, about excessive campaign contributions, ballot tampering, fraudulent nominat-

ing petitions, and the like. The board investigated and issued final determinations on only 31 complaints, a mere 3 percent of those received. It referred only five matters during this period to the district attorney, a paltry 0.5 percent. Indeed, a review of the final determinations that actually were issued reveals a forgiving response to several serious violations. While it is unlikely that all the complaints were meritorious, the public needs to have confidence that our election laws are being enforced vigorously and fairly.

One reason for this woefully inadequate record is a lack of resources. In the last year or so, the board has had only one investigator. But the deeper cause is that the board's very existence depends upon the political party leaders who put them there. Others have tried to change this. As a way of breaking the bipartisan gridlock, ex-Governor Eliot Spitzer proposed to have a fifth, independent commissioner appointed to the state board. His legislation was unsuccessful.

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Effectiveness

As a way of giving the state board some muscle, Governor Cuomo suggested a non-partisan, independent investigatory unit. His bill also failed. Some, including coauthor Jerry H. Goldfeder, have suggested a return to the Attorney General of jurisdiction over election law violations.⁹ Unlike the Board of Elections, the attorney general's office is not saddled with political appointees or scant resources; and unlike most district attorneys, the attorney general would be able to detect broad patterns of misconduct that could lead to remedial legislation. The attorney general has sweeping powers in other areas of malfeasance

and criminal conduct, and hundreds of dedicated attorneys and professional investigators.

An effective enforcement agency is important for the additional reason that courts often defer to it. One example is telling. In a case involving a \$500,000 loan that was unpaid by election day, which turned it into an excessive, illegal contribution, the Supreme Court in Albany County refused to order a remedy, holding that "the remedy lies with the State Board of Elections, which has jurisdiction of, and is responsible for the execution and enforcement of Article 14 [the campaign finance law]."¹⁰

Reform of election enforcement is obviously essential if the response to corruption is to be successful.



1. The Moreland Act is named after Assemblyman Sherman Moreland, a Republican from the town of Van Etten in Chemung County, who served at the beginning of the 20th century. He authored the Sherman Moreland Omnibus Investigation Bill, a measure that gives the governor power to investigate the executive branch. The new commission was appointed pursuant to N.Y. Executive Law §63(8). See Executive Order No. 106, July 2, 2013.

2. John D. Feerick, "Reflections on Chairing the New York State Commission on Government Integrity," 18 *Fordham Urb. L.J.* 157.

3. The new commission appears not to have been funded yet.

4. Eric Schneiderman also serves as cochair of the Mortgage Origination and Securitization Abuses Unit of the president's Financial Fraud Enforcement Taskforce. Cochair Kathleen Rice, the Nassau County District Attorney, is about to be president of the District Attorneys Association of the State of New York. Cochair William J. Fitzpatrick is the Onondaga County District Attorney. The third cochair is attorney Milton L. Williams Jr., a former federal prosecutor.

5. One recently indicted state senator, John Sampson, was charged with embezzling funds he held as a court-appointed fiduciary.

6. See www.osc.state.ny.us/pubauth/.

7. N.Y. const., art. II, §8.

8. There are 58 county boards, one for each county outside of the City of New York, and one for the city. The boards have either four commissioners or two, divided equally by party. On the city board, there are 10 commissioners, one Democrat and one Republican from each borough.

9. Jerry H. Goldfeder, "Make AG an Election Watchdog," *Albany Times Union*, April 29, 2013.

10. *Cook v. Unger*, 2002 WL 32067509 (N.Y. Sup. Ct. Albany Co. 2002).