

DRAFT

The Anatomy of Government Ethics Reform: Lessons Learned, A Path Forward

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I. Introduction

This paper examines the lessons learned from one of the nation's most ambitious and promising state ethics reform initiatives - New Jersey's enactment in 2005 of sweeping legislative reforms of the state's executive branch of government.¹ Those were precipitated by a crisis of confidence and leadership that reached a tipping point with the then governor's resignation, in 2004, amidst accusations that he, staff members and heads of various state agencies and boards had engaged in self-dealing, nepotism and misuse of state funds.² At the time, ethics-based lapses throughout the state's government were so widespread that in 2004 the state's newspaper of record reported on "one corruption-related event" every three days.³

That crisis yielded an inflection point, with the then new governor's appointment of Special Ethics Counsel – retired New Jersey supreme court justice Daniel J. O'Hern, Sr. and me

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¹ See Daniel J. O'Hern, Sr. & Paula A. Franzese, SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, ETHICS REFORM RECOMMENDATIONS FOR THE EXECUTIVE BRANCH OF NEW JERSEY GOVERNMENT (2005), https://www.state.nj.us/ethics/docs/reports/ethics_report.pdf.

² Paula A. Franzese & Daniel J. O'Hern, Sr., *Restoring the Public Trust: An Agenda for Ethics Reform of State Government and a Proposed Model for New Jersey*, 57 RUTGERS L. REV. 1175, 1176 (2005).

³ Nicholas Kusnetz, *How Did New Jersey Rank Tops in Integrity?*, CTR. FOR PUB. INTEGRITY (May 1, 2015), <https://publicintegrity.org/politics/state-politics/how-did-new-jersey-rank-tops-in-integrity/>.

- charged with conducting an extensive ethics audit and investigation and issuing recommendations for reform (the “Report”).⁴ Those recommendations prompted passage in 2005 of “some of the nation’s strongest ethics and transparency laws.”⁵ The comprehensive ethics reform package,⁶ applicable to the executive branch of the state’s government,⁷ created a newly empowered State Ethics Commission and secured passage of a Uniform Ethics Code with strict conflicts laws,⁸ recusal and anti-nepotism laws,⁹ zero tolerance on gifts,¹⁰ mandatory ethics training protocols,¹¹ provision for routine ethics auditing,¹² and procedures to assure transparency in the awarding of state contracts.¹³

The reforms brought a renewed government commitment to restoring and preserving the public trust. The newly fortified model was working. Soon New Jersey would earn the top spot in the Center for Public Integrity’s national ranking of state government ethics laws.¹⁴ But the ensuing years would find the state’s revived template tested, amidst the norm-shattering of a later gubernatorial administration and scandals involving several of that administration’s top appointees and staff members.¹⁵ Those showed that even the strictest laws are only as good as their custodians.

⁴ See Daniel J. O’Hern, Sr. & Paula A. Franzese, SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, ETHICS REFORM RECOMMENDATIONS FOR THE EXECUTIVE BRANCH OF NEW JERSEY GOVERNMENT (2005), https://www.state.nj.us/ethics/docs/reports/ethics_report.pdf.

⁵ Kusnetz, *supra* note 3.

⁶ See N.J. Stat. Ann. §§ 13D-1–52:13D-28.

⁷ See N.J. Stat. Ann. § 52:13D-21.

⁸ N.J. Stat. Ann. § 52:13D-21.

⁹ N.J. Stat. Ann. § 52:13D-21.

¹⁰ N.J. Stat. Ann. § 52:13D-14.

¹¹ N.J. Stat. Ann. § 52:13D-21.1.

¹² N.J. Stat. Ann. § 52:13D-21.

¹³ N.J. Stat. Ann. § 52:34-10.

¹⁴ Colleen O’Dea, *New Jersey: Best Score in the Country*, CTR. FOR PUB. INTEGRITY (Mar. 19, 2012), <https://publicintegrity.org/politics/state-politics/state-integrity-investigation/new-jersey-best-score-in-the-country/>.

¹⁵ See *infra* notes 71-121 and accompanying text; Mark J. Magyar, *Christie Loyalist to Run Ethics Panel That Would Get Bridgegate Complaints*, NJ SPOTLIGHT NEWS (Jan. 29, 2014), <https://www.njspotlight.com/2014/01/14-01-29-christie-loyalist-to-run-ethics-commission-that-would-field-bridgegate-complaints/>; Ted Sherman, *In Bridgegate’s Wake: Questions over Campaign Work at Statehouse*, NJ ADVANCE MEDIA (Nov. 21, 2016), https://www.nj.com/news/2016/11/in_bridgegates_wake_questions_over_campaign_work_o.html; Tim Darragh &

New Jersey’s Sisyphean struggle to advance the aims of good government provides important object lessons for all public and private sector actors committed to the task of government ethics reform. With the benefit of hindsight, this Article examines how even a strong ethics regime can become vulnerable to cronyism,¹⁶ conflicts of interest,¹⁷ dual loyalties,¹⁸ misuse of office,¹⁹ illegal withholding of public records,²⁰ and challenges to gatekeeper independence.²¹ It makes plain the need to finish the reform work that the state began in 2005. That work, once completed, will better assure the independence of the state’s ethics monitors. Most essentially, the New Jersey experience reinforces the conviction that ethics laws depend for their vindication on top-down leadership invested in making integrity, transparency, and accountability the cornerstones of good government.

The New Jersey reform objectives resonate loudly at this fraught moment for our nation’s democracy. The message is plain: honest leadership starts at the top. Character counts. Indeed, character is destiny. William Safire rightly observed that “[f]or a person, a party and a nation, the element essential to success is character, a word that grew out of the Greek for ‘to mark, to

Ted Sherman, *David Samson, Close Confidant of Christie, Pleads Guilty in Airline Shakedown*, NJ ADVANCE MEDIA (July 14, 2016), https://www.nj.com/news/2016/07/david_samson_port_authority.html; Kate Zernike, *2 Ex-Christie Allies Are Convicted in George Washington Bridge Case*, N.Y. TIMES (Nov. 4, 2016), https://www.nytimes.com/2016/11/05/nyregion/bridgegate-conviction.html?_r=0.

¹⁶ Magyar, *supra* note 15; *see also* Matt Katz, *Cracks in Christie’s Post-Bridgegate Ethics Reform*, WNYC (Mar. 25, 2015), <https://www.wnyc.org/story/cracks-in-christies/>.

¹⁷ Andrea Bernstein, *Documents Reveal Insider Deal to Build Light-Rail Station in Hoboken*, WNYC (Feb. 13, 2014), <https://www.njspotlight.com/2014/02/14-02-12-documents-reveal-insider-deal-to-build-light-rail-station-in-hoboken/>; Katz, *supra* note 16; Salvador Rizzo, *Former Watchdogs Accuse Christie of Interfering with State Ethics Agency*, STAR-LEDGER (Mar. 29, 2019), https://www.nj.com/politics/2014/04/former_watchdogs_accuse_christie_of_interfering_with_state_ethics_agency.html.

¹⁸ Bernstein, *supra* note 17; Katz, *supra* note 16; Zernike, *supra* note 15; *David Wildstein’s Plea Agreement in Bridge Lane-Closing Scandal*, N.Y. TIMES (May 1, 2015), <https://www.nytimes.com/interactive/2015/05/01/nyregion/document-wildstein-plea-agreement.html>. 5

¹⁹ Bernstein, *supra* note 17; Sherman, *supra* note 15.

²⁰ Molly Redden, *Chris Christie Is Now Waging 23 Court Battles to Keep State Documents Secret*, MOTHER JONES (Feb. 4, 2015), <https://www.motherjones.com/politics/2015/02/chris-christie-transparency-records-requests/> (detailing “unprecedented efforts” by Christie administration to keep public records secret, forcing media outlets to sue to obtain “even routinely disclosed information.”).

²¹ Magyar, *supra* note 15; Rizzo, *supra* note 17.

engrave.’ It is the mark of character that can appeal to, and make manifest, ‘the better angels of our nature.’”²²

Ethical stewardship in a participatory democracy depends too on recognition of the symbiotic relationship between the citizenry and its elected officials. Honest and just leadership requires that our political and social economies inspire principled people to seek public office. Civic engagement and a return to teaching civics in our schools can reinforce the resolve to recognize and support the efforts of those who desire to gain power not for personal enrichment, but to achieve public good. In addition to calling out bad actors, fair and responsible journalism has the potential to call *in* the honest just by shining a spotlight on best practices.

Good government requires a collective return to first principles. Those proceed on the simple truth that public office is a public trust. A badly shaken public trust can be reclaimed. That task demands a steadfast commitment, starting at the top and reinforced at every level of government, to the twin aims of transparency and accountability. The public deserves assurances that its elected officials and public servants are without dual loyalties or conflicts of interest. Citizens ought to have confidence that their leaders will not abuse power in pursuit of political retaliation²³ or private gain.²⁴ All stakeholders are entitled to rely on the guarantee that the system’s ethics overseers and gatekeepers will be independent of actual or perceived allegiance to the very offices that they are entrusted to police. Citizens need to know that the same set of rules apply to all.

²² William Safire, *Character is Destiny*, N.Y. TIMES, Jan. 12, 2005, at A21.

²³ Zernika, *supra* note 15.

²⁴ Claude Brodesser-Akner, *Christie Never Sought Advice from Ethics Panel while Cowboys Friend Jerry Jones Bid on P.A. Contract*, NJ ADVANCE MEDIA (Jan. 6, 2015), http://www.essexcountypolitics.com/christie_never_sought_advice_from_ethics_panel_while_cowboys_friend_jerry_jones_bid_on_p_a_contract; Ted Sherman, *David Samson Avoids Jail in United Airlines Bribery Scandal*, NJ ADVANCE MEDIA (Mar. 6, 2017), https://www.nj.com/news/2017/03/david_samson_sentenced_to_probation_in_united_airl.html.

Humble and values-driven governance is indispensable to the task of healing a weary and wary electorate. That requires leaders to depoliticize what should be unifying first principles of honesty, integrity, resilience, and valor. It recognizes the essential interdependence of the governors and the governed. Indeed, the excesses of our nation's and state's past and recent history remind us that "[e]very government degenerates when trusted to the rulers of the people alone. The people themselves are its only safe depositories."²⁵

II. A Return to First Principles of Good Government

The betrayals, rancor, and cynicism that have come to define the political stage underscore the need for a return to the foundational elements of good government. Those entrusted with the power of office must first and foremost commit steadfastly to upholding the rule of law and must never presume that they are above its letter and spirit. Elections must put character on the ballot. Demonstrated integrity counts. Words matter. With them, leaders can inspire or dismay, unify or stir division, lie or tell the truth.

Certainly, clear rules and regulations have an important role to play in the task of ethics reform. Those rules can express the values of the organization and establish governing standards. But the task of ethical leadership transcends the legalities of do's and don'ts. It requires the norming of ethical behaviors and nurturing of ethical cultures. Over-legalizing the system can backfire, honoring the letter but not the spirit of the law as it sends the message that "*if it is legal, it is ethical.*" But having the right to do something does not mean that it is the right thing to do.²⁶

²⁵ Thomas Jefferson, *Notes on the State of Virginia (1781-1782)*, reprinted in *Writings* 274 (Merrill D. Peterson ed., Library of Am. 1984).

²⁶ William Safire

Building a cultural climate of ethics requires leaders to reach beyond compliance. Ethical leadership starts at the top, with evidence that the chief executive is making ethics the cornerstone of governance and inspiring supervisors at all levels to do the right thing. Actions must align with rhetoric. When my youngest child, then in grade school, asked me the meaning of integrity, the best answer I could come up with at the time is the answer I return to today. Integrity is when the outside matches the inside, when people do what they promise to do and refrain from doing what they promise not to do.

Nurturing strong ethical cultures in government demands the abiding commitment on the part of those who hold the public trust to “always do right. This will gratify some people and astonish the rest.”²⁷ Honesty and truth-telling are non-negotiable. So is candor. Ethical climates depend on the collective commitment to honesty to a fault. Citizens deserve to know that their public servants will tell the truth even when that is uncomfortable or less than politically expedient.

A return to ethical government requires that leaders develop a robust moral vocabulary to effectively communicate the power of virtue and humility, with less public promotion and more self-awareness. Author and columnist David Brooks lamented that “we live in the culture of the Big Me.”²⁸ Integrity-led government depends on the sort of selflessness willing and able to replace “the Big Me” with the best interests of the bigger *us*.

While independent overseers have an essential role to play, in the final analysis, the duty to uphold a given state’s ethics laws rests with the governor. The governor sets the example and moral tone. The chief executive must be expected to demonstrate by words and conduct that

²⁷ Mark Twain, Note to the Young People’s Society, Greenpoint Presbyterian Church (1901).

²⁸ David Brooks, *The Moral Bucket List*, N.Y. TIMES (Apr. 11, 2015), <https://www.nytimes.com/2015/04/12/opinion/sunday/david-brooks-the-moral-bucket-list.html>.

honesty, trustworthiness, and fairness are paramount. The power of the office must be wielded judiciously, to show that holding office is a privilege vested to serve the public and not the self. Public office is for public service, not personal enrichment.

The foundational values of good government transcend partisanship. Their vindication demands top-down messaging to public officials and employees that the rules of the game matter and that consequences attach to betrayal of those rules. There are many ways to do that, including at cabinet meetings, in agency communications, through regular and mandatory ethics training and refresher courses, compliance checks, and inclusion of ethics advisors during deliberative and decision-making processes. Decision-making must include more than consideration of what the polls suggest or what popular opinion would have the governor do. It requires that careful attention be paid to the question of whether the proposed course of conduct is the right and just thing to do.

The Report noted that the top-down task of “[b]uilding a strong ethical culture in government is not easy and most certainly requires work.”²⁹ The chief executive can set the example and expectations by “ensuring regular departmental review of the code of ethics and compliance with that code, providing ethics liaisons with the authority to discuss key issues directly with department heads and the governor’s staff, and refreshing the administration’s commitment to ethics with periodic presentations to the cabinet and to major state agencies.”³⁰

It is important that the governor’s own words and actions align with the messaging that ethical comportment is paramount. Those must be beyond reproach, demonstrating that public office is a matter of public service and not private gain. The steadfast commitment to

²⁹ See Daniel J. O’Hern, Sr. & Paula A. Franzese, SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, ETHICS REFORM RECOMMENDATIONS FOR THE EXECUTIVE BRANCH OF NEW JERSEY GOVERNMENT 101–02 (2005), https://www.state.nj.us/ethics/docs/reports/ethics_report.pdf.

³⁰ *Id.*

transparency can help to disabuse citizens of some of the cynicism and distrust wrought when power is abused.

While no set of laws, no matter how strict, will deter a person intent on bending them for personal or political advantage, clear standards regarding performance and penalty communicate that transgressions will not be abided and that ethics is everyone's business. In that latter respect, good government finds support in a strong political economy, a responsible press, citizen overseers, the organized bar, public interest groups, religious groups, and private sector business leaders invested in facilitating the aims of good government.

In the classroom, civics courses can help to normalize elements of robust civility and citizen engagement. Civics curricula can include components that teach students media literacy, thereby helping to mitigate some of the biases, falsehoods, and ideological insularities that plague virtual spheres. Units on first amendment values can provide historical and contemporary context for the abiding premise of democracy that “the ultimate good desired is better reached by free trade in ideas.”³¹

Civics classes at every grade level can caution students against succumbing to the idle distractions that virtual worlds invite and instead teach how responsible online engagement can be a means for citizens to help keep government honest. Those courses can challenge students to not simply trust their beliefs or the words of others but to also test them by rigorous fact-checking and vetting. They can counsel the next generation of voters to understand the power and responsibility they share for safeguarding our democracy. Lessons taught can provide antidotes to cynicism by showing how government, at its best, can be a force of compassion and renewed hope. Restoring a sense of nobility and higher calling to government service sets the

³¹ *Abrams v. U.S.*, 250 U.S. 616 (1919) (J. Holmes' dissent).

stage for a renewed commitment to civic engagement and more meaningful partnership between government and the citizenry.

Recently, in assessing best practices of leadership, the observation was made that “[l]eadership may be hard to define, but in times of crisis it is easy to identify.”³² Those who effectively meet the challenges of the moment demonstrate empathy, decency, a respect for expertise, the willingness to admit mistakes, and the ability to be self-corrective. They practice honest and transparent messaging, and with that practice succeed at calling *in* those of good intent and conscience rather than calling *out* those with whom they might disagree. They start with *why*³³ before making decisions, take care to abide the laws that they are sworn to uphold, and avoid shortcuts to the lawful means to accomplish appropriate ends.

In their decision-making and in their treatment of others, effective leaders understand that wisdom and compassion are indivisible. They know that while compassion without technique is a mess, technique without compassion is a menace.³⁴ Leadership inspires when it is practiced with humility, decency, and the willingness to put the citizenry above self.

The New Jersey ethics reform experience demonstrates that it is possible for state governments to repair and restore the public trust. Still, while the template in place for the past fifteen years has enjoyed significant success, it has also suffered setbacks. The fits and starts of the state’s reform efforts show the strengths of its model and the vulnerabilities even of clear and firm rules. Those provide a meaningful basis for taking stock of the strides made, identifying the failures, and charting a path forward. As an exhausted nation and states begin again to repair and

³² Jeremy Engle, *What Makes a Great Leader?*, N.Y. TIMES (May 6, 2020), <https://www.nytimes.com/2020/05/06/learning/what-makes-a-great-leader.html>.

³³ See SIMON SINEK, *START WITH WHY: HOW GREAT LEADERS INSPIRE EVERYONE TO TAKE ACTION* (Penguin Books 2009).

³⁴ Karl Llewellyn, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 346 (1945).

restore the fabric of our democracy, the New Jersey model provides a helpful roadmap for routes to take and potholes to avoid.

III. The New Jersey Model

On November 17, 2004, acting New Jersey Governor Richard J. Codey appointed Daniel J. O'Hern, Sr. and me as Special Ethics Counsel, charged with recommending ethics reforms for the executive branch of New Jersey's state government.³⁵ The governor made this among his first initiatives in office to reclaim a public trust badly shaken by the transgressions of the previous administration.³⁶ Our work required that we thoroughly review the state's existing ethics and conflicts laws, conduct an extensive ethics audit of state agencies and departments, engage in a comparative review of other state and federal ethics models, conduct numerous interviews, and solicit and review public comment.³⁷

Our study left us with the indelible impression of firm resolve on the part of state employees in the trenches of government service to serve the public honestly and faithfully. Our proposed reforms aimed to reinforce that resolve at every level of government. That would require stricter, uniformly applied ethics laws together with measures to assure that public officials and employees understand those laws and permissible parameters of conduct.³⁸ Public officials' financial affairs would have to be subject to strident reporting and disclosure mandates

³⁵ See Daniel J. O'Hern, Sr. & Paula A. Franzese, SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, ETHICS REFORM RECOMMENDATIONS FOR THE EXECUTIVE BRANCH OF NEW JERSEY GOVERNMENT 2 (2005), https://www.state.nj.us/ethics/docs/reports/ethics_report.pdf.

³⁶ See Jonathan Schuppe & John P. Martin, *New Jersey's Year of Corruption and Scandal*, STAR-LEDGER (Newark, N.J.), Jan. 2, 2005 at 18; see also James Ahearn, *More Missteps by the Governor*, BERGEN RECORD, Dec. 8, 2002 at O2; Ronald Smothers, *Ex-McGreevey Aide Settles Insider Charges*, N.Y. TIMES, May 8, 2005 at 14; Paul Carpenter, *For the DRJTBC, a \$ 4,500 Junket is Just Peanuts*, MORNING CALL (Allentown, Pa.), June 10, 2003, at B1.

³⁷ Daniel J. O'Hern, Sr. & Paula A. Franzese, SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, ETHICS REFORM RECOMMENDATIONS FOR THE EXECUTIVE BRANCH OF NEW JERSEY GOVERNMENT 2 (2005), https://www.state.nj.us/ethics/docs/reports/ethics_report.pdf.

³⁸ *Id.* at 97.

to assure that their actions were without improper influence.³⁹ Transparency would need to be partnered with accountability in the form of investigatory and enforcement mechanisms administered by an independent and nonpartisan agency.⁴⁰

Most essentially, we emphasized again and again that ethical leadership starts at the top.⁴¹ The governor sets the tone and leads by example, communicating by words and actions that integrity is the cornerstone of responsible government.⁴² It is up to the state's chief executive to vindicate the ethics rules, demonstrating best practices to show that no one is above the law.

In 2005, under the leadership of then Gov. Codey, the Report became the basis for enactment of an ambitious reform package.⁴³ The reforms included passage of a strong Uniform Ethics Code and created a newly empowered State Ethics Commission (the "Commission") vested with heightened investigatory and enforcement powers.⁴⁴ The Report and ensuing reforms proceeded on the premise that good government depends on the firm commitment to transparency and accountability. Those require citizen engagement and open public access to the business of government and the business dealings of public officials.

With "sunlight as the best disinfectant,"⁴⁵ the reforms required state officials to file publicly available annual financial disclosure forms.⁴⁶ The new laws established a Business

³⁹ *Id.* at 90.

⁴⁰ *Id.* at 23.

⁴¹ Daniel J. O'Hern, Sr. & Paula A. Franzese, SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, ETHICS REFORM RECOMMENDATIONS FOR THE EXECUTIVE BRANCH OF NEW JERSEY GOVERNMENT 101 (2005), https://www.state.nj.us/ethics/docs/reports/ethics_report.pdf.

⁴² *Id.*

⁴³ *See id.*

⁴⁴ *Id.*

⁴⁵ LOUIS BRANDEIS, OTHER PEOPLE'S MONEY 62 (National Home Library Foundation ed. 1933).

⁴⁶ N.J. Stat. Ann. 40A:9-22.2(e).

Ethics Guide and protocol for entities wishing to do business with the state.⁴⁷ That protocol made plain the governing strictures and required transparency in the state's contracting processes and business dealings.⁴⁸

Second, the new ethics template sought to render the governing ethics rules available and understandable to all state employees. In that pursuit, the reforms modernized, reinvigorated, and streamlined the otherwise confusing array of the state's ethics laws and regulations. That effort yielded a Uniform Ethics Code, whose rules endeavored to close the revolving door of influence by imposing strict conflict of interest and post-employment restrictions, stringent recusal standards, anti-nepotism laws, transparency in the contracting process, imposition of the ethics laws upon gubernatorial transition teams, and zero-tolerance on the acceptance of gifts.⁴⁹ For ease of reference, those rules were also condensed into a pocket reference tool – the Plain Language Ethics Guide.⁵⁰ All public officials and employees now had to participate in annual ethics training and certify understanding of and compliance with the governing standards of ethical comportment.⁵¹

The key tenets of the Report's recommendations to the governor as contained in our Report⁵² sought:

⁴⁷ Daniel J. O'Hern, Sr. & Paula A. Franzese, SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, ETHICS REFORM RECOMMENDATIONS FOR THE EXECUTIVE BRANCH OF NEW JERSEY GOVERNMENT 99 (2005), https://www.state.nj.us/ethics/docs/reports/ethics_report.pdf.

⁴⁸ See NEW JERSEY DEPARTMENT OF THE TREASURY DIVISION OF PURCHASE AND PROPERTY, BUSINESS ETHICS GUIDE, <https://www.nj.gov/treasury/purchase/pdf/BusinessEthicsGuide.pdf>.

⁴⁹ Paula A. Franzese & Daniel J. O'Hern, Sr., *Restoring the Public Trust: An Agenda for Ethics Reform of State Government and a Proposed Model for New Jersey*, 57 RUTGERS L. REV. 1175, 1177 (2005).

⁵⁰ Daniel J. O'Hern, Sr. & Paula A. Franzese, SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, ETHICS REFORM RECOMMENDATIONS FOR THE EXECUTIVE BRANCH OF NEW JERSEY GOVERNMENT 97 (2005), https://www.state.nj.us/ethics/docs/reports/ethics_report.pdf.

⁵¹ *Id.* at 82.

⁵² *Id.* at 6.

- creation of an independent watchdog to be known as the State Ethics Commission.⁵³ The Commission would be comprised of seven public members charged with appointing an executive director whose staff would be responsible for performing routine ethics audits, conducting mandatory ethics training for state officials and employees, investigating alleged ethics transgressions, and making recommendations to the Commission on sanctions. It would be vested with significant investigatory and enforcement powers and have available to it a range of penalties for violation of the ethics rules.⁵⁴
- passage of a Uniform Ethics Code (“Code”) that simplified, clarified, and streamlined the state’s otherwise bewildering array of ethics laws.⁵⁵ The Code would help to close the revolving door of influence by imposing stricter post-employment restrictions, conflicts of interest laws, recusal standards, and anti-nepotism laws. It included a zero-tolerance policy on the acceptance of gifts and added mechanisms to assure enhanced transparency in the state’s contracting processes.⁵⁶ Its post-employment restrictions included a lifetime ban on using confidential information and a one-year ban on “side switching.”⁵⁷
- appointment within each executive branch department and agency of an ethics liaison officer to serve as an on-site resource, sounding board and compliance check.⁵⁸

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 10.

⁵⁶ Daniel J. O’Hern, Sr. & Paula A. Franzese, SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, ETHICS REFORM RECOMMENDATIONS FOR THE EXECUTIVE BRANCH OF NEW JERSEY GOVERNMENT 10 (2005), https://www.state.nj.us/ethics/docs/reports/ethics_report.pdf.

⁵⁷ *Id.* at 12–13.

⁵⁸ *Id.* at 61.

- promulgation of a Plain Language Ethics Guide (“Guide”) to clearly and succinctly set forth the standards and requirements to be met by all in government service.⁵⁹ The governor would require that every state employee certify on an annual basis understanding of and compliance with the rules.⁶⁰
- imposition of ethics strictures on third parties who do business with the state and passage of a Business Ethics Guide whose terms required transparency in the bidding process, prohibitions on gifts, and a sworn certification of compliance as a prerequisite to the submission of every bid.⁶¹
- added transparency in the procurement process by requiring disclosure of all communications between the vendor, the state, and the bidder.⁶²

The Report stressed that the Commission, as ethics overseer for the executive branch, should be wholly independent of that branch.⁶³ It recommended that the Commission be comprised exclusively of public members, who would be appointed by a four-person panel of two retired state supreme court justices (one from each party) and two citizens with experience in government ethics laws (one from each party).⁶⁴ Its members would serve four-year terms, with the chair and vice-chair elected by its members.⁶⁵

The Report deemed it important that the monitors and enforcers of the rigorous framework be bipartisan and shielded from political pressure. To support this recommendation, the Report provided its findings on the best practices of other states’ models. It noted that of

⁵⁹ *Id.* at 97.

⁶⁰ *Id.* at 10.

⁶¹ *Id.* at 99–100

⁶² Daniel J. O’Hern, Sr. & Paula A. Franzese, SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, ETHICS REFORM RECOMMENDATIONS FOR THE EXECUTIVE BRANCH OF NEW JERSEY GOVERNMENT 15 (2005), https://www.state.nj.us/ethics/docs/reports/ethics_report.pdf.

⁶³ *Id.* at 75–76.

⁶⁴ *Id.*

⁶⁵ *Id.* at 23.

thirty-nine states with state-wide ethics watchdog agencies, twenty-eight of those were comprised entirely of public members.⁶⁶

While the bulk of the Report's recommendations were enacted into law, the give and take of various political processes yielded a compromise regarding the Commission's composition. It would be composed of four public members (two of each political party) and three members of the executive branch.⁶⁷ All seven members would be appointed by the governor.⁶⁸ Still, there was a basis for reassurance because the majority of its members, including the chair, would be members of the public. As to the three members appointed from within the executive branch, experience had shown that those in government service could add valuable context and perspective on matters apt to come before the Commission.

Finally, it was understood as a matter of firmly entrenched and decades-long practice and policy dating back to the establishment more than thirty years earlier of the Commission's forebear agency (the Executive Commission on Ethical Standards) that the Commission's head, its full-time executive director, would be independent and nonpartisan. The ensuing years would find that reassurance shaken, showing that even the strictest rules are only as good as their custodians and that ethical stewardship can only succeed if it starts at the top with the governor's office.⁶⁹

IV. A Strong Reform Model is Tested

⁶⁶ *Id.* at 76.

⁶⁷ STATE ETHICS COMMISSION, ABOUT US, <https://www.nj.gov/ethics/about/> (last visited January 1, 2021).

⁶⁸ *Id.*

⁶⁹ *See infra* note 15 and accompanying text.

New Jersey's ambitious 2005 reform effort⁷⁰ found the state's new ethics strictures heralded as "some of the nation's strongest ethics and transparency laws."⁷¹ The Commission began its work,⁷² using its bolstered investigatory and enforcement powers to communicate that transgressions would not be abided.⁷³ Routine ethics training and auditing protocols were implemented. The revised governing rules, together with the work of the Commission's executive director and staff and efforts of ethics liaisons officers in place throughout the executive branch, fueled heightened awareness and vigilance with the messaging that ethical comportment matters.

The template and new ethics regime remained strong notwithstanding the retirement, in 2007, of the Commission's widely respected executive director.⁷⁴ Consistent with longstanding protocol in place for more than three decades (since creation of the Commission's predecessor agency),⁷⁵ the selection of a candidate to fill that important post was left solely to the purview of the Commission. I served as chair of the Commission at the time and for the 2006-2010 term. Retired state senator William D. Schluter (long a good government advocate and architect in

⁷⁰ See Daniel J. O'Hern, Sr. & Paula A. Franzese, SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, ETHICS REFORM RECOMMENDATIONS FOR THE EXECUTIVE BRANCH OF NEW JERSEY GOVERNMENT (2005), https://www.state.nj.us/ethics/docs/reports/ethics_report.pdf.

⁷¹ Nicholas Kusnetz, *Forget Bridgegate: New Jersey's Actually the Most Ethical State*, WASHINGTON POST (May 1, 2015), https://www.washingtonpost.com/opinions/forget-bridgegate-new-jerseys-actually-the-most-ethical-state/2015/05/01/3e59122e-ef70-11e4-8666-a1d756d0218e_story.html.

⁷² The Author and retired state senator William D. Schluter (long a good government advocate and architect in 1973 of the model that would become the state's Election Law Enforcement Commission), served respectively as chair and vice-chair of the Commission. Kevin Shea, *Bill Schluter, Former State Senator Who Ran for Governor, Dies at 90*, NJ.COM (Aug. 6, 2018), https://www.nj.com/mercer/2018/08/bill_schluter_former_state_senator_who_ran_for_governor_dies_at_90.html. or the 2006-2010 term.

⁷³ See, e.g.,

⁷⁴ See Magyar, *supra* note 15.

⁷⁵ Daniel J. O'Hern, Sr. & Paula A. Franzese, SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, ETHICS REFORM RECOMMENDATIONS FOR THE EXECUTIVE BRANCH OF NEW JERSEY GOVERNMENT 78 (2005), https://www.state.nj.us/ethics/docs/reports/ethics_report.pdf.

1973 of the legislation that would strengthen campaign finance laws and create the state's Election Law Enforcement Commission)⁷⁶ served as vice-chair.

Following a public search and transparent vetting process, the position was filled by a well-qualified and highly regarded public servant with more than twenty years of experience.⁷⁷ Consistent with the long-standing tradition and practice, the search for and selection of the executive director was free from interference from the office of the then new governor (Jon Corzine), elected the year before in 2006.⁷⁸ That was as it should be. The chief administrator of the agency entrusted with applying and enforcing ethics rules and sanctions against members of the governor's office must be free of any real or perceived allegiance to that or any other governor.

During my term as Commission chair, I had the opportunity to see in action the nonpartisan expertise and dedication of the agency's directors and staff. Their work guided and informed the Commission as it rendered determinations and enforced the rules no matter the party affiliation of the actors involved and without involvement by the governor's office.⁷⁹ The system, now fortified, was working. Within a few years, New Jersey earned the top spot in the Center for Public Integrity's national ranking of states' ethics laws and enforcement regimes.⁸⁰

⁷⁶ See WILLIAM E. SCHLUTER, *SOFT CORRUPTION: HOW UNETHICAL CONDUCT UNDERMINES GOOD GOVERNMENT AND WHAT TO DO ABOUT IT* (Rutgers University Press 2017)

⁷⁷ Kathleen Wiechnik became new executive director.

⁷⁸ David W. Chen, *Corzine Prevails in a Nasty Governor's Campaign in New Jersey*, N.Y. TIMES (Nov. 9, 2005), <https://www.nytimes.com/2005/11/09/nyregion/metrocampaigns/corzine-prevails-in-a-nasty-governors-campaign-in.html>.

⁷⁹ On the success of the fortified model, *see, e.g.*, Colleen O'Dea, *New Jersey: Best Score in the Country*, THE CENTER FOR PUBLIC INTEGRITY, March 19, 2012 ("New Jersey now has some of the toughest ethics and anti-corruption laws in the nation. The Garden State ranks first in the integrity probe for ethics enforcement, first for executive branch accountability and fourth for procurement practices."); Melissa DiPento, *South Jersey Times, Officials Say Gift-Giving Has Lessened at the State and Local Levels*, Dec. 22, 2012 (recounting success of zero-tolerance policy on receipt of gifts).

⁸⁰ Caitlin Ginley, *Grading the Nation: How Accountable is Your State?*, CTR. FOR PUB. INTEGRITY (Mar. 19, 2012), <https://publicintegrity.org/politics/state-politics/grading-the-nation-how-accountable-is-your-state/>.

By 2015, however, the state’s top mark dropped dramatically, when New Jersey was awarded a grade of D.⁸¹ That “precipitous drop”⁸² was foreshadowed by events that followed the state’s election in 2009 of a new governor, Chris Christie. Those events reached their apex with the scandal that would become known to the nation as “Bridgegate.”⁸³

The first indication of the new ethics model’s vulnerability came in 2010 when the Commission’s experienced and independent executive director was forced to resign, so that she could be replaced by a member of the governor’s own staff.⁸⁴ In short order, the Commission’s executive director and four of its seven members (including its chair) would have ties to the governor’s office,⁸⁵ leaving the public with the uneasy impression that the agency created to zealously police public officials, employees, and members of the executive branch had become an arm of that branch rather than an independent and impartial monitor. That perception would be reinforced in the months ahead.

A. Challenges to Gatekeeper Independence

The Commission and its predecessor agency (the Executive Commission on Ethical Standards) always had at its helm a strong, experienced, and politically independent executive director, responsible for applying and enforcing the ethics rules strictly, impartially, and without pressure from the governor’s office. The executive director is meant to be a troubleshooter relied upon by the governor, staff, and executive branch officials and employees to provide straightforward directives and render advice immune from political influence or sway. For the

⁸¹ Ian T. Shearn, *New Jersey Gets D Grade in 2015 State Integrity Investigation*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2015), <https://publicintegrity.org/politics/state-politics/state-integrity-investigation/new-jersey-gets-d-grade-in-2015-state-integrity-investigation/>.

⁸² *Id.*

⁸³ See *infra* notes and accompanying text.

⁸⁴ Rizzo, *supra* note 17; *Ethics Advocate Sidelined*, THE TRENTONIAN (March 10, 2013).

⁸⁵ Magyar, *supra* note 15.

several decades since the agency's inception and until 2010, New Jersey's governors from both sides of the aisle honored that tradition of independence.

That all changed in 2010, with allegations that the governor's office had forced the resignation of the Commission's nonpartisan executive director.⁸⁶ That independent ethics monitor for the executive branch was replaced by a member of the governor's own staff.⁸⁷ According to news reports at the time,⁸⁸ the executive director was asked to submit her resignation shortly after she refused to accede to a demand from the governor's office that she turn over a confidential ethics complaint filed against one of the governor's aides.⁸⁹ Former ethics officials charged that she was replaced by the Commission "with the governor's pick"⁹⁰ for the post, a member of the governor's office who was installed without a public search.

An ethics reformer who wrote the state's first election and lobbying restrictions and who served as the Commission's vice-chair at the time opposed the maneuvers, stating that they "strike at the heart of the Commission in the public's eye, undermining its independence and integrity."⁹¹ He added that the actions "marked the first time a governor had asked for the Commission's top investigator to be removed, or suggested his own candidate lead the agency."⁹² As a result, now the Commission's executive director, chair, and majority of its seven members had ties to the governor. Shortly thereafter, the Commission dismissed that complaint filed against the governor's aide.⁹³

⁸⁶ *Id.*; Rizzo, *supra* note 17.

⁸⁷ Magyar, *supra* note 15; Rizzo, *supra* note 17; *see also Don't Quit on Ethical Government*, ASBURY PARK PRESS, April 20, 2014 (Gov. Christie "playing games in manipulating the State Ethics Commission to serve the governor's own purposes ... plant[ing] his own people to provide a soft landing for any members of his administration and other friends who may find themselves under ethical scrutiny.")

⁸⁸ Rizzo, *supra* note 17.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

Subsequently, a citizens' complaint revealed that the Commission's chair, a friend and former classmate of the governor's,⁹⁴ was appointed by the governor to dual public offices in violation of the very conflicts laws that the chair and Commission are tasked with enforcing.⁹⁵ Citing ignorance of the ethics' laws that prohibit dual office-holding,⁹⁶ the chair resigned from one of the two posts but stayed on as ethics chair.⁹⁷ Thereafter, the governor appointed the Commission's executive director to a state judgeship.⁹⁸ His successor to lead the ethics agency was described in news accounts as a "Christie loyalist"⁹⁹ with ties to the governor's office.¹⁰⁰ She was installed by the Commission without a public search.

That executive director had spent eight years working in the law firm of the governor's "most trusted political adviser, overlapping with Mr. Christie's last four months as a partner at the firm."¹⁰¹ Later it would be learned that she had also "served in the governor's office with all nine Christie aides subpoenaed in the scandal that would become known as Bridgegate."¹⁰² News stories ran with headlines like "Christie Loyalist to Run Ethics Panel that Would Get Bridgegate Complaints."¹⁰³ When the Commission did get those complaints, it declined to act.¹⁰⁴ This notwithstanding the fact that the transgressions alleged were squarely within the Commission's investigatory and enforcement purview.¹⁰⁵

⁹⁴ Rizzo, *supra* note 17.

⁹⁵ *Id.* The charges stemmed from violation of the stricture against dual office holding. When news of that story broke the chair resigned from one of the two posts, staying on as Commission chair. *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Magyar, *supra* note 15.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Rizzo, *supra* note 17.

¹⁰⁵ Magyar, *supra* note 15.

Meanwhile, news broke that another of the governor’s top allies and “longtime confidants,”¹⁰⁶ appointed to the powerful executive branch post of chair of the Port Authority, had abused the power of office in what became known as the United Airlines bribery scandal.¹⁰⁷ The matter culminated with the official’s guilty plea on federal bribery charges “for abusing his position to pressure United Airlines to provide a route that would make it easier for him to fly to his vacation home in South Carolina.”¹⁰⁸ The governor defended the executive branch official, describing his actions as a “lapse in judgment.”¹⁰⁹ The governor also came to the defense of his former transportation commissioner and cabinet member, who was charged with conspiracy in the case.¹¹⁰ While the abuse of office at issue was within the Commission’s jurisdiction to investigate and sanction, it did not act.

Additional news reports surfaced indicating that that same Port Authority chair, in violation of the ethics laws’ strict recusal, conflict of interest, and disclosure rules, had voted to approve a \$256 million light rail station that would financially benefit his private client.¹¹¹ The conduct involved in that matter was within the investigative and enforcement jurisdiction of the Commission. Again, it did not act.¹¹²

B. Defiance of Transparency Mandates

¹⁰⁶ Todd South & Paul Berger, *Ex-Port Authority Chief Samson Gets Probation in Bribery Scheme*, NORTHJERSEY (Mar. 6, 2017), <https://www.northjersey.com/story/news/crime/2017/03/06/ex-port-authority-chief-samson-gets-probation-bribery-scheme/98690210/>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Dustin Racioppi, *Christie Defends David Samson after Ex-Port Authority Chief’s Guilty Plea*, THE RECORD (July 20, 2016), <https://www.northjersey.com/story/news/2016/07/20/christie-defends-david-samson-after-export-authority-chiefs-guilty-plea/94949376/>.

¹¹⁰ *Id.*

¹¹¹ The Bergen Record story about this. Alternatively, Alex Johnson, *Christie Bridge Ally under Scrutiny in Yet Another Case: Report*, NBC NEWS (Jan. 27, 2014), <https://www.nbcnews.com/news/us-news/christie-bridge-ally-under-scrutiny-yet-another-case-report-flna2D12006570>.

¹¹² David Cruz, *Conflict of Interest Concerns Surface with Port Authority*, NJ SPOTLIGHT NEWS, Feb. 24, 2014.

The 2005 reforms' emphases on transparency and accountability were displaced by the "unprecedented efforts" of the Christie administration to keep public records secret, forcing media outlets to sue to obtain "even routinely disclosed information."¹¹³ After exhausting its appeals that tied cases up for years, the administration would lose dozens of the court battles it waged, costing the state hundreds of thousands of dollars in litigation costs and court awards of attorneys' fees.¹¹⁴

The state's Open Public Records Act¹¹⁵ is intended to protect against that sort of government stonewalling. It provides an essential means to help advance the abiding precept that "sunlight is the best disinfectant."¹¹⁶ Transparency, so vital to assuring the public trust, became frustrated as the administration used vast amounts of state time and money¹¹⁷ to litigate one open records request after another "on everything from Bridgegate to Christie's out-of-state travel and contracts awarded in the aftermath of superstorm Sandy."¹¹⁸ The governor's "unprecedented efforts to keep public records a secret"¹¹⁹ would deny the public access to documents connected to Bridgegate, pay-to-play allegations, receipt of gifts, misuse of office for campaign purposes, and taxpayer-fueled political fundraising and travel as the governor weighed a run for president.¹²⁰

C. *"Squeezing the Juice out of the Orange"*

¹¹³ Redden, *supra* note 20.

¹¹⁴ *See id.* and accompanying text.

¹¹⁵ N.J. Stat. Ann. § 47:1A-1.

¹¹⁶ LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (National Home Library Foundation ed. 1933).

¹¹⁷ *Christie Pays High Price Fighting Records Requests*, NBC10 PHILADELPHIA (Sep. 9, 2014), <https://www.nbcphiladelphia.com/news/local/christie-pays-high-price-fighting-records-requests/67830/>.

¹¹⁸ AJ Vicens, *Why Chris Christie Is Fighting the Release of His Media List*, MOTHER JONES (June 22, 2015), <https://www.motherjones.com/politics/2015/06/chris-christie-public-records-media-list/>.

¹¹⁹ Redden, *supra* note 20.

¹²⁰ *Id.* *See also* Mark Lagerkvist, *State Secrets: Why Won't Gov. Christie Disclose His Travel Expenses?*, NJ SPOTLIGHT (Dec. 2, 2014), <https://www.njspotlight.com/2014/12/14-11-30-state-secrets-why-won-t-gov-christie-disclose-his-travel-expenses/>; Vicens, *supra* note 118.

The persistence of various independent investigative reporting outlets, media groups, and citizen watchdogs would reveal the governor's receipt of lavish gifts from actors doing business with the state.¹²¹ The governing ethics rules prohibit members of the executive branch from accepting gifts from actors engaging in business with or aiming to do business with the state. But with Mr. Christie, New Jersey had a governor who, in his own words, wanted to “squeeze all the juice out of the orange.”¹²² And he did, accepting luxury box seats and rides on the private jet of a football team owner “after the governor vouched for” that team owner's business group in its bidding for a multi-million dollar state contract.¹²³ Other news stories recounted that the governor accepted “a \$30,000 luxury hotel weekend from the King of Jordan, a trip to Israel on the private plane of casino mogul Sheldon Adelson and goodness knows what else.”¹²⁴ When questioned, the governor's office dismissed the suggestion of impropriety on the basis that the gifts were from “personal friends” of the governor's, and hence outside the law.¹²⁵

The public's impression of gubernatorial exceptionalism was perhaps best encapsulated by a viral photograph that showed Mr. Christie and his family “sunning themselves on an empty beach that had been closed during the holiday weekend because of a state government

¹²¹ Bob Jordan, *Christie Gifts from Cowboys Raise Ethics Concerns*, COURIER POST (Jan. 7, 2015), <https://www.courierpostonline.com/story/news/local/south-jersey/2015/01/07/christie-gifts-cowboys-raise-ethics-concerns/21374427/> (describing gifts to governor from football team owner Jerry Jones “after governor vouched for a Jones group in bidding for a Port Authority contract worth millions.”); Editorial Board, *Thanks to Lax Gift Rules, It's Christmas for Christie*, STAR-LEDGER (Sep. 19, 2016), https://www.nj.com/opinion/2016/09/why_are_we_still_letting_christie_grab_lavish_gift.html (“Gov. Chris Christie got away with accepting luxury box seats and rides on the private jet of Dallas Cowboys owner Jerry Jones, a \$30,000 luxury hotel weekend from the King of Jordan, a trip to Israel on the private plane of casino mogul Sheldon Adelson and goodness knows what else.”); Kate Zernike & Michael Barbaro, *Christie Shows Fondness for Luxury Benefits When Others Pay the Bill*, N.Y. TIMES (Feb. 2, 2015), <https://www.nytimes.com/2015/02/03/nyregion/in-christies-career-a-fondness-for-luxe-benefits-when-others-pay-the-bills.html>.

¹²² Zernike, *supra* note 121.

¹²³ See *supra* note 121 and accompanying text.

¹²⁴ *Id.*

¹²⁵ Zernike, *supra* note 121.

shutdown.”¹²⁶ When questioned about what that conduct might be messaging to the electorate, the governor replied, “That’s just the way it goes. Run for governor, and you can have a residence.”¹²⁷ A posture of chief executive exceptionalism would soon be on display on the national stage during Donald J. Trump’s presidency.¹²⁸ Mr. Christie helped to assure Mr. Trump’s election to the office of president in 2016 and actively supported his bid for re-election in 2020, becoming for a time one of Mr. Trump’s “most influential advisers.”¹²⁹

D. *Ethics Lapses Reach their Apex: “Bridgewater”*

“Bridgewater”¹³⁰ became the Christie administration’s ultimate *coup de gras*. That scheme involved high-ranking executive branch actors¹³¹ and was conducted under the guise of a “traffic study” that would close off access lanes to the George Washington Bridge during rush hours for days on end.¹³² The resultant interminable traffic delays posed significant public health and safety risks.¹³³ The scheme precluded commuters from getting to work, children from getting to school, and ambulances from reaching their destinations.¹³⁴ The ensuing investigation

¹²⁶ Gerry Mullany, *Chris Christie Hits a Closed State Beach and Kicks Up a Fury*, N.Y. TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/03/nyregion/chris-christie-beach-new-jersey-budget.html> (“Gov. Chris Christie of New Jersey provoked widespread ridicule as pictures emerged of him and his family sunning themselves on an empty beach that had been closed during the holiday weekend because of a state government shutdown.”).

¹²⁷ *Id.*

¹²⁸ See Albert Hunt, *Trump’s Exceptionalism: No President Has So Disrespected Our Exceptional Institutions*, THE HILL (Dec. 8, 2019), <https://thehill.com/opinion/white-house/473566-trumps-exceptionalism-no-president-has-so-disrespected-our-exceptional>; Jack Shafer, *Trump’s Exceptionalism Explained*, POLITICO (Feb. 19, 2016), <https://www.politico.com/magazine/story/2016/02/trumps-exceptionalism-explained-213658>.

¹²⁹ Alexander Burns & Maggie Haberman, *Chris Christie Becomes Powerful Figure in Donald Trump Campaign*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/2016/07/01/us/politics/chris-christie-donald-trump.html>.

¹³⁰ See *supra* note 15 and accompanying text.

¹³¹ Ted Sherman, *I Got Sucked into Christie’s ‘Cult,’ Says Former Ally During Re-Sentencing for Bridgewater Scandal*, NJ ADVANCE MEDIA (Feb. 26, 2019), <https://www.nj.com/news/2019/02/bridgewater-defendant-gets-a-slight-break-in-a-do-over-of-his-sentencing-in-scandal.html>. Bill Baroni, former Port Authority executive, and Bridget Anne Kelly, a former deputy chief of staff to Governor Christie, were found guilty of conspiring with David Wildstein, “a former political operative and patronage appointee to the Port Authority, to cause massive traffic jams in Fort Lee as payback against Mayor Mark Sokolich, after the Democratic mayor walked away from an expected endorsement of Christie, a Republican, during the governor’s 2013 re-election campaign.” *Id.*

¹³² See *id.*

¹³³ *Id.*

¹³⁴ *Id.*

revealed that the havoc was an act of political retaliation executed by top executive branch officials and aides to the governor to punish the local mayor for his unwillingness to support the governor's re-election campaign.¹³⁵

While Bridgegate was squarely within the Commission's jurisdiction to investigate, it failed to act on the matter. The scandal resulted in a federal criminal trial and convictions of one of Mr. Christie's top executive branch appointees¹³⁶ and the governor's deputy chief of staff¹³⁷, as well as a plea deal involving a senior official in the governor's administration.¹³⁸ The criminal convictions were later overturned by the U.S. Supreme Court on the ground that the conduct in question, while an abuse of power, was not a federal crime.¹³⁹

After the federal trial in Bridgegate, the governor's former deputy chief of staff maintained that the governor, who was never charged in the case, had "escape[d] justice."¹⁴⁰ While testimony in the trial contradicted the governor's public statements about when he was notified of the lane closures,¹⁴¹ he denied involvement. Still, "the testimony painted an unflattering picture of his administration and damaged his presidential aspirations."¹⁴² It portrayed a top-down culture of bullying, retaliation, and abuse of power described in newspaper accounts as a "hallmark" of Mr. Christie's administration.¹⁴³ An editorial published at the time

¹³⁵ *Id.*

¹³⁶ Sherman, *supra* note 131.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Adam Liptak & Nick Corasaniti, *Supreme Court Unanimously Overturns 'Bridgegate' Convictions*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/us/supreme-court-bridgegate.html>.

¹⁴⁰ Ryan Hutchins, *Convicted Bridgegate Figure Says Christie Managed to 'Escape Justice'*, POLITICO (Apr. 24, 2019), <https://www.politico.com/states/new-jersey/story/2019/04/24/former-christie-aide-sentenced-to-13-months-in-bridgegate-case-987943>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Don't Quit on Ethical Government*, Asbury Park Press, April 20, 2014. *See also* *Chris Christie's Ex-Aide Call Him a 'Coward' and 'Bully' Who Should Have Been Punished for Bridgegate*, THE WEEK, April 24, 2019 (convicted deputy chief of staff Bridget Kelly "has long said Christie, who was never charged in the scandal, and others knew about the plan and did not attempt to intervene . . . Christie, she continued, is 'a bully.'"); Paula A. Franzese, *Bridgegate is a Cancer on the Governorship*, STAR-LEDGER (Nov. 6, 2016) (Bridgegate witnesses for

summed up the perception that “if the governor doesn’t always get his hands dirty with direct action, he has certainly created an environment that fosters these types of intimidating, manipulative actions. If the boss is a bully, why shouldn’t his staff feel empowered to push people around as well?”¹⁴⁴

Bridgegate cost taxpayers tens of millions of dollars in addition to costing the state more than ten million dollars in legal fees accrued in defense of the governor.¹⁴⁵ At the sentencing of Mr. Christie’s deputy chief of staff for her part in the retaliatory bridge lane closures, the presiding federal district court judge invoked the subtitle of one of Mr. Christie’s books to condemn the actions at issue. The judge stated, “People spent hours, for days, trying to get to work, kids trying to get to school, all because of this. . . I guess that’s the power of ‘in-your-face’ politics. It wasn’t acceptable then. It isn’t acceptable today.”¹⁴⁶

After Bridgegate, a report revealed that Mr. Christie was using an office within the executive branch (the Office of Intergovernmental Affairs) to help run his reelection campaign.¹⁴⁷ The state’s ethics and conflicts laws strictly prohibit state employees from using state time or resources for campaign purposes. The conduct described in the report was within the Commission’s purview and warranted investigation. The Commission did not act.¹⁴⁸

both prosecution and defense “testified to the culture of retaliation, bullying and petty mean-spiritedness that infected official decision-making.”)

¹⁴⁴ See *Don’t Quit on Ethical Government*, supra note 143.

¹⁴⁵ Donald Scarinci, *The Cost of the Chris Christie Bridgegate Show*, OBSERVER (Sep. 28, 2016), <https://observer.com/2016/09/the-cost-of-the-chris-christie-bridgegate-show/>.

¹⁴⁶ Dustin Racioppi, *Bridgegate: Former Chris Christie Deputy Chief Bridget Anne Kelly Gets 13 Months in Prison*, NORTHJERSEY (Apr. 24, 2019), <https://www.northjersey.com/story/news/new-jersey/2019/04/24/former-chris-christie-deputy-bridget-kelly-re-sentenced-bridgegate-traffic-scheme/3550658002/>.

¹⁴⁷ Mark Magyar, *Why the Mastro Report Creates New Problems for Gov Christie*, NJ SPOTLIGHT (Apr. 7, 2014), <https://why.org/articles/why-the-mastro-report-creates-new-problems-for-gov-christie/>. The Mastro report revealed that members of Mr. Christie’s office had engaged in coordinated activity between the state’s office of intergovernmental affairs and the governor’s re-election campaign. *Id.*

¹⁴⁸ Paula Franzese, *Bridgegate Is a Cancer on the Governorship*, STAR-LEDGER (Nov. 6, 2016), https://www.nj.com/opinion/2016/11/bridgegate_is_a_a_cancer_on_the_governorship_opini.html.

The Commission’s failure to act in Bridgegate and other matters implicating high-ranking Christie officials left the public with the discomfiting perception that when it comes to enforcement of ethics laws, those at higher levels of government get a pass while those who labor in the trenches of state service and are without clout or political influence are treated more harshly. All citizens, and particularly those on the front lines of government service who serve with distinction and endeavor every day to do the right thing, deserve better. The 2005 Report made plain that the public trust depends on the assurance that the laws and standards will be applied evenhandedly at all levels of government. The experiences of the ensuing decade showed the centrality of independent ethics monitors to achieving that end.

As the state and nation turned its attention to the 2016 presidential election, Mr. Christie became “one of the most influential advisers to his party’s presumptive presidential nominee, Donald J. Trump.”¹⁴⁹ For a time, the governor would be “the right-hand man of the most culturally polarizing presidential candidate in a generation.”¹⁵⁰ While once said to be a leading contender for the role of Mr. Trump’s running mate,¹⁵¹ he would instead become a “sounding board” for the president, supporting and assisting him at various times throughout his presidency and 2020 re-election efforts.¹⁵²

In 2017, New Jersey elected a new governor, Phil Murphy. Mr. Murphy included among his campaign promises the revived commitment to good government.¹⁵³ Ethics reform quickly took a back seat to the state’s various budgetary crises and the ongoing ravages of the COVID-19

¹⁴⁹ Burns & Haberman, NY Times, Christie Becomes Powerful Figure 6/30/16

¹⁵⁰ Id.

¹⁵¹ Id.

¹⁵² Grynbaum, Chris Christie Helped Run Trump’s Debate Prep, NY Times, 9/29/20

¹⁵³ Ashley Balcerzak, *NJ Lawmakers Should Say More About Their Finances and Who’s Pressuring Them*, *Murphy Says*, NORTHJERSEY (Feb. 19, 2020), <https://www.northjersey.com/story/news/2020/02/19/nj-lawmakers-need-tougher-ethics-rules-gov-phil-murphy-says/4797332002/>.

pandemic.¹⁵⁴ But when the furies of this fraught moment subside, the executive and legislative branches must return in earnest to the task of finishing the work of the state’s 2005 ethics recommendations and reforms. That work, once completed, would help to safeguard the Commission’s independence and provide assurances that the ethics rules and standards apply consistently, zealously, and uniformly at every level of government.

V. Lessons Learned, A Path Forward

Sixteen years ago, the Report warned: “Although our recommendations are significant, without a commitment that survives the current climate of ethics reform, all that we will have succeeded in doing is putting more laws on the books.”¹⁵⁵ The Report concluded that autonomous oversight, rooted in the unrelenting assurance that the rules of the game apply without favor, serves as the most effective and enduring check on government.¹⁵⁶ While no regulation will deter those determined to betray the public trust, uniform standards enforced by independent overseers signal that transgressions will not be abided and that ethics is everyone’s business.

The lessons of the past decade and a half reinforce the conviction that the custodians of government ethics laws must be independent members of the citizenry, insulated from political sway or retaliation. The public trust is compromised by the appearance that the agency charged with ethics oversight of the executive branch has become an extension of that branch rather than an independent and impartial monitor, so that those at higher levels of government get a pass while those who labor in the lower-ranks of state service are perceived to be treated more

¹⁵⁴ *Governor Murphy Delivers New Jersey’s State of the State Address*, ABC7NY (Jan. 12, 2021), <https://abc7ny.com/phil-murphy-new-jersey-state-of-the-address/9585235/>.

¹⁵⁵ Paula A. Franzese & Daniel J. O’Hern, Sr., *Restoring the Public Trust: An Agenda for Ethics Reform of State Government and a Proposed Model for New Jersey*, 57 RUTGERS L. REV. 1175, 1177 (2005).

¹⁵⁶ *Id.* at 1214–15.

harshly. The public servants who labor honestly and faithfully in the trenches and on the front lines deserve to know that every level of government supports and upholds their example.

The public deserves assurances that its trust will be vindicated by those elected to serve and that no one is above the law. The Report repeatedly emphasized the simple principle that public office is a public trust. It invoked the Jeffersonian wisdom that “in every government on earth there is some trace of human weakness, some germ of corruption and degeneracy, which cunning will discover and wickedness insensibly open, cultivate and improve. Every government degenerates when trusted to the rulers of the people alone. The people themselves are its only safe depositories.”¹⁵⁷ Ultimately, it is independent oversight, anchored in transparency, scrutiny, and accountability, that serves as the most effective and enduring check.

The Report’s ethics audit and extensive polling made plain that “[c]itizens want and deserve evidence that officials are making an ethical culture the central hub of governance. They want leaders who will guide managers at all levels to do the right thing when faced with tough decisions. They want to see less partisan politics and more public interest politics.”¹⁵⁸

The New Jersey experience demonstrates that a reinvigorated commitment to good government can succeed. Still, it is not enough for state ethics agencies to be armed with broad investigatory and adjudicatory powers. Those powers must be wielded by independent and nonpartisan custodians who are free from the specter of influence from or loyalties to the administration that they are entrusted to police. Norms and custom, while helpful, have proven to be insufficient guarantors of those essential ends. They must instead be secured by clear statutory mandates.

¹⁵⁷ Thomas Jefferson, Notes on the State of Virginia (1781-1782) reprinted in Writings 274 (Merrill D. Peterson ed., Library of Am. 1984).

¹⁵⁸ Paula A. Franzese & Daniel J. O’Hern, Sr., *Restoring the Public Trust: An Agenda for Ethics Reform of State Government and a Proposed Model for New Jersey*, 57 RUTGERS L. REV. 1175, 1176 (2005).

In New Jersey, to ensure the Commission's independence the Report recommended that it be bipartisan and composed of seven public members. Its members should serve staggered four-year terms. Its chair and vice-chair should be elected by its members to two-year terms. It was anticipated at the time of the Report's issuance that the next round of ethics reforms would mandate that shift. Instead, still today the Commission remains composed of four public members and three executive branch employees.¹⁵⁹ All are appointed by the governor.¹⁶⁰ That must change.

The task of constituting the Commission should be entrusted to an independent panel of two retired New Jersey supreme court justices not of the same party and two members of the public not of the same party and with experience in state ethics laws. That panel should be tasked with engaging in transparent public screening and selection processes that seek out candidates who have conversancy with the letter and spirit of the ethics and conflicts laws and who are without political ties or allegiances to the executive branch.

Once reconstituted, the all-public Commission should elect its chair and vice-chair from its ranks. What had previously been entrusted to tradition must be statutorily codified so that the Commission is required to conduct a public search and engage in a transparent vetting process to appoint an executive director. That individual must possess expertise in government ethics and be assuredly independent and perceived by the public as such. Otherwise, the decision to investigate any complaint and the subsequent investigation, analysis, and recommendation resulting from that complaint could become susceptible to the sway of power and politics, whether actual or perceived. The executive director and Commission must be free to initiate

¹⁵⁹ STATE ETHICS COMMISSION, ABOUT US, <https://www.nj.gov/ethics/about/> (last visited January 1, 2021).

¹⁶⁰ *Id.*

inquiries and render advice objectively, without fear of retaliation from those who wield political power.

A call to lawmakers to protect states' ethics watchdogs from the specter of retaliation and partisan influence finds support in legislative reforms recently proposed at the federal level. Those initiatives are intended "to ensure that Mr. Trump's four-year record of violating democratic and constitutional norms cannot be repeated."¹⁶¹ During his term as president, Mr. Trump ignored ethics rulings, fired multiple inspectors general (the federal equivalent of the executive director of the state ethics commission), retaliated against whistleblowers, and shattered norms that guided presidential conduct.¹⁶²

As discussed herein, the federal legislation – the most ambitious federal ethics overhaul since the post-Watergate years – contains stricter conflicts of interest rules for the executive branch, firmer financial disclosure and reporting requirements, and enhanced investigatory and enforcement powers for independent ethics watchdog agencies.¹⁶³ Significantly, the newly proposed laws would insulate inspectors general and the Office of Government Ethics from retaliation, assure that watchdog slots are filled promptly, and help to preserve the independence of the ethics gatekeepers.

Those two federal bills, the Protect Our Democracy Act and H.R. I,¹⁶⁴ were introduced in January of 2021. They aim "to reconstruct and strengthen the guardrails that Mr. Trump plowed

¹⁶¹ Elizabeth Williamson, *Beyond Impeachment, a Push for Ethics Laws That Do Not Depend on Shame*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/11/us/politics/trump-ethics-democracy-biden.html>.

¹⁶² Brian Stelter, *Trump Attacks Whistleblower in Tweetstorm Full of Rants and Conspiracies*, CNN (Dec. 28, 2019), <https://www.cnn.com/2019/12/28/politics/trump-ukraine-whistleblower-twitter/index.html>; Jessica Tillipman, *Trump's Latest Ethical Violation: Firing the State Department's Inspector General*, USA TODAY (May 22, 2020), <https://www.usatoday.com/story/opinion/2020/05/22/trump-latest-ethical-violation-firing-state-department-inspector-general-column/5223920002/>.

¹⁶³ See Protecting Our Democracy Act, H.R. 8363, 116th Cong. (2020).

¹⁶⁴ *Id.*

through”¹⁶⁵ as the nation reeled from the January 6, 2021 mob attack on the Capitol. Mr. Trump was impeached for inciting that insurrection. The leader of the federal ethics reform effort, Representative John P. Sarbanes, noted that the attack on the Capitol created “even more urgency to swiftly reform the structural flaws in our democracy.”¹⁶⁶ He added, however, that ethics breaches and betrayals of the public trust had occurred well before then as Mr. Trump “ignored watchdog rulings and constitutional safeguards, pressed to overturn the outcome of an election, and pardoned those who covered for him.”¹⁶⁷

The lessons of recent national and state history reinforce the conviction that no set of laws will deter those who presume to be above them. Ethics-driven leadership starts at the top. Still, independent checks in the form of nonpartisan ethics watchdog agencies vested with meaningful enforcement powers have an important role to play to if the public trust is to be assured. Those agencies need to routinely communicate and coordinate their efforts with the work of other governmental investigative and enforcement authorities. Those include the office of the attorney general. Just as there are joint task forces of state and federal agencies to combat environmental harm or fight crime, there can and should be joint task forces of inter- and intra-governmental agencies to fight ethical misconduct in government.¹⁶⁸

In turn, the work of independent gatekeepers must be supported by the efforts of an engaged citizenry and a responsible press. Citizen watchdog groups and media outlets are particularly important to the tasks of assuring vindication of the letter and spirit of laws intended to promote transparency and accountability in government. Those laws, such as state open

¹⁶⁵ Williamson, *supra* note 161.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Daniel J. O’Hern, Sr. & Paula A. Franzese, SPECIAL ETHICS COUNSEL TO THE GOVERNOR OF THE STATE OF NEW JERSEY, ETHICS REFORM RECOMMENDATIONS FOR THE EXECUTIVE BRANCH OF NEW JERSEY GOVERNMENT 89 (2005), https://www.state.nj.us/ethics/docs/reports/ethics_report.pdf.

public records acts¹⁶⁹ and open public meetings acts,¹⁷⁰ depend for their success on the vigilance of good government groups, journalists, and media outlets, public officials, and private citizens.¹⁷¹

VI. Conclusion

A fundamental principle of democracy is that a representative government must hold the public's trust. The public trust depends, in turn, on the zealous and cumulative commitment, at every level of government, to assuring best practices for ethical behavior and comportment. Integrity matters. Character counts. Without those, public distrust devolves into cynicism and, worse, complacency – an ominous harbinger for a participatory democracy.

Ethical leadership in government depends on a top-down commitment to best practices. Citizens deserve honest leadership by example, transparency in government affairs and accountability for wrongdoers. Most essentially, public confidence rests on the guarantee that the gatekeepers – the watchdogs charged with monitoring government actors and enforcing the rules - are free of divided loyalties and conflicts of interest.

Building a strong ethical culture in government is no easy task. In addition to robust laws and vigorous law enforcement mechanisms, it requires sturdy norms. Those demand a combination of clear standards, routine training and compliance checks, the engagement of the press and public interest groups, and vigilant messaging and example-setting from the top.

Leading with integrity requires less partisan-driven politicking and more public interest politics. That is challenging, particularly amidst the balkanizing effects of party loyalties,

¹⁶⁹ N.J. Stat. Ann. §§ 47:1A-1–47:1A-13.

¹⁷⁰ N.J. Stat. Ann. §§ 10:4-1–10:4-21.

¹⁷¹ Redden, *supra* note 20. “[L]ocal reporters and watchdog groups accuse Christie’s administration of making unprecedented efforts to keep public records a secret.” *Id.* As a result of dozens of open-record lawsuits, court determinations that the Christie administration had illegally withheld public records cost the state hundreds of thousands of dollars in legal fees awarded to various media outlets. *Id.*

endless election cycles, and the ideological insularities of virtual worlds. It requires the kind of alchemy that comes from the higher ground of our shared values, hopes, and dreams. It requires leaders who understand that with the richness of our diversity, the human heart speaks a single language and yearns for reasons to believe in the promise of good and honest government.

Inspired leadership reminds us of our shared humanity and humanness as it reveals the countless threads that tie together the stories, struggles, setbacks, and triumphs experienced in pursuit of the promise of participatory democracy.