

Public Campaign Financing:

New Jersey Governor



weeding out big money in the garden state

by Jessica A. Levinson



Public Campaign Financing in New Jersey—Governor

WEEDING OUT BIG MONEY IN THE GARDEN STATE

Jessica A. Levinson

CENTER *for* GOVERNMENTAL STUDIES

2008



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Foreword

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The Center for Governmental Studies (CGS) has studied public financing of elections in state and local jurisdictions for 25 years. This report examines public campaign financing for gubernatorial elections in New Jersey, which has one of the nation's oldest public financing programs. A companion report analyzes public campaign financing in New Jersey legislative elections. The goal of the project is to gauge how this program is working and determine whether improvements are necessary.

CGS has published several general reports on public financing: a comprehensive analysis of state and local jurisdictions, *Keeping It Clean: Public Financing in American Elections* (2006); a primer, *Investing in Democracy: Creating Public Financing Elections in Your Community* (2003); and a report on innovative ways to fund public financing programs, *Public Financing of Elections: Where to Get the Money?* (2003).

CGS has also published detailed, jurisdiction-specific analyses of public financing programs in Wisconsin, *Public Campaign Financing in Wisconsin: Showing its Age* (2008); New Jersey, *Public Campaign Financing in New Jersey-Legislature: A Pilot Project Takes Off* (2008); Minnesota, *Public Campaign Financing in Minnesota: Damming Big Money in the Land of 10,000 Lakes* (2008); Michigan, *Public Campaign Financing in Michigan: Driving Towards Collapse?* (2008); Tucson, *Political Reform That Works: Public Campaign Financing Blooms in Tucson* (2003); New York City, *A Statute of Liberty: How New York City's Campaign Finance Law is Changing the Face of Local Elections* (2003); Suffolk County, NY, *Dead On Arrival? Breathing Life into Suffolk County's New Campaign Finance Reforms* (2003); San Francisco, *On the Brink of Clean: Launching San Francisco's New Campaign Finance Reforms* (2002); and Los Angeles, *Eleven Years of Reform: Many Successes, More to be Done* (2001); (copies of these and other CGS reports are available at www.cgs.org).

CGS thanks the public officials, administrators and advocates on both sides of the public financing debate that assisted CGS in the preparation of this report. These experts provided invaluable information, suggestions and stories about public financing in New Jersey.

Jessica Levinson, CGS Political Reform Director, authored this report. Tiffany Mok, formerly Campaign Finance Project Manager, conducted some interviews and prepared early drafts of this report. CGS Chief Executive Officer Tracy Westen and President Bob Stern provided editorial comments.

CGS is a non-profit, non-partisan organization that creates innovative political and media solutions to help individuals participate more effectively in their communities and governments. CGS uses research, advocacy, information technology and education to improve the fairness of governmental policies and processes, empower the underserved to participate more effectively in their communities, improve communication

between voters and candidates for office, and help implement effective public policy reforms.

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EXECUTIVE SUMMARY

In the aftermath of the Watergate scandal, states created legal solutions to combat political corruption. In 1973, New Jersey, whose politics were long associated with corruption and scandal, passed a comprehensive campaign finance law known as the Campaign Contributions and Expenditures Reporting Act (“the Act”). One year later, the legislature amended the Act to include a public financing program for gubernatorial candidates (“the program”). The basic premise of the gubernatorial public financing program (and of most public financing programs across the country) is straightforward: candidates running for governor who voluntarily agree to limit their spending during an election become eligible to receive public money to run their respective campaigns. Candidates for governor receive matching funds from the state to complement money they raise through private contributions. This system is known as partial public financing.

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 Although the gubernatorial public financing program operated effectively for over two decades, it faltered in the 2005 election. That year, both major party candidates opted out of the program and self-financed their campaigns.

New Jersey funds its gubernatorial public campaign financing program through a \$1 taxpayer check-off program. If revenues from the \$1 check-off are not sufficient to cover the public funds need, the legislature appropriates funds from the general fund to cover the shortfall.

The goal of the gubernatorial public financing program is to remove the undue and improper influence of large contributions and special interest money in the political process. The program provides qualified candidates with the financial resources to communicate to voters and reduce the pressures of fundraising.

Although the gubernatorial public financing program operated effectively for over two decades, it faltered in the 2005 election. That year, both major party candidates opted out of the program and self-financed their campaigns. This left the future of the gubernatorial public financing program in question.

The Center for Governmental Studies (CGS) extensively analyzed New Jersey’s gubernatorial public financing program. It reviewed the history of the program, examined relevant literature and data over the course of various elections, and interviewed key political players in New Jersey. From this analysis, CGS identified which aspects of New Jersey’s public financing programs are working and which ones need reform.

The following summarizes the recommendations detailed at the end of this report for gubernatorial campaigns. New Jersey should:

1. *Increase the Expenditure Limit and Amount of Matching Funds to Publicly-Financed Candidates Who Face Non-Participating Candidates*

When a publicly funded gubernatorial candidate runs against a self-financed or well-funded opponent who spends more than a specified amount, New Jersey should provide that participating candidate with up to three times the public funds grant and allow him or her to spend up to three times as much as the expenditure limit in effect in that election.

2. *Increase the Expenditure Limit and Provide Additional Public Funds to Counter Independent Expenditures and Issue Ads*

New Jersey should provide additional public funds and increase the expenditure limits for participating candidates to counter independent expenditures and issue advertisements. New Jersey's public financing law should have triggers to provide participating candidates with public funds up to a maximum of three times the public funds grant and allow him or her spend up to three times the expenditure limit in place at that time, when participating candidates are faced with independent expenditures and issue ads.

3. *Convert the Check-Off Program to an Opt-Out Program, and Explore Alternative Funding Mechanisms or Eliminate the Check-Off*

The gubernatorial public financing program is funded with a voluntary \$1 tax check-off, which does not adequately cover the program's costs. However, the legislature always appropriates the funds needed from the general fund. While New Jersey may utilize a number of approaches to combat low participation in the check-off program such as appropriating funds to educate the public about the check-off, the best approach is to eliminate the check-off program and fund the program directly from the general fund.

4. *Eliminate the Gubernatorial Spending Qualification Threshold*

Participating candidate have to raise *and spend* a threshold amount before the primary and general elections. Requiring the candidate to *spend* a threshold amount by a fixed date in advance of the election is unduly burdensome on a candidate who may need to spend campaign funds closer to the date of the election. It also injects unnecessary governmental interference into campaign spending decisions. The gubernatorial spending qualification threshold should be abolished.

5. *Require Greater Disclosure of Issue Ads to Determine Who Funds Them and Whether Candidates Should Be Entitled to Matching Funds*

New Jersey should require candidates or organizations paying for issue ads to disclose their identities and the amounts that they paid.

Further, to determine whether an issue ad is the functional equivalent of an independent expenditure, by supporting or opposing a candidate, New Jersey could require the issue ad committee to state whether it is supporting or opposing a candidate under penalty of perjury on the disclosure forms in files with ELEC or ELEC could make its own independent determination as to whether an issue ad supports or opposes a candidate.

6. *Track Independent Expenditures*

ELEC should track the amount of independent expenditures spent in each gubernatorial campaign. Without an accurate count of the level of independent expenditures, who funds those expenditures, and when those expenditures are made, it is impossible to create a system which properly accounts for independent expenditures—for instance by increasing expenditure limits and matching funds given to participating candidates.

7. *Provide Public Financing for Lieutenant Governor Candidates*

The first election for the Lieutenant Governor race begins in 2009. New Jersey should consider separately providing public financing program for candidates for lieutenant governor. This would provide candidates for lieutenant governor with all of the benefits provided to gubernatorial campaigns; it would allow for candidates to conduct campaigns free of improper influence, and it would assist candidates of limited means to compete with wealthier candidates.

8. *Increase the Number of Required Debates for Publicly-Financed Candidates and Include Non-Participating Candidates in the Debates*

New Jersey should require that there be more than two mandatory debates for participating candidates. The greater the number of debates, the more the public has an opportunity to hear all of the views of their future governor. ELEC should also make it clear that candidates who do not participate in the state's public financing program but raise enough funds to qualify for the program should be able to participate in state-supported debates.

9. *Increase the Penalties for Public Financing Violations to Conform to Other Penalties in the Campaign Reporting Act*

The penalty amounts for public financing violations have not changed since 1974. Inflation alone dictates that the legislature should increase these penalties. The current maximum penalty for public financing violations is \$1,000 for a first offense and \$2,000 for a second and each subsequent offense. However, other penalty provisions in the Act have increased over the years to \$6,000 for a first offense and \$12,000 for a

second offense.¹ Penalties for violating the public financing provisions should increase to comparable levels.² Further, it is incongruous to have lower penalties for candidates running for governor, the most important office in the state, than for school board.

¹ For instance, any person (including candidates and committees) charged with preparing, certifying, retaining, etc. documents related to contributions and/or expenditures who fails to do so at the time and in the manner prescribed by the act, shall be liable to a penalty of not more than \$6,000 for the first offense and not more than \$12,000 for the second and each subsequent offense. N.J.S.A. 19:44A-22. In 1993, ELEC fined Florio Inc. \$2,500 for a violation of the election law by expending general election funds prior to the primary election.

² The Act additionally provides that persons who violate the Act may be subject to criminal penalties. For instance, the Act provides that ELEC shall forward to the attorney general or county prosecutor any violations of the Act which could be the subject or criminal prosecution. N.J.S.A. 19:44A-6b(10). Further, the Act provides that “any officer director, attorney, agent or other employee of a corporation or labor organization” who violates the prohibition against corporations and labor organizations from making contributions through their employees is guilty of a crime of the fourth degree. N.J.S.A. 19:44A-20.1. The Act additionally states that any person who, among other things, purposefully and with the intent to conceal misrepresents contributions or expenditures in support of the nomination, election, or defeat of a candidate for public office is guilty of a crime of the fourth degree. N.J.S.A. 19:44A-21(a). No one has ever been criminally prosecuted for violating the Act.



INTRODUCTION

New Jersey's gubernatorial campaign finance law has encountered significant obstacles in recent years. The law must be understood and analyzed so that its laudable public interest goals will be achieved.

A. HISTORY AND PURPOSE OF NEW JERSEY'S GUBERNATORIAL PUBLIC FINANCING PROGRAM

In 1973, New Jersey, inauspiciously “lead[ing] the nation in discovered political corruption,”³ enacted significant reforms in the New Jersey Campaign Contributions and Expenditures Reporting Act (“the Act”). In 1974, the legislature amended the Act to provide partial public financing of gubernatorial campaigns.⁴

From 1970 to 1973, New Jersey indicted 67 public officials and convicted 35 of various crimes, including mail fraud and income-tax evasion. State Republicans were caught operating an illegal scheme that solicited funds for Governor William Cahill's 1969 campaign. The Republicans advised contributors to write off contributions on their tax returns as business expenses.⁵ By 1974, two high-ranking government officials with close ties to Cahill were convicted of illegally disguising contributions to his campaign.⁶ Those convictions came on the heels of the 1972 conviction of Cahill's closest political confidant, Secretary of State Paul Sherwin, who sought a kickback from a highway contractor.⁷

New Jersey was, of course, not the only example of political corruption at the time. Indeed, during this time public attention was transfixed by the national Watergate scandal. In the aftermath of Watergate, the public increasingly believed that politicians needed to be accountable to them.⁸

³ “Busting Public Servants,” *Time Magazine*, April 23, 1973.

⁴ N.J.S.A. 19:44A-1 *et seq.* (2007).

⁵ See “Busting Public Servants,” *supra*, note 1.

⁶ David Stout, “William T. Cahill, 84, Former Governor,” *New York Times*, July 2, 1996.

⁷ See “Busting Public Servants,” *supra*, note 1.

⁸ New Jersey Election Law Enforcement Commission (“ELEC”), “New Jersey Public Financing: 1985 Gubernatorial Elections,” (September 1986), at 3.

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 Because of the governor's extensive appointment and veto powers, and because the governor is the only state official elected by a statewide vote, "the concern that large contributors might exercise undue influence and that persons with limited financial resources be prevented from running is particularly compelling."

The Governor of New Jersey is unique among elected officials in a number of respects. First, the governorship is the sole office in state government to be elected statewide and therefore only candidates for governor or United States Senator can receive statewide electoral votes. Second, due to her/his appointment authority, the Governor of New Jersey is one of the most powerful governors in the country. The governor appoints or approves *every* executive and judicial officer, except state auditor. The governor's appointments include all department heads (including the secretary of state), many division heads, all county prosecutors and the attorney general, members of county boards of education and taxation, policy and advisory boards, executive commissions, state and regional authorities, and interstate agencies. Third, as in most other states, the governor exercises an absolute veto, but unlike in other states, the governor also exercises a conditional veto.⁹ Fourth, and finally, the governor has the power to issue line-item vetoes.¹⁰ Because of the governor's extensive appointment and veto powers, and because the governor is the only state official elected by a statewide vote, "the concern that large contributors might exercise undue influence and that persons with limited financial resources be prevented from running is particularly compelling."¹¹ It is for these reasons and others, that New Jersey became the first state in the nation to provide public financing for gubernatorial elections.

I. THE 1974 ACT: CREATION OF THE NEW JERSEY CAMPAIGN CONTRIBUTIONS AND EXPENDITURES REPORTING ACT

"The wave of political reform that accompanied Watergate washed over New Jersey" in 1973 with the enactment of campaign finance reforms.¹² The Act has three primary features: 1) it limits the amount of political contributions that can be made or received; 2) it requires the reporting of contributions received and expenditures made to aid or promote the election or defeat of a candidate or a public question in any election; and 3) it requires the reporting of contributions made to provide political information on any candidate for public office or any public question. In 1974, New Jersey amended the Act to establish a system for the partial public financing of gubernatorial elections.¹³ The legislature specifically provided that it was the state policy for the primary and general election gubernatorial campaigns to be publicly-financed. Sufficient public financing would enable gubernatorial candidates to "conduct their campaigns free from improper influence

⁹ A conditional veto allows the governor to object to part of a bill and proposes amendments that would make it acceptable to that governor. In the event that the legislature re-enacts the bill with the recommended amendments, it is once again presented to the governor for signature.

¹⁰ A line item veto applies only to bills containing an appropriation; this type of veto allows the governor to approve the bill but reduce or eliminate monies appropriated for specific items.

¹¹ See ELEC, *supra* note 8, at 3.

¹² ELEC, "Public Financing in New Jersey: The 1977 General Election for Governor," (August 1978), at I.

¹³ *Id.* at I.

and so that persons of limited financial means may seek election to the state's highest office."¹⁴ As the court stated in *Markwardt v. New Beginnings*:¹⁵

The legislative goal [of the Act] was to ventilate the political process by identifying and monitoring the source and flow of money intended to influence the electoral process. The object of the restrictions on campaign contributions was to level the playing field, not bar citizens from making such donations.

2. CREATION OF THE NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION

In 1973, the Act established the New Jersey Election Law Enforcement Commission ("ELEC") to administer and enforce the provisions of the Act.¹⁶ The overarching purpose of ELEC is to monitor campaign financing in all state elections. ELEC has a number of functions: 1) it insures that candidates and campaign organizations file with ELEC contribution and expenditure reports; 2) it administers partial public financing of the gubernatorial primary and general elections; 3) it administers the law requiring candidates for governor and legislature to make public their personal finances prior to election day;¹⁷ 4) it administers the law, which establishes a filing obligation on the part of lobbyists and their clients; and 5) it exercises enforcement authority, by conducting hearings with regard to possible violations of the Act and imposing penalties for any violations of the Act.¹⁸

Pursuant to a 1989 amendment, the Act further provides that ELEC is authorized to maintain the continuing adequacy of the caps and limits set forth in the statute. To that end, the legislature charged ELEC with establishing an index reflecting changes in the general level of prices of particular goods and services such as mass media, personnel, rent, office supplies and equipment, data processing, utilities, travel and entertainment, and legal and accounting services directly affecting the overall costs of election campaigning in the state.¹⁹

3. THE CHECK-OFF PROGRAM

Starting in 1976, the state financed the gubernatorial election fund with a voluntary \$1 taxpayer check-off.²⁰ Taxpayers check a box on their state income tax forms which

¹⁴ N.J.S.A. 19:44A-27.

¹⁵ *Markwardt v. New Beginnings*, 304 N.J. Super. 522, 541 (N.J. Super. A.D. 1997) (Holding that candidates sued continuing political committees and others under the Campaign Contribution and Expenditure Reporting Act, challenging the legality of campaign contributions received by an opponent in a primary election where the challenged contributions were transferred for use in the general election).

¹⁶ N.J.S.A. 19:44A-5.

¹⁷ Candidates must file financial disclosure statements, which include "sources of income received from sources other than the State during the preceding calendar year by the candidate and members of his household," including, but not limited to, earned income, unearned income (such as dividends), certain gifts, fees, and reimbursements, and holdings in real property. N.J.S.A. 19:44B-4.

¹⁸ ELEC, "2006 Annual Report," (April 2007), at ii.

¹⁹ N.J.S.A. 19:44A-7.I.

²⁰ ELEC, *supra* note 12, at I.

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 Since 1989, funds raised by the voluntary check-off program have fallen short of the public funding needed for the gubernatorial elections.

allocates \$I from the general fund to the program; those funds are then deposited in a separate account for the program. The check-off does not increase taxpayers' taxes. If the check-off revenues are not large enough to cover the demand for public funds, the legislature appropriates funds from the general treasury to make up the difference.²¹ Since 1989, funds raised by the voluntary check-off program have fallen short of the public funding needed for the gubernatorial elections.

4. CANDIDATE QUALIFICATION AND THE MATCHING PROGRAM

The Act provides that once a gubernatorial candidate qualifies for public funding, the state matches each dollar raised by her/his election campaign with two dollars in public funds up to a specified maximum. Although this two-to-one ratio has been in effect since the beginning of the public financing program, ELEC has over the years recommended that the state reduce the ratio to one-to-one due to fiscal constraints.

In 1977, a candidate had to raise a minimum of \$40,000 in contributions under \$600, to qualify for public matching funds. In comparison, in 2005, to qualify for public financing, a candidate had to raise \$300,000 in private contributions under \$3,000. The rationale behind this qualification requirement is that a candidate must demonstrate that she or he has sufficient popular support to merit a state grant of funds. Currently, after a candidate meets the qualification threshold, for every \$3,000 raised from a private source, the state gives the candidate up to \$6,000.

The program does not provide for public funds for candidates who face wealthy self-financed candidates or who are negatively targeted by independent expenditures or issue advertisements.

5. CONTRIBUTION LIMITS

New Jersey's contribution limits have changed substantially since 1977. In 1977, general election gubernatorial candidates were prohibited from accepting contributions in excess of \$600 from any contributor. In contrast, in 2005, candidates could not receive contributions of more than \$3,000 from any contributor.²² (See Appendix I for a detailed list of contribution totals by candidate by election.)

6. PUBLIC FUNDS CAP

In 1977, there was no public funds cap in place; the only limits on the amount of public matching funds that could be dispersed to a candidate were the amount of money that candidate could raise as well as the spending limit. After a number of amendments to the Act, in 1981, when the legislature amended the law, the maximum amount in public funding available to a candidate was \$599,975 in the primary and \$1,199,951 in the gen-

²¹ ELEC, "New Jersey Gubernatorial Public Financing Revised: 1989 and Beyond," (March 1992), at 3.

²² N.J.S.A. 19:44A-29.

FIGURE 1 Gubernatorial Qualification Threshold and Contribution Limit²³

Year	Qualification Threshold	Contribution Limit
2005	\$300,000	\$3,000
2001	\$260,000	\$2,600
1997	\$210,000	\$2,100
1993	\$177,000	\$1,800
1989	\$150,000	\$1,500
1985	\$50,000	\$800
1981	\$50,000	\$800
1977	\$40,000	\$600

Source: New Jersey Election Law Enforcement Commission

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In 2005, New Jersey could have provided maximum matching public funds of up to \$2.7 million for the primary election, and \$6.4 million for the general election.

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eral election.²⁴ In contrast, in 2005, New Jersey could have provided maximum matching public funds of up to \$2.7 million for the primary election, and \$6.4 million for the general election.²⁵

7. SPENDING LIMITS

Expenditure limits have always been part of New Jersey's public financing program. In the 1985 case, *Friends of Governor Tom Kean v. New Jersey Election Law Enforcement Com'n*, the court held that "campaign expenditure limits may be validly imposed upon a gubernatorial candidate concomitant with that candidate's receipt of public financing."²⁶

In 1977, candidates who chose to receive public funding had to limit expenditures for the campaign to \$1,518,576 for the general election.²⁷ The public financing program did not extend to the primary elections. In comparison, by 2005, participating candidates could spend no more than \$4.4 million in the primary election and \$9.6 million in the general election. Some expenditures are exempt from the campaign expenditure limits, such as those for a candidate's travel, legal and accounting costs for complying with the public financing law, election night parties and some food and beverage costs of fund raising.²⁸

In addition, candidates who choose to participate in the public funding program can only use public funds for certain purposes: 1) payment for time on television and radio stations; 2) purchase of rental space on billboards and outdoor signs; 3) purchase of advertising space in newspapers and other periodicals; 4) payments of the costs of

²³ In order to qualify to receive public matching funds, a gubernatorial candidate must deposit and expend the qualification threshold amount established for that gubernatorial election year.

²⁴ See ELEC, *supra* note 8, at 4.

²⁵ ELEC, "2005 Cost Index Report," (December 2004).

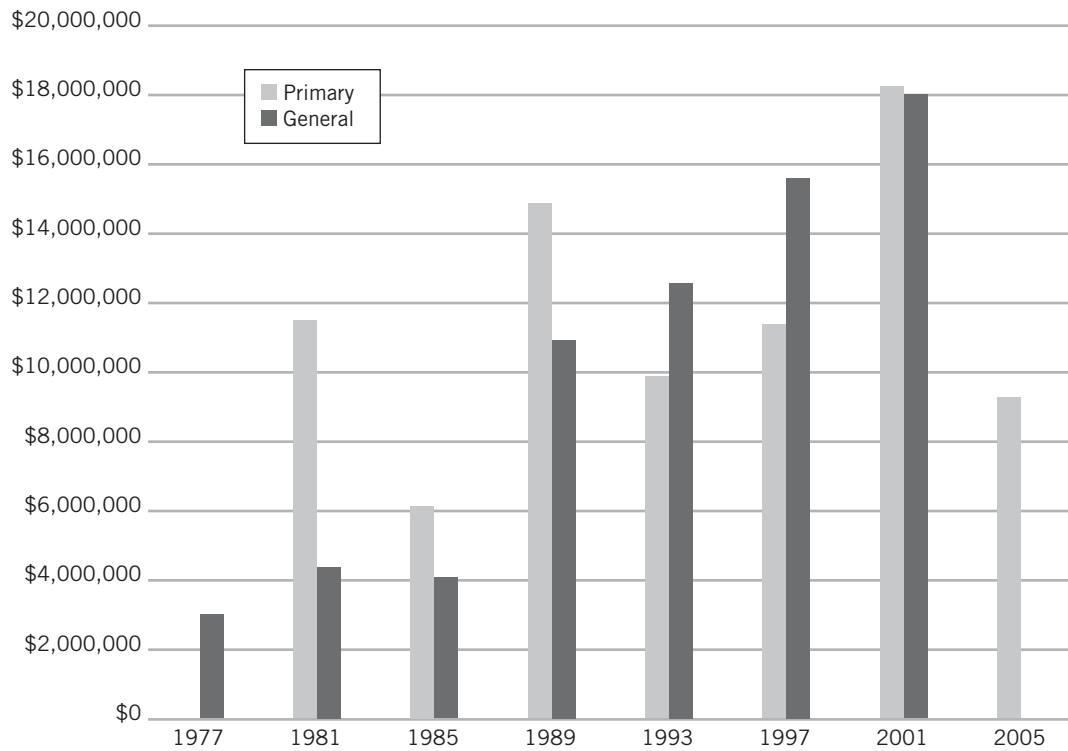
²⁶ 203 N.J. Super. 523, 535-36 (N.J. Super. A.D. 1985).

²⁷ See ELEC, *supra* note 12, at I.

²⁸ See ELEC, *supra* note 8, at 4.

advertising production; 5) payment of the costs of printing and mailing campaign literature; 6) payment of the costs of legal and accounting expenses incurred through compliance with the Act; and 7) payment of the costs of telephone deposits, installation charges, and monthly bills.²⁹ In 2001, ELEC advised that public matching funds could be used for “airplane banner advertising” and “internet banner advertising,” because it is a “method by which a candidate may communicate their message.”³⁰

FIGURE 2 Total Expenditures By Publicly-Financed Gubernatorial Candidates



Year	Primary	General
2005	\$9,361,384	\$95,053
2001	\$18,305,620	\$18,072,079
1997	\$11,358,114	\$15,795,628
1993	\$9,967,455	\$12,901,061
1989	\$15,007,233	\$10,942,810
1985	\$6,224,290	\$4,235,184
1981	\$11,541,271	\$4,741,697
1977	N/A	\$3,309,365
Total	\$81,765,367	\$70,092,877

²⁹ N.J.S.A. 19:44A-35; see also ELEC, *supra* note 12, at 25.

³⁰ ELEC, “Advisory Opinion No. 09-2001,” (September 20, 2001).

8. OTHER REQUIREMENTS

The Act requires limits on loans, limits on expenditures by county and municipal political party committees on behalf of gubernatorial candidates, and mandates free candidate use of public television broadcast time at the public's expense, and the mailing of a statement by each candidate in the general election to all registered voters.³¹

In 1977, there was no limit on the amount of a candidate's personal funds that could be contributed or loaned to the campaign, whereas, in 2005, candidates could not expend over \$25,000 in each of the primary and general elections from their personal funds.³²

Pursuant to a 1989 revision to the Act, New Jersey, once again a pioneer, was the first state in the nation to create a campaign cost index to ensure the sufficiency of, among other things, the contribution limits, public funds caps, qualification threshold and expenditure limits.

9. CAMPAIGN COST INDEX

Pursuant to a 1989 revision to the Act, New Jersey, once again a pioneer, was the first state in the nation to create a campaign cost index to ensure the sufficiency of, among other things, the contribution limits, public funds caps, qualification threshold and expenditure limits.³³ The index reflects changes in the prices of goods and services directly affecting the overall costs of gubernatorial elections in the state, including, but not limited to "mass media and other forms of public communication, personnel, rent, office supplies and equipment, data processing, utilities, travel and entertainment, and legal and accounting services."³⁴

The limits and thresholds affected by the campaign cost index are automatically adjusted, and therefore reflect changes in the economy without the need of legislative action.³⁵ The automatic adjustment process "introduces certainty and financial responsiveness into the gubernatorial public financing cycle."³⁶

B. PAST GUBERNATORIAL ELECTIONS

I. THE 1977 ELECTION: NEW JERSEY'S FIRST PUBLICLY-FINANCED GENERAL ELECTION

New Jersey was the first state in the nation to create a public campaign finance program for gubernatorial elections.³⁷ In 1977, the first election under the Act, the Act applied only to the general election, not the primary election. Incumbent democratic Governor Brendan T. Byrne and Republican challenger State Senator Raymond H. Bateman both qualified for public funds. During the 1977 campaign the state disbursed a total of

³¹ See ELEC, *supra* note 12, at I.

³² N.J.S.A. 19:44A-29.

³³ N.J.S.A. 19:44A-7.1(a).

³⁴ N.J.S.A. 19:44A-7.1(b).

³⁵ N.J.S.A. 19:44A-7.1(c).

³⁶ See ELEC, *supra* note 21, at 3.

³⁷ See ELEC, *supra* note 12, at I.

\$2,070,816 in public matching funds: \$1,020,247 to Bateman and \$1,050,569 to Byrne. Both candidates also made additional expenditures that were exempt from the spending limit: Byrne made \$161,471 in such expenditures, and Bateman made \$145,829. Public funds comprised 62% of the funds available to the Bateman campaign and 65% of the total funds available for the Byrne campaign.³⁸ Together, Byrne and Bateman spent over \$3 million.

In the 1977 election, the state did not impose a cap on the public funds that could be disbursed to a candidate, and hence the principal restraints on public funds were the extent to which candidates were able to generate contributions and unable to spend money because of the expenditure limit.³⁹ Candidates who chose to receive public funding had to limit their expenditures to \$1,518,576.

On the whole, those involved in the public funding of the 1977 general election considered it a “favorable experience,” as public funds “were found to be a preferable alternative to large contributions and were seen as providing a floor of resources to assist candidates in conducting serious and competitive campaigns.”⁴⁰

.....
 The legislature concluded that “much of the desirable effect of publicly funding general elections would be diluted unless it were applied to the primary as well.”

2. THE 1981 ELECTION: NEW JERSEY’S FIRST PUBLICLY-FINANCED PRIMARY AND GENERAL ELECTION

New Jersey expanded its public financing program in 1981 to include both the primary and the general elections. The legislature concluded that “much of the desirable effect of publicly funding general elections would be diluted unless it were applied to the primary as well.”⁴¹

The legislature made a number of other significant changes to the Act before the 1981 election, it:

- A. raised the threshold to qualify for public funds from \$40,000 to \$50,000;
- B. raised the private contribution limit from \$600 to \$800;
- C. set expenditure limits at \$1.05 million in the primary and \$2.1 million in the general election, raising them from \$1.5 million for the general election in 1977;
- D. added a \$25,000 limit on publicly-financed candidate’s use of own their funds;
- E. imposed new limits on purposes for which public funds could be spent, including monthly billing and legal and accounting compliance expenses; and
- F. set per candidate limits on public funds, for the primary election based on \$0.20 per voter in the 1980 presidential general election or a total of \$599,975, and set the limit for the general election at \$0.40 per voter based on the 1980 presidential election or a total of \$1,199,950.

³⁸ *Id.* at 2.

³⁹ ELEC, “New Jersey Public Financing: 1981 Gubernatorial Election, Conclusions and Recommendations,” (June 1982), at I.

⁴⁰ *Id.*

⁴¹ *Id.*

A few provisions of the Act remained the same:

- the ratio of two dollars of public funding for every eligible private dollar;
- the \$50,00 bank loan limit for publicly funded candidates; and
- the \$100,000 limit statewide and the \$10,000 limit county-wide on the amounts county and municipal political party committees could spend in aid of a gubernatorial general election candidate.⁴²

..... Partly as a result of the extension of the program to the primary, expenditures of public funds in 1981 increased fourfold from 1977.

New Jersey spent \$8.7 million in public funds for both the primary and general elections; \$6.3 million on 16 of the 22 candidates in the primary, and \$2.4 million on two candidates in the general election.⁴³ Partly as a result of the extension of the program to the primary, expenditures of public funds in 1981 increased fourfold from 1977.

..... In the 1981 primary, six of the 16 candidates who qualified for public funding received the maximum in public funds, \$599,975. Without a per candidate cap on public funds that could be distributed to each candidate. The program would have disbursed an additional \$1.5 million in public funds. In the general election, both Congressman James Florio and Assemblyman Thomas Kean received the maximum in public funds, \$1,199,950. Kean won the election. Despite the cap on the amount of public funds that could be disbursed to each participating candidate, the 1981 candidates received a total of nearly \$33,000 more in public funds than their 1977 counterparts. If there were not a per candidate cap on public funds, the total additional public matching funds disbursed to the primary and general election candidates would have exceeded \$2 million.⁴⁴

In the general election, candidates spent a majority of their money on three main categories: broadcast media (58 percent); printing and mailing of campaign literature (12.7 percent); and administration (including polls, office overhead expenses, salaries and telephone) (24.4 percent).⁴⁵

ELEC concluded that, based on the experiences of 1977 and 1981, New Jersey's partial public financing program "substantially achieved [its] goals."⁴⁶ In its report on the 1981 Gubernatorial Elections, ELEC found that "the amount of public funds made available in the 1981 primary and general elections was adequate to enable candidates to conduct their campaigns."⁴⁷

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⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 19.

⁴⁵ ELEC, "Analysis of Costs of Election Campaigning and Recommendations for Altering Contribution and Expenditure Limits for Gubernatorial Elections," (May 1984), at 4.

⁴⁶ See ELEC, *supra* note 39, at 6.

⁴⁷ *Id.* at 8.

3. THE 1985 ELECTION: INCREASING EXPENDITURES

The 1981 statute remained in effect during the 1985 election. ELEC noted that although some expressed interest in enacting changes proposed after the 1981 election, their interest ultimately waned.⁴⁸

In 1985, New Jersey provided approximately \$6.2 million in public matching funds for both elections. Five candidates in the primary election participated in the program, receiving a total of \$3.6 million in public funds. Both major party candidates in the general election participated in the program, receiving a total of \$2.6 million in public matching funds.⁴⁹ In the primary, four of the qualified candidates received the maximum in public funds, while one of the two qualified general election candidates received the maximum public funding.⁵⁰

The law required publicly funded candidates to limit campaign expenditures to \$1,126,251 for the primary election and \$2,252,503 for the general election. By comparison, expenditures limits in 1977 were \$1,518,575 in the general election, and in 1981, expenditure limits were \$1,049,957 for the primary election and \$2,099,915 in the general election.⁵¹ The legislature based expenditure limits on voter levels of participation in the preceding presidential election.

The voluntary check-off payment program generated enough public funding for the 1985 gubernatorial election.⁵² The gubernatorial election fund check-off generated about \$1.5 million a year over the four-year period prior to the 1985 election, with payouts only in the election year.

ELEC found that the program “succeeded in allowing persons of limited means to run for Governor and in eliminating undue influence from gubernatorial campaigns.” ELEC concluded that “[a]ny viable candidate can reach the current qualification threshold.”⁵³

4. THE 1989 ELECTION: DEPLETING THE VOLUNTARY CHECK-OFF FUND AND ADDING THE DEBATE REQUIREMENT

Legislation enacted on January 21, 1989, raised the maximum amount of public funds available to a qualified candidate to \$1.35 million per candidate in the primary election and to \$3.3 million per candidate in the general election pursuant to the campaign cost index. As a result, in the primary, eight qualified candidates received a record total of \$8,658,782 in public matching funds, and the two qualified general election candidates received a record total of \$6,600,000. To put this in perspective, the \$15.3 million in public matching funds distributed to the gubernatorial primary and general election candidates in the 1989 election was almost as large as the \$17 million total distributed to all candidates in the 1977, 1981 and 1985 gubernatorial election cycles combined.⁵⁴

⁴⁸ See ELEC, *supra* note 8, at I.

⁴⁹ *Id.*

⁵⁰ *Id.* at 4.

⁵¹ *Id.*

⁵² *Id.* at I.

⁵³ *Id.*

⁵⁴ See ELEC, *supra* note 21, at I-2.

.....
 The \$15.3 million in public matching funds distributed to the gubernatorial primary and general election candidates in the 1989 election was almost as large as the \$17 million total distributed to all candidates in the 1977, 1981 and 1985 gubernatorial election cycles combined.

In 1989, for the first time since the state held publicly-financed gubernatorial elections, the record \$15.3 million in matching funds distributed to the candidates “not only stripped the ability of the fund created by the \$1 voluntary check-off to replenish itself and sustain the program over each four-year cycle, but made it virtually impossible for the program to achieve fiscal balance in the future.”⁵⁵ ELEC recommended reducing matching funds distributed to candidates to keep the cost of the program in balance with the revenue generated by the voluntary income tax check-off funding source.⁵⁶ ELEC found that “public financing must be refinanced before 1993 in order to remain viable.”⁵⁷ The legislature did not implement that suggested change.

The legislature amended the Act to raise the primary and general election expenditure limits: \$2.2 million per candidate in the primary election and \$5 million per candidate in the general election. In 1989 publicly-financed candidates, including private and public funding, spent slightly over \$15 million in the primary, almost \$11 million in the general.⁵⁸

The 1989 revisions to the Act also adopted another requirement: candidates who opted into the program had to participate in two televised debates held before the primary and general elections. This debate requirement was the first of its kind in the nation. ELEC later found that it was successfully implemented and gave the public a guaranteed opportunity to hear the views of all candidates receiving public money.⁵⁹

5. THE 1993 ELECTION: IMPLEMENTING THE CAMPAIGN COST INDEX

New Jersey applied the campaign cost index in the 1993 gubernatorial election. ELEC later reflected that the campaign cost index “was a pioneering and major accomplishment.”⁶⁰

Governor Jim Florio battled his Republican rival, Christine Todd Whitman for the governorship, both accepted public funds.⁶¹ Whitman prevailed. Both candidates received the maximum in public funds, \$3.9 million. As a result of the campaign cost index, ELEC determined that costs relevant to gubernatorial campaigns rose by 17.91 percent in the period 1989 to 1993.

Since the beginning of the program, campaign spending steadily shifted to mass communications to voters and away from spending on administrative, travel and fundraising services. New Jersey gubernatorial campaigns spent approximately 80 percent of their campaign dollars on efforts to communicate their message to voters, primarily using the broadcast media.⁶²

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 1.

⁵⁷ *Id.* at 6.

⁵⁸ *Id.* at 3.

⁵⁹ *Id.* at 3.

⁶⁰ ELEC, “1993 Gubernatorial Cost Index Report,” (December 1992), at 1.

⁶¹ Telephone interview with Herb Jackson, Reporter, *Bergen County Record*, April 9, 2007.

⁶² *Id.* at 5; ELEC, “1997 Cost Index Report,” (December 1996), at 6, 8.

6. THE 1997 ELECTION: CONTINUING APPLICATION OF THE CAMPAIGN COST INDEX

Governor Whitman narrowly defeated challenger James McGreevey in the 1997 general election. Whitman and McGreevey both opted into the program and received the maximum amount of public funds, \$4.6 million. In 1997, for the first time in a publicly funded general election, three candidates qualified to receive public matching funds: a Republican candidate, a Democratic candidate and a third-party candidate, Libertarian Murray Sabrin.⁶³

Just prior to this election, ELEC wrote that the campaign cost adjustment process “remains essential as a tool to keep the Campaign Reporting Act responsive to economic change.”⁶⁴ ELEC determined that costs relevant to gubernatorial campaigns rose in New Jersey by 16.12 percent in the period 1993 to 1997.

In 2000, ELEC once again noted that spending by the gubernatorial general election campaigns “maintained the steady shift observed since 1973 to concentration of gubernatorial campaign spending on mass communications to voters and away from spending on administrative, travel and fundraising goods and services.”⁶⁵

7. THE 2001 ELECTION: GROWING INDEPENDENT EXPENDITURES

In 2001, general election candidates Bret Schundler (who did not participate in the program in the primary election) and James McGreevey each received the maximum amount of public funds, \$8.9 million. McGreevey won the election.⁶⁶

ELEC determined that costs relevant to gubernatorial campaigns rose in New Jersey by 12.1 percent in the period 1997 to 2001.

The 2001 general election saw historically high independent expenditures by political parties and committees. Unfortunately, ELEC does not record the total amount of independent expenditures during campaigns. The New York Times reported that “[a] recent campaign finance report showed that Democrats spent a combined total of \$23 million on races in the state, compared with \$13 million by Republicans.”⁶⁷ High independent expenditures are typically a response to low expenditure and contribution limits. People who would otherwise contribute large sums of money to a candidate instead run independent expenditures supporting that candidate, or targeting that candidate’s opponent.

.....
 The 2001 general election saw historically high independent expenditures by political parties and committees.

⁶³ Sabrin qualified for the program primarily by obtaining contributions under \$200. Telephone interview, Herb Jackson, reporter, *Bergen County Record*, April 9, 2007; ELEC, “2001 Cost Index Report,” (December 2000), at 5.

⁶⁴ ELEC, “1997 Cost Index Report,” (December 1996) (ELEC noted for the first time that the campaign cost index would apply to all non-gubernatorial candidates and committees as well as gubernatorial candidates).

⁶⁵ ELEC, “2001 Cost Index Report,” (December 2000), at 5.

⁶⁶ Even though McGreevey participated in the program he raised money for the New Jersey Republican party through his website. Telephone interview with Herb Jackson, *Bergen County Record*, April 9, 2007.

⁶⁷ David M. Herszenhorn, “Governor Candidates Saturate New Jersey with Last-Minute Commercials,” *New York Times*, November 3, 2001.

8. THE 2005 ELECTION: NON-PARTICIPATION BY THE GENERAL ELECTION CANDIDATES

While many view New Jersey's public financing of gubernatorial campaigns as a model for campaign finance reform, in the 2005 election, for the first time, both leading major party candidates, each of whom were multimillionaires, opted out of the program in the election. This was a sea change in the public financing system in New Jersey.

In the primary election, John Corzine won the Democratic nomination with little opposition. On the Republican side, Douglas Forrester won the nomination by a plurality of the vote, defeating six publicly-financed candidates. The press reported that some Republicans supported Forrester merely because he had private funds to oppose Corzine's deep war chest.⁶⁸ In the primary election, Forrester spent \$11 million, mostly of his own

FIGURE 3 Gubernatorial Public Financing Overview

Election	Public Funds Capita Per Candidate	Expenditure Limit	Number of Candidates Receiving		Public Funds Distributed
			Public Funds	Maximum Public Funds	
2005 Primary	\$2,700,000	\$4,400,000	6	–	\$6,488,677
2005 General	\$6,400,000	\$9,600,000	1	–	\$431,850
2005 Totals			7	0	\$6,920,527
2001 Primary	\$3,700,000	\$5,900,000	3	3	\$11,100,000
2001 General	\$5,600,000	\$8,400,000	2	2	\$11,200,000
2001 Totals			5	5	\$22,300,000
1997 Primary	\$1,860,000	\$3,100,000	4	3	\$6,638,216
1997 General	\$4,600,000	\$6,900,000	3	2	\$9,789,134
1997 Totals			7	5	\$16,427,350
1993 Primary	\$1,600,000	\$2,600,000	4	3	\$5,632,211
1993 General	\$3,900,000	\$5,900,000	2	2	\$7,800,000
1993 Totals			6	5	\$13,432,211
1989 Primary	\$1,350,000	\$2,200,000	8	5	\$8,658,782
1989 General	\$3,300,000	\$5,000,000	2	2	\$6,600,000
1989 Totals			10	7	\$15,258,782
1985 Primary	\$643,572	\$1,126,251	6	4	\$3,620,835
1985 General	\$1,287,144	\$2,252,503	2	1	\$2,568,227
1985 Totals			8	5	\$6,189,063
1981 Primary	\$599,975	\$1,049,957	16	5	\$6,373,659
1981 General	\$1,199,951	\$2,099,915	2	2	\$2,399,903
1981 Totals			18	7	\$8,773,562
1977 General	No Limit	\$1,518,575	2	–	\$2,070,816
TOTAL			63	34	\$91,372,313

Source: New Jersey Election Law Enforcement Commission

⁶⁸ Josh Benson and Terry Galway, "Down to the Final Insult in Primary for Governor," *New York Times*, June 5, 2005.

money. By contrast each of his six publicly-financed opponents had a primary spending cap of \$4.4 million.⁶⁹

With both major party candidates opting out of the public financing system, the general election campaign broke the state records for expenditures. The media estimated that Corzine and Forrester spent \$72 million on campaign; with Corzine outpacing Forrester by a margin of 2-to-1.⁷⁰

Prior to the 2005 election, ELEC determined that costs of gubernatorial campaigns rose in New Jersey by 11.3 percent in the period 2001 to 2005.⁷¹

⁶⁹ Mitchel Maddux, "Forrester Faces Logic-Defying Hurdle," *New Jersey Media Group*, April 11, 2005.

⁷⁰ Bruce Lambert, "New Jersey Governor Tops List of Races Reaching Finish Line," *New York Times*, November 8, 2006; Mitchel Maddux, "Forrester Faces Logic-Defying Hurdle," *New Jersey Media Group*, April 11, 2005.

⁷¹ ELEC, "2005 Cost Index," (December 2004), at 19.



ANALYSIS OF NEW JERSEY'S GUBERNATORIAL PUBLIC CAMPAIGN FINANCING PROGRAM

The manifest objective of the New Jersey Campaign and Expenditures Reporting Act is to identify and attempt to regulate the significant flow of substantial wealth aimed at affecting the outcome of elections, public questions and the legislative process. No one doubts that money is a prime lubricant of the machinery of politics. For too many years the financial aspect of politics has been shrouded either in a veil of secrecy or a fog of confusion. The average voter is aware of the tremendous cost involved in running even a modest campaign for elective office; however, he cannot help but wonder where the money comes from and more importantly . . . why it comes.⁷²

New Jersey was a pioneer in publicly financing elections. Over thirty years ago New Jersey's legislature created and implemented the nation's first program to provide public financing for gubernatorial elections. The legislature changed and improved the program over the past three decades. This report analyzes the various facets of the program and proposes a number of solutions.

New Jersey's system of publicly financing gubernatorial elections has long served as a model for other states. It was the first, and widely regarded as one of the best, public financing programs. By and large, the system functioned well for nearly three decades, helping to create competitive gubernatorial elections in which candidates could focus more on issues than fundraising.⁷³ Each elected governor, from the time of the Act's creation through the election of 2001, participated in the program.

⁷² *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission*, 135 N.J. Super. 537, 544 (N.J. Super. 1975), *reversed on other grounds* 155 N.J. Super. 218 (1977), *affirmed and modified on other grounds* 82 N.J. 57 (1980).

⁷³ Editorial, "Legislature Must Try Again on Election Bill," *The Morning Call* (Allentown, PA), March 13, 2003.

A. CHALLENGES TO NEW JERSEY'S PROGRAM

New Jersey now faces numerous challenges to maintaining the program's viability. The 2005 election was a watershed moment in New Jersey's public financing program. Neither general election candidate participated in the program. New Jersey must now seek to keep its public financing system financially feasible and able to attract candidates in an era of increasingly high independent expenditures, issue advertisements and wealthy self-financed candidates.⁷⁴

Whether the 2005 election represents an aberration or a trend is unclear. In any event, New Jersey continues to be strongly committed to public financing of elections. Both ELEC and Governor Corzine's Ethics Task Force have, for example, called for more research and studies on the gubernatorial program.⁷⁵ In addition, in 2004, some 30 years after it adopted the gubernatorial public financing program, New Jersey enacted an experimental full public financing program for select legislative districts known as the New Jersey Fair and Clean Elections Pilot Project. In 2007, Governor Corzine reauthorized the Clean Elections program, and a legislative working group wrote the New Jersey Fair and Clean Elections Act of 2007. Sixteen of 20 candidates participated in the program.

I. DECREASING CANDIDATE PARTICIPATION

The New Jersey gubernatorial public financing program has a long history of candidate participation. From 1977 to 2001, every major party candidate in the state's general elections participated in the program. Participation of most gubernatorial candidates is vital to continuing the viability of the program.

There are two primary reasons why candidates do not participate in the program. First, they may voluntarily opt out of the system because they do not want to abide by the expenditure limits. Second, they may not be able to raise the threshold amount to participate in the program.

The 2005 election exemplifies the first situation. In that year, both major party candidates, John Corzine and Douglas Forrester, voluntarily opted out of the program. Each had personal fortunes allowing them to spend more money than the expenditure limits would permit.⁷⁶

⁷⁴ A few months before the 2005 gubernatorial election, 47 percent of likely voters said that New Jersey politics was more corrupt than in most other states, six percent said it was less corrupt, and 41 percent believed the level of corruption was typical of most other states. (Rasmussen Reports, "New Jersey Governor—Corzine 45%, Forrester 37%," August 8, 2005, available at http://legacy.rasmussenreports.com/2005/New%20Jersey%20Governor_August%208.htm.) This statistic is not necessarily a reaction to an election between two self-financed candidates, but could also be a result of the personal scandals involving former Governor James McGreevey who resigned in November 2004; McGreevey appointed the man identified as his lover as an adviser, and this man later claimed McGreevey sexually harassed him. Jonathan Miller, "McGreevey Saga Goes On: Now His Ex-Wife Weighs In," *New York Times*, April 1, 2007.

⁷⁵ Ethics Governance Reform Transition Policy Group, "Final Report," State of New Jersey, January, 2006.

⁷⁶ David Chen and David Kocieniewski, "As Multimillionaires Duel, Corzine Outspends Forrester," *New York Times*, November 5, 2005.

A number of candidates have also been unable to participate in the program because they could not raise the threshold level of funds needed to participate in the program. This is particularly the case for third-party party candidates, who have only qualified for funds a handful of times over the 30-year history of the program.⁷⁷ Qualification thresh-

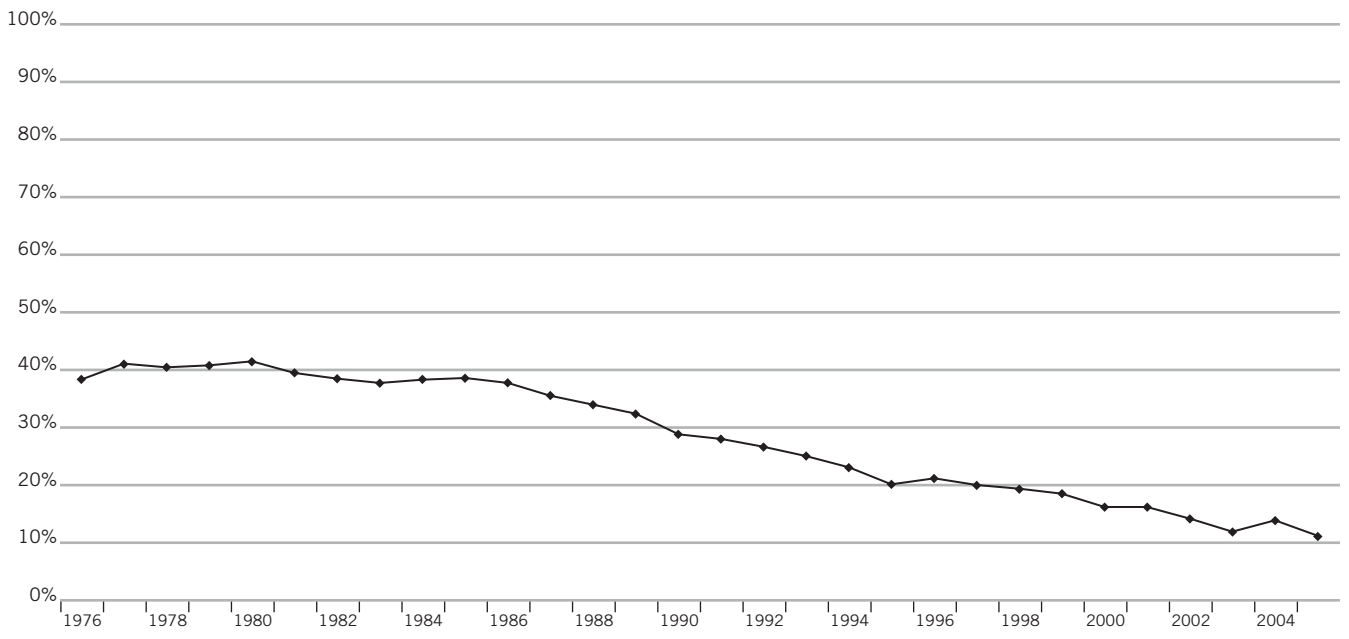
.....
 Since 1989, the state has funded New Jersey's public financing of gubernatorial elections largely from the state treasury. The taxpayer check-off program has not produced sufficient funds to support the program.

olds test the viability of the candidates, ensuring that only those candidates with a certain level of support (and hence a realistic chance of winning election) receive public funds. Therefore, the fact that not all candidates qualify for the program is a positive development.

2. FAILURE OF THE CHECK-OFF PROGRAM

Since 1989, the state has funded New Jersey's public financing of gubernatorial elections largely from the state treasury. The taxpayer check-off program has not produced sufficient funds to support the program. This may result from a number of factors. Taxpayer participation in the program has dramatically decreased (see Figure 4). The check-off amount has remained the same for three decades, despite ELEC's recommendations to increase it.⁷⁸ The state has not explored other sources of funding, such as a surcharge on civil and criminal fines (Arizona), or proceeds from the sale of unclaimed and abandoned

FIGURE 4 Taxpayer Participation in the Check-Off Program, 1976–2005



Source: New Jersey Department of the Treasury, Division of Taxation

⁷⁷ Jennifer Preston, "Libertarian Candidate Seeks Public Funds," *New York Times*, September 3, 1997; ELEC, "2005 Gubernatorial Report Quick Data," (2007).

⁷⁸ See ELEC, *supra* note 21, at 33.

property (Connecticut). The cost of gubernatorial campaigns has risen considerably. There is a lack of education about the check-off program (the legislature does not allocate any funding to educate the public about the program). Finally, there may be a decrease in public confidence in politicians.

In 1977, 38 percent of taxpayers participated in the check-off program, and in 1980 a record 42 percent of taxpayers designated \$1 of their tax dollars to the fund.⁷⁹ In comparison, in 2005, only slightly over 11 percent of taxpayers allocated \$1 of their tax dollars to the fund.⁸⁰

3. GROWTH OF THE NUMBER OF WEALTHY CANDIDATES, INDEPENDENT EXPENDITURES, AND ISSUE ADS

Candidates who opt into New Jersey's public financing program may find that the level of matching public funds available and/or expenditure limits are too low to allow them to be competitive in a world of wealthy self-financed candidates, independent expenditures and issue ads. This may, in part, be a result of the fact that the program does not provide for additional public funds for certified candidates who face wealthy self-financed candidates, or are negatively targeted by independent expenditures or issue advertisements, or whose opponents benefit from independent expenditures or issue advertisements.

To be sure, the legislature has increased the amount of public funds available to gubernatorial candidates since the Act was adopted. Moreover, the legislature changed the method by which the amount of matching funds given to candidates is determined. In the beginning of the program, the legislature based the amount of public funds available on the number of state voters who voted in the last presidential election. In 1989, the legislature changed the system and gave candidates who participated in the system a set amount of money, regardless of the number of voters in the state pursuant to the campaign cost index. However, the legislature needs to go even further and provide additional matching funds for certified candidates in certain situations.

Election Year	Public Funding Amount Available for Primary Election	Public Funding Amount Available for General Election
1977	N/A	No limit
1981	\$599,975	\$1,199,951
1985	\$643,572	\$1,287,144
1989	\$1,350,000	\$3,300,000
1993	\$1,600,000	\$3,900,000
1997	\$1,860,000	\$4,600,000
2001	\$2,300,000	\$5,600,000
2005	\$2,700,000	\$6,400,000

⁷⁹ *Id.* at 85.

⁸⁰ ELEC, "Percentage Checkoff," State of New Jersey, (2005).

Despite these changes, however, campaign costs and expenditures have also increased over the past three decades. ELEC has in the past recommended that the state eliminate expenditure limits for both the primary and general elections, stating that expenditure limits can prevent non-incumbent candidates from establishing sufficient name recognition to be competitive, and that expenditure limits do nothing to further the program's goal of preventing corruption.⁸¹ ELEC has further argued that the original justification for the limit—"that it makes the election fairer by equalizing the spending among candidates" is not borne out by the data.⁸² ELEC contends that "expenditure limits are unnecessary and undesirable so long as the gubernatorial election process includes limits on contributions, limits on loans, limits on a candidate's personal funds and limits on the amount of public funds available to any one candidate."⁸³ It must be noted, however, that nearly every other public funding program in the nation has spending limits.

a. Emerging Wealthy Candidates

In the 2005 primary and general elections, for the first time since the Act's enactment, both major party candidates, each multimillionaires, opted out of the public financing program. In the Democratic primary, John Corzine faced little opposition. Appointed incumbent Governor Richard Codey dropped out of the race when Corzine vowed to spend as much as necessary to win the nomination.⁸⁴ In the Republican primary, Douglas Forrester defeated six primary candidates, all of whom participated in the public financing program. In 2005, Corzine and Forrester combined to primarily self-finance almost \$45 million of the \$72 million in campaign costs.⁸⁵

Wealthy candidates pose a serious threat to the viability of the public financing system. While the level of financing may not ultimately determine the outcome of elections, there can be no doubt that money helps candidates convey their message to the public. The more that wealthy self-financed candidates opt out of the system, the more that publicly funded candidates, who must abide by public funds caps and expenditure limits, are placed at a disadvantage. Dr. Fred Herrmann, executive director of ELEC, acknowledged that the big question facing New Jersey's gubernatorial public financing program is how to deal with wealthy self-financed candidates.⁸⁶ Similarly, Dr. Joseph Marbach, professor of political science at Seton Hall who studied New Jersey's public financing program, stated that the program worked well until 2005 when the gubernatorial race was a race among multimillionaires. Dr. Marbach suggested that perhaps the public funds grant should be increased when participating candidates face wealthy, self-financed opponents.⁸⁷ This idea is discussed in depth in the recommendation section of this report.

⁸¹ See ELEC, *supra* note 21, at 49.

⁸² See ELEC, *supra* note 45, at 2.

⁸³ See ELEC, *supra* note 45, at 4.

⁸⁴ Chris Cillizza, "Corzine Defeats Forrester to Become N.J. Governor," *Washington Post*, November 9, 2005.

⁸⁵ *Id.*

⁸⁶ Telephone interview with Dr. Fred Herrman, Executive Director of ELEC, April 4, 2007.

⁸⁷ Telephone interview with Dr. Joseph Marbach, Professor at Seton Hall, March 18, 2008.

The impact of wealthy self-financed candidates on public financing programs has gained national attention. In 2004, Congress passed the so-called "Millionaire's Amendment" to the 2004 Bipartisan Campaign Reform Act ("BCRA"). Under the provisions of BCRA, contribution limits may be increased for Congressional candidates facing opponents who spend personal funds in excess of certain threshold amounts and who do not have a significant fundraising advantage over their self-financed opponents.⁸⁸ Critics of the Millionaires' Amendment, however, contend the amendment helps incumbents, and that larger contributions could corrupt the candidates.

b. Growing Independent Expenditures and Issue Advertisements

Independent expenditures expressly advocate the election or defeat of a candidate by using the words, "vote for," "elect," "support," "cast your ballot for," "vote against" or "defeat," without cooperating with, consulting with, or obtaining the prior consent of the candidate.⁸⁹ In contrast, issue ads do not "expressly advocate" the election or defeat of a candidate, and purport to support or oppose an issue, not a candidate.⁹⁰ In practice issue advertisements often function the same way as independent expenditures, supporting or opposing a candidate without using the magic words "vote for" or "elect," etc. New Jersey's public financing program does not provide matching funds for independent expenditures or issue ads, and it does not limit party/committee spending for issue ads. There is evidence that independent expenditures and issue ads have already effected New Jersey gubernatorial elections. Others, such as Dr. Fred Herrmann, executive director of ELEC, stated that while independent expenditures and issues ads have yet to pose a serious problem in past gubernatorial campaigns, they likely will in the future.⁹¹

.....
 ELEC concluded that independent expenditures by political party committees and legislative leadership committees could circumvent the legislature's goal of equalizing expenditures by or on behalf of all gubernatorial candidates.

In 1997, the legislature prohibited political party committees and legislative leadership committees from making independent expenditures to support or defeat a gubernatorial candidate. In proposing these amendments, ELEC concluded that independent expenditures by political party committees and legislative leadership committees could circumvent the legislature's goal of equalizing expenditures by or on behalf of all gubernatorial candidates.⁹²

In 2001, the Republican National Committee ("RNC") petitioned ELEC to determine whether the Republican National State Elections Committee ("RNSEC") could make independent expenditures that expressly advocated the election or defeat of a gubernatorial candidate if the communications were made without coordination or consultation with the consent of the affected

⁸⁸ II C.F.R. 400.30-400.60 (2007); In January 2008, the Supreme Court of the United States agreed to hear a challenge to the Millionaire's Amendment on free speech and equal protection grounds. The case is *Davis v. Federal Election Commission*, No. 07-320, (2008).

⁸⁹ Federal Election Commission, Campaign Guide for Corporations and Labor Organizations 31, 84 (2001).

⁹⁰ *Id.*

⁹¹ Telephone interview with Dr. Fred Herrmann, Executive Director of ELEC, April 4, 2007.

⁹² ELEC, "1997 Cost Index Report," (December 1996), at 28.

candidates.⁹³ ELEC found that while campaigns, participating candidates and their state party organizations are subject to expenditure limits, the Act allowed the RNC to spend unlimited amounts (in the form of independent expenditures) promoting the party's nominee or attacking his opponent.⁹⁴ The *New York Times* commented:

This previously undiscovered loophole defeats the intent of the public financing law, which is to reduce the influence of big contributors by limiting spending and providing generous public funding. Big donors can now get around the rules by funneling contributions through the national party. . . . The new ruling frees national parties from spending limits, but they are still prohibited from coordinating strategy, conferring about advertisements or sharing poll data with gubernatorial candidates. New Jersey's officials can contain this year's damage to the state's public financing system by strictly enforcing these restrictions. The longer-term solution is to strengthen the law.⁹⁵

There are indications that independent expenditures in New Jersey gubernatorial campaigns in 2001 were significant, at least compared to prior elections. Prior to the last few weeks of the campaign, the RNC ran more than \$2 million worth of get-out-the-vote operations and direct mailings in New Jersey, more than the RNC had ever spent on a New Jersey gubernatorial election.⁹⁶ Independent expenditures from outside groups increased in the last days and weeks of the election. For instance, the New Jersey Education Association (the state's largest teachers' union) and Ceasefire (an antigun group) ran ads in support of McGreevey, while the New Jersey Right to Life political action committee and the Club for Growth ran ads in support of Schundler.⁹⁷ A few days prior to the election, the media reported that Democrats enjoyed a significant advantage in terms of spending by state and national party committees and independent expenditures groups, with Democrats spending a total of \$23 million on races in New Jersey, compared to \$13 million by Republicans.⁹⁸

Under the current system, public funds grants, and expenditure limits may be too low to allow candidates to respond to wealthy self-financed candidates, independent expenditures and issue ads.⁹⁹

4. FAILURE TO INCREASE THE NUMBER OF DEBATES

Starting in 1989, candidates who participate in the program had to take part in two televised debates, one before the primary election and the other before the general election.¹⁰⁰ This debate requirement was the first of its kind in the nation and was successfully

⁹³ ELEC, Advisory Opinion No. 07-2001 (August 16, 2001).

⁹⁴ Editorial, "Hobbling New Jersey's Campaign Law," *New York Times*, August 17, 2001.

⁹⁵ *Id.*

⁹⁶ David H. Herszenhorn, "National Party Hasn't Clogged the Airways for Schundler," *New York Times*, October 25, 2001.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ N.J.S.A. 19:44A-7.1(v).

¹⁰⁰ N.J.S.A. 19:44A-35.

implemented, giving the public a guaranteed opportunity to hear the views of all candidates receiving public money.¹⁰¹ ELEC has repeatedly suggested that the legislature increase the number of mandatory debates from two to three, and that the legislature allocate funds to advertise the debates in newspapers. The legislature has not implemented either of these suggestions, and there is no funding for advertising the debates. Increasing the number of debates would increase the public's exposure to the candidates' ideas and opinions of the issues facing voters in that election.

ELEC recently ruled that candidates who opt out of the program may still take part in the debates.¹⁰² In 2005, ELEC held that Douglas Forrester could be included in the primary debates because he raised contributions above the public financing program's threshold qualification.¹⁰³

B. NEW OFFICE: LIEUTENANT GOVERNOR

In 2005, New Jersey voters passed a constitutional amendment creating the statewide elected office of lieutenant governor. The first lieutenant governor in New Jersey will be elected with the next governor in the 2009 election.¹⁰⁴ Previously, in the event of a gubernatorial vacancy, the President of the New Jersey Senate assumed the role of Acting Governor while at the same time retaining a powerful role in the Senate. This situation caused concern regarding the possibility of having an unelected governor (the members of the New Jersey Senate chose the Senate President, there is not a statewide election), the separation of powers (an acting Governor serves in both the executive and legislative branches), and political party disparity. In recent years there were two gubernatorial vacancies; first in 2001, when Christine Todd Whitman left the Governorship to work at the Environmental Protection Agency, and second in 2004, when James E. McGreevey resigned the Governorship after a personal scandal.

.....
 In 2005, New Jersey voters passed a constitutional amendment creating the statewide elected office of lieutenant governor. The first lieutenant governor in New Jersey will be elected with the next governor in the 2009 election.

The gubernatorial public financing program does not address whether candidates for lieutenant governor would be eligible to participate in the public financing program. According to Dr. Fred Herrmann, Executive Director of ELEC, candidates for governor and lieutenant governor will run together on one ticket, as vice presidential and presidential candidates do. In this way, candidates for lieutenant governor will not receive separate financing.¹⁰⁵

¹⁰¹ See ELEC, *supra* note 21, at 3.

¹⁰² Mitchel Maddux, "Let Forrester Debate, Rules State Panel," *New Jersey Media Group*, April 14, 2005.

¹⁰³ *Id.*

¹⁰⁴ Telephone interview with Herb Jackson, political reporter, *Bergen County Record*, April 9, 2007.

¹⁰⁵ Telephone interview with Dr. Fred Herrman, Executive Director of ELEC, April 21, 2008.



RECOMMENDATIONS

New Jersey’s public financing system for gubernatorial elections should be improved in a number of respects. The following recommendations seek to achieve the twin goals of keeping the program viable and able to attract gubernatorial candidates, while at the same time preserving public money by judicious distribution of matching funds. Successfully implementing reforms necessarily depends on several factors, including the current political environment, the efforts of grassroots groups and primarily the will of legislators to enact the reforms.

1. INCREASE THE EXPENDITURE LIMIT AND AMOUNT OF MATCHING FUNDS TO PUBLICLY-FINANCED CANDIDATES WHO FACE NON-PARTICIPATING CANDIDATES

.....
The recent increase of non-participating and wealthy, self-financed candidates undermines the ability of candidates of lesser means to participate in the gubernatorial election, which is a central goal of the public financing program.
.....

The recent increase of non-participating and wealthy, self-financed candidates undermines the ability of candidates of lesser means to participate in the gubernatorial election, which is a central goal of the public financing program. Congress identified this problem when it enacted the “Millionaires’ Amendment,” under which an opponent of a self-financed candidate could exceed the federal contribution limit by two or three times the allowed amount when a self-financed opponent spent above a statutory threshold. Similarly, New Jersey’s pilot project, which provides for full public financing of certain legislative candidates, gives those candidates additional public funds when faced with wealthy self-financed candidates.

When a publicly funded gubernatorial candidate runs against a self-financed or well-funded opponent who spends more than a specified amount, New Jersey should provide that candidate with up to three times the public funds grant and allow him or her to spend up to three times as much as the expenditure limit in effect in that election. ELEC has repeatedly recommended this change to the Act.

2. INCREASE THE EXPENDITURE LIMIT AND PROVIDE ADDITIONAL PUBLIC FUNDS TO COUNTER INDEPENDENT EXPENDITURES AND ISSUE ADVERTISEMENTS

New Jersey should provide additional public funds and increase the expenditure limits for participating candidates who face independent expenditures and issue advertisements, thereby making participating candidates more competitive. Candidates could be left unable to address massive spending by outside groups without such a provision. New Jersey’s public financing law should have triggers to provide participating candidates with public funds up to a maximum of three times the usual limit and allow them to spend up to three times the expenditure limit in place at that time. If New Jersey fails to enact these proposals, candidates will have diminishing incentives to opt into the program. New Jersey already allocated so-called “rescue funds” in the 2007 Legislative Pilot Project. The same remedy should be applied to the gubernatorial program.

3. CONVERT THE CHECK-OFF PROGRAM TO AN OPT-OUT PROGRAM, AND EXPLORE ALTERNATIVE FUNDING MECHANISMS OR ELIMINATE THE CHECK-OFF

The gubernatorial public financing program is currently funded with a voluntary \$I tax check-off, which does not adequately cover the program’s costs. However, the legislature always appropriates the funds needed from the general fund. Hence, increasing the amount of the checkoff is unnecessary, particularly in light of the decreasing percentage of taxpayers participating in the program.

.....
 The gubernatorial public financing program is currently funded with a voluntary \$I tax check-off, which does not adequately cover the program’s costs. However, the legislature always appropriates the funds needed from the general fund.

If New Jersey wants to save the check-off program and combat decreased participation it could change the tax check-off on the tax return from an opt-in to an opt-out system for taxpayers filing both paper and electronic copies of their tax returns. More voters would likely participate in the program if it was the default option and the voters would not affirmatively have to do anything to take part in the program.

New Jersey could also explore other sources of funding for its public financing program. Potential sources that have worked in other states include a surcharge on civil and criminal fines (Arizona) and proceeds from the sale of unclaimed and abandoned property (Connecticut).

Perhaps the best and more straight-forward option would be to eliminate the check-off program altogether and fund the program directly from the general fund. As Dr. Fred Herrmann, Executive Director of ELEC, stated, there is no reason to have the checkoff, and it merely competes with other checkoff programs on the tax form.¹⁰⁶

¹⁰⁶ Telephone interview with Dr. Fred Herrmann, Executive Director of ELEC, April 21, 2008.

4. ELIMINATE THE GUBERNATORIAL SPENDING QUALIFICATION THRESHOLD

A 2005 gubernatorial candidate had to raise *and spend* a threshold amount (\$300,000) by a date in April for the primary election, and a date in September for the general election, to receive public matching funds and participate in the gubernatorial debates.

While the contribution threshold tests a candidate's viability, as ELEC has stated, requiring the candidate to *spend* a threshold amount by a fixed date in advance of the election is unduly burdensome on a candidate who may need to spend campaign funds closer to the date of the election. It also injects unnecessary governmental interference into campaign spending decisions. The requirement to return all unspent funds to the state at the end of the campaign sufficiently protects against the possibility that a campaign might receive public matching funds and not spend them. For these reasons, the gubernatorial spending qualification threshold should be abolished.

5. REQUIRE GREATER DISCLOSURE OF ISSUE ADS TO DETERMINE WHO FUNDS THEM AND WHETHER CANDIDATES SHOULD BE ENTITLED TO MATCHING FUNDS

Voters need to know how much outside groups spend on issue ads and who funds them. New Jersey does not, but should, require candidates or organizations paying for issue ads to disclose their identities and the amounts that they paid.

New Jersey must also determine whether an issue ad is the functional equivalent of an independent expenditure in order to provide rescue funds to participating candidates. This report recommends adopting one of two ways to determine whether an issue ad supports or opposes a candidate for purposes of providing rescue funds to participating candidates. New Jersey could require an issue ad committee to state whether it is supporting or opposing a candidate under penalty of perjury on the disclosure forms in files with ELEC. Alternatively, ELEC could make its own independent determination as to whether an issue ad supports or opposes a candidate.

6. TRACK INDEPENDENT EXPENDITURES

ELEC does not, but should, track the amount of independent expenditures spent in each gubernatorial campaign. William Schluter, of ELEC, also stated that there should be greater disclosure of independent expenditures.¹⁰⁷ As discussed above, independent expenditures pose a threat to the continued viability of the program. Without an accurate count of the level of independent expenditures, who funds those expenditures, and when those expenditures are made, it is impossible to create a system which properly accounts for independent expenditures—for instance by increasing expenditure limits and matching funds given to participating candidates.¹⁰⁸

¹⁰⁷ Telephone interview with William Schluter, Former State Senator, March 11, 2008.

¹⁰⁸ ELEC will of course require additional funding in order to track independent expenditures. However, ELEC is currently low on funding, and never received funding increases requested in 2004.

7. PROVIDE PUBLIC FINANCING FOR LIEUTENANT GOVERNOR CANDIDATES

The first election for the Lieutenant Governor race begins in 2009. If New Jersey determines that it is impractical for the candidates for governor and lieutenant governor to run on one ticket, New Jersey should separately provide public financing to candidates for lieutenant governor. This would provide candidates for lieutenant governor with all of the benefits provided to gubernatorial campaigns. It would allow those candidates to conduct campaigns free of improper influence and it would assist candidates of limited means to compete with wealthier candidates.

8. INCREASE THE NUMBER OF REQUIRED DEBATES FOR PUBLICLY-FINANCED CANDIDATES AND INCLUDE NON-PARTICIPATING CANDIDATES IN THE DEBATES

New Jersey's current debate requirement gives the public an opportunity to hear the views of all candidates receiving public money. It is unrealistic to expect that the voters will be interested in, or able to view, only one primary election and one general election debate. The greater the number of debates, the more the public has the chance to hear all of the views of their future governor. Considering the power and authority that New Jersey's governor possesses, it is particularly important for voters to have a full and fair opportunity to hear all the candidates' views. In an era of independent expenditures and issue ads, debates can provide participating candidates with another venue to respond to attacks by outside groups. ELEC should also make it clear that candidates who do not participate in the state's public financing program should nonetheless be able to participate in state-supported debates. New Jersey should require three debates between certified candidates for governor and one debate between candidates for lieutenant governor.

9. INCREASE THE PENALTIES FOR PUBLIC FINANCING VIOLATIONS TO CONFORM TO OTHER PENALTIES IN THE CAMPAIGN REPORTING ACT

The legislature has not changed the penalty amounts for public financing violations since 1974. Inflation alone dictates that the legislature should increase these penalties. The current maximum penalty for public financing violations is \$1,000 for a first offense and \$2,000 for a second and each subsequent offense. However, the legislature has increased other penalty provisions in the Act over the years to \$6,000 for a first offense and \$12,000 for a second offense. Penalties for violating the public financing provisions should increase to comparable levels. It is incongruous to have lower penalties for candidates running for governor, the most important office in the state, than for school board.



CONCLUSION

New Jersey was the first state in the nation to enact public financing for gubernatorial elections. For decades, its program served as a model for other states. New Jersey has amended and improved its program over the years to maintain its viability, for instance by adding a campaign cost index and debate requirements.

New Jersey now faces new challenges to the continued viability and success of its gubernatorial program. New Jersey must insure that its program is sufficiently funded, continues to serve its core purposes, and remains viable in a world of independent expenditures, issues ads and wealthy self-financed candidates.



APPENDIX

CONTRIBUTION TOTALS BY CANDIDATE BY ELECTION

GENERAL ELECTION		PRIMARY ELECTION	
2005		2005	
Wesley K. Bell	\$392	Todd Caliguire	\$357,356
Hector L. Castillo	\$349,223	Jon S. Corzine	\$5,440,681
Jon S. Corzine	\$39,150,771	Paul DiGaetano	\$496,780
Douglas R. Forrester	\$19,706,785	Douglas R. Forrester	\$11,699,102
Michael Latigona	\$4,010	Steven M. Lonegan	\$496,070
Jeffrey Pawlowski	\$319,774	John J. Murphy	\$625,327
		Robert Schroeder	\$757,736
		Bret D. Schundler	\$1,145,785
2001		2001	
James E. McGreevey	\$3,541,037	Donald T. DiFrancesco	\$1,449,535
Bret Schundler	\$3,516,871	Robert D. Franks	\$2,360,530
		James E. McGreevey	\$2,357,409
		Bret Schundler	\$2,689,162
1997		1997	
James E. McGreevey	\$2,778,097	Robert E. Andrews	\$1,034,794
Murray Sabrin	\$185,324	James E. McGreevey	\$1,199,728
Christine T. Whitman	\$3,243,266	Michael Murphy	\$606,070
		Christine T. Whitman	\$1,361,695
1993		1993	
Jim Florio	\$6,322,402	Cary Edwards	\$2,849,691
Christine T. Whitman	\$6,673,287	Jim Florio	\$2,908,151
		James H. Wallwork	\$1,311,664
		Christine T. Whitman	\$2,950,283

1989		1989	
Jim Courter	\$5,353,360	Tom Blomquist	\$26,789
James J. Florio	\$5,597,564	Gerald Cardinale	\$1,141,914
Daniel M. Karlan	\$875	Jim Courter	\$2,533,544
Michael Ziruolo	\$150	Cary Edwards	\$2,426,350
		James J. Florio	\$2,446,125
		William L. Gormley	\$2,205,858
		Chuck Hardwick	\$2,385,941
		Alan Karcher	\$1,190,016
		Lois G. Rand	\$479
		Barbara Sigmund	\$680,756
1985		1985	
Rodger Headrick	\$14,964	Robert J. Del Tufo	\$737,524
Thomas H. Kean	\$2,301,670	Kenneth A. Gibson	\$963,861
Peter Shapiro	\$1,988,618	Thomas H. Kean	\$1,146,415
		John F. Russo	\$1,134,059
		Peter Shapiro	\$1,165,722
		Stephen B. Wiley	\$1,058,538
1981		1981	
James J. Florio	\$2,422,279	Herbert J. Buehler	\$4,786
Thomas H. Kean	\$2,353,187	John J. Degnan	\$699,494
		Frank P. Dodd	\$463,687
		James J. Florio	\$452,611
		Kenneth A. Gibson	\$482,003
		Bill Hamilton	\$430,182
		Anthony Imperiale	\$16,068
		Thomas H. Kean	\$672,085
		Ann Vklein	\$120,600
		Lawrence F. Kramer	\$630,438
		Donald Lan	\$323,844
		Barbara Mcconnell	\$152,679
		Richard Mcglynn	\$321,424
		Joseph P. Merlino	\$635,304
		Barry T. Parker	\$417,752
		John K. Rafferty	\$353,229
		Robert A. Roe	\$647,550
		Thomas F. Smith	\$660,972
		Joseph B. Sullivan	\$183,566
		Jim Wallwork	\$690,833

Source: New Jersey Election Law Enforcement Commission



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Public Campaign Financing: New Jersey Governor

weeding out big money in the garden state

New Jersey enacted the nation's first partial public financing program for gubernatorial elections in 1974, and it has served as a model for other states. The state has improved its program by adding campaign cost indexes and debate requirements. In 2005, however, both major party candidates opted out of the program and self-financed their campaigns.

This report recommends a number of specific reforms to keep New Jersey's law viable in a world of independent expenditures, issue ads and wealthy self-financed candidates :

- ◆ Raise the expenditure limit and increase matching funds to publicly-financed candidates who face non-participating opponents.
- ◆ Give participating candidates additional public funds to counter independent expenditures and issue ads.
- ◆ Change the check-off program to an opt-out program, explore alternative funding mechanisms or eliminate the check-off altogether.
- ◆ Eliminate the gubernatorial spending qualification threshold.
- ◆ Require greater disclosure of independent expenditures and issue ads.
- ◆ Provide public financing for lieutenant governor candidates.
- ◆ Increase the number of required debates for publicly-financed candidates.
- ◆ Increase the penalties for public financing violations to conform to other penalties in the Campaign Reporting Act.

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