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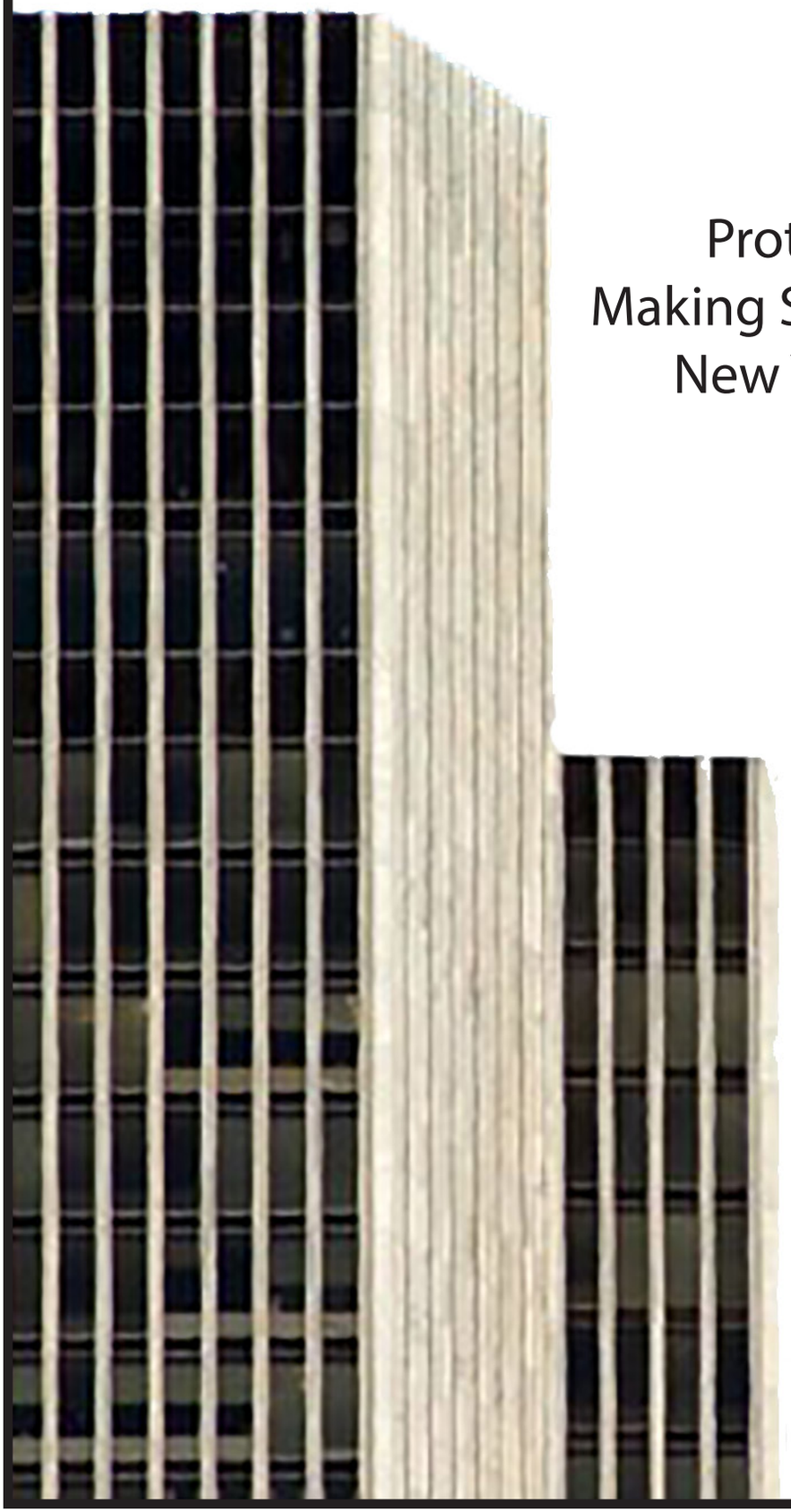

Protecting the Deep State: Making Sense of Section 107 of New York's Civil Service Law

By Bennett Liebman

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I. INTRODUCTION

Under Section 94.9 of the Executive Law, the current Joint Commission on Public Ethics has the authority to review complaints of violations of Section 107 of the Civil Service Law. Section 107 contains a variety of limitations on political activities by government officers and employees. These prohibitions serve largely to protect rank and file government employees from coerced actions by their political and governmental superiors.

More specifically, Section 107 limits politically based recommendations and the making of employment and appointment decisions based on the political affiliation of individuals. It bans political assessments. It bans all requests for political contributions made by individuals sited within government buildings, and it forbids trading political support for the promise of governmental jobs and promotions. Since 2007, the state's omnibus ethics body has been given jurisdiction to enforce Section 107 of the Civil Service Law. While this was originally the State Commission on Public Integrity, that body was replaced in 2011 by the Joint Commission on Public Ethics (JCOPE).[1]

Recent events have shown the centrality of the concerns of Section 107. In the 2018 federal prosecution of top Governor Andrew Cuomo aide Joseph Percoco, it was revealed that Percoco, although off the public payroll, had access to his former office in the Executive Chamber and often used it for his work.[2] The longtime Kings County district attorney Charles Hynes was found to have been using his office as the site for his political operations in his 2013 reelection bid. Hynes was fined $40,000

[1] *See* the Public Integrity Reform Act of 2011, L.2011, Ch. 399.

[2] "The Capitol's Blurred Ethics," *Albany Times Union,* Mar. 25, 2018; Tim Knauss, "Top Cuomo Aide Quit to Run Campaign but Kept Using Staff and Office," *Syracuse Media Group*, Feb.1, 2018.

by the New York City Conflicts of Interest Board.[3] In 2017, Albany city mayor Kathy Sheehan advertised the use of the Schuyler Mansion—a state-managed historical site in the city of Albany—as the site of a proposed fundraising event.[4] The event was eventually cancelled.

Section 107 of the Civil Service Law has been frequently referred to as the state's Little Hatch Act,[5] the counterpart to the federal Hatch Political Activity Act (hereinafter referred to as the Hatch Act).[6] Yet this is far from the truth. The Hatch Act limited federal employees from active participation in political activities. The amended Hatch Act of 1940 (often referred to as Hatch II) extended the Hatch Act's limitation on political activities to state and local government officials whose positions were funded in whole or part by the federal government.[7]

A state version of the Hatch Act would have added provisions limiting political activity by state and local government employees.[8] Section 107, however, does not limit New York governmental employees' participation in politics.

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[3] Andrew Denney, "Hynes Agrees to $40K Fine for Political Use of City Email as Brooklyn DA," *New York Law Journal*, Mar. 28, 2018; Erin Durkin, Ex-DA Fined $40G," *New York Daily News*, Mar. 28, 2018.

[4] "A Schuyler Mansion Fundraiser Supporting Mayor Sheehan," July 26, 2017. https://www.facebook.com/events/1775419346082296 [last viewed Apr. 13, 2018]. The Sheehan campaign was eventually cited for other election law violations. Amanda Friers, "Albany Mayor Sheehan's Campaign under Fire as State Board Issues Complaint, *Albany Times Union*, Apr. 17, 2018.

[5] See Shannon D. Azzaro, "The Hatch Act Modernization Act: Putting the Government Back in Politics," 42 *Fordham Urb. L. J.* 781, 823 (2015). 2008-29 N.Y. St. Reg. 35 2008-41 N.Y. St. Reg. 26; 2008-52 N.Y. St. Reg. 19.

[6] Hatch Political Activity Act, Aug. 2, 1939, ch. 410, 53 Stat. 1147. July 19, 1940, ch. 640, 54 Stat. 767. *See generally* 5 U.S.C. §§ 1501–1508.

[7] July 19, 1940, ch. 640, 54 Stat. 767. *See generally* 5 U.S.C. §§ 1501–1508.

[8] Numerous states have enacted their own versions of Little Hatch acts. "Thirty-five states have enacted some form of explicit restriction concerning the ability of state employees to actively engage in politics." Rafael Gely and Timothy D. Chandler, "Article: Restricting Public Employees' Political Activities: Good Government Or Partisan Politics?," 37 *Hous. L. Rev.* 775, 791 (2000).

New York does have an actual Little Hatch Act, which was passed in 1940[9]—a year after the initial federal Hatch Act. The New York Little Hatch Act was designed to prevent inquiries about the political affiliation of relief recipients and to prevent political officials from treating relief as a political plum.[10] It was largely an addendum to the amended Hatch II that was similarly passed by Congress in 1940. The State's Little Hatch Act has not been altered since its initial passage and remains on the books as Section 17-154 of the Election Law.[11]

The Hatch Act and Section 107 have related but separate functions. Section 107 is largely designed to protect government bureaucracy from being influenced by political superiors, including political party interference. On the other hand, the Hatch Act superimposes the creation of a nonpartisan, sterilized bureaucracy [12] which functions without regard to partisan politics. Section 107 is designed to protect the bureaucrats from political officials. The Hatch Act works to protect the citizenry from potential partisan behavior on the part of the bureaucracy by restricting bureaucrats from exercising their political beliefs. "The [Hatch] Act limits the partisan political activity of most federal employees and state and local employees employed in connection with federal loans or grants." [13] The Hatch Act enforces political neutrality on the public workforce—unlike

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[9] See "New York Now Has Own Hatch Law," *Christian Science Monitor,* Apr. 24, 1940; "Lehman Signs Ryan Bill to Ban Relief Politics," *N.Y. Herald Tribune*, Apr. 24, 1940; "Bars Relief Funds from Use at Polls," *N. Y. Times,* April 24, 1940.

[10] This had been a significant issue in the years between 1936 and 1940. There were concerns that the federal Roosevelt administration was collecting political assessments from participants in federal relief programs such as the Works Progress Administration. *See* "Vandenburg Calls for Inquiry on WPA," *N.Y. Times*, Feb. 6, 1936.

[11] It was L. 1940, ch. 667. It was placed in the Election Law after the codification of the Penal Law in 1965. *See* L. 1965, Ch. 1031.

[12] "Notes, Restrictions on the Civil Rights of Federal Employees," 47 *Colum. L. Rev.,* 1161, 1178 (1947).

[13] Scott J. Bloch, "The Judgment of History: Faction, Political Machines, and the Hatch Act," 7 *U. Pa. J. Lab. & Emp. L.* 225, 228 (2005). In today's parlance, the Hatch Act might be regarded as an attempt to prevent a "deep state" from being formed within the governmental bureaucracy.

Section 107, which protects the public work force from political tampering.

Section 107 has a far older origin than the Hatch Act. Much of Section 107 derives from the State's original civil service law in 1883. That law, in turn, was modeled on the Pendleton Act, the federal government's landmark civil service effort passed earlier in 1883 which introduced the merit system to the federal bureaucracy.[14] The newest part of Section 107—subdivision two—dates from 1934. There is nothing technically Hatch-connected about Section 107.[15]

And therein lie many of the problems of Section 107. It has largely been on the books for some 133 years. It has been enforced sporadically at best. Its language is archaic. How would JCOPE or any ethics body begin to enforce or interpret it?[16] What guidance can an ethics body give after long periods of this law being ignored and unenforced? How does Section 107 apply to an electronic age?

This essay is designed to try to explain the basics of Section 107, but it is more likely than not that this explanation will serve only to point out the overall ambiguous nature of the law and the difficulties that any government entity would have in enforcing the prohibitions of Section 107. Section 107 has unfortunately become a muddled mess.

II. NEW YORK'S INTRODUCTION OF CIVIL SERVICE

Before 1883, the spoils system was largely the basis of all public employment. That had especially been the case in New York State. Under the first New York State Constitution, the

[14] ch. 27, 22 Stat. 403 (1883).

[15] Section 107 can only be considered a "Little Hatch Act" in the sense that it is concerned broadly with the confluence of partisan politics and the government bureaucracy.

[16] A ban on political assessments that is related to the ban in Section 107(3) is contained in Section 17-156 of the Election Law. Section 200.56 of the Penal Law is similar in nature to Section 107(4).

power of appointment was based in the Council of Appointments. It soon became the policy of the state to fill positions and vacancies based on whichever party had control over the Council of Appointments.[17] "As the years went by, one had little security in public office unless he held the same political beliefs as the party in power and contributed either money, work or both to its support."[18] By the time that the Council was forced out of existence after the State Constitutional Convention of 1821, the Council controlled 14,950 offices, 8,287 military offices and 6,662 civil positions.[19] After the election of Andrew Jackson to the presidency in 1828, the spoils system found its way to the federal government.

"Partisan activity was nearly the sole test for public office, the ends of government were perverted to those of party and personal aggrandizement, and public service came to mean party service. With every turnover in party control, the public offices were swept clean."[20] Only after the Civil War were

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[17] Florence Wiener Siegel, *The Development Through Judicial Interpretation of the Constitutional Merit System in in the State of New York*, 3 (1949). The Council consisted of four members of the Senate appointed by the Assembly, with the Governor given a casting vote. Hugh M. Flick, *The Council of Appointment in New York State,* 15 *New York History* 253, 258 (1934).

[18] *Id.* at 2–3.

[19] Flick, *supra* note 23, at 277. *See also* C.R. Fish, *The Civil Service and Patronage* 90 (1905). "The spoils system was particularly dangerous in New York because of the enormous extent of the patronage.… It appointed nearly all the state officers, all mayors and some minor city officers, militia officers, and justices of the peace."

[20] William Mosher and J. Donald Kingsley, *Public Personnel Administration* 19 (1941). The Court of Appeals in *Rogers v. Buffalo*, 123 N.Y. 173, 177 (1890) stated, "Long prior to the passage of the first so-called Civil Service Reform Act by the federal congress, the condition of that service and the method of appointment thereto had become the subject of most anxious thought on the part of many upright, intelligent and experienced men. The semibarbarous maxim that 'to the victors belong the spoils,' had been the foundation-stone upon which the system of appointments to the civil service of the nation had been placed for a number of years. The system had grown to such proportions under the necessary enlargement of the service, and it had become in practice so entirely the creature of political chiefs, that the appointing power was regarded merely as a formal means of registering and legalizing the appointments to office which had already been substantially made by them."

serious efforts made to bring a nonpartisan merit-based election process into government. The civil service efforts were intensified after the assassination of President Garfield in 1881 by a disappointed political job seeker. This helped to galvanize public opinion against the spoils system and led to the passage of the Pendleton Act in 1883.

With a government workforce that was totally dependent on political loyalty, that workforce would serve to provide campaign contributions to parties and to candidates.[21] "Since electioneering required time and money that few Americans could spare, political leaders recruited civil servants (or would-be civil servants) to perform party work and contribute to the party a percentage of their salary (called a political assessment)."[22] The demand for assessments and the money to be earned through assessments grew as the number of government employees increased significant during the 1870's.[23]

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[21] Dorman B. Eaton, who would become the first chair of the federal Civil Service Commission, wrote in 1882, "Such a system makes the public servant a partisan and factionist in self-defense. It tells him to court the chieftains and bosses who hold power over his earnings. It tells him that that he has no right to his wages which the Government respects makes it impossible for him to feel a duty of economy, fidelity, or exertion in behalf of a government which, without attempting his protection, sees him deprived of a great portion of the salary and wages which its legislators had declared his due." Dorman B. Eaton, "Political Assessments,"310 *N. Am. Rev.,* Issue 310, 210-211 (1882). In *Rogers v. City of Buffalo*, *supra* note 26, at 178, the Court of Appeals added "The government, it was said, in such case, where the public offices are thus filled, is looked upon as an enemy's country, fit to be raided and conquered, and to obtain possession of it is a desirable thing, because all the offices within the gift of those who administer it are lawful spoil of war, and to be parceled out by the chiefs of the victorious party to their faithful followers, in recognition of past political services, or in expectation of future support of the same nature.… Struggles of this nature necessarily bring out every low, selfish and sordid quality of the participants therein; and corruption and fraud at the elections become the usual accessories thereto."

[22] Paul S. Boyer, *The Oxford Companion to United States History,* "Civil Service Reform," Online Version 2004 http://www.oxfordreference.com.i.ezproxy.nypl.org/view/10.1093/acref/9780195082098.001.0001/acref-9780195082098-e-0303?rskey=f2gIF9&result=1. [last viewed Apr. 17, 2018]

[23] The number of federal employees increased from 51,000 to 101,000 from 1871 to 1881. *See* Kurt Hohenstein, *Coining Corruption: The Making of the American Campaign Finance System* 14 (2007). "From 1861 to 1881, the number of political appointees increased 173%." Sean M. Theriault,

In 1878, the Republican Campaign Committee assessed all federal officeholders one percent of their salaries.[24] In 1880, twelve separate letters for assessments were sent to New York's federal employees.[25] "The assessment system, which had developed as integral to the spoils system, became the most important source for campaign contributions."[26]

Civil service reformers took the position that the political assessments worked to assure that the public workforce would be responsive to the partisan concerns of their patrons rather than to the public welfare.[27] As Ohio Senator George Pendleton stated when he introduced the federal civil service reform act in 1882, "Civil service … has welded the whole body of its employees into a great political machine; that it has converted them into an army of officers and men, veterans in political warfare, disciplined and trained, whose salaries, whose time, whose exertions at least twice within a very short period of time in the history of your country have robed the people of the fair results of Presidential elections."[28]

The Pendleton Act largely banned federal officials from soliciting assessments, subscriptions and contributions from other federal employees.[29] It also prevented political

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"Patronage, the Pendleton Act, and the Power of the People," 65 *The J. of Pol.* 50, 52 (2003).

[24] *Id.* at 15.

[25] *Id.* Assessment letters sent out by the Republican Congressional Committee in 1880 raised an estimated $100,000. A. Bower Sageser, *First Two Decades of the Pendleton Act: A Study of Civil Service Reform* 49 (1935). Even in 1882, while civil service reform was increasingly dominating the public stage, the Republican Congressional Committee continued to levy assessments. "None were spared; government clerks, scrub-women, enlisted men in the army, common laborers on works of public improvement, pages in Congress, janitors in public buildings—all were levied on to meet campaign expenses." Edwin Erle Sparks, "Civil Service Reform 1881-1884," in 23 *The American Nation: A History* 196 (Albert Bushnell Hart ed.) (1907).

[26] *Id.* at 19.

[27] See Ari Hoogenboom, "The Pendleton Act and the Civil Service," 64 *The Am. Hist. Rev.* 301, 302 (1959).

[28] Congressional Record, 47-2, Senate, 12 Dec. 1882, 204.

[29] Pendleton Act, § 11. *See also Ex parte Curtis*, 106 U.S. 371 (1882) (finding constitutional an earlier effort by Congress to limit—although not ban—political assessments).

contributions from being solicited or received in any government building.[30]

As a result of these revisions in civil service procedures, the entire system of campaign financing was forced to change.[31] Instead of gathering funds from government employees, political office seekers and political parties needed to find other sources for political funding. Without the employee funding, parties tuned to wealthy individuals and businesses for campaign contributions. Corporations took the place of the spoils system. "Business organizations, emerging then as national players in an increasingly national market … sought out party officials in a distinctly new political effort. The parties, to court corporate interests, promoted legislation on their behalf seeking to elect politicians sympathetic to the emerging ethic of economic individualism."[32] "The Civil Service Act prohibits officers and employès [sic] paid out of the national treasury from becoming the collectors or receivers of assessments, and the solicitation of them in any office, navy-yard, fort or arsenal of the nation. It is made penal to discharge, promote or change the compensation of, or to degrade any public servant by reason of any payment or non-payment for political purposes. The aim was to secure a real liberty to those that have long been the victims of partisan extortion."[33]

Months after the federal government in January of 1883 had passed the Pendleton Act, the first major introduction of a

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[30] *Id.* at § 12.

[31] The economist Henry George at the time of the passage of the Pendleton Act wrote, "It is encouraging that

there is at last an effort to stop the assessment of Government employès [sic] for political funds; but it should not be forgotten that behind such assessments is the larger fact that political parties require great sums for election purposes. These shameless levies are in truth rather a result than a cause of political corruption. That appointed officials are assessed for political purposes is secondary to the fact that elective officials (or others for them) must roundly pay for election." Henry George, "Money in Elections," 136 *N. Am. Rev.*, Issue 316, 201 (1883).

[32] Hohenstein, *supra* note 29, at 31.

[33] Dorman B. Eaton, "Two Years of Civil Service Reform," 141 *The N. Am. Rev.*, Issue 344, 15 (1985).

civil service system, New York State followed the example of the federal government. In May of 1883, New York became the first state in America to establish a civil service system.[34]

Besides creating a civil service commission,[35] which was designed to provide "for open, competitive examination for testing the fitness of applicants for the public service,"[36] the law added several provisions protecting the public workforce from political interference.[37] As Theodore Roosevelt—who in 1883 as an assemblyman strongly supported, introduced, and worked with Grover Cleveland to secure civil service reform[38]—later wrote, "Civil Service Reform had two sides. There was, first, the effort to secure a more efficient administration of the public service, and, second, the even more important effort to withdraw the administrative offices of the Government from the domain of spoils politics, and thereby cut out of American political life a fruitful source of corruption and degradation."[39]

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[34] L. 1883, ch. 354. Governor Grover Cleveland in his 1883 message to the legislature had advocated for the creation of a civil service system. Cleveland wrote, "It is submitted that the appointment of subordinates in the several State departments and their tenure of office or employment should be based upon fitness and efficiency, and that this principle should be embodied in legislative enactment, to the end that the policy of the State may conform to the reasonable public demand on that subject." VII *State of New York, Messages from the Governor*, 838 (1909).

[35] *Id.* § 1.

[36] *Id.* § 2.

[37] *Id.* §§ 9–14.

[38] *See* Edmund Morris, *The Rise of Theodore Roosevelt* 171–172 and 179 (Modern Library ed. 2001); Paul Grondahl, *I Rose Like a Rocket* 117 (2004). In a speech before the State Assembly on April 9, 1883, Roosevelt said, "My object in pushing this measure is … to take the office-holders as a body out of politics. It is a good thing to raise the character of our employes [sic], but it is better to take out of politics the vast band of hired mercenaries whose very existence depends on their success and who can almost always in the end overcome the efforts of men whose only care is to secure a pure and honest government." "The Standard of Reform," *N. Y. Times*, Apr. 10, 1883.

[39] Theodore Roosevelt, *Theodore Roosevelt, an Autobiography*, 132–133 (1914). "Theodore Roosevelt together with R. H. Bowker of the Brooklyn Young Men's Republican Club secured the endorsement of the Republican group in the legislature." Vernon B. Santen, *The Administration of the New York State Civil Service Law 1883-1917*, 14 (1952).

III. THE TEXT OF SECTION 107

Section 107 is composed of five subdivisions, each dealing with a distinct topic.

> § 107. Prohibition against certain political activities; improper influence.
>
> 1. *Recommendations based on political affiliations.* No recommendation or question under the authority of this chapter shall relate to the political opinions or affiliations of any person whatever; and no appointment or selection to or removal from an office or employment within the scope of this chapter or the rules established thereunder, shall be in any manner affected or influenced by such opinions or affiliations. No person in the civil service of the state or of any civil division thereof is for that reason under any obligation to contribute to any political fund or to render any political service, and no person shall be removed or otherwise prejudiced for refusing so to do. No person in the said civil service shall discharge or promote or reduce, or in any manner change the official rank or compensation of any other person in said service, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or service or any other valuable thing for any political purpose. No person in said service shall use his official authority or influences to coerce the political action of any person or body or to interfere with any election.
>
> 2. *Inquiry concerning political affiliations.* No person shall directly or indirectly ask, indicate or transmit orally or in writing the political affiliations of any employee in the civil service of the state or of any civil division thereof or of any person dependent upon or related to such an employee, as a test of fitness for holding office. A violation of this subdivision shall be deemed a misdemeanor and conviction thereof shall subject the person convicted to a fine of not less than

one hundred dollars nor more than five hundred dollars or to imprisonment for not less than thirty days nor more than six months, or to both such fine and imprisonment. Nothing herein contained shall be construed to prevent or prohibit inquiry concerning the activities, affiliation or membership of any applicant or employee in any group or organization which advocates that the government of the United States or of any state or of any political subdivision thereof should be overturned by force, violence or any unlawful means.

3. *Political assessments*. No officer or employee of the state or any civil division thereof shall, directly or indirectly, use his authority or official influence to compel or induce any other officer or employee of the state or any civil division thereof, to pay or promise to pay any political assessment, subscription or contribution. Every officer or employee who may have charge or control in any building, office or room occupied for any governmental purpose is hereby authorized to prohibit the entry of any person, and he shall not knowingly permit any person to enter the same for the purpose of making, collecting, receiving or giving notice therein, of any political assessment, subscription or contribution; and no person shall enter or remain in any such office, building or room, or send or direct any letter or other writing thereto, for the purpose of giving notice of, demanding or collecting a political assessment; nor shall any person therein give notice of, demand, collect or receive any such assessment, subscription or contribution. No person shall prepare or take any part in preparing any political assessment, subscription or contribution with the intent that the same shall be sent or presented to or collected of any officer or employee subject to the provisions of this chapter, and no person shall knowingly send or present any political assessment, subscription or contribution to or request its payment of any said officer or employee. Any person violating

any provision of this subdivision shall be guilty of a misdemeanor.

4. *Prohibition against promise of influence.* Any person, who while holding any public office, or in nomination for, or while seeking a nomination or appointment for any public office, shall corruptly use or promise to use, whether directly or indirectly, any official authority or influence, whether then possessed or merely anticipated, in the way of conferring upon any person, or in order to secure or aid any person in securing any office or public employment, or any nomination, confirmation, promotion or increase of salary, upon the consideration that the vote or political influence or action of the last named person, or any other, shall be given or used in behalf of any candidate, officer or party, or upon any other corrupt condition or consideration, shall be deemed guilty of bribery or an attempt at bribery. Any public officer, or any person having or claiming to have any authority or influence for or affecting the nomination, public employment, confirmation, promotion, removal, or increase or decrease of salary of influence, directly or indirectly in order to coerce or persuade the vote or political action of any citizen or the removal, discharge or promotion of any officer or public employee, or upon any other corrupt consideration, shall also be guilty of bribery or of an attempt at bribery. Every person found guilty of such bribery, or an attempt to commit the same, as aforesaid, shall, upon conviction thereof, be liable to be punished by a fine of not less than one hundred dollars nor more than three thousand dollars, or to imprisonment for not less than ten days nor more than two years, or to both such fine and imprisonment in the discretion of the court.

5. *Violation of this section.* Complaints alleging a violation of this section by a statewide elected official or a state officer or employee, as defined in section

seventy-three of the public officers law, may be directed to the commission on public integrity.

Sections nine, ten and thirteen of the 1883 law provide the basis of current Section 107(1). Section nine bans most elected state and high-ranking public officers from making politically based job recommendations for civil service positions. All these officers can do is speak to the character and residence of the job applicant. Section ten prevents soliciting political assessments and contributions for "any political purpose whatever," and Section thirteen bans any recommendations to civil service positions based on "the political opinions or affiliations of any person."

Section eleven is in substance very close to the language of current Section 107(3). It bans officers from compelling political assessments, and it prevents the use of government offices for the purpose of "making, collecting, receiving or giving notice of any political assessment." Subsequently in 1883 and 1884, the ban on political assessments was extended to ban requests or collections of both political subscriptions and contributions, in addition to political assessments, of government officers, agents and employees.[40]

Section fourteen is also the basis for current Section 107(4). It bans officers and candidates from corruptly promising to use their presumed authority in order to secure the vote or political influence of another person.

Section 107(5) places no substantive restrictions on conduct. It simply gives the commission on public integrity (now JCOPE) jurisdiction over violations of Section 107 when the conduct is by a state officer or employee. It was initially added as part of the Public Employee Ethics Reform Act of 2007.[41]

Subdivisions one, three, and four of Section 107 all are derived from the state's foray into the creation of a merit-based

[40] L. 1883, ch. 422; L. 1884, ch. 357 §3.

[41] L. 2007, ch, 14.

bureaucracy in 1883. Subdivision two was a legislative response to preclude certain government reform efforts in New York City.[42]

No changes have been made in subdivisions one through four of Section 107 since 1958, when the state's Civil Service Law was recodified.[43] The 1958 recodification largely left unchanged the language of subdivisions one, three and four of Section 107 as they had been contained in the initial 1909 codification of the Civil Service Law.[44] The 1958 recodification made some syntactical changes in the 1909 language, but it left the substantive aspects of these provisions unchanged.

While the language of Section 107(2) of the Civil Service Law was unchanged by the 1958 recodification, there was an additional provision added to this subdivision. The recodification added the concluding sentence to the subdivision which authorized an inquiry into an applicant or employee's activities involving an organization that might advocate the violent overthrow of the government.[45]

IV: SECTION 107(1) AND THE USE OF POLITICAL AFFILIATION IN EMPLOYMENT

Section 107(1) contains a series of prohibitions on the use of an officer or employee's political opinions or affiliations in determining that person's position in government. Unlike the other provisions in Section 107 which contain criminal penalties for their violation, subdivision one of Section 107 contains no specific penalties. A person who violated Section 107(1) would presumably be subject to discipline under the applicable

[42] L. 1934, ch. 739

[43] L. 1958, ch, 790.

[44] L. 1909, ch. 15.

[45] A similar attempt to ban individuals who advocate the violent overthrow of the government is contained in Section 105 of the Civil Service Law which was also part of the recodification in L. 1958, ch. 790. That ban was initially added by L. 1939, Ch. 547.

provisions of the Civil Service Law.[46] The provisions of subsection one ban the following conduct:

A. A recommendation under the "authority of this chapter" cannot "relate to the political opinions or affiliations of any person whatever";

B. No appointment or removal within the "scope of this chapter" may be "affected or influenced" by political opinions or affiliations;

C. No person in the civil service is under any obligation to contribute to a political fund or to do any political service. No person may be removed from his or her position for refusing to contribute or to do such political work.

D. No person in the civil service may promote or discipline an individual in the civil service based on that person's giving or failing to make a political contribution or that person's providing or not providing a political service; and

E. No person in the civil service can use his or her authority to coerce the "political action of any person or body or to interfere with an election."

The subsection poses numerous questions as to its reach.

Broadly, the question is who is covered by the prohibitions of this subdivision? Does it protect nearly all the public servants of the state and its local governments, or only those who have tenure under the applicable provisions of the Civil Service Law? Does it apply to all employees and officers or only to those in the competitive class of government?[47] Membership in the

[46] *See* Civil Service Law § 75.

[47] Civil Service Law § 44. The notion of a competitive class is also contained in Article V, Section 6 of the State Constitution (finding that appointments and promotions should be made "as far as practicable, by examination which, as far as practicable, shall be competitive.").

"competitive class" includes all positions where it is practicable to test the fitness of applicants by "competitive examination."[48] If only the competitive class is protected by Section 107(1), the non-protected classes would include all the other classes within the classified service of the state: the exempt class,[49] the non-competitive class[50] and the labor class.[51] Members of the unclassified service[52] of the state would similarly not be protected.

A textual analysis of Section 107(1) would make it appear that it applied to nearly all public servants. Under Section 2(5) of the Civil Service Law, the "civil service" of the state of New York or any of its civil divisions is defined extremely broadly. The term "includes all offices and positions in the service of the state or of such civil divisions, except such offices and positions in the militia and the military departments as are or may be created under the provisions of article twelve of the constitution."[53] The Civil Service chapter of New York State

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[48] *Id.*

[49] Civil Service Law § 41. This class includes the top deputies of principal executive officers and "all other subordinate offices or positions for the filling of which competitive or non-competitive examination may be found to be not practicable."

[50] Civil Service Law § 42. This class "includes all positions that are not in the exempt class or in the labor class and for which it is found … to be not practical to ascertain the merit and fitness of applicants by competitive examination."

[51] Civil Service Law § 43. This class includes "all unskilled laborers in the service of the state and each of its civil divisions except those whose positions can be examined for competitively."

[52] Civil Service Law § 35. The unclassified service includes elected officials, appointees of the state legislature, many gubernatorial appointees and most of the professional education staff employed throughout the state.

[53] Civil Service Law § 2.5. Similarly, an argument can be made that the State Constitution implies that the term the "civil service of the state and all of the civil divisions" is broader than the competitive class. State Constitution, Article 5, Section 6 states "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." This language implies that there are some government positions not subject to competitive examination which accordingly must be outside the competitive class.

law [54] includes all the positions of the state and its civil divisions.[55] It includes the "classified and unclassified service"[56] positions, and accordingly all the positions in the state and its civil divisions are literally included within the civil service of the state.

The provisions of Section 107(1) also refer broadly to the civil service. Thus, the ban on political recommendations (¶ A above) applies to "questions under the authority of this chapter." The limitation on political removals and appointments (¶ B above) applies to offices and employment "within the scope of this chapter or the rules established thereunder." The ban on coerced political contributions and political work (¶ C above) applies to a "person in the civil service." The ban on individuals taking action against another individual for failure to contribute or do political work (¶ D above) applies to "a said person in the civil service." Finally, the ban on coercing political action and/or interfering with an election (¶ E above) applies to a "person in said service."
Thus, literally, these bans on political interference apply to everyone holding an office in state government and its civil divisions.

Resort to the State Constitution to resolve the question of the extent of these bans provides little assistance. The Constitution does not define the extent of civil service protections. Section 6 of Article V of the State Constitution provides that "appointments and promotions in the civil service of the state and all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as afar as practicable by examination which, as far as practicable shall be competitive."[57] This provision, which was

[54] Chapter 7 of the Consolidated Laws of New York.

[55] It would not include the military divisions under the definition of "civil service" in Civil Service Law Section 2.5.

[56] Civil Service Law § 35.

[57] New York State Constitution, Article V, §6.

added by the 1894 Constitutional Convention, made New York the first state to constitutionally require a civil service system.[58]

The Court of Appeals soon found that the prior New York States civil service statutes were not affected by the 1894 constitutional changes.[59] According to the court, the purpose of the constitutional change was simply to declare two principles: that "appointments and promotions should be made according to merit and fitness,"[60] and that the determination of merit and fitness was to be made as much as practicable by examinations.[61] Most everything else was to be left to the discretion of the legislature. The court stated, "It was the purpose of its framers to declare these two principles and leave their application to the direction of the legislature."[62] The constitution created an "elastic"[63] system under which merit and examinations govern only when practicable. The legislature is to determine the specific applications of merit and fitness.

This was emphasized by the Court of Appeals in invoking the debate on the civil service provision at the 1894 convention. John Gilbert, the chairman of the committee reporting on civil service reform, stated:

> Now, if we should undertake to prescribe definitely the limits within which this rule should apply, whether by examination non-competitive or examination competitive, we should find ourselves quickly involved in a mass of details; and so it seemed best to the committee, after very careful and repeated consideration, to leave the application of the principle to the good sense of the

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[58] This provision was added by the Constitutional Convention of 1894. See Robert Allan Carter, *The New*

York State Constitution: Sources of Legislative Intent, 44 (2nd ed., 2001). See also Samuel H. Ordway, "The Civil Service Clause in the Constitution," V *Proceedings of the American Academy of Political Science,* 251, 253 (1914).

[59] *People ex rel. Sweet v. Lyman*, 157 N.Y. 368, 375 (1898).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Ordway, *supra* note 82, at 255.

> Legislature - the application of it. So that the effect of the proposed amendment, as a whole, is to embody in the organic law the proposition that appointments to and promotions in the civil service ought to be based upon merit, fitness - fitness for the particular service to be rendered - and that that fitness should be ascertained by examinations where practicable and those examinations should be competitive, so far as experience shows that such examination is practicable.[64]

The court viewed this statement as largely giving the legislature overall control over the workings of the civil service system. The Constitution may have set the principles, but the details of the system were the domain of the legislature.[65] The court stated, "Thus, it is apparent, not only upon the face of the provision itself, but from the debates in the constitutional convention, that the framers of the amendment did not intend to absolutely determine how the merit and fitness of appointees were to be ascertained and determined."[66]

Freed from having to be concerned over the meaning of the term "civil service" and the extent of civil service protections in the State Constitution, the courts have largely been free to use legislative intent to interpret Section 107(1), and the case law seems to conclude that the bans on political interference do not apply to all persons holding positions in state government and its civil divisions. In *People ex rel. Garvey v. Prendergast*,[67] an individual in the exempt class of state service challenged his termination by the New York City comptroller. A jury had found that the termination was for improper political reasons under the predecessor to Section 107(3).

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[64] New York (State) Constitutional Convention, *Revised Record of the Constitutional Convention of the State of New York, May 8, 1894, to September 29, 1894.,* Albany: The Argus Company, printers 835-836 (1900).

[65] *People ex rel. Sweet v. Lyman, supra* note 83, at 375-376.

[66] *Id.* at 376.

[67] 148 A.D. 129 (1st Dept., 1911). In an earlier case due to an interpretation of the State Constitution, the Court of Appeals had found that the department of public works was not subject to the operation of the civil service law. *People ex rel. Killeen v. Angle,* 109 N.Y. 564 (1888).

On appeal, the Appellate Division found that the termination was not in violation of the Civil Service Law. Writing for the court, future governor Nathan Miller noted that if the law was literally construed, it would apply to all positions including unclassified positions and would "direct that the appointments of heads of departments should not be influenced or affected by their political opinions or affiliations."[68] He added, "In a government by parties it is to be expected that the principal executive officers, the heads of departments, whether appointed or elected, and their deputies and secretaries, will be selected with some reference at least to the political opinions and affiliations of the appointees, and it is plain that the Legislature did not intend to direct otherwise. The purpose of creating an exempt class would be defeated if the motives of the appointing officer could be inquired into."[69]

Miller then determined that the exempt class of employees was not protected from political dismissals.[70] He distinguished the exempt class from the competitive, non-competitive and the labor classes who would be given the remedy of the writ of mandamus to address a violation of their rights.[71]

Miller's opinion would seem to make political, if not legal, sense. In the real political world, government employers and political party officials often need to know about the political affiliation of people who hold positions that are not protected by

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[68] *Id*. at 133.

[69] *Id.*

[70] As an additional hedge, Miller found that even if the members of the exempt class were technically protected from political retribution, they were not provided with the right to have a writ of mandamus issued against that retribution. For the exempt class, "the said provision was to be directory only." *Id.* at 134. The Court of Appeals in *People ex rel. Somerville v. Williams,* 271 N.Y. 40, 44 (1916) found that if the position was covered by the law preventing political retribution, the writ of mandamus would lie. "They are mandatory and were intended to be observed, and where these provisions are disregarded and one who is employed in the civil service is removed, he is entitled to reinstatement."

[71] *Id.*

civil service requirements. They need deputies and assistants who share their goals, values and often their loyalties. This is especially true for people in exempt positions.[72] An incoming gubernatorial administration—even a new Attorney General or State Comptroller—is likely to want to share the political affiliation of his or her top subordinates. Some administrative boards have provisions limiting the number of individuals that can be appointed from any particular party.[73] In those cases, the appointing bodies need to ask and be concerned about the political affiliations of the applicants for the position.

The Court of Appeals in *Merriweather v. Roberts*[74] went further than the *Prendergast* court and extended the finding that the right against political retribution did not extend to individuals in the non-competitive class. The court stated, "The courts have definitely decided that section 25 does not apply to the exempt class. The same reasoning requires a holding that it does not apply to the non-competitive class."[75] The court decision viewed only competitive positions as being the ones protected from political retributions "in that they can only qualify for their positions through competitive examinations."[76]

Lower courts have built on the *Merriweather* decision. These cases have found that protection against political retribution is only for individuals in the competitive class of government service. Relief has been denied to individuals in the unclassified service,[77] the noncompetitive class,[78] the exempt

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[72] Civil Service Law § 41.

[73] For example, no more than three members of the Public Service Commission can be from one party. Public Service Law § 4.1. Membership on the State Board of Elections is split evenly between the parties, Election Law § 3-100.1, and membership on county boards of election is similarly evenly split among the two major parties, Election Law § 3-200.

[74] 268 N.Y. 12 (1935).

[75] *Id.* at 20.

[76] *Id.* at 18.

[77] *Nowicki v. Healy*, 180 Misc. 184 (Sup. Ct. Westchester Co., 1943).

[78] *Deth v. Castimore,* 245 A.D. 15 (4th Dept., 1935); *Daly v. Goldwater,* 163 Misc. 502 (Sup Ct. New York Co., 1937).

and non-competitive classes,[79] the exempt class,[80] and only to people in the competitive class.[81]

Interestingly, while the New York courts have limited the protections against political retributions, the United States Supreme Court has greatly added to these protections. Under *Branti v. Finkel*[82] and *Elrod v. Burns*,[83] dismissals are only appropriate when party affiliation is an appropriate job requirement for the effective performance of the public office involved."[84] Otherwise, the political retribution violated the First Amendment. In that regard, the New York State Constitution has its own freedom of speech protections,[85] and it would be interesting to note whether the New York State Constitution would separately provide for a remedy against most political retributions.[86]

While the state courts may have limited the language protecting individuals to only the competitive class,[87] the problems in analyzing Section 107(1) remain. Does the judicial decision to confine the language "office or employment within the scope of this chapter" to mean only competitive class position holders, apply as well to potential "transgressors" and to the victims of the transgressors? For example, the conduct described

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[79] *Rohr v. Kenngott*, 176 Misc. 838 (Sup. Ct. Erie Co., 1940); aff'd 262 A.D.944 (4th Dept., 1941) modified by 288 N.Y. 97 (1942).

[80] *Bass v. Bragalini*, 207 Misc. 1055 (Sup. Ct. Albany Co., 1955).

[81] *Greenfield v. Moses,* 169 Misc. 389 (Sup. Ct. New York Co., 1938).

[82] 445 U.S. 507 (1980).

[83] 427 U.S. 347 (1976).

[84] *Branti, supra* note 106, at 518. *See also Wallikas v. Harder,* 118 F. Supp. 2d 303 (N.D.N.Y., 2000).

[85] N.Y. Const., art. 1, § 8. "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right…"

[86] For a case where a state court tried to apply *Branti v.Finkel* to a state position, see *Perfetto v. Cemetery Board, Division of Cemeteries* 166 Misc.2d 211 (Sup. Ct. New York Co., 1995).

[87] While the language of Merriweather might be seen as limiting the protection only to the competitive class, there do not appear to be decisions on whether individuals in the labor class would be eligible for protection.

in ¶ A, ¶ D and ¶ E above is designed to punish the transgressors. Provision D reads, "No person in the said civil service shall discharge or promote or reduce, or in any manner change the official rank or compensation of any other person in said service."[88] Provision E states, "No person in said service shall use his official authority or influences to coerce the political action of any person or body or to interfere with any election." Does this mean that the transgressor must be a member of the competitive class, since the courts have already limited the meaning of the terms "in the said civil service" and "in said service" to include only members of the competitive class?

Similarly, who is actually benefitted by the conduct in ¶ C, protecting a "person in the civil service of the state or of any civil division?" Does this protection apply to all officers and employees in government or only to individuals in the competitive class?

We have almost the reverse example of the *Prendergast* case, where it made little sense to protect individuals in the exempt class from political retribution. As Judge Miller wrote in *Prendergast*, failing to protect members of the bureaucracy from actions taken against them by individuals in the exempt class or in the unclassified service makes no governmental or political sense: "Manifestly, such a construction was not intended."[89] The drafters of the civil service laws wanted to protect the bureaucracy from political leaders. The definition used by the courts in defining the civil service system would preclude these political leaders (who would be in the exempt class or in the unclassified service) from being held responsible for their conduct. Interpreting "civil service" consistently would mean that Section 107(1) merely protects the competitive class from itself. That would make little sense.

There are few cases in recent decades that seem to have enforced or interpreted the provisions of Section 107(1). It has largely fallen out of use. This makes increasing sense given the

[88] This is the actual language of the misconduct outlined in ¶ D.

[89] Prendergast, *supra* note 91, at 133.

lack of any specific penalty for violating Section 107(1), and the fact that other sections of the law cover many of the prohibited actions in Section 107(1). The provision on political coercion (¶ E above) is covered in far greater depth in Article 17 of the Election Law and articles 195[90] and 200[91] of the Penal Law. The provisions on political contributions by public servants (¶¶ C and D above) are covered in greater depth in Section 107(3).

V. SECTION 107(2) AND INQUIRIES INTO POLITICAL AFFILIATION

Section 107(2) of the Civil Service Law bans inquiries into an officer or employee's political affiliation or that of any person dependent on or related to that employee. It was a specific attempt to protect certain politically hired workers from the newly elected La Guardia administration in New York City. Mayor Fiorello LaGuardia had won election in 1933 as the Fusion candidate, running primarily against the Democratic Party machine of Tammany Hall. Tammany Hall leadership entering the 1934 calendar year controlled significant patronage positions in New York City and maintained considerable backing in both the City and the State legislative bodies. Tammany leadership was concerned that the LaGuardia administration would use its power to fire city workers connected to Tammany Hall.[92] The Fusion representatives had stated that the government employees should not be involved in any political organizations.[93] Tammany Hall saw this as a direct threat.

In order to protect their patronage from the LaGuardia administration, the Tammany Hall forces introduced legislation

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[90] Article 195 involves "official misconduct."

[91] Article 200 includes "bribery involving public servants."

[92] "Bill Aims Blow at Mayor's Civil Service Plans," *N.Y. Herald Tribune,* Mar. 15, 1934.

[93] *Id.* The Fusion belief was similar to the policies advocated by the Hatch Act proponents that government employees should not be involved in any partisan political activity.

to block inquiries of the political affiliation of employees.[94] The sponsor of the legislation, Senator John McNaboe, stated directly that the bill was directed at the LaGuardia administration.[95] The bill "was aimed at inquiries that have been made in the LaGuardia administration notably by William Fellowes Morgan Jr., Commissioner of Markets seeking to find out the extent that the civil service has been filled by Tammanyites."[96]

The Markets Commissioner, William Fellowes Morgan, had sent out a questionnaire to workers at his agency asking for their political club affiliations.[97] Specifically that questionnaire asked for the names of political organizations the employee belonged to, the employee's relationship to other City employees, whether the employee belonged to a political group before entering City service, and whether the employee had any relatives connected with any political organization."[98] The bill passed easily through the legislature and was signed by Governor Lehman on May 19, 1934.[99] Governor Lehman signed the bill with a one sentence message of approval stating, "I am signing this bill on the approval of the State Department of Civil Service."[100]

While the language of the 1934 bill has not been changed, the 1958 recodification of the Civil Service Law[101] added an additional sentence to the law. It authorized an inquiry into the affiliation of an employee or applicant in a group that advocated

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[94] *Id.*

[95] *Id.*

[96] "5 of Lehman Utility Bills Pass in Old Guard Rout," *N.Y. Herald Tribune*, Apr. 18, 1934.

[97] "Denies Market Politics," *N.Y. Times,* Jan. 30, 1934.

[98] "Kelly Defiance Wilts in Market Racket Inquiry," *N.Y. Herald Tribune*, Jan. 28, 1934.

[99] "Governor Signs Bill Proposing 3d Bond Issue: Hopes 40 Million," *N.Y. Herald Tribune*, May 23, 1934; "$40,000,000 Bill for Relief Signed," *N.Y. Times*, May 23, 1934; "Signs Bill to Halt Raids on Workers' Pay, *Buff. Courier Express*, May 23, 1934.

[100] *Id. Public Papers of Herbert H. Lehman,* 356-357 (1934).

[101] L. 1958, ch.790.

the forceful overhaul of the government. This was directed at membership in the Communist party and was likely a reaction to cases like *Slochower v. Board of Higher Education of the City of New York*,[102] involving the attempted dismissal of a Brooklyn College professor for his membership in the Communist Party.

Violation of Section 107(2) is punishable as a misdemeanor with a fine of between $100 and $500 and imprisonment between thirty days and six months, or a combination of a fine or imprisonment.

Section 107(2) literally protects "any employee in the civil service of the state or of any civil division." That raises the same issue as the coverage of Section 107(1)—who are the protected parties? Are they only members of the competitive class of government service, or does it apply to all employees of the civil service?

It creates a series of anomalies. If Section 107(2) is only aimed at the competitive class, it creates a situation where the questioning of an employee about his political party affiliation is a misdemeanor, while firing that person does not have a penalty. If Section 107(2) applies to classes beyond the competitive class (and it might be assumed that not all Tammany patronage holdovers passed a competitive exam), then you have the situation where inquiring about an exempt employee's political affiliation would be a misdemeanor, but firing that person based on that person's party affiliation would be thoroughly authorized.

Further, as written, the language applies to all inquiries of people in the civil service system. The crime itself can be committed by anyone, whether or not that person is in government or in politics. So, if a random stranger asks a government employees what party they belong to, that, at least in theory, is a potential violation of Section 107(2). The only provision of this statute that would prevent this inquiry from being a criminal act is the language in the provision connecting

[102] 350 U.S. 551 (1956).

the inquiry "to a test of fitness for holding office," and that language is at best extremely amorphous. If a low-level employee, who is a related to higher officials in the controlling political party, asks fellow government office workers about their politics, is this a violation of Section 107(2)?

Besides its lack of clarity, the literal wording of Section 107(2) might be far too broad for it to be effectively administered. It is hardly a surprise that there are no cases that actually construe Section 107(2).

VI. SECTION 107(3) AND POLITICAL SOLICITATION OF GOVERNMENT EMPLOYEES

Section 107(3) contains, in effect, six separate provisions.[103] Violation of any of these provisions constitutes a misdemeanor.[104]

A. Officers or employees of the state may not use their authority to compel employees of the state or any civil division of the state to pay a political assessment, subscription or contribution;

B. Officers or employees who control access to buildings or rooms "occupied for any governmental purpose" may not knowingly allow any person to enter those buildings or rooms for the purpose of making or collecting any "political assessment subscription or contribution";

C. No person may enter or remain in a building, office or room occupied for any governmental purpose or send a letter or writing to any such room for the purpose of demanding a political assessment;

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[103] These six separate violations were basically listed in ch. 693, L. 1892, which amended the Penal Code in regard to separate violations of the elective franchise.

[104] Under the Penal Law, a misdemeanor created outside the Penal Law is a Class A misdemeanor which is punishable by a jail sentence of up to one year. Penal Law §§ 55.10 and 70.15.

D. No person in a building, office or room occupied for any governmental purpose give notice of demand or collect any "such assessment, subscription or contribution";

E. No person may prepare or take part in preparing or making out "any political assessment, subscription or contribution" with the intent that the demand or request be sent to officers and employees subject to the provisions of the Civil Service Law;[105] and

F. No person shall knowingly send or present any political assessment, subscription or contribution to any officer or employer subject to the provision of the Civil Service Law.

Most every aspect of this subdivision presents ambiguities. There is no definition of an "assessment," "subscription" or "contribution." How would a subscription differ from an assessment?[106] There is no definition of a "governmental purpose." Again, much like the questions raised under Section 107(1) and Section 107(2), what constitutes the class of recipients who are protected from these political solicitations?

It should be pointed out there is a ban on political assessments in the Election Law. Election Law Section 17-156 bans government officers or employees from using their position or authority to compel other government officers or employees to pay political assessments. Voluntary political contributions are authorized, and the violation of the Election Law provision is a Class A misdemeanor.

Is there any need for the Election Law provision on political assessments? All the conduct prohibited by the Election

[105] Under § 2.5 of the Civil Service Law, the term "civil service" includes position in the state and civil divisions of the state except positions in the militia and the military departments. It would include positions that are not protected as competitive positions. *See* Civil Service Law § 40.

[106] Several state statutes dealing with civil service political contribution issues do refer to subscriptions. These include: RI ST § 36-4-53; 16 P.S. § 2193.2; MCA § 7-3-1254; MO ST § 36.15; KY ST § 18A.140 29; Del. C. 1953, § 5954.

Law provision is prohibited by Section 107(3). On the other hand, the class of protected recipients is potentially broader under the Election Law since it shields "any other officer or employee of the state or a political subdivision."
What is a "civil division" of the state as this term is used in this section?

Some provisions are aimed only at "political assessments." Other are aimed at both assessments, subscriptions and contributions. Some crimes can only be committed by government officials. Others are more broadly directed against any person.

Some provisions are specifically referenced to government buildings or locations. For other provisions, the site of the activity is immaterial. There remains the question of whether locations that a government unit leases to private parties are covered by this section. This issue has arisen specifically in respect to the State's franchised thoroughbred tracks that have been leased by the State to the New York Racing Association.[107]

For some of the provisions, the recipient of the solicitation needs to be a government (defined as "state or civil division thereof") employee or officer who is "subject to the provisions of this chapter." For other provisions, the job status of the recipient is immaterial. In ¶ A, the target-recipient is any "officer or employee of the state or any civil division thereof." This may or may not be different than officers or employees "subject to the provisions of this chapter." (See ¶¶ E and F above)

Even though the basic provisions of Section 107(3) have been on the books for well more than a century, there are few judicial decisions that provide any context to the provision.
The drafters of the provision deliberately avoided a problem that had affected the Pendleton Act. That was the issue of whether a letter soliciting an assessment mailed to a government office was an illegal solicitation. The New York statute clarifies that

[107] James M. Odato, "Campaign Ban at Track Sinking In," *Albany Times Union,* July 19, 2013; James M. Odato, "Track Events Risky Bet?," *Albany Times Union*, Aug. 10, 2009.

sending or directing "any letter or other writing thereto" is a violation of the law. At the federal level, it was an open question whether a letter soliciting a solicitation mailed from outside a government office to employees inside a government office was prohibited. It was not until the decision of the Supreme Court in *United States v. Thayer*[108] in 1908 that a solicitation mailed into a government office was determined to be a violation of the Pendleton Act.

The decisions establish that any contributions received in a government office building are banned even when there is no intent to coerce, or event to solicit, such contributions.[109] The provision bans the giving of notice in a "building occupied for governmental purposes by a public office to his subordinates that they are to collect and receive contributions."[110] Even if no coercive language is used, the giving of notice in the public building establishes the violation of Section 107(3).[111] Political meetings not involving campaign contributions can be held in government-owned property or property leased from a government entity.[112] One court has also noted that violations of the Civil Service Law "should not be tolerated."[113]

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[108] 209 U.S. 239 (1908).

[109] *People ex rel. Johnson v. Connolly*, 168 A.D. 919, 920 (2nd Dept., 1915), appeal dismissed, 216 N.Y. 706 (1915). "The Legislature of New York, following various Federal statutes, aimed to check a political abuse in taking party tribute from officers when within their office surroundings."

[110] *People v. Haff,* 53 N.Y. 2d 997, 999 (1981). *See People v. Haff*, 47 N.Y.2d 695, 699 (1979). "We believe a notice given by a public officer to his subordinates that they are to collect and receive political assessments, subscriptions or contributions on behalf of a political organization falls within this proscription." In the late 1970's and early 1980's, a series of suits were brought, concerning the use of political assessment by Republican Party leadership in Nassau County. See *People v. Phears,* 523 N.Y.2d 1001 (1981); *U.S. v. Margiotta*, 688 F. 2d 108 (2nd Cir. 1982), cert. denied, 461 U.S. 913 (1983); "Hempstead Town Official Is Found Guilty of Lying to Kickback Grand Jury," *N.Y. Times*, Oct. 5, 1976; Bob Wyrick, "Price for Public Job in Nassau: One Per Cent Cut for the Party," *Newsday,* Apr. 16, 1972.

[111] *Id.*

[112] *Hempstead Democratic Club v. Incorporated Village of Hempstead*, 112 A.D. 2d 428 (2nd Dept., 1985).

[113] *Cullen v. Margiotta*, 81 Misc.2d 809, 814 (Sup. Ct. Nassau Co., 1975).

Questions abound about innovations in technology. Is an email soliciting a political contribution sent to a person at a .gov URL the equivalent of a letter asking that person for a contribution at that person's government office? What about a text message or pin-to-pin message? Would these solicitations be exempt because they are not a "letter or writing?" Could an email be considered a letter?

If people inside a government building using their personal computer, tablet, or cellular phone (rather than a government-issued electronic device) solicits a contribution, is this a violation of Section 107(3)?

Knowing solicitation of a person subject to civil service for a contribution is considered a violation of Section 107(3). Yet, what would happen if a candidate for a judgeship in Albany County (the location of state government) sent a request for a political contribution to all attorneys or members of the bar association in Albany County? A very high percentage of lawyers in Albany County work for government. Many are in the competitive class of civil service. Wouldn't the person who sent the solicitation have to know that the solicitation was being sent to persons who were not supposed to receive political solicitations?

Again, a high percentage of the residents in Albany County are subject to civil service. Any request for contributions sent to Albany County residents—who are members of a political party—is assuredly going to be sent to people who are banned from receiving political solicitations. Would this general request for contributions in Albany County be considered a "knowing" violation of Section 107(3)? Section 107(3) can become a trap for the unwary.

VII. SECTION 107(4) AND MAKING DEALS TO OBTAIN POLITICAL SUPPORT

Section 107(4) is the quid pro quo subsection, banning corrupt deals for political support. It often is thought of as involving a political candidate making a deal to obtain another person's political support by promising a favor to that person, such as a job or a promotion. To a large extent Section 107(4) has been subsumed by Section 200.56 of the Penal Law, banning the corrupt use of position or person. Subdivisions one and two of Section 200.56 read almost exactly the same as the first two sentences of Section 107(4). Section 200.56 was traditionally (since 1965)[114] a fixture of the Election Law, but in 2014 was moved—with minimal changes in its substance[115]—to the Penal Law as a part of the "Public Trust Act."[116] Until these minimal changes in 2014, the wording in current Section 200.56 is the same as it was first enacted as part of the Penal Code in 1892.[117]

A violation of Section 200.56, unlike Section 107(4), is a class E felony. It is punishable with a maximum jail term of four years.[118] A violation of Section 107(4) is punishable with a jail penalty of between 10 days and two years and/or a fine of between $100 and $3,000.

The substance of Section 107(4), banning corrupt promises[119] to secure a person's political support, was part of the

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[114] L. 1965, ch. 1031. Before 1965, it was Section 775 of the Penal Law.

[115] See William C. Donnino, "Practice Commentary," § 200.256 Penal Law at 120 *McKinney's Consolidated Laws of New York Annotated* (West).

[116] L. 2014, ch.55.

[117] L. 1892, ch. 693.

[118] Penal Law § 70.00.2.(e.).

[119] The Court of Appeals in *People v. Willett*, 213 NY 368, 377 (1915), viewed the 1892 Penal Code as a law "to prevent bargaining in offices" especially at "a time when such corrupt bargaining on the part of any person with power by reason of position or authority, official or otherwise, to make or control appointments or nominations, was quite universally condemned." *See People v. Burke*, 82 Misc.2d, 1005, 1008 (Sup. Ct. New York Co., 1975), stating that the "true aim of the statute as being against corrupt bargains by so-called 'bosses' and power-brokers."

state's initial Civil Service Law.[120] Its language was altered slightly in 1899,[121] and its language has largely remained the same since 1899.

Most of the cases interpreting the language of Section 107(4) are cases interpreting the penal law provision.
The banned conduct in the first sentence of Section 107(4) applies generally "to a person who is seeking a nomination for public office, or is nominated for public office, or is holding a public office. It is designed to penalize such person's corrupt use (or promise to use) his or her 'official authority or influence possesses or anticipated' in order to secure or aid another to secure any office or public employment or 'nomination, confirmation, promotion or increase of salary.'"[122]

The key case in interpreting the language of the first sentence of Section 107(4) is likely the 1978 case of *People v. Hochberg*. [123] In that case, the prosecution alleged that Assemblyman Alan Hochberg tried to make sure that a constituent of his, Charles Rosen, would not run against him in a Democratic primary for the Assembly. To avoid the election contest, Hochberg offered Rosen a job in the legislature, a smaller legislative job for Rosen's brother-in-law, plus a political contribution for a potential campaign of Rosen's. Hochberg was convicted of several crimes including what has become Section 200.56.

On appeal, Hochberg raised numerous arguments against his conviction. He argued that the Election Law was both overbroad and unconstitutionally vague. The court rejected these arguments stating, "No one has a constitutional right to corruptly use official position or authority to obtain political gain. Secondly, the statutes here under attack are sufficiently definite to give a reasonable person notice of the nature of the acts prohibited. They are generally aimed at corrupt bargaining

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[120] L. 1883, ch. 354, § 14.

[121] L. 1899, ch. 370.

[122] Donnino, *supra* note 139, at 120.

[123] 62 A.D. 2d 239 (3rd Dept., 1978).

to obtain public office and specifically the use of the public payroll in such bargains. In view of the myriad ways in which the objects sought to be prohibited may be accomplished, laws with narrow particularity would afford easy circumvention of their purpose and be ineffectual. Thus, the statutes are not impermissibly vague or overbroad."[124]

The conduct was criminal, even where the defendant did not have a specific intent to violate the law. Based on the defendant's conduct itself, the jury could determine that the defendant knowingly and intentionally violated the law.[125] Finally, the language of Section 107(4), sentence one, includes only "corruptly promising to use official authority in exchange for a promise not to enter the primary."[126]

The second sentence of Section 107(4) applies to any "public officer."[127] "It is designed to penalize such person who has or who claims to have 'authority or influence' affecting the specified aspects of public office or employment, and corruptly promises (or threatens) to use same to affect the vote (or political action) of, or on account of the vote (or political action) of, the employee."[128] Perhaps due to the abstruse nature of the language in this provision, there is no case law on either Section 107(4), sentence two, or on Section 200.56.2 of the Penal Law or its predecessors. It is conduct both difficult to define and to assess.

> The basic problem of Section 107(4) is that it serves little purpose. The second sentence is especially obscure and seems to have been disregarded. The first sentence on corrupt electoral bargains may be necessary (to the extent that the topic is not incorporated by bribery laws), but it is not in use because the prohibited conduct is fully covered in Section 200.56.1 of the Penal Law. The Penal Law, as a Class E felony, provides for a potentially more

[124] *Id*. at 248.

[125] *Id.* at 247.

[126] *Id.*

[127] Section 200.56.2 of the Penal Law applies both to public officers and employees of the state or a political subdivision.

[128] Donnino, *supra* note 139, at 120.

significant penalty of four years of imprisonment—as compared to two years for Section 107(4). The Penal Law provision also permits a court to impose a variety of penalties on a guilty party, ranging from unconditional discharge, conditional discharge, probation, or a fine to or a term of imprisonment.[129] Under the Civil Service law provision, a guilty party receives a fine and/or imprisonment. There is little reason for a district attorney to charge a defendant with violating Section 107(4) when that defendant can be charged under Section 200.58 of the Penal Law

VIII. CONCLUSION

Section 107 deals with issues that are important to the continued operation of an effective government bureaucracy. Since the time of Theodore Roosevelt and Grover Cleveland, it has been New York State policy to protect the public servants of New York State and its local governments from political interests. State law has striven to let public servants do their work in the best interest of the public, free from political interference. Political concerns cannot affect hiring and firing decisions. Recommendations for jobs cannot concern political affiliations. Employees cannot be forced to provide political contributions or do political work. Employers cannot even inquire into the political affiliation of a public servant of his or her family. Public servants are protected from political assessments, and the workplace is supposed to be free of political solicitations. A government building cannot be used for any campaign fundraising. Individuals cannot promise jobs or pay raises in order to obtain the support of public servants.

As current events have shown, the need to make sure that the government serves the public interest, and not any private partisan interest, are every bit as significant as they were in 1883.

Yet the effort to protect the public workforce through Section 107 has failed almost entirely. It has rarely been

[129] Penal Law § 60.01.

enforced. The penalties provided for its violations are inconsistent. Its provisions are antiquated. The language presents hosts of ambiguities. Other state provisions cover the same conduct. Some portions are contradictory. Others overlap. The digital age has made some of its provisions passé. The Joint Commission on Public Ethics has little way of enforcing Section 107. It is at best an antique, a Potemkin village for virtue signaling. At its worst, it is a trap for the unwary, as almost nobody knows what conduct is covered by the statutes.[130]

If the state wants to protect its workforce from political pressures, and provide a government that serves the needs of its people, it needs Section 107 to be reconceived, reworked and reinvigorated.

[130] This is especially true for §§ 107(2) and 107(3). Many people in government are likely unaware that asking public servants about their political affiliations and soliciting for political contributions while inside a government building are crimes.