

## Testimony of Laurence D. Laufer

### New York City Campaign Finance Board Hearing

December 1, 2009

Thank you for the opportunity to testify. As you know, my firm Genova, Burns & Vernioia represents many candidates for New York City office in campaign finance compliance matters, including Comptroller Bill Thompson who ran for mayor this year. While my views are informed by this experience, I wish to emphasize that I speak today solely for myself and not on behalf of anyone else.

Before proceeding, I want to emphasize that there is nothing wrong with being an incumbent seeking re-election. In a democracy, it is right and necessary that incumbents must seek approval of their electorate in order to remain in office. As the NYC Campaign Finance Act aims to promote fair competition, incumbents should not be unduly advantaged or disadvantaged under the law. But one fact is inescapable, as CFB reports have repeatedly shown: incumbency is generally advantageous for candidates seeking re-election and it has been the factor with the highest correlation to winning an election. Of course, that advantage is certainly not invariable.

One more caveat. I think we can point to significant success of the Campaign Finance Program in the 2009 election in several areas, especially the role that matching funds played in City Council races. I have chosen to limit my testimony to a very different dynamic that took hold in the Mayor's race. That was no accident. The power and allure of the office of Mayor of the City of New York is beyond unique. By itself, that fact should put into serious question the continuing viability of the generally "one size fits all" approach of the City's campaign finance law.

#### The Big Problem

I am here to urge the Board to focus its next post-election report primarily on the Tyrannosaurus in the room: an officeholder disclosing over 100 million in campaign spending from personal funds – and, at the same time, not disclosing other expenditures from personal funds that may have served a re-election purpose. *See, e.g.,* Barbaro, "Chief Factor in Mayor's Race: Bloomberg Influence", New York Times (Nov. 4, 2009).

This is the single biggest flaw in the City's campaign finance law, regardless of the election result. Had the Mayor lost re-election, it would nonetheless have been the biggest problem. In comparison, I believe, all other campaign finance issues in this past election are trivial both in dollar terms and in terms of the threat they pose to reform.

I would like to illustrate this threat. Then, I have several proposals to make for legislative changes, which concern public disclosure and spending limits.

In the 19<sup>th</sup> Century, New York State repealed property qualifications for voting and holding office. In the 20<sup>th</sup> Century, New York City passed a campaign finance reform with the stated aim of ensuring:

that citizens, regardless of their personal wealth, access to large contributions or other financial connections, are enabled and encouraged to compete effectively for public office....

In theory, then, we have it all, right? Private wealth is not a qualification for holding public office and laws exist to enable non-wealthy candidates to compete effectively. But there is a glaring gap – the law does not prevent an officeholder from making unlimited use of his personal funds in order to perpetuate his hold on public office, nor does it require public disclosure of all such expenditures from personal funds.

I think this gap in the law gives rise to corruption, or the appearance of corruption, in New York City elections. To illustrate what I mean, let's go back over 100 years. In *Plunkitt of Tammany Hall*, William Riordon described, in the words of political boss George Washington Plunkitt, how political nominations should not be sold:

Now, I ain't sayin' that we sell nominations. That's a different thing altogether. There's no auction and no regular biddin'. The man is picked out and somehow he gets to understand what's expected of him in the way of a contribution, and he ponies up – all from gratitude to the organization that honored him, see?

Let me tell you an instance that shows the difference between sellin' nominations and arrangin' them in the way I described. ... [He proceeds to describe a saloon back room auction conducted by a Republican district leader for a Congressional nomination.] The highest bidder got the nomination for \$5000. Now, that wasn't right at all. These things ought to be always fixed up nice and quiet.

William L. Riordon, *Plunkitt of Tammany Hall*, New American Library, New York, 1995 at p. 74. Change the dollar amount on account of inflation and it seems like only yesterday. "Fixed up nice and quiet" – that pretty much sums up why we have public disclosure laws, so that corruption of the election process, or its appearance, won't be fixed up nice and quiet.

But when a public disclosure law falls short, or worse, is not enforced, the public doesn't get to assess for itself whether the democratic process has been corrupted. Perhaps the public doesn't "need to know", but I think most would agree that notion is almost as archaic and paternalistic as a property qualification.

Let me be clear: when a candidate reaches into his own pocket – to buy political support or influence, or to silence potential opposition, or to do "good works" in return for future political "considerations", or to say "thanks" for a party nomination, or to crush competition – there is at the very least a risk that personal wealth is being employed in a corrupt manner. Each particular use potentially influences political decisions by its beneficiary and the overall magnitude of the spending may undermine any reasonable sense of fair competition. Such

practices degrade our Constitutional rejection of property qualifications for officeholders and diminish the benefits of campaign finance reform. When private wealth is employed on a massive and secretive scale, a personal fortune can make a mockery of the law's promise of enabling and encouraging citizens to compete effectively for public office, "regardless of their personal wealth."

The opportunity to fashion remedies is now. We must not simply chalk this phenomenon up to an inherent limitation in our reforms, for that would be to admit their failure. It cannot be that New York City in 2009 lacks the means for curbing corrupt practices described in *Plunkitt of Tammany Hall in 1905*. Were that the case, we might as well throw up our hands and seriously question the wisdom of paying well over 100 million in taxpayer dollars to City candidates since 1989.

In my view, we can and must take additional steps.

### Premises

We know that because money buys influence, or at least appears to do so, contribution limits and public disclosure requirements are constitutional. *Buckley v. Valeo*. Campaign finance regulations tend to focus on the influence wielded by large contributors. The common notion is that self-financed candidates are "unbought and unbossed," and so the question of influence-peddling or influence-purchasing receives less scrutiny in that context.

But candidates are no different from contributors. Both are human and so just as likely to use personal wealth to try to gain influence over others. Our disclosure laws tell us much about what contributors are doing. We also need to hold candidates accountable.

Not all candidates are alike. Some candidates hold public office, meaning they are public servants accountable to the public before the election. Public service is a public trust. The public, through its representatives, gets to set the ground rules for holding public office. Officeholders may be required to abide by these ground rules as a condition of holding office.

A conflict of interest necessarily arises between public duty and personal ambition when an officeholder uses personal funds to perpetuate his hold on public office. This problem has a constitutional dimension. With the Constitutional abolition of property qualifications for holding public office, a public servant's private wealth should not be an instrument of their tenure and retention of office. That aspiration must be more than mere fantasy. It lies at the core of what it means to be a democracy.

The constitutional issue worth exploring is the extent to which public servants, while in office, may be held accountable to the public for using their personal funds to influence public policy and the outcome of elections.

### Disclosure

When a public servant uses personal wealth in the course of seeking or exercising the responsibilities of public office, those private funds have the potential to unduly and unfairly affect

the outcome of an election or public policy debate. Fairness in discourse is D.O.A. when private funds are deployed to boss, buy and bully support for a candidate or policy position. We have a right to require openness and fair play from those whose first duty is to serve the public.

The duty of a public servant is always to put the public interest above any personal or special interest he or she harbors. The following reforms would shed light and curb the potential for secretive influence-purchasing by public servants:

- 1) Require public servants to disclose on their annual financial disclosure reports payments and gifts they make in the aggregate amount or value of \$1,000 or more, with exceptions such as payments or gifts made to a relative, living expenses and home improvements. This amendment would parallel current requirements for the disclosure of gifts to and loans by public servants. See NYC Administrative Code §12-110(d)(8)(d).
- 2) If the public servant is a candidate for an office covered by the Campaign Finance Act, require the Conflicts of Interest Board to provide copies of that candidate's annual filings for the first three years of the election cycle to the CFB and require the candidate to report directly to the CFB such payments and gifts made during the election year on a more frequent basis.
- 3) Authorize the CFB to publish these disclosures in its online searchable database and to conduct a review to determine whether such payments or gifts are campaign contributions or expenditures under the Campaign Finance Act. Compare NYC Charter §1136.1 (authorizing CFB review to determine whether the use of government resources are contributions or expenditures under the Campaign Finance Act).
- 4) Require public servants to disclose their making, soliciting or collecting of political contributions for a different candidate or political committee. Compare NYC Administrative Code §3-216.1 (requiring lobbyists to file fundraising and political consulting reports with the City Clerk).

#### Spending Limits – The Rationale

Under New York City's campaign finance law, levels of public funding are set in relation to the spending limits that apply to each covered office. This is no accident, for two reasons.

First, public matching funds and spending limits were designed in tandem for the common purpose of enabling and encouraging citizens to compete effectively for public office.

The second reason is Buckley v. Valeo.

In Buckley, the U.S. Supreme Court did more than just hobble the federal legislation's campaign finance system (i.e., upholding mandatory limits on contributions to candidates, while striking down mandatory limits on spending/personal funds use). Buckley also upheld public campaign financing, including permission to "condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations."

The Buckley decision upheld public campaign financing because:

- Public funds are provided to candidates to “facilitate and enlarge discussion and participation in the electoral process, goals vital to a self-governing people.”
- Public campaign financing “furthers, not abridges, pertinent First Amendment values.”
- Because “limits on contributions necessarily increase the burden of fundraising, ... Congress properly regarded public financing as an appropriate means of relieving ... candidates from the rigors of soliciting private contributions.”

Buckley v. Valeo, 424 U.S. 1, 92-93, 96 (1976). The Buckley court also rejected the argument that a “matching formula favors wealthy voters and candidates”, because the eligibility requirement of “acceptance of an expenditure ceiling ... [helps] candidates with little fundraising ability ... increase their spending relative to candidates capable of raising large amounts in private funds.” Id. at 107-108.

Thus, under Buckley, mandatory spending limits are unconstitutional under the First Amendment as restrictions on speech, whereas eligibility for public funding may be conditioned on the acceptance of campaign spending limits. How may these constitutional distinctions be applied in the case of public servants seeking re-election in the City of New York?

#### The Duties of Officeholders

First, laws of the City of New York currently prohibit certain political speech by public servants. For example,

- A public servant may not request any subordinate public servant to participate in a political campaign or to pay any political contribution. Charter §2604(b)(9)(b), (11)(c).
- A public servant may not promise any money or contribution in consideration of being nominated, elected or employed as a public servant. Charter §2604(b)(10), (11).
- High level appointed public servants may not request any person to make any political contribution for any candidate for City elective office or for any City elected official who is a candidate for any elective office. Charter §2604(b)(12).

These laws recognize that public servants may be held to a different standard than private citizens: these prohibitions are constitutional under the First Amendment precisely because they are voluntarily accepted as conditions of public service.

Second, all City elected officials are recipients and custodians of public funds. The public funds their public salaries, stipends, pensions, security, staff, etc. Elected officials exercise authority over collection and disbursement of public tax dollars, adoption of a budget for the City, and various kinds of discretionary funding accounts. All City elected officials, in some form or another, therefore accept the benefit of public funding as an attribute of holding

public office. Thus, Buckley's condition for subjecting candidates to spending limits, i.e., acceptance of public funding, is met upon taking elective office.

Third, the law of the City of New York today is that public matching funds are made available to candidates who qualify and agree to abide by spending limits. Whether or not this is a wise investment, it is the public policy of the City of New York which we as taxpayers have a right to demand will be implemented in a fiscally responsible manner.

When a private citizen seeks office and rejects spending limits, he or she is merely exercising a constitutional right and not violating a condition for the acceptance of public funds. But elected officials do not necessarily have the same latitude because they, as incumbents seeking re-election, owe their first duty to the public. From their first day in office, these elected officials are recipients and beneficiaries of public funding and are accountable to the public for the use of public funds. Given this and the other obligations of public service, the question becomes whether compliance with Campaign Finance Act spending limits should be made an additional condition of holding office while seeking re-election.

#### Spending Limits – A Proposal

I maintain the answer must be yes if rejection of spending limits by the public official would result in a fiscally irresponsible use of public matching funds.<sup>1</sup>

When is it fiscally irresponsible for a City elected official to reject spending limits? Let me suggest a standard. Rejection of spending limits is fiscally irresponsible if it: (1) results in an additional disbursement of public matching funds to opposing candidates because this is wasteful; and (2) significantly diminishes the public benefit of public financing. In other words, it is fiscally irresponsible for an elected official to unilaterally turn public campaign financing into a bad public investment – one that poorly serves its legislative purposes and constitutional justification.

I submit that these two conditions are always met under New York City law only when a non-participating incumbent is seeking re-election and faces at least one opponent who qualifies for public funds.<sup>2</sup> This is not to say that the non-participating incumbent will necessarily win, but rather that it is the incumbent's rejection of spending limits that results in both wasteful disbursement and diminished public benefit of public matching funds.<sup>3</sup> Subjecting every

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<sup>1</sup> The case of a non-participating non-incumbent candidate is different because he or she owes no duty to the City of New York to protect against a fiscally irresponsible use of public matching funds.

<sup>2</sup> In contrast, the first condition (waste) is never met when no opposing candidate qualifies to receive public funds. The second condition (diminished public benefit) is not likely met in the historically competitive conditions of open seats or well-funded non-participants challenging incumbents.

<sup>3</sup> If you think New Jersey Governor Corzine's loss may provide a counter-example, think again. The New Jersey public funding law is different. His decision to "opt-out" did not result in any

incumbent seeking re-election to the applicable spending limit is therefore necessary to conserve public tax dollars and to protect the public's investment in the matching funds program.

For these reasons, the Campaign Finance Act may and should be amended to require enrollment of all City elected officials as participants or limited participants in the Campaign Finance Program as a condition of taking public office. This status would remain in effect as a condition of holding that office, unless the elected official chooses not to become a candidate for re-election. Like any participating candidate, the elected official would not be required to actually accept matching funds and would be relieved from the spending limit when an opposing non-participating candidate's financing reaches the trigger levels set forth in the Act. Moreover, the elected official would continue to have the option of running as a limited participant, whereby he or she could self-finance up to the spending limit, without raising any contributions or accepting any matching funds.

Would such a requirement erase the distinction between Mr. X the elected public official and Mr. X the private citizen/candidate? Yes, that fiction would be erased in the narrow context of an official seeking re-election to his or her current office. The advantages of incumbency would remain and so would the option of running as a non-participant. The only change would be to preclude an incumbent from seeking re-election as a non-participant because that circumstance poses an exponential advantage (call it incumbency with no limits) that undermines the fundamental purpose of the Campaign Finance Act: to enable and encourage "citizens, regardless of their personal wealth, access to large contributions or other financial connections, ... to compete effectively for public office."

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additional public funding for his opponents (i.e., no waste), however much it may have diminished the relative value of the public funds provided.