



## INNOVATIONS FOR SUCCESSFUL SOCIETIES

### BLOWING THE WHISTLE ON THE PAY-TO-PLAY GAME: CAMPAIGN FINANCING REFORM IN NEW JERSEY, 1998–2012

#### SYNOPSIS

In the late 1990s, civil society reformer Harry Pozycki began a grassroots campaign to eliminate pay to play, a form of influence buying whereby businesses donated money to New Jersey political parties and candidates in exchange for favorable consideration in the awarding of government contracts. Pay to play had plagued state politics for decades and raised the cost of public services. Pozycki pushed for enactment of contracting regulations at the state and local levels that would bar companies making campaign contributions from being awarded New Jersey government contracts. Although civic groups did make steady progress in winning public support for reform, the state legislature failed to pass regulations because both political parties relied heavily on donations from contractors to fund their electoral campaigns. But in 2004, outgoing Governor James E. McGreevey implemented the regulations by executive order, and his successor, Richard J. Codey, carried forward that momentum, thereby enacting a state law that made the regulations permanent. The state and local pay-to-play reforms ultimately required very little administrative cost and avoided legal complications related to free speech by their regulation of state contracts rather than of campaign financing. By 2006, New Jersey had one of the strongest anti-pay-to-play laws in the United States, and several other states followed its model. Under two successive governors, New Jersey continued to consider the legislation and make changes to it through the end of 2012.

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*Most ISS case studies chronicle reforms in detail and rest on large numbers of interviews. This publication is intended to provide an overview of implementation challenges and was informed by fewer interviews than other ISS case studies.*

#### INTRODUCTION

Harry Pozycki of the nonpartisan group the Citizens Campaign leaned back in his chair at his organization's office in Metuchen, New Jersey, and reflected on one of the state government's

thorniest problems: "The last bastion of responsibility in a democracy is 'we the people,' and if we don't develop solutions to make government work better and cost less, then we deserve what we get," he said.

Pozycki was referring to his long fight to halt the subtle but pervasive practice on the part of New Jersey elected officials who handed out government contracts to businesses based on those businesses' political contributions rather than on cost and fairness. Dubbed *pay to play* by media and critics, the system had funded state election campaigns for decades; and politicians who relied on the system to win reelection repeatedly found ways to block reform attempts.

Influence buying cost New Jersey taxpayers millions of dollars during the 1990s, and the elimination of pay to play was a core issue of Governor James E. McGreevey's platform when he was elected in late 2001, even though he too raised money from government contractors to finance his campaign for office. During his first two years in office, however, he failed to take any meaningful steps toward changing the system.

Then, in 2004, revelations of an extramarital affair forced McGreevey to resign, and he stunned New Jersey's political establishment by taking unilateral action during his last days in office. In an executive order, he banned state government agencies from entering into any transaction valued at more than \$17,500 with any business entity that had contributed to a gubernatorial campaign or to a state or county political party committee.

As he left public office—because he no longer needed to protect his own reelection prospects—McGreevey finally had the freedom to put an end to what he called “politics as usual” in New Jersey. Though McGreevey's executive order broke the political logjam on pay to play, for Pozycki and his allies in government, it was only one step in the difficult trek toward cutting out a malignancy that was deeply embedded in New Jersey's political tradition.

## THE CHALLENGE

In issuing his executive order, McGreevey described pay to play as a dangerous political addiction. “The fund-raising culture takes hold of

its participants and makes them weak and unable to resist, as if the need to sustain it becomes an end in itself,” he said. “The requirement to amass staggering amounts of money has created a climate which has inevitably jeopardized the moral integrity of government's basic obligations.”<sup>1</sup>

Long notorious in the United States for political corruption, New Jersey was particularly vulnerable to procurement corruption because of the interaction of three conditions: the state's concentration of power in its governor, its weak lobbying-disclosure laws, and its highly flexible procurement rules.

At the time, the governor was not only the top official in state government but also the only directly elected official in the executive branch. Where other states used *elections* to determine certain other top-level positions, New Jersey's governor had the power to *appoint* officials such as the attorney general and the treasurer, thereby consolidating great power in a single person and in the outcome of a single election.

Further, because New Jersey law did not require firms that sought state contracts to disclose their political contributions or the money they spent on lobbyists to help themselves win bids, contract lobbying was effectively exempt from the conventional rules governing conflict of interest.

Finally, procurement laws gave state officials unusually broad discretion in awarding contracts for reasons other than price. Winning bids needed only to be “most advantageous to the State, price and other factors considered.”<sup>2</sup> While overspending on procurement was never quantified, civil society groups estimated that contracting costs were at least 10% too high because contractors built the cost of political contributions into their bids.<sup>3</sup> The Citizens Campaign found that more than \$1 billion was wasted annually through no-bid contracts and other favors.<sup>4</sup>

One contracting scandal in particular threw those vulnerabilities into sharp relief. In August 1998, Parsons Infrastructure & Technology Group, Inc., won a seven-year, \$392-million contract from the state to privatize automobile inspections. When the system began operations 16 months later, it was projected to run nearly \$200 million over budget. The motor vehicle inspection system broke down within a few weeks, prompting a state investigation.

In March 2002, after extensive witness interviews and public hearings, the New Jersey State Commission of Investigation (SCI) released a report examining where the Parsons contract had gone awry. In its findings, the SCI skewered not only the procurement officials' decision making in the Parsons case but also New Jersey's procurement system as a whole. The commission recommended sweeping changes in the ways the state did business. The report concluded, "In sum, the investigation revealed an ill-conceived state process undermined by mismanagement from within and tainted by manipulation from without."<sup>5</sup> The bidding process had been "tainted at key intervals by political considerations and by the granting of favorable treatment." As a result, Parsons became the sole bidder on the project, the report stated. Even before the company submitted an official bid, Parsons representatives met privately with top state officials and gained exclusive information that helped the company develop its bid, the report said.

Although the report did not allege Parsons had made campaign donations to buy its contract, the investigators noted that from 1997 to 2000, Parsons contributed more than \$500,000 to "select candidates and political committees in the state, nearly all affiliated with the Republican Party apparatus," which controlled the executive branch at the time. Those donations had been made both directly to campaigns and committees and indirectly through the company's "contract lobbyists," the report said. In testimony before the

SCI, a Parsons lobbyist said the donations were not intended to influence contracts but rather to "participate in the political process."<sup>6</sup>

The SCI report recommended that the state require that vendors disclose campaign contributions, regulate contract lobbying, and implement stronger conflict-of-interest controls. In addition, the contracting process itself needed stronger integrity controls to prevent inappropriate contact between prospective contractors and those making the awards, as well as better oversight for major contracts.

Though it was not the central problem with the Parsons contract, the issue of pay to play in the case captured media attention and bolstered the case of civil society groups like the Citizens Campaign that sought sweeping reforms in New Jersey's procurement processes.

Pozycki, who had gained experience in New Jersey politics as Middlesex County Democratic Party chairman and as a county legislator, said he decided to tackle the issue of pay to play after realizing that the electoral system encouraged elected officials to cultivate relationships with vendors in order to attract financial support for increasingly costly election campaigns. Indeed, from 2003 to 2004, engineering, construction, and architecture firms contributed nearly \$2.5 million to "party and caucus committees" in New Jersey—far beyond the contribution levels in other states, according to the Center for Public Integrity, a nonpartisan, nonprofit investigative news organization based in Washington, DC. And in 2004, more than half of the government's roughly \$400 million of no-bid contracts were awarded to "frequent political contributors," according to New Jersey's largest newspaper, *The Star-Ledger*.<sup>7</sup>

## FRAMING A RESPONSE

McGreevey's 2004 executive order was based almost entirely on an earlier bill the Citizens Campaign team had written in the wake of the Parsons scandal. After founding the organization

in 1998, Pozycki began working with former Harvard University president Derek Bok, former New Jersey Supreme Court justice Gary Stein, and several former local and state government attorneys in an effort to devise an efficient regulatory mechanism that would combat pay to play. Pozycki himself had experience under previous governors in the drafting of legislation on a voluntary basis. Craig Holman, a governance advocate involved in the drafting of proposed reforms while at the Brennan Center for Justice at New York University's School of Law, also consulted on the project.

In seeking a solution, the group found fault with the existing regulatory systems used in various other states and federal agencies. Each system required a large bureaucratic structure to identify and investigate possible attempts to influence contracts through campaign donations, and each system also required an administrative hearing or judicial process to determine whether a violation had occurred. Pozycki instead wanted a low-cost system with minimal administrative machinery and no requirements for hearings or evidentiary procedures that could be both slow and open to manipulation or lax enforcement.

The solution, the group decided, was to build a regulatory trigger into the procurement contracts, which were legally binding documents. Their legislative proposal would bar government agencies from entering into any contract with a business entity that had given a contribution of more than \$300 to a gubernatorial candidate or a state or county party committee during the negotiation period, which began 18 months before the contract execution. Under the proposal, the contract would include a clause that the document could be voided or penalties assessed if the contractor made a donation during the term of the agreement. "That simple mechanism of using contract qualification criteria and a breach-of-contract penalty for enforcement, as opposed to a fact-finding regulatory process, meant that

virtually no regulatory machinery was necessary," Pozycki said.

Because the proposed system was a preventive measure rather than an enforcement measure, procedures for investigations or fact finding were unnecessary. The New Jersey Election Law Enforcement Commission, the state agency charged with enforcing electoral donation disclosure laws and with monitoring campaign financing, had only to compare campaign-contribution reports with contracting awards, the records of both of which were publicly available. That policy also served to fortify citizen and media oversight.

The proposed legislation also defined a business entity broadly: to include top executives, company owners, and spouses, all of whose donations would count toward contribution limits. To simplify the process of sorting out all of the potential donors and donations, the law required companies to submit campaign-contribution reports and to certify that they were in compliance with the law. That provision thus shifted the burden of keeping track of covered individuals to the business itself.

Because of their own concerns about the possibility of unintended violations given the range of individuals covered under the broad definition of a business entity, the group drafting the bill added a "cure" provision to the draft legislation: if a contractor discovered that one of the covered individuals, such as an executive's spouse, had made a contribution in violation of the law without the contractor's knowledge, getting the contribution refunded would "cure" the violation and preserve contracting eligibility.

Although the legislation covered direct donations by contractors to state and county political party committees, the proposal did not deal with other types of campaign funding, which would prove to be a weakness in the regulations. Political action committees, which were not affiliated directly with a candidate or party and

often solicited donations to advance issue-oriented agendas, were not covered. Legislative leadership committees, which raised money on behalf of a party's head in the state legislature in order to further that party head's agenda, were also exempt.

The practice of wheeling, which is the exchange of unlimited amounts of money between political committees, including state and county political committees, legislative leadership committees, and political action committees, would also later create problems for the pay-to-play regulatory system. According to the rules, a contractor could make a large donation to a political action committee or other exempt committee, which could then turn around and give the donation to a political party committee—without triggering the regulations.

When drafting the proposal, however, the reformers were concerned about overreaching. “We could easily have made this unconstitutional had we taken into account all of the possibilities of people trying to evade the contribution restrictions,” Holman said. “For instance, one of the original proposals, something that Harry [Pozycki] and others were pushing for, was to include all political committees, so there couldn't be wheeling. Well, that would mean any executive or the spouse of an executive of a committee who gave a contribution to the Sierra Club [an environmental organization that lobbies the government on preservation issues] would suddenly have rendered his or her spouse's company ineligible for a state contract in New Jersey. That just goes way, way beyond what I think any court would have upheld.”

To address the problem, Pozycki and the others included a provision that prohibited a business from receiving a government contract for four years if it was found attempting to intentionally circumvent the regulations by donating through a third party. “The penalty in that case is so strong that the temptation to

circumvent is avoided, because . . . in most cases, government contractors have a continuing relationship with the government,” Pozycki said. “So, they don't want to run the risk if some politician approaches them and says, ‘Look, I know you can't give to me, but give to so and so and then they'll get the money to me.’”

In 2001, as the group worked to draft the legislative proposal for state-level contracts, the Citizens Campaign also created a model local ordinance that would implement a similar system for municipal and county government contracts. Various local governments around the state gradually began adopting the model ordinance, beginning with Robbinsville Township in 2001. “Pay-to-play cash was the lifeblood of most politicians, and the higher up you got, the more cash they got and the more they were addicted to pay to play,” Pozycki said. “So, instead of trying to break the habit at the state level first, we leveraged local victories to create the political momentum for success.”

As voters across New Jersey became aware of the pay-to-play problem, more towns began adopting the legislation. “One of the good things about passing it on the local level is that we were able in the early days to fine-tune it,” Pozycki said, explaining how the experience of implementing local-level reforms shaped the proposed state regulations.

The Citizens Campaign also hoped that passage at the local level would put pressure on the legislature to vote for the state-level regulations. The model ordinance gained momentum at the local level, and by 2003, at least 10 municipalities had passed the regulations, and others were considering it or similar models. “It was passing in town after town after town,” Pozycki said. “Citizens were picking it up themselves and just going into their own communities and calling for it. We didn't have to go out and recruit people. We don't do that; we recruit them for empowerment but not for a

particular law. But people were coming in saying, ‘Yeah, I want that, too. I read about it in this newspaper, and I want it for my town.’”

While local efforts continued, the Citizens Campaign and other governance advocates turned their attention to the state legislature. In January 2003, the state-level draft law, introduced with bipartisan support, went up for a vote in the state’s bicameral legislature. The bill passed in the Senate 35-1 but stalled in the Assembly. State Assembly rules required the speaker (the presiding officer of the Assembly) to introduce any bill for a floor vote. The speaker at the time, Democrat Albio Sires, told the bill’s sponsors he would not allow it to be introduced for a vote.

In public statements, Sires said he was holding out for stronger legislation, but a report in *The Star-Ledger* at the time noted the speaker had “flourished” under the system. The article noted that, during Sires’s tenure as Assembly speaker and concurrent term as mayor of the city of West New York, 24 companies that had made contributions of more than \$318,300 to his local political accounts had won \$10.9 million in government contracts from 2000 to 2004. Sires denied that his administration had made procurement decisions based on campaign contributions.<sup>8</sup>

Pozycki and his fellow campaigners eventually found a parliamentary workaround that allowed Assembly members to motion for a direct vote on whether the bill could be introduced on the floor. The bill subsequently failed in the Assembly by one vote, which Holman attributed to Governor McGreevey’s vocal opposition to the bill. McGreevey argued publicly that the proposal was not strong enough and threatened to veto it if it passed. He later wrote in his autobiography that he had felt unable to challenge party leaders who opposed the regulations behind the scenes. In a press statement at the time the legislation was before the Assembly, Pozycki also pointed to Sires and Democratic Assembly majority leader Joseph

Roberts as the main roadblocks to that ethics reform.<sup>9</sup>

After the state-level proposal failed, Pozycki and the Citizens Campaign continued to encourage municipalities and counties to adopt pay-to-play reform. Holman said he considered the state-level regulations to be on the back burner until McGreevey unexpectedly called him in September 2004 for advice in drafting his executive order. The executive order the governor signed on the way out the door was an important first step, Pozycki said, but the intention had always been to turn it into legislation.

## GETTING DOWN TO WORK

After McGreevey resigned in November 2004, then Senate president Richard J. Codey, a fellow Democrat, became acting governor for the remainder of McGreevey’s term—as specified by the state constitution at the time. Before he signed his executive order on pay to play, McGreevey spoke with Codey, who agreed to enforce the order for the remainder of his term. During his term, Codey would not only keep his promise to preserve the executive order but he would also become instrumental in moving the reforms forward.

Codey immediately began working to turn the executive order into law. Framing the effort in terms of a broader ethics and transparency agenda, the acting governor not only pushed the pay-to-play ban but required greater lobbying disclosures and created a state ethics commission, among other reforms. Days after taking office, he pledged to create “a good sense of ethics for people who are employed by the taxpayers in the governor’s office, and in all the agencies and authorities throughout the state . . . Whatever the price is to have good ethics, I’ll pay it.”<sup>10</sup>

“There was a tremendous push in the general public by then,” Pozycki recalled. He said the media, too, created momentum. “All the editorial writers were, across the board, in favor of the pay-

to-play reforms, so [Codey] arrived at a time when the question was: 'Are you going to continue this executive order?'"

Codey first had to deal with legal challenges to McGreevey's pay-to-play reform order, particularly questions about its constitutionality. In mid-October, less than a month after McGreevey signed the order, the Democratic Assembly majority leader asked the state Office of Legal Services for an opinion on whether such circumvention of the legislature was within a governor's powers. The office concluded that McGreevey had infringed on the powers of the legislature by "attempt[ing] to set State policy when State policy has already been set,"<sup>11</sup> throwing the order's legality and enforceability into question and adding urgency to the push for legislation.

At about the same time, the Federal Highway Administration (FHA) froze roughly \$250 million in federal road projects on the basis that the pay-to-play ban undermined federal competitive-bidding requirements, thereby disqualifying potentially lower bidders and adding criteria to the decision-making process. The U.S. federal agency threatened to block any future funds as long as the order was applied to its contracts. At the time, New Jersey was receiving roughly \$750 million to \$800 million in federal highway funds annually.<sup>12</sup> The state took the FHA to court and lost, requiring the governor to amend the executive order by exempting federally subsidized highway projects. "The federal government is dead wrong," Codey said at the time. "But I cannot jeopardize nearly \$1 billion in federal transportation aid."<sup>13</sup>

Meanwhile, to address the Office of Legal Services' opinion on the tenuous legality of McGreevey's executive order, Codey began pushing to turn the order into law. The bill Codey first introduced was based largely on the text of

McGreevey's executive order, which had come from the earlier legislation crafted by Pozycki and the Citizens Campaign. This time, the bill passed the Assembly unanimously but failed in the Senate in February, less than four months after McGreevey's resignation. Media analyses said at the time that Democratic lawmakers had been forced to support the bill publicly in order to prevent Republicans from making lack of progress on ethics issues under a Democratic majority a powerful campaign issue in the next election. But the legislation received only 17 of the 21 Senate votes required for passage, after four leading Democratic senators joined all Republican senators in abstaining from the vote.

Republican Party leaders said they were holding out for a stronger bill, arguing that a weak measure would give Democrats enough political cover to block further reforms. The Republican unity surprised Codey and other proponents, who had expected support from at least a few members of the party, even in an election year. Pozycki described the situation as "the normal dynamic of politics at work": "Republicans on the other side, what could they say? 'Applaud this'? Say, 'This is great, this is wonderful'? No, they had to say, 'No, well, you should make it even stronger then.'"

Though both parties benefited from contractor electoral contributions, blocking campaign contributions from many state business interests would disproportionately disadvantage the Republican Party, said Paul Josephson, who served as McGreevey's chief counsel after holding the position of chief of authorities for the state, representing the governor on more than 50 bi-state and state authorities. Josephson noted that although both sides relied on corporate donations, Democratic candidates tended to win far greater financial support from unions and labor interests. Despite the financial disadvantages, however, blocking the bill to hold out for more-

comprehensive legislation would have hurt Republican lawmakers in the next election if they were seen as impeding ethics reform.

“At a certain point, you make a decision on this as in many other legislative matters—‘Am I going to let perfection be the enemy of the possible?’—and recognize you have an ideal for what you want in legislation, but you’re rarely going to get it, and so, what are you going to take?” Josephson said.

Two weeks later, as media commentators criticized lawmakers blocking the bill for being weak on ethics, Codey called senators back for a special session to vote again, and it passed 34-0. As with previous attempts to pass pay-to-play legislation, behind the scenes the senators of both parties continued to voice strong objections to the bill; but they knew they would appear soft on corruption if they didn’t vote for it.

“One of the good things we learned about the passage of pay to play,” Pozycki said, “was that it may be resisted vigorously by the powers that be—the powers that are drawing the pay-to-play cash—but once you could get a public vote, even those who are most against it vote for it. It’s too embarrassing to say, ‘We believe we should continue the practice of taking huge sums of political cash while we’re negotiating a government contract.’”

Codey signed his pay-to-play legislation into law on March 22, 2005. The final legislation closely followed the language of McGreevey’s executive order, with an exception for instances when its application would violate federal laws or regulations, making permanent the temporary amendment affecting federal highway funds. In a statement at the time, Codey touted the bill as the strongest legislation against pay to play in the United States.<sup>14</sup>

## OVERCOMING OBSTACLES

Only two days after the bill became law, media reported that Democrats were already exploring ways to continue contractor-based fund-raising. *The Star-Ledger* said the New Jersey Democratic Party’s top lawyer, Angelo Genova, had written a memo the previous month that contained guidelines for circumventing the pay-to-play ban. The memo was distributed to party fund-raisers just hours after Codey signed the bill into law, according to the newspaper.<sup>15</sup> Genova was one of a handful of people McGreevey had consulted in drafting his original executive order.

In his memo, Genova pointed out that by donating to the Democratic State Committee’s *federal* campaign funds, state contractors could still make annual contributions of as much as \$10,000 each without jeopardizing their eligibility for *state* contracts. The law covered only funds that must be reported under the New Jersey Campaign Contributions and Expenditures Reporting Act, which was enforced by the Election Law Enforcement Commission. *Federal* electoral donations, governed by the US Federal Election Commission, were not covered by the new state law. *The Star-Ledger* noted that although contributions to the federal account were typically used for presidential and congressional races, no regulation blocked the party from also using the funds for state gubernatorial and legislative races.

Quoted in the *Star-Ledger* article, Codey appeared unconcerned about Genova’s memo and denied that it described a loophole in the law. “How do you penalize somebody where federal law governs federal elections? We govern state elections. We can’t prohibit anybody from donating to federal accounts,” Codey said, according to the newspaper. “I wouldn’t call it a

loophole off the top of my head. I'd have to speak to Angelo [Genova] about it.”

When the memo became public, the Republican state chairman said the party would not seek contractor donations to its federal accounts, because “it would be a glaring, giant, gaping, intentional violation of the spirit of the law.” However, Democratic state chairwoman Bonnie Watson Coleman left the door open to taking advantage of the supposed loophole. “Proactively, we’ve talked to people that have supported us in the past and have expressed an interest in supporting us in the future,” she told *The Star-Ledger*. “The federal account, as far as I know, is outside the jurisdiction of the [pay-to-play law].”

A state Treasury Department official said in response to the controversy that the department did not recognize a distinction between political parties’ state and federal accounts.

#### *Legislative weaknesses*

Third-party analyses of the bill highlighted additional problems. Employees and partners with stakes of less than 10% in a business could make contributions without affecting contracting eligibility. And contractors could continue to donate directly to legislators’ campaigns. Although legislators did not exert official control over contracts in the same manner as the governor’s office did, they did have influence on state agencies’ budgets and position nominations.

Wheeling also continued to create problems. Because donations to legislative leadership committees and some political action committees were not covered by the pay-to-play legislation, prospective contractors could each make donations of up to \$25,000 a year to the committees, which could in turn donate unlimited amounts to other campaign accounts.

#### *Local regulation*

Although some local governments had adopted the model ordinance set up by the Citizens Campaign or similar pay-to-play regulations, others kept the default rules established under the state’s Local Unit Pay-to-Play Law, which preserved eligibility for prospective contractors that had made campaign donations to win municipal and county contracts awarded through a “fair-and-open” bidding process, a distinction not made at the state level. A contract was considered fair and open under New Jersey law if it was advertised in newspapers or on the public entity’s Web site for an unspecified length of time, if proposals were solicited under public criteria disclosed in advance, and if the proposals were publicly announced and opened at the time of the contract award. Because officials were not required to award the contract to the lowest bidder, the fair-and-open contracting process left room for campaign contributions to influence awards.

The reformers faced an additional problem at the local level: some analysts said statutory language in the state’s 2005 pay-to-play legislation banned municipal and county governments from enacting their own pay-to-play laws.<sup>16</sup> This presented an obstacle for the Citizens Campaign’s efforts to promote its local-level model ordinance, and implementation briefly stalled.

In January 2006, days before the end of his term, Codey bolstered Pozycki’s local initiative when he signed into law a bill empowering county and municipal governments to enact their own, local pay-to-play ordinances—beyond the provisions at the state level. After that bill passed, grassroots and voter-driven campaigns pushed through legislation in many municipalities. The Citizens Campaign template closed the fair-and-open loophole as it was implemented, and by

November 2007, roughly 60 municipalities had adopted the model ordinance, according to an article in *The Record* of Bergen County.<sup>17</sup> By August 2008, 90 municipalities out of 566 and all 21 counties had passed a version of pay-to-play reform.<sup>18</sup>

Some local governments went even further than the legislation outlined in the Citizens Campaign model. In September 2007, Atlantic County passed one of the strongest local-level pay-to-play reforms in New Jersey. It not only closed the fair-and-open loophole but also included an antiwheeling provision.<sup>19</sup> Other towns, however, chose to subsequently water down their new regulations, a decision attributed in the media to a drop in campaign funds for local elected officials following implementation of the regulations. For instance, in 2007, Bloomfield's town council repealed the pay-to-play ordinance, putting back in effect the state law containing the fair-and-open provision.<sup>20</sup>

#### *A new administration*

Democrat Jon Corzine was sworn in as governor of New Jersey in January 2006, after having served as one of the state's US senators. Independently wealthy based on his former position as chief executive of Goldman Sachs Group Inc., an investment banking and securities firm, Corzine largely funded his own campaign. After taking office, he pledged to put forth an ethics reform package that would include legislation to make uniform local government pay-to-play laws while closing the fair-and-open loophole and eliminate wheeling.

On September 24, 2008, Corzine signed two executive orders addressing additional loopholes in the pay-to-play legislation. The first extended the definition of *business entity*, applying the legislation to campaign donations by employees and partners whose stakes exceeded 10% as well as

by their employees' and partners' spouses/civil union partners rather than simply donations by top officers and executives. That first executive order also expanded the law to cover contributions to legislative leadership committees and municipal political party committees.

Although that order did not prevent prospective contractors from donating directly to legislators' campaigns, it did indirectly address one of the major sources of wheeling by banning contractors from making massive donations to a legislative leadership committee based on the implicit understanding that the money would be transferred to the state party. The order also added the committees or election funds of candidates for the office of lieutenant governor to the covered recipients. (In response to Codey's simultaneously holding the office of Senate president and governor after McGreevey's resignation, the office was created after the original bill was passed.)

The second order addressed an additional vulnerability that had developed since passage of the original legislation. The law had not taken into account the awarding of redevelopment rights, the conferring of tax breaks, or the granting of other development incentives. As New Jersey saw increasing real estate redevelopment in urban areas, builders were free to donate to candidates and parties with influence over lucrative development rights.<sup>21</sup> To address the problem, Corzine's order extended the contracting regulations to cover redevelopment agreements: the order prohibited the state from entering into an agreement with a redeveloper that made campaign contributions after an official request for proposals on the specific project had been publicly issued. Notably, the order covered donations to legislative leadership committees and to legislators' individual campaigns; both entities had been absent from the 2005 legislation.

*Changing the agenda*

In 2009, Corzine lost to Republican challenger and then United States Attorney for the District of New Jersey Chris Christie. Both candidates had made promises of further pay-to-play reform in their platforms, but Christie also slammed Corzine for failing to push his promised ethics agenda through the legislature during his first term. Christie argued that Corzine hadn't done enough to pressure lawmakers to turn his executive orders and other promised reforms into legislation. Christie's background as a tough anti-corruption crusader as United States attorney for New Jersey gave weight to his criticisms.

The day after his January 2010 inauguration, Christie signed an executive order making two significant changes to pay-to-play regulations. First, he closed a widely criticized loophole in the law by adding legislation leadership committees to the covered recipients of donations. Second, in a more controversial move, Christie extended the definition of a *business entity* to include the state's powerful labor unions and labor organizations on the premise that they too entered into contracts with state officials when engaging in collective bargaining. Under the order, unions, which had long been major sources of Democratic Party political funding, were not eligible to enter into collective bargaining agreements with the state if they had given campaign contributions of more than \$300.

Christie's administration did not use the original goals of pay-to-play reform, reducing contracting corruption, to justify the policy change. "The governor's intention with this executive order is to level the playing field for everyone," Christie spokesman Michael Drewniak said in a statement to *The Star-Ledger* shortly after Christie signed the executive order. "If individuals and businesses must abide by campaign donation rules in New Jersey, the same rules should apply to public employee unions," Drewniak said. "Public

policy should not be dictated by groups who have the most money to contribute to a political campaign."<sup>22</sup>

Labor unions took the state to court over the order and won. Five months after Christie signed it, the executive order was invalidated by an appellate court, which ruled the governor had infringed on the powers of the legislature—in violation of the state's constitution. The court also ruled that the order stretched the meaning of the pay-to-play law when applying the regulations on procurement contracts to collective bargaining.

In May 2012, Senate minority leader Republican Tom Kean Jr. introduced a bill that would make Christie's overturned executive order law. In late 2012, at the time of publication, the legislature had yet to vote on the bill. Holman said he was concerned that if the legislation passed, it would be unconstitutional. He pointed to the Colorado Supreme Court, which in 2010 struck down that state's pay-to-play law as unconstitutional on the grounds that its inclusion of collective bargaining in the contracts covered by the law abridged the rights of unions. The entire law was invalidated on the basis of that decision.

ASSESSING RESULTS

After New Jersey passed its 2005 pay-to-play law, other states, including Connecticut and Illinois, followed suit, passing procurement reform modeled on New Jersey's regulations. Ohio also updated its laws following the New Jersey model.

According to Holman, pay-to-play reform has achieved the original goals of the legislation. "The key benchmark is that we haven't heard of anything comparable to the Parsons scandal since it passed," he said. "There are other indicators such as a significant reduction in campaign contributions coming from government contractors, but the key indicator is that there just hasn't been a comparable scandal. It's always very difficult to come up with an empirical

measurement of an ethics law that works, other than the fact that you just don't have that type of ethics violation happening anymore."

At the time of writing, publicly available data on the number of contracts voided due to pay-to-play violations did not exist for local or state government. For example, however, in February 2011 the law director of the city of Trenton found a prominent law firm to be in breach of pay-to-play laws due to a \$7,200 donation to a political action committee that then made an identical donation to Mayor Tony Mack's election campaign. The firm agreed to withdraw from the \$50,000 contract.<sup>23</sup>

In November 2012, former Mercer County Republican Party chairman Philip Angarone Jr. pleaded guilty to tampering with public records and making prohibited campaign contributions in a scheme to mask campaign donations from an engineering firm that had contracted with the state. At the time of writing, he had not yet been sentenced but faced nearly a year in jail. The firm had not reported to the Election Law Enforcement Commission or any of the contracting agencies any of the campaign donations.<sup>24</sup>

Over the years since the original bill became law, however, the political rhetoric on the reform changed dramatically. Politicians began to frame the goals of the pay-to-play legislation as keeping business and corporate money out of election campaigns rather than as reducing procurement corruption. "Pay to play is certainly achieving its original intent, which was to dampen contribution activity by public contractors," Election Law Enforcement Committee executive director Jeff Brindle said in a 2011 statement on the drop in contractor donations to New Jersey electoral committees.

"It's become not as specific to contracts as it is to the notion of 'Let's keep a particular group of people out of here,'" Josephson said. That debate continued in late 2012, with some Republican

lawmakers working to curtail the ability of unions and other labor organizations to simultaneously make political contributions and engage in collective bargaining with the state.

Despite certain continuing problems with loopholes, New Jersey's pay-to-play regulations had an immediate effect on contractors' campaign contributions. In 2005, *The Star-Ledger* reported that the 10 contractors that had been the biggest campaign contributors had halved their electoral donations. The paper also reported that contractor donations to the six top fund-raising committees for both parties had dropped to \$1.8 million in 2005 from \$5.4 million in 2001.

In 2011, according to the state Election Law Enforcement Commission, political donations by government contractors dropped for the fifth year in a row, to \$9.6 million across the state from \$15.1 million in 2006. Those remaining donations were made largely to political action committees not officially affiliated with parties or candidates.

But donations to political action committees may have violated the spirit, if not the letter, of the law. An April 2012 report in *The Star-Ledger* found, for example, that one contractor's partners had donated more than \$600,000 to Middlesex County political action committees during a four-year period. Those political action committees then made \$360,000 in donations to towns in which the company had won contracts valued at more than \$21 million. The article listed numerous examples of engineering, construction, and other contracting firms' donating to political action committees that then gave money to electoral campaigns, state party committees, and municipalities before or in the same year that the firms won lucrative contracts.

Josephson said the side-by-side disclosure of donations made by—and contracting awards won by—government contractors had a significant impact on how contracting entities gave to electoral campaigns. "That has affected a real sea change in the political and the contracting

environments because it no longer requires a researcher's spending countless hours trying to match up information from among multiple databases. It becomes one document which is filed electronically now; so, that literally connects the dots between a specific business's contracts and their contributions," he said. "You put all that together and you get (a) a much better picture of what's going on in the aggregate and (b) a much better picture of what's going on at the micro level with respect to particular contractors, contracts, and officeholders. I'm a great believer in the notion of the disinfecting power of shining light on what people are doing."

Still, Josephson said, it would be impossible to cut off all avenues for donations in exchange for contracts—meaning, the legislation could never be fully successful. "I think that substantively, [pay-to-play legislation] hasn't had a great impact on the contracting process," he said. "Those people that are still going to try to ingratiate themselves to officeholders still have other ways of getting there and doing that, and they will."

The law's impact at the local level was less clear. By late 2012, 81 New Jersey municipalities and two counties had adopted the model ordinance or one of similar strength, according to the Citizens Campaign. In total, more than 100 of 566 municipalities and all 21 counties had passed a version of pay-to-play reform. Some adopted different measures from the Citizens Campaign model. Most municipalities, however, stuck with the default regulatory structure, creating a patchwork of regulations at the local level.

"Frankly, that's part of the Citizens Campaign strategy of passing all these local ordinances," Josephson said, referencing the compliance problems created by the range of local ordinances. "That if we can't get the legislature to do real pay-to-play reform at the local level, then . . . we'll go out and we'll pass a hundred versions, and we'll make this so complicated that everyone

gets a headache and people stop making contributions. And the elected officials will say, 'Well, we can't have this, so let's figure out one uniform provision that will apply statewide.'"

Some advocates argued that pay-to-play legislation became an increasingly important piece of campaign ethics regulations after the 2010 US Supreme Court decision in *Citizens United v. Federal Election Commission*, in which the court ruled it was unconstitutional for the federal government to limit political expenditures. The Supreme Court interpreted the First Amendment to the US Constitution—which guarantees freedoms of religion, speech, the press, and peaceful assembly—to protect political expenditures as speech. "Pay to play has become one of the major reform efforts, especially at the state level," Holman said. "But it's going to become significant at the federal level as well, especially now that the Supreme Court has invalidated so many of the campaign finance laws, especially with the *Citizens United* decision, which leaves one of the biggest vehicles for trying to rein in corruption in government up to government contractors and pay-to-play laws."

The Supreme Court ruling, however, did not affect the New Jersey pay-to-play model, which did not regulate an individual's ability to make campaign contributions. The pay-to-play law "is really a contract reform more than it is a campaign finance reform," Pozycki said. "And therefore the regulation is not on the vendor or the individual citizen and does not in any way abridge First Amendment rights, because the vendor can choose not to go into that contract and can give whatever is normally permitted in the election."

But though the ruling did not invalidate the pay-to-play law, it did provide a legal workaround for prospective contractors looking to influence elections. Following the Supreme Court ruling, a business or individual could make unlimited independent expenditures on behalf of a candidate or party instead of giving money directly to that

candidate or party. The disclosure laws governing pay to play did not cover such expenditures.

## REFLECTIONS

In late 2012, local-level regulation of contracting was the most pressing pay-to-play issue for New Jersey. The fair-and-open loophole remained a problem in many towns. In 2011, state comptroller Matthew Boxer called the standard “ridiculously easy” to qualify for. The patchwork of regulations can also make following contracting laws difficult for vendors. But given the political climate at the beginning of the reforms and the variations in contracting authorities in different municipalities and counties, it appeared unlikely that a blanket, local-level regulation would have been effective at the start of the pay-to-play reform campaign.

Even though such states as Connecticut, Illinois, and Ohio have adopted regulations modeled on New Jersey’s approach, the applicability of similar pay-to-play reform to federal contracts could be hampered by problems with the Federal Highway Administration. As of late 2012, New Jersey was still unable to apply its regulations to federally funded highway projects, and Illinois had a similar dispute with the agency. Because a federal court upheld the agency’s interpretation of federal contract law, this situation appeared unlikely to change without legislative amendments.

Reflecting on the long fight for pay-to-play reform in New Jersey, Harry Pozycki of the nonpartisan group the Citizens Campaign described the tangled nature of the system: “It’s

very hard for an elected official or a candidate for elected office to not be tempted to go to government vendors in search of cash,” he said. “Fund-raising is one of the most undesirable activities for even the most hardened of politicians because no one likes to beg, but when you’re collecting cash from vendors, you’re not begging, you’re trading.”

The burden instead is on the system to remove the incentive for contractors to make those types of contributions, which, Pozycki said, is possible only if voters are aware of the problem and individuals outside the system make it a priority.

Paul Josephson, who served as Governor James E. McGreevey’s chief counsel after working as gubernatorial representative to more than 50 bi-state and state authorities, however, was less optimistic about the ultimate effect of any effort to remove pay-to-play incentives, calling it an attempt to “regulate human nature.” The reform’s effects instead come from disclosure, he argued. “There’s just no way of absolutely closing off the money getting into somebody’s political campaign,” Josephson said. “The better, more effective thing, I think, is, let’s watch where the money is going, let’s see where it’s going, let’s see how it trickles through the system. Let’s let reporters and bloggers put that information out there for the public to see, and then voters can make their decisions. And that ultimately is what will convince otherwise wayward public officials that they need to play it straight and that they’ve got to make decisions on the merits.”

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**Endnotes**

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- <sup>2</sup> New Jersey state and local government contract law N.J.S.A. 52:34-12, enacted January 1999.
- <sup>3</sup> Terrence Dopp, “Pay-to-Play Laws in Jeopardy Threat. New Law Would Supersede Local Measures,” *Express Times*, 22 November 2005.
- <sup>4</sup> Editorial staff, “Another Setback for Ethics Reform,” *Trenton Times*, 29 January 2007. This alleged loss of \$1 billion to inflated contracting prices was substantial. In comparison, in 2004, the year reformers first tried to pass a statewide pay-to-play ban, New Jersey made \$48.6 billion in expenditures.
- <sup>5</sup> “New Jersey Enhanced Motor Vehicle Inspection Contract,” State of New Jersey Commission of Investigation Report, March 2002, p. 1.
- <sup>6</sup> New Jersey State Commission of Investigation Report, p. 65.
- <sup>7</sup> Joe Donohue, “Pay-to-Play Ban Working . . . Some Say Too Well. Analysis Shows Many Once-Generous Companies Have Cut Back on Donations in N.J.,” *The Star-Ledger*, 11 June 2006.
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- <sup>10</sup> Richard J. Codey with Stephen Seplow. 2011. *Me, Governor?* New Brunswick, NJ: Rivergate, p. 170.
- <sup>11</sup> Office of Legal Services Letter to Joseph J. Roberts Jr. 15 October 2004, on file with Rutgers New Jersey Legal Library, <http://njlegallib.rutgers.edu/ols/ols20041015.pdf>.
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- <sup>15</sup> Josh Margolin and Jeff Whelan, “New Jersey Acting Gov. Richard Codey’s Ban on Pay-to-Play May Not Curb the Practice,” *Star-Ledger*, 24 March 2005.
- <sup>16</sup> Kevin Weber. 2008. “Unsuccessful Campaign Finance Reform: The Failure of New Jersey’s 2004–2005 Pay-to-Play Reforms to Curb Corruption and the Appearance of Corruption,” *Seton Hall Law Review* 38, 1443–78.
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- <sup>20</sup> *Ibid.*, p. 25.
- <sup>21</sup> Weber, p. 1468.
- <sup>22</sup> Peggy Ackerman, “N.J. Labor Unions Lawsuit Claims Gov. Chris Christie’s ‘Pay to Play’ Restrictions Violates [sic] First Amendment,” *Star-Ledger*, 25 February 2010, [http://www.nj.com/news/index.ssf/2010/02/nj\\_labor\\_unions\\_lawsuit\\_claims.html](http://www.nj.com/news/index.ssf/2010/02/nj_labor_unions_lawsuit_claims.html).
- <sup>23</sup> “Trenton Voids Law Firm Contract over Pay-to-Play Violation Linked to Mayor Mack’s Campaign,” *Times of Trenton*, 2 February 2011, [http://www.nj.com/mercer/index.ssf/2011/02/trenton\\_voids\\_law\\_firms\\_contra.html](http://www.nj.com/mercer/index.ssf/2011/02/trenton_voids_law_firms_contra.html).
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