

## JCOPE FIX

### A Proposal for Ethics Reform in Albany

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#### CHECKLIST FOR JCOPE REFORM

- Reduce the number of Commission members;
- Diversify the appointing officials;
- Increase transparency of the appointment process;
- Simplify quorum and voting requirements;
- Eliminate factional veto powers;
- Make the Commission subject to the Freedom of Information Law;
- Make the Commission subject to the Open Meetings Law;
- Make substantial basis investigations public;
- Make elected officials accountable for penalizing ethics breaches.

Governor Hochul is promising to reform the Joint Commission on Public Ethics (JCOPE) in the wake of negative publicity arising from its role in the controversy over former Governor Cuomo's book deal for "American Crisis." It's the latest incident to put JCOPE under the spotlight in its ten-year history.

At a meeting this fall with some good government groups Hochul reportedly stated her desire to, "blow up" JCOPE. The groups, in turn, directed her toward Senator Liz Krueger, who has drafted a proposed constitutional amendment to establish the New York State Government Integrity Commission.<sup>1</sup>

The amendment would replace JCOPE and the Legislative Ethics Commission with a "single, truly independent, enforcement agency" modeled on the Commission on Judicial Conduct already established under the state Constitution.<sup>2</sup> But New York's Constitutional amendment process would make it two years before Krueger's Integrity Commission could be operating.

Senator Krueger apparently chose the constitutional amendment route, at least in part, to bypass former

Governor Cuomo’s veto power.<sup>3</sup> With Cuomo out and Hochul pledging reform, the Legislature and Hochul should explore an immediate legislative fix for ethics enforcement in the state. Such legislation should reform JCOPE by restructuring it to limit partisan mischief, shed light on the appointment process, and increase accountability through greater transparency.

## THE EVOLUTION OF JCOPE

While other states enforce their ethics laws without elaborate committees or commission structures, New York has been on a trend of adding greater complexity.<sup>4</sup>

JCOPE was an early product of Cuomo’s 2010 campaign promise to address ethics reform under his “Clean Up Albany” agenda.<sup>5</sup> In 2011, JCOPE succeeded the Commission on Public Integrity, which itself was formed as part of sweeping public ethics and lobbying reforms in the Public Employee Ethics Reform Act of 2007.<sup>6</sup>

The Commission on Public Integrity had assumed jurisdiction over individuals then subject to the State Ethics Commission and the Temporary State Commission on Lobbying. The 2007 legislation created a 13-member commission, with members appointed by the Governor. Seven appointments were on the Governor’s own nomination, with no more than four being from the same political party. The remaining six were appointed on the nomination of the Comptroller, the Attorney General, and four legislative leaders.

The Commission on Public Integrity, however, played a questionable role during the Troopergate investigations into former Governor Eliot Spitzer.<sup>7</sup> The state Inspector General found that the Commission’s chair, Herbert Teitelbaum, improperly leaked information to a Spitzer cabinet member meant for Spitzer and the Executive Chamber. The Spitzer incident confirmed misgivings

aired by good government groups in 2007 that the new commission would not be sufficiently independent. They were concerned about the Governor appointing the majority of members, and the chair serving at his pleasure. They also thought political party officers – not only political party chairs – should be ineligible to serve.<sup>8</sup>

The 2011 reforms that created JCOPE did not fix problems with ethics oversight in New York. JCOPE’s critics question its independence and lack of transparency.<sup>9</sup> Those problems, however, arise from JCOPE’s statutory design. Those flaws can first be addressed by revisions to the law without waiting two years for a constitutional amendment to take effect (assuming voter approval).

## JCOPE’S STRUCTURAL PROBLEMS

Under the current law the majority leaders of the Senate and Assembly each appoint three members, the minority leaders appoint one each, and the Governor and Lieutenant Governor appoint six commissioners – three of whom must be from the major political party that is not the Governor’s. The Governor and Lieutenant Governor must solicit appointee recommendations from the Attorney General and Comptroller, but they are not bound to appoint members from those lists. Thus, the process for filling vacancies is designed to maintain partisan affiliations.<sup>10</sup>

The voting rules require a majority of members (eight votes) for JCOPE to act, except investigations of legislative personnel and statewide elected officials can be vetoed on political party lines and state employee investigations require votes from two gubernatorial appointees.<sup>11</sup> For example, if one of the major political parties controls both the Senate and the Assembly, then a full investigation of a majority legislator cannot take place if none of the six JCOPE members appointed by the majority leaders vote in favor.

Similarly, if eight members vote to investigate a state officer or state employee, the investigation still won’t occur unless two of the Governor’s

appointees agree. Statewide elected officials or their appointees cannot be investigated by JCOPE unless two of the three Governor's appointees from the same political party as the investigative target vote in favor.

Unlike the Commission on Public Integrity, JCOPE's executive director can only be appointed and removed by JCOPE's members. Any appointment or removal must be made by a majority vote, but that majority must include, "at least one member appointed by the governor from each of the two major political parties, and one member appointed by a legislative leader from each of the two major political parties."<sup>12</sup>

In other words, the Governor and the Legislative leaders hold veto powers over appointing and removing JCOPE's executive director, depending on their control of their members. Last April,

JCOPE appointed a new executive director after a two-year vacancy in the position, amid speculation that Cuomo's office finally relented on hiring an Albany outsider.<sup>13</sup>

## A LEGISLATIVE FIX

Senator Alessandra Biaggi introduced a bill aimed at eliminating partisan voting requirements, including for the appointment or removal of JCOPE's executive director.<sup>14</sup> Senator Biaggi's bill requires only a simple majority vote for JCOPE to initiate investigations, issue findings, and appoint an executive director. The bill also distributes legislative appointees evenly among the majority and minority leaders in the Senate and Assembly. Senator Biaggi's bill makes positive headway, but more must be done.





## SOLUTIONS

Any legislative fix should start with improvements to the current JCOPE structure, its enforcement mandate, and the transparency of its appointments and procedures. The first step should be to reduce JCOPE's size and revise its voting rules.

### *Re-size JCOPE*

JCOPE should be shrunken, and its appointments diversified and diluted among many interests. A nine-member commission could be comprised of appointments made from one nomination each for the majority and minority members of the Senate and Assembly, the Attorney General, the Comptroller, the Chief Judge of the Court of Appeals, and two appointments by the Governor and Lieutenant Governor.

### *Simplify JCOPE's Voting*

JCOPE should then operate without any special voting requirements. A majority of the commissioners should form a quorum and JCOPE should act by a majority vote of those

commissioners present. A similar system was heralded by good government groups in the Temporary State Commission on Lobbying (see sidebar).

Good government groups in 2007 expressed misgivings about the Temporary State Commission on Lobbying ("Lobbying Commission") being absorbed into the Commission on Public Integrity. They asserted the Lobbying Commission, "has arguably been the most effective government watchdog agency in Albany, and it has served the public well by investigating abuses and holding lobbyists and elected officials accountable for their malfeasance."<sup>15</sup> They were concerned that remaking the commission could result in "a less independent and effective body."<sup>16</sup>

The Lobbying Commission was formed under the Lobbying Act of 1977. It had six members appointed by the Governor. Four of the six were appointed on nomination of the majority and minority leaders of the Senate and Assembly. The Governor's remaining two appointments needed to be from the same political party as the majority and minority leaders of the Senate, respectively.<sup>17</sup>

All Lobbying Commission votes required the support of a majority of members to succeed. A chairman and a vice-chairman were elected by a majority of commission members and each needed to be a member of a different major political party. The chairman and vice-chairman would serve one-year terms and the chairman could not be from the same political party as the preceding chairman. The chairman and vice-chairman could appoint and remove the commission's executive director.

The Lobbying Commission did not have a magic formula in its structure that made it the most effective watchdog in Albany according to the good government groups. The Lobbying Commission's perceived success appears to be attributable to the quality of its members, and not necessarily anything related to its design.

The Lobbying Commission's six-person membership and majority vote requirement in its

design left it susceptible to partisan gridlock and inaction. The Lobbying Commission, however, did not have special voting rules that could be abused, like delaying the appointment of an executive director for two years.

### *Increase JCOPE's Accountability*

Fixing JCOPE may only require reducing its size, diversifying its membership, simplifying its processes, and increasing its accountability. The Lobbying Commission did not enjoy any special confidentiality privileges and was subject to the same transparency laws as other state agencies.<sup>18</sup> A frequent complaint about JCOPE is the extent to which it shrouds itself in secrecy, as encouraged by its enabling law.<sup>19</sup> Accountability for JCOPE can be encouraged with greater transparency.

First, there should be more transparency in the appointments process. After she was sworn in as Governor, Hochul made JCOPE appointments the



day of the September 14<sup>th</sup> JCOPE meeting,<sup>20</sup> and the day before each of JCOPE's meetings on October 5<sup>th</sup><sup>21</sup> and October 19<sup>th</sup>.<sup>22</sup> JCOPE appointments should be made on reasonable notice to the public. The Legislature could also provide for the establishment of a public pool of candidates for appointment, akin to judicial nominations.

In addition to adding transparency to the appointments process, the Legislature should mandate greater transparency in JCOPE's enforcement procedures. The law presently keeps all proceedings confidential and exempts JCOPE from the Freedom of Information Law ("FOIL")<sup>23</sup> and the Open Meetings Law ("OML").<sup>24</sup> Only adverse determinations against individuals are made public, along with a limited list of other records identified in the statute.<sup>25</sup>

The Committee on Open Government wrote letters concerning the 2007 and 2011 ethics reforms that addressed confidentiality and transparency issues for the commissions being created. It urged the new commissions be subject to FOIL and OML, pointing out that those laws contain provisions protecting individuals against unwarranted invasions of personal privacy and allowing an ethics commission to carry out its duties with appropriate discretion. The Committee further noted that "ethics boards and committees at the local government level are subject to open government laws and they function effectively by protecting privacy as appropriate and enhancing the accountability of government."<sup>26</sup>

JCOPE should be subject to the state's transparency laws and its proceedings should be made public once JCOPE determines it will conduct a substantial basis investigation. A substantial basis investigation occurs after JCOPE receives a complaint or initiates an investigation and notifies the alleged

offender, receives a written response from that party, and votes as a commission to conduct a substantial basis investigation, including a hearing. That investigation and hearing process should be public, including all subpoenas issued and evidence gathered by JCOPE.

Finally, JCOPE should not be the body that imposes penalties for ethics violations. Currently, it does not impose penalties on members of the Legislature, legislative employees, or candidates to be legislative members. Instead, it presents a written report to the Legislative Ethics Commission, which is empowered to act on it.

Similarly, JCOPE should only present written reports of ethics violations by executive branch officials and statewide elected officials. The Governor and the statewide officials can be accountable to the voters for actions taken (or not) on those reports. Elected officials should be responsible for disciplinary actions against their employees, and their colleagues. Voters in turn can hold those elected officials accountable. If they fail to do so, they will reap the consequences.

## CONCLUSION

There are obvious structural flaws in JCOPE that should be addressed. And while there's no guarantee that reform will improve the Committee's behavior, recent experience shows it surely won't make it any worse. Governor Hochul has promised reform, is ideally situated to do so, and appears to have the support of legislative leaders and the public. Legislation enacting the reforms described above should be introduced and acted upon early in the upcoming session, before interest wanes and election-year partisanship takes hold in Albany.



## ENDNOTES

- 1 Bragg, Chris. "Hochul Wants to 'Blow up JCOPE.' but How?" Times Union, Oct. 15, 2021. <https://www.timesunion.com/state/article/Hochul-wants-to-blow-up-JCOPE-But-how-16533648.php>.
- 2 NY State Senate Bill S855. May 20, 2021, <https://www.nysenate.gov/legislation/bills/2021/s855>.
- 3 Lyons, Brendan J. "Lawmakers Seek to Bypass Cuomo, Overhaul State Ethics Panel." Times Union, Feb. 27, 2020. <https://www.timesunion.com/news/article/Lawmakers-seek-to-bypass-Cuomo-and-overhaul-state-15086388.php>.
- 4 The National Conference of State Legislatures provides a helpful resource for researching ethics enforcement bodies in the 50 states. <https://www.ncsl.org/research/ethics/50-state-chart-state-ethics-commissions-jurisdic.aspx>.
- 5 Cuomo, Andrew. "Clean Up Albany," The New NY Agenda, <https://s3.documentcloud.org/documents/1151579/clean-up-albany-andrew-cuomo-campaign-document.pdf-page=34>
- 6 L. 2007, c. 14.
- 7 "Hope For JCOPE." Report of the New York City Bar Association and Common Cause/New York. March 14, 2014. <https://www2.nycbar.org/pdf/report/uploads/Hope-for-JCOPE-Report.pdf-page=8>. In an incident the media referred to as "Troopergate," individuals on Spitzer's staff and the State Police were accused of gathering and releasing travel records of then-Senate Majority Leader Joseph Bruno implying he abused his position by using State Police aircraft to attend fundraising and political events.
- 8 New York Bill Jacket, 2007 A.B. 3736, Ch. 14.
- 9 Hope For JCOPE at 3.
- 10 NY Executive L. §94(2).
- 11 NY Executive L. §94(13)(a).
- 12 NY Executive L. §94(9)(a).
- 13 Bragg, Chris. "After Shift, State Ethics Panel Hires New Executive Director." Times Union, April 29, 2021. <https://www.timesunion.com/news/article/After-shift-JCOPE-hires-new-executive-director-16136111.php>.
- 14 NY State Senate Bill S6964. May 20, 2021. <https://www.nysenate.gov/legislation/bills/2021/s6964>.
- 15 New York Bill Jacket, 2007 A.B. 3736, Ch. 14.
- 16 New York Bill Jacket, 2007 A.B. 3736, Ch. 14.
- 17 L. 1977, c. 937, § 1.
- 18 L. 1977, c. 937, § 1.
- 19 "New York's Ethics Watchdog under Scrutiny." Capitol Perspective. July 12, 2021. <https://www.nypirg.org/capitolperspective/new-yorks-ethics-watchdog-under-scrutiny/>.
- 20 "Governor Hochul Announces Appointments to the Joint Commission on Public Ethics." Governor Kathy Hochul. September 14, 2021. <https://www.governor.ny.gov/news/governor-hochul-announces-appointments-joint-commission-public-ethics>.
- 21 "Governor Hochul Announces Appointments to the Joint Commission on Public Ethics." Governor Kathy Hochul. October 4, 2021. <https://www.governor.ny.gov/news/governor-hochul-announces-appointments-joint-commission-public-ethics-0>
- 22 "Governor Hochul Appoints Terry Brown to Joint Commission on Public Ethics." Governor Kathy Hochul. October 18, 2021. <https://www.governor.ny.gov/news/governor-hochul-appoints-terry-brown-joint-commission-public-ethics>.
- 23 NY Executive L. § 19(a).
- 24 NY Executive L. § 19(b).
- 25 NY Executive L. § 19(a).
- 26 New York Bill Jacket, 2007 A.B. 3736, Ch. 14.