THE PROBLEM WITH DUAL-OFFICE HOLDING IN NEW JERSEY AND POTENTIAL RECOMMENDATIONS FOR FURTHER REFORMS POST THE 2007 DUAL-OFFICE HOLDING BAN

Edmund Caulfield[*]

> As government becomes more complex and additional roles are assigned, the opportunities for dual office holding must inevitably diminish. What remains constant is the demand of sound public policy that the incumbent in public office shall act with undivided devotion to duty.[1]

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[*] J.D. Candidate, 2009, Seton Hall University School of Law; B.A. in Government with a minor in History, Georgetown University (cum laude) 2004. I would like to thank former Senator Robert Martin for providing me with his invaluable insights into the New Jersey Legislature and the problems surrounding dual-office holding.

[1] McDonough v. Roach, 171 A.2d 307, 310-11 (N.J. 1961).

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I. INTRODUCTION

The prophetic statement quoted above, made by Chief Justice Weintraub of the New Jersey Supreme Court some forty-six years ago, indicates the modern day problems associated with the practice of dual-office holding in New Jersey. Over the years the state government has become more complex, and instead of the opportunities for dual office holding decreasing, there has been a steady increase in the number of state legislators holding multiple public offices.[2] The widespread nature of the practice of dual-

[2] TOM O'NEILL, ONE TO A CUSTOMER—THE DEMOCRATIC DOWNSIDES OF DUAL OFFICE HOLDING, 10 (New Jersey Policy Perspective 2006) (finding that 33 percent of legislators in New Jersey received income from other government agencies, a rate that is nearly one-third higher than any other state. In one of the sections of the paper, O'Neill lays out the history of dual-office holding in New Jersey, which is reflected in this comment's section on the early development of the practice of dual office holding. This note adds to the historical evaluation by investigating events that took place after the authorization of dual-office holding in 1962 and various attempts at ethics reform in the 1980s and 1990s, all of which eventually led in the

office holding has increased the potential conflicts of interest among state legislators, as evidenced in the last few years by a number of scandals involving these politicians.[3]

This concern over ethical conflicts has been clearly evidenced by the presentation of a number of bills proposing both a Commission to study the negative effects of dual-office holding as well as an outright ban on the practice.[4] Finally, in June 2007, legislation was passed by both houses of the Legislature banning the practice of dual-office holding in New Jersey.[5]

Although it appeared the Legislature was taking the issue of ethics enforcement seriously, there was a swift critical response from journalists and commentators across the state regarding this bill.[6] Many saw the new law as a lost opportunity to create

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first few years of this decade to an increased demand to ban the practice).

[3] *See* TOM O'NEILL & BILL SCHLUTER, HOW MUCH IS ENOUGH? DRAWING THE LINES ON MULTIPLE PUBLIC JOB HOLDING IN NEW JERSEY 2 & 6 (New Jersey Policy Perspective 2007) (describing a number of scandals and resulting government investigations that indicate the relative ease with which those individuals who hold both an elected statewide office and a publicly appointed office can take advantage of their status and use their influence for their own means. This paper was published immediately after the passage of the dual office holding ban in July 2007, and makes recommendations as to how New Jersey can revise the current law to attack the problem of state and local elected officials continuing to hold local appointed positions. This note focuses exclusively on New Jersey legislators and recommendations for curbing their practice of holding another local appointed office. This author fully endorses O'Neill and Schluter's conclusions, especially their investigation into Louisiana's dual office holding statute, which this note addresses only in relation to state legislators. This note also undertakes a detailed analysis of other states like Florida, Michigan, and North Carolina, in order to make definitive recommendations for new legislation limiting the kinds of local appointed offices legislators can continue to hold).

[4] *See* Assem. J. Res. 21, 211th Leg., 1st Sess. (N.J. 2004) (as introduced June 3, 2004), Assem. J. Res. 72, 212th Leg., 1st Sess. (N.J. 2006), Assem. B. 3972, 212th Leg., 2nd Sess.. (N.J. 2007) (as introduced Feb. 8, 2007 before the Assembly State Government Committee), S. B. 3008, 212th Leg., 2nd Sess. (N.J. 2007), Assem. B. 4326, 212th Leg., 2nd Sess. (N.J. 2007).

[5] Pub. L. 2007, ch. 161 (N.J. 2007), *available at* http://www.njleg.state.nj.us/2006/Bills/PL07/161_.PDF.

[6] *See* Editorial, *Inching Toward Reform,* THE STAR-LEDGER (Newark, N.J.), Sept. 5, 2007, at 14 (An editorial from the largest newspaper in New Jersey released the day after the dual-office holding ban was signed into law. The editorial laments the lack of true reform); *see also* Jonathan Tamari & Gregory J. Volpe, *Holes in Dual Office Holding Ban,* THE DAILY RECORD (Morris County, N.J.), July 20, 2007, at 2 (reporting the findings of O'Neill & Schulter Report and interviewing various lawmakers on the deficiencies in the dual-office holding ban); Editorial, *Non-Elected Jobs Raise Fresh Concerns,* THE COURIER NEWS (Bridgewater, N.J.), July 22, 2007, at 1 (also reporting

meaningful reform.[7] These critical voices were primarily concerned with the clause that allows those politicians holding two offices on February 1, 2008, to remain in those positions until they retire or are voted out of office.[8] Additionally, while the bill contains a restriction preventing any newly elected legislator from simultaneously holding another elected position, there is no similar provision regarding local appointed positions.[9]

In order to thoroughly examine the continuing problems presented by dual-office holding, this Note will begin in Part II by examining the origins of this practice in the state of New Jersey. It will show that dual-office holding first gained legal authorization in 1962, when the Legislature passed a statute authorizing dual-office holding in response to a number of New Jersey Supreme Court decisions. These decisions used the common law doctrine of incompatibility of offices to prevent certain elected officials from holding other local government offices simultaneously.[10]

Part III of this note will examine the wide expansion of the practice of dual-office holding among state legislators after the passage of the original dual-office holding authorization. Part IV will focus on the growing concerns that began to arise in the 1980s and 1990s regarding potential conflicts of interest and the corresponding complaints made by the public, other politicians, and the local media. These complaints reached a fever pitch in the past decade due to a number of high profile indictments of dual office holders on various charges of corruption and self-dealing[11] and laid the groundwork for the legislation approved in June 2007.[12] Regrettably, the need for a more robust law is evident.

Part V of the note will focus on the various recommendations for further reform, concentrating particularly on the issue of a

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the findings of O'Neill & Schulter and voicing caution that any additional prohibitions instituted be done so with much investigation and selectively).

7 *Id.*

8 Pub. L. 2007, ch. 161.

9 *Id.*

10 1962 N.J. Sess. Law Serv. 404 (West); *see also* Conditional Veto Message to the General Assembly on A-491, Gov. Richard J. Hughes, Nov. 15, 1962.

11 *See* "Profiting from Public Service" Series, NEW JERSEY GANNETT NEWSPAPERS, Sept. 21-28, 2003.

12 *See* Pub. L. 2007, ch. 161.

state senator or member of the General Assembly also holding a local, publicly appointed office. These additional recommendations will be based on the successful implementation of dual office holding prohibitions in other states. These reforms should adequately guide the New Jersey Legislature in determining the appropriate number and type of appointed offices, if any, that legislators may continue to hold. Although the idea of a full-time Legislature is often proposed as a method of reducing potential conflicts of interest, such a system would be difficult to impose in New Jersey due to the tradition of a Citizen-Legislature and a number of other factors.[13] Based on these considerations, the New Jersey Legislature must plan on drafting and approving more detailed reforms than the current legislation provides, namely by including more detailed definitions of terms, as well as clear categories of offices that cannot be held at the same time.

II. ORIGINATION OF DUAL-OFFICE HOLDING IN NEW JERSEY

Since the passage of the first New Jersey Constitution in 1776 until the 1960s, there has been no express approval of or ban on the practice of dual office holding. At the 1947 Constitutional Convention, proposals on how to limit the practice were discussed, but the revisions to the original document still left major ambiguities as to what additional offices legislators were allowed to occupy.[14] This resulted in the need for judicial intervention, where courts addressed these ambiguities by applying the common-law prohibition against incompatible offices.[15] After a number of rulings upholding this doctrine as it

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[13] *See* O'Neill, *supra* note 2, at 28.

[14] N.J. Constitutional Convention: Vol. 2 at 1476-78, *available at* http://www.njstatelib.org/NJ_Information/Searchable_Publications/constitution/constitutionv2/NJConst2n1476.html (examination by the Convention of other state constitutions to see what positions they enumerated in their dual-office holding bans. While a number of these other states barred legislators from holding another public office, New Jersey was not willing to go that far and the Convention recognized the inherent value of service in the Legislature preparing politicians to hold other positions).

[15] *See* McDonough v. Roach, 171 A.2d 307, 308-09 (N.J. 1961) (This incompatibility doctrine was defined by the New Jersey Supreme Court as concerning any situation where "the duties of office clash in their demands with the

applied to a number of state offices, the Legislature moved to statutorily override such decisions and permit the practice with only minimal restriction.

A. *Constitutional Ambiguities*

The proliferation of the practice of dual-office holding in New Jersey can at least be initially attributed to the vague wording of the State Constitution, which provides that "[n]o member of Congress, no person holding any Federal or State office or position, of profit, and no judge of any court shall be entitled to a seat in the Legislature."[16] This provision left open the possibility that those people not holding state or federal offices would still be entitled to hold a seat in the Legislature if they were elected.[17]

The State's Constitutional Convention was responsible for crafting the 1947 Constitution, and as part of this process it examined the issues surrounding dual-office holding.[18] The Legislative Committee of the Convention cited arguments both for and against the practice of dual-office holding, finding that there was some credence to the argument that imposing a ban on the practice would protect "legislation against improper motives of legislators and prevent[] . . . executive dominance of the legislature through manipulation of the appointing power."[19] Nevertheless, some of the committee members supported the view that "the state legislature [represents] . . . a good training ground for further public service, and . . . that often the most competent administrator will be a person with legislative experience."[20]

Ultimately, the latter view prevailed, and the Convention adopted the provision currently in effect. This provision consisted of an open-ended statement permitting a legislator to hold local elected and appointed offices.[21] But this result was not for lack of a vociferous opposition to the practice of dual-office holding.

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result that the incumbent must choose between them.").

16 N.J. CONST. art. IV, § V, ¶ 4 (1947).

17 *Id.* (Absent from this restriction is any mention of local or municipal elected or appointed positions).

18 N.J. Constitutional Convention: Vol. 2, *supra* note 14, at 1476-78.

19 *Id.* at 1478.

20 *Id.*

21 *See* N.J. CONST. art. IV, § V, ¶ 4 (1947).

Various interest groups and individuals submitted proposals and recommendations to be considered by the Committee. One of these statements was from Thomas Taggart, a former assemblyman, senator, and mayor of Atlantic City, all offices which he never held simultaneously during his career.[22] In Taggart's statement he indicated the dangers of legislators holding two public offices at the same time:

> A member of the Legislature can use his position in the Legislature to increase both his power and his salary in a municipal or county office; he can use the power of his legislative office to keep him perpetually in his municipal or state office, and further, since no man can serve two masters well and do justice to both at one and the same time, the dual-office holding shall be prohibited by constitutional provision.[23]

B. Judicial Intervention

The concerns cited by Taggart were the focus of a number of important cases decided by the New Jersey Supreme Court in the late 1950s and early 1960s dealing with the common-law doctrine of incompatibility of public offices.[24] Although most of these cases involved the holding of two municipal or local offices, most legislators and the Governor believed that the court's reliance on the common-law doctrine of incompatibility indicated that they would use similar reasoning in a future decision regarding the status of dual-office holding legislators.[25]

The case of *Jones v. MacDonald*[26] laid out specific factors that should be considered in determining whether two offices are incompatible. The case considered the issue of whether the defendant could be both a member of the Somerset County Board of Taxation and a councilman for the Borough of North Plainfield.[27] The court relied on the following test to determine if two offices were incompatible:

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[22] Letter from Thomas D. Taggart, Jr., Esq., N.J. Constitutional Convention, Vol. 3 at 898 (July 28, 1947); *see also* O'Neill, *supra* note 2, at 16-17.

[23] Taggart, *supra* note 22, at 898; *see also* O'Neill, *supra* note 2, at 17.

[24] *See infra* notes 26-32 and accompanying text.

[25] *See* Hughes' Conditional Veto Message, *supra* note 10, at 1120-21.

[26] 162 A.2d 817 (N.J. 1960).

[27] *Id.* at 818.

> Where there is no express [constitutional or statutory] provision, the true test is, whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing out of them. Offices . . . are incompatible or inconsistent, when they cannot be executed by the same person; or when they cannot be executed with care and ability; or where one is subordinate to, or interferes with another . . . .[28]

Using this standard, the court found that the defendant could not hold both offices due to the fact that the municipality would often be a litigant before the county board and then the defendant could sit in judgment of his own cause.[29] The following year in *McDonough v. Roach*, the court used the same standard as in *Jones*, in finding that the mayor of the Township of Dover could not also be a member of the Board of Chosen Freeholders of Morris County.[30] The court held that "the county board is bound to consider the interests of all of its citizens while the local governing body has a like obligation to the citizenry of the municipality alone."[31]

During these years preceding the legislative authorization of dual-office holding, there were also several cases which rejected the applicability of the incompatibility doctrine of *Jones* to certain offices. One of these cases, *Reilly v. Ozzard*, dealt with the issue of whether the office of state senator was incompatible with the office of municipal attorney.[32] The court found that these offices were not in conflict; however, the court limited this holding to the facts of the case. This specific municipal attorney was not engaged to advance a bill before the Legislature on behalf of the municipality.[33] The court found that "if the office of municipal attorney (or any other local office) were specifically charged with the duty thus to lobby, the obligation would plainly be

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[28] *Id.* at 818-19 (quoting State ex. rel. Clawson v. Thompson, 20 N.J.L. 689 (Sup. Ct. 1846)).

[29] *See Jones*, 162 A.2d at 819-20.

[30] *See* McDonough v. Roach, 171 A.2d 307, 308 (N.J. 1961).

[31] *Id.* at 309; *see also* O'Neill, *supra* note 2, at 19-20 (setting up the legal background regarding dual office holding before providing a comprehensive ethical framework for potential reforms. This article was written prior to the passage of the new legislation on dual office holding).

[32] Reilly v. Ozzard, 166 A.2d 360, 363 (N.J. 1960).

[33] *Id.* at 368.

incompatible with the duty of a legislator and would bar dual holding of the offices."[34] The majority of Justices in this case felt that a typical municipal attorney would not be engaged in such lobbying activities, and, therefore, that those legislators holding municipal attorney positions would not be subject to the greater conflicts of interest that legislators holding a policy making local office experience.[35]

The dissent directly countered this argument, finding that many mayors and council members across the state expected municipal attorneys to prepare recommended legislation.[36] The dissenting Justices explained that town attorneys were increasingly being called to travel to the state capital "in furtherance or protection of municipal interests," [37] which certainly appeared to be similar to the very lobbying activities the majority condemned.[38] Furthermore, the dissent highlighted the obvious conflicts of interest that can arise when a legislator is also acting as a municipal attorney, where "[o]ftentimes the individual interests of the municipalities will differ [with the legislative district] and one need only refer to his daily newspaper to see how intense the differences may become."[39] The court's focus on the peculiarities of this particular municipal attorney position signified that the holding of this case was limited strictly to its facts. It should not be seen as providing a broad standard that any municipal attorney position would be considered compatible with an elected position in the state Legislature.

C. Legislative Action

Legislators began to feel the need to intervene and legislatively override the state courts due to their fear that these prior decisions signaled that future decisions would prevent them

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34 *Id.*

35 *Id.* (The court held that conflicts of interest were "more pronounced if the legislator holds a local office which has authority to make the policy decision to seek or to oppose legislation, a power which does not repose in the municipal attorney.").

36 Reilly v. Ozzard, 166 A.2d 360, 375 (N.J. 1960) (Jacobs & Schettino, JJ., dissenting).

37 *Id.*

38 *Id.* at 368 (majority opinion).

39 *Id.* at 376 (Jacobs & Schettino, JJ., dissenting).

from simultaneously holding other local or municipal offices.[40] The view of many legislators was expressed by Assemblyman Jerome Krueger (D-Union), who also served as President of the Linden City Council and "insisted that his municipal experience ha[d] helped him as an assemblyman and that his legislative background ha[d] aided his city service."[41]

These concerns led to the introduction of a bill in the General Assembly permitting "any person holding a county or municipal elective office, or a member of the Senate or General Assembly to be eligible for election to any municipal or county office."[42] The co-sponsors of the bill, Assemblymen Bressler and Smith, justified its introduction based upon the Legislature's inherent power to implement laws overriding the effect of certain judicial-made law: "Decisions of the courts in cases involving incompatibility of office have always recognized that the Legislature may declare offices compatible or incompatible, thereby taking the particular office out of the common law rules."[43] This drafters of the legislation went on to indicate that the proposed legislation was only affirming the long held custom of voters, who "in many instances [elected] county and municipal office holders . . . to the Legislature."[44]

After passing in the Assembly and Senate, Governor Richard Hughes examined the proposed legislation and returned the bill with his recommended amendments on November 19, 1962.[45] In his statement he indicated that "impetus ha[d] been given to this legislation by recent judicial decisions concerning the incompatibility of holding certain offices at different levels of government . . . [and] several [pending] suits to determine whether it is permissible for one person to hold certain specific offices at the same time."[46] The Governor agreed with the particular provision allowing members of the Legislature to come from the ranks of county and municipal officeholders and

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[40] *See* Gov. Hughes' Conditional Veto, *supra* note 10, at 1.

[41] Angelo Baglivo, *For Dual Jobs: Assembly Passes Bill to Lift Ban*, NEWARK EVENING NEWS, April 3, 1962, at 1.

[42] 49 N.J. Leg. Index 1109 (1963).

[43] Assem. B. 491, 186th Leg., 1st Sess.,.2 (N.J. 1962).

[44] *Id.*

[45] Gov. Hughes' Conditional Veto, *supra* note 10, at 1.

[46] *Id.*

employees.[47] He adopted such a position because he feared that under the common law doctrine of incompatibility of offices, "[a] liberal construction . . . of the duties of the Legislature could effectively prevent all or most of our public officials or employees from serving in this important deliberative body."[48] In support of this argument, he cited an example where even "school teachers [could] be barred from the Legislature because they would be required to pass upon legislation that would have an effect upon the school system."[49]

The Governor also focused on the holding of two elected offices, which he found acceptable due to the fact that this practice of "dual office holding is open for all to see and can be terminated whenever his constituents so decide."[50] In adopting this position, the Governor employed a balancing test and found that the "values to be gained by permitting one person to bring to several elective offices the experiences garnered from each more than offset any theoretical incompatibility which might exist between such offices."[51] Interestingly, Hughes did not extend this reasoning to local elected officials who hold appointed positions, finding that "the public may not be aware that a single individual is holding two offices which have duties and responsibilities potentially or actually in conflict."[52] The Governor should have extended this line of reasoning to state legislators who also hold local appointed positions, considering that the general public may not know that a state legislator was also holding a local appointed position, one which is not well publicized and could pose a serious risk of conflict.

Taking the Governor's recommendations and revisions into account, the Legislature finally passed this dual office holding authorization into law on December 3, 1962.[53] The final version of the statute provided in pertinent part: "It shall be lawful for a member of the Legislature of the State to hold simultaneously any elective or appointive office or position in county or municipal

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47 *Id.* at 1-2.

48 *Id.* at 2.

49 Gov. Hughes' Conditional Veto, *supra* note 10, at 2.

50 *Id.*

51 *Id.* at 2-3.

52 *Id.* at 3; *see also* O'Neill, *supra* note 2, at 20.

53 49 N.J. Leg. Index 1109.

government."[54] This provision gave state legislators free reign to hold multiple public offices, and, as a result, created a number of issues regarding conflicts of interest between their role as legislators and their duties in other offices, either elective or appointed.

III. EXPANSION OF THE PRACTICE OF DUAL-OFFICE HOLDING AND INCREASING VOICES FOR REFORM

The practice of dual office holding quickly expanded among state legislators in the years following the Legislature's approval of the practice. This was apparent by the number of cases that continued to be filed before the New Jersey Supreme Court on the issue of an official holding incompatible offices.[55] This expansion of the practice among state legislators began to create a number of conflicts of interest that led to the formation of various legislative committees in the ensuing years to try and stem the potential for impropriety among those state legislators who were serving multiple constituencies.[56]

A. Subsequent Judicial Developments

In the years following the authorization of dual-office holding, the courts continued to decide cases under the common law doctrine of incompatibility—but most of these cases dealt with local elected and appointed positions.[57] In one of these subsequent cases, *Ahto v. Weaver*, two defendants were accused of holding incompatible offices:[58] Weaver was a member of the governing body of North Bergen and also a legal assistant to the Hudson County Counsel, and Klein was a member of the governing body of Guttenberg Township and a Boulevard Commissioner of Hudson County.[59] The court concluded that the statute permitted the defendants to hold offices whether or not they were incompatible because the statute overrides the common

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54 N.J. STAT. ANN. § 40A:9-4(2) (West 1993).

55 *See infra* notes 57-67 and accompanying text.

56 *See infra* notes 69-93 and accompanying text.

57 *See* Ahto v. Weaver, 189 A.2d 27 (N.J. 1963).

58 *Id.* at 29.

59 *Id.* at 30-31.

law.[60] The result of the case would have been the same even if the doctrine of incompatibility was applied due to the fact that the office of Legal Assistant would not be considered an "office," and, therefore, could not conflict with Weaver's other position.[61] The court made this decision on the basis that Weaver would not be making continuous policy determinations in this post, but, rather, would be following the directions of the head County Counsel.[62] Additionally, the majority reasoned that the County Counsel could screen the assignments given to Weaver and prevent him from working on any matter that might affect North Bergen.[63]

The same dissenting Justices from *Reilly* also dissented in *Weaver*,[64] rejecting the majority's argument that the County Counsel would self-screen Weaver's activities to avoid a conflict with his elected position.[65] The Justices argued that: "It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices."[66] The statute authorizing dual office holding allowed for a similar self-screening process, meaning that a legislator can abstain from a particular vote if he or she feels there is a conflict of duty or interest.[67] The effectiveness of this provision is questionable, however, considering that in subsequent years the Legislature created a number of committees in an attempt to solve recurring issues that arise regarding conflicts of interest.[68]

B. State Legislature Hearings on Conflicts of Interest

In the years following the passage of the dual-office holding authorization, multiple legislative committees consisting of legislators and members of the general public met to discuss

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60 *Id.* at 29-30.

61 *Id.* at 33-34.

62 Ahto v. Weaver, 189 A.2d 27, 33-34 (N.J. 1963).

63 *Id.* at 34-35.

64 *Id.* at 35 (Jacobs & Schettino, JJ., dissenting); Reilly v. Ozzard, 166 A.2d 360, 372 (N.J. 1960) (Jacobs & Schettino, JJ., dissenting).

65 *Ahto*, 189 A.2d at 36 (Jacobs & Schettino, JJ., dissenting).

66 *Id.* at 36 (quoting Jones v. MacDonald, 162 A.2d 817, 820 (N.J. 1960)).

67 N.J. STAT. ANN. § 40A:9-4(3).(West 1993).

68 *See infra* notes 70, 81-83 and accompanying text.

problems that could result from the lack of regulations governing conflicts of interest and general ethics in the Legislature.[69] The first of these hearings occurred in 1969 and consisted of a large amount of testimony and discussion regarding the inherent conflicts posed to legislators who also served as municipal attorneys or even attorneys in the private sector.[70] A number of public policy experts testified at this hearing. Among them was Alan Chartok, a professor with the Eagleton Institute of Politics at Rutgers University, who testified that legislation regulating conflicts of interest was sorely needed because it would "define[] terribly grey, difficult areas in which individual legislators could unwittingly make mistakes. It helps to convey the appropriate image of an honest group of individuals, dedicated to public service."[71] One of the ways that Chartok recommended to project this image of integrity was through implementing a "principle that state legislators should not practice in any capacity for fees before state agencies." [72] At this early juncture, however, these recommendations were still met with some skepticism.[73] An example of the varied cynical responses to these potential recommendations was Senator Marazati's unwillingness to seriously consider Chartok's recommendations regarding the composition of a Commission on Ethics.[74]

The issue of legislative ethics continued to be a concern for certain members of the Legislature as well as for the general public. These concerns were evident in *Democratic Party of N.J., Inc. v. Collins,* a case that arose in the mid 1980s and involved future Speaker of the General Assembly, Jack Collins.[75] The case was brought by the Democratic Party of New Jersey, which sought to enjoin the results of the November 1987 election in Collins'

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69 *Id.*

70 *Public Hearing before the Joint Legislative Conflicts of Interest and Code of Ethics Study Commission,* March 20, 1969.

71 *Id.* at 50 (statement by Alan Chartok of the Eagleton Institute of Politics at Rutgers University).

72 *Id.*

73 *Id.* at 50-51.

74 *Id.* at 53-54 (discussion between Mr. Chartok and Senator Marazati in which the Senator attempted to cut-off a response from Mr. Chartok regarding the composition of a bipartisan ethics commission appointed by the Governor and Senate/Assembly leaders).

75 Democratic Party of N.J., Inc. v. Collins, 537 A.2d 1305 (1987).

district.[76] The plaintiffs alleged that the employment of Collins as a tenured professor at Glassboro State University[77] violated the New Jersey Constitution's ban on any member of the State Legislature holding a state office or position of profit.[78] The supreme court, hearing the case on appeal from the superior court, remanded so that the lower court could do as follows:

> . . . make findings of fact and conclusions of law on the issues of whether the full-time employment held by the defendants in these consolidated actions constitutes a state office or position of profit within the meaning of [the 1947 New Jersey State Constitution] and whether the provisions... contemplate that any distinctions in eligibility to serve in the Legislature may be drawn based upon the relationship to the State of New Jersey of the employer, be it State university, State college, authority, or other agency.[79]

Unfortunately, on remand the parties agreed to settle and to dismiss the consolidated action.[80] This created a state of legal limbo, where the ramifications of a legislator holding a simultaneous position at a state university remained ambiguous.

In the years that followed, the voices for reform continually failed to win over skeptical legislators, many of whom continued to serve in more than one public office.[81] The views of these skeptical legislators and the opposing voices for ethics reforms were on display in another round of hearings in 1990.[82] These hearings examined various problems, including when a legislator would need to remove him or herself from voting on a matter because of undue influence from another public or private job.[83] A

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[76] *Id.*

[77] *See* Cynthia Burton, *All the World's a Classroom for Assembly Speaker Collins*, THE STAR LEDGER, Oct. 6, 1996, at 25 (article indicating that Assemblyman Collins had been teaching and coaching basketball at Glassboro State College/Rowan University since 1969).

[78] *Collins*, 537 A.2d at 1306; *see also* N.J. CONST. art. IV, § V, ¶¶ 3-4 (1947).

[79] *Collins*, 537 A.2d at 1306.

[80] Democratic Party of N.J., Inc. v. Collins, 564 A.2d 548 (1988).

[81] *See Commission Meeting before the Ad Hoc Commission on Legislative Ethics and Campaign Finance*, 1990 Assem. 65-66 (Sept. 12, 1990) (statement of Assemblyman Deverin regarding his opposition to the implementation of a dual office holding ban).

[82] *Commission Meetings before the Ad Hoc Commission on Legislative Ethics and Campaign Finance*, 1990 Assem. (Aug.- Oct. 1990).

[83] *Commission Meeting before the Ad Hoc Commission on Legislative Ethics and*

number of legislators and members from the general public, however, voiced concern about expanding personal interest restrictions to such an extent that legislators would be unable to hold other public and/or private positions.[84] One of the members representing the general public, Ms. Patricia Sheehan, indicated her trepidation in recommending too broad of an ethics regulation:

> It makes me very nervous when we try to cover all the possibilities to exclude any wrongdoing because I think that the more we do that, the more that we set ourselves up so that the only people eligible to serve in elective office are the ones that can't make it any other way; they can't hold a job, or they can't have a successful background in whatever field that they're an expert in.[85]

This reluctance to impose increased regulations on personal interest issues was also evidenced by the strong opposition to any implementation of a dual-office holding ban.[86] The only voice of support appeared to be Assemblyman Haytaian, who thought that legislators holding other offices like those of mayor or councilman "could cause them problems and probably does at times."[87] He felt that these dual office holders often agonized as to "[w]hen [they should] take one hat off and put the other hat on."[88] These arguments were met by opposition from a number of the other members, such as Senator Orechio, who indicated he was about to become a dual-office holder and stated that: "The expertise that you acquire as a municipal official, I think, augers well for a person who also is a State legislator."[89] In response, Dr. Allen Rosenthal, the chairman of the Commission, highlighted the common objection to a legislator also serving as a mayor of a municipality, finding that such a legislator could have the "tendency to serve those interests [of the citizens of the

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Campaign Finance, 1990 Assem. 3-5 (Aug. 24, 1990).

84 *Id.* at 5-6 (statement of Assemblyman Deverin expressing concern that such wide ranging conflict of interest laws would not work well in a citizen legislature, where legislators hold a wide array of positions in number of professional fields outside of politics).

85 *Id.* at 15.

86 *Commission Meeting*, Sept. 12, 1990, *supra* note 81, at 65-70.

87 *Id.* at 65.

88 *Id.*

89 *Id.* at 67.

municipality] more than [he/she] would serve the interest of the people who are not in that particular municipality but who are also in [his/her] district when the interests come into conflict."[90] This point was met with stringent opposition on the part of Assemblyman Deverin who articulated the counter-argument that there is no problem when constituencies in both a municipality and a legislative district voted for a particular politician.[91] Moreover, Deverin argued that if such a politician unduly favored the municipality over the greater legislative district, then those voters in the district would vote him or her out of that office.[92]

Based on these debates, the Commission issued a final report with a small passage indicating that a "majority of the members do[] not see [dual office holding] as an actual problem since, at least with regard to elective offices, the electorate ultimately determines whether an individual can fulfill the responsibilities of two public offices."[93] As a result of this report, the Commission delayed a definitive decision on the question of dual office holding, finding that it was not within the province of the Commission's work. Thus, it recommended that some other Commission or the full Legislature deal with these problems at a later date, further delaying any meaningful reform.

IV. TIME FOR REFORM—INCREASING POLITICAL CORRUPTION IN NEW JERSEY LEADING TO THE PASSAGE OF A DUAL-OFFICE HOLDING BAN

In the last few years, the frequency of ethical scandals involving state politicians rose with alarming rapidity. This created

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[90] *Id.* at 68.

[91] *Commission Meeting*, Sept. 12, 1990, supra note 81, at 68-69.

[92] *Id.* This statement is not completely accurate, however, considering that there are some districts, of which more than half of the constituents reside in a large city, such as Newark or Jersey City. In that case, it would be more difficult for such a legislator to be voted out of office because he or she is actually serving the interests of over half of his or her district in his or her role as mayor or councilman. *See* New Jersey District Number Breakdown, *available at* http://www.njleg.state.nj.us/districts/districtnumbers.asp (depicting districts 28 & 29 (Newark making up a large portion of the districts) and districts 31 & 32 (Jersey City partially represented in both districts)).

[93] FINDINGS AND RECOMMENDATIONS OF THE AD HOC COMMISSION ON LEGISLATIVE ETHICS AND CAMPAIGN FINANCE, 1990 Assem., at 35 (Oct. 22, 1990), *available at* http://www.njleg.state.nj.us/legislativepub/reports/Ethics.pdf.

a movement among media outlets across the state exposing the serious conflicts of interest surrounding those state legislators who held more than one elected or appointed office.[94] The increasing outrage among the media and the general public motivated the Legislature to undertake efforts to curtail the practice of dual-office holding in some fashion.[95] When these initial efforts failed to gain the approval of a majority of the Legislature, the Governor and certain legislators sought compromise and finally passed a dual-office holding ban in June 2007.[96]

A. *Increasing Public Demands for Reform*

While there might not have been many strong voices for reform in the Legislature during the 1980s and 1990s, by the start of the twenty-first century there was increasing outrage due to a number of scandals involving some of the highest officials in the Legislature.[97] In 2003, the *Asbury Park Press* and a number of other newspapers in the state published by Gannett released a series entitled "Profiting from Public Service," in which journalists exposed the New Jersey Legislature as "a personal money machine for many lawmakers who parlay their public service into private gain."[98] The series represented the culmination of a five-month investigation into various underhanded practices of legislators, which included "profiteering, pension-padding and nepotism."[99] The investigation found what many had known for years: that the practice of dual-office holding only facilitated these practices, leading to the creation of "low-show" jobs and allowing state legislators to make six-figure salaries all off of taxpayer money.[100]

With the approach of the legislative elections in November 2003, a number of journalists tried to draw the voting public's attention to the unethical practices of those legislators who had

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94 *See infra* notes 97-102 and accompanying text.

95 *See infra* notes 103-04 & 116-18 and accompanying text.

96 *See infra* notes 119-24 and accompanying text.

97 *See* O'Neill & Schluter, *supra* note 3, at 2 (explaining two high profile corruption cases against former senate leaders, Wayne Bryant (D-Camden) and John Bennett (R-Monmouth)).

98 *See* "Profiting from Public Service," *supra* note 11.

99 Paul D'Ambrosio, *As Lawmakers Ride the Gravy Train, Jersey Residents Pay the Freight*, ASBURY PARK PRESS (Asbury Park, N.J.), Sept. 21, 2003, at A1.

100 *Id.*

used the system for their own personal gain.[101] It was clear that the public was strongly in favor of putting an end to such practices in order to reduce the ethical lapses in Trenton.[102]

B. Failed Legislative Efforts at Increased Reform

Entering the 2004 election season, the Legislature was motivated to finally try to reduce, if not eliminate, the practice of dual-office holding due to the increasingly strong demand for reform. By June 2004, a joint resolution was circulating through the Assembly, co-sponsored by Assemblymen McKeon, Chivukula, Stanley, and Quigley, which proposed to establish a Commission to study dual office holding.[103] The resolution empowered the Commission to consider "the possible effects of banning or limiting dual office holding in New Jersey" based upon a review and analysis of the constitutional and statutory dual-office holding provisions of other states.[104] Such an in-depth examination could have spurred efforts at reform; however, after passing the Assembly by a 69-10-0 vote, the proposal failed to garner enough votes in the Senate State Government Committee to be released to the full chamber for a vote.[105]

Further efforts at reform were thwarted, such as a proposal by Assemblyman Azzolina (R-Middletown) to have a vote on a direct

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101 *Id.*; *see also* Richard Quinn, *No Ethical Problems in Holding Multiple Public Jobs, Legislator and Mayor Says*, ASBURY PARK PRESS (Asbury Park, N.J.), Sept. 23, 2003 (profiling Assemblyman Robert S. Dancer (R-Ocean), who was serving as an assemblyman, the mayor of Plumsted since 1990, and an interviewer with the Ocean County Adjuster's Office, which, combined, earned him approximately $100,000 a year. Dancer indicated that he did not find any serious ethical issues arising from the holding of multiple public offices, and, therefore, would not support any legislative efforts to ban the practice).

102 *See* Michael Symons, *Voters: Lawmakers Self-Serving*, ASBURY PARK PRESS (Asbury Park, N.J.), Sept. 28, 2003 (referencing a September 2003 poll finding that "[b]y a 2-to-1 margin, [voters] opposed allowing lawmakers to hold second public jobs.").

103 Assem. J. Res. 21, 211th Leg., 1st Sess. (N.J. 2004) (as introduced June 3, 2004).

104 *Id.* at 2:39 to 2:46.

105 *See* New Jersey Legislature Bill History, http://www.njleg.state.nj.us/Default.asp (on home page search 2004-2005 legislative session for AJR 21) (last visited Feb. 28, 2008). Bill history indicates that the resolution passed the Assembly on June 10, 2004 and was received by the Senate State Government Committee on June 14, 2004. After this date there is no action indicated.

dual-office holding ban.[106] These failed bills and resolutions demonstrated the continuing stalemate in the Legislature between those in support of dual-office holding in all its forms and those who believed it should be abolished.[107]

C. *A Breakthrough—Movement Towards New Legislation Banning Dual Office Holding*

Finally, in 2007, substantial progress was made on efforts to institute a meaningful dual-office holding ban. This movement was initially spurred by then Acting Governor Richard Codey, who, upon taking office, appointed Professor Paula Franzese and former New Jersey Supreme Court Justice Daniel O'Hern as Special Ethics Counsel.[108] Franzese and O'Hern reported that one-third of the 120 members of the General Assembly and the Senate held at least one other publicly funded job.[109] They found that such practices "simultaneously allow[] for a consolidation of influence that alters the delicate balance of power in state politics."[110]

This report motivated a number of legislators to attempt to draft legislation that would end the practice of dual-office holding. Unfortunately, because the Legislature was so closely divided, the sponsors of the proposed legislation needed to accept some key compromises to assure that some version of a dual-office

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106 Editorial, *Dual Posts Another Stain on Ethics Laws*, COURIER NEWS (Bridgewater, N.J.), June 23, 2004, at 9A (indicating that both the resolution to form a commission to study the problem and Assemblyman Azzolina's proposal for a direct ban were rejected by the legislature).

107 Michael Symons, *Dual-Office Ban Prospects Hazy—Lawmakers in Both Parties Split on Prohibition, and on a Study*, ASBURY PARK PRESS (Asbury Park, N.J.), June 2, 2004, at A1 (quoting Senator Richard Cody describing the competing factions in the Legislature: "There's people who think people are fully understanding of the fact that you're running for a second office, and if they choose to have you despite that, that's their business and it's nobody's right to tell them they can't have that. There's others that think it's a practice that should be outlawed.").

108 Paula A. Franzese & Daniel J. O'Hern, Sr., *Restoring the Public Trust: An Agenda for Ethics Reform of State Government and a Proposed Model for New Jersey*, 57 RUTGERS L. REV. 1175, 1176 (2005) (After submitting their report in March 2005 to the Governor, Franzese and O'Hern published this article in Rutgers Law Review the following summer, in which they proposed more wide ranging reforms).

109 *Id.* at 1224.

110 *Id.*

holding ban would become law.[111] Initially, the Assembly passed a bill in January 2007 with language similar to the present law, allowing current dual-office holders to continue the practice, essentially grandfathering them into the old system.[112] The Senate found this unacceptable, indicating that it favored an immediate ban.[113] It was not clear, however, whether this support for an immediate ban was actually just a deceptive tactic used by certain senators to prevent the passage of a ban prior to the upcoming elections.[114] This suspicion was initially raised by the Assembly Speaker Joseph Roberts (D-Camden), who indicated that: "[T]his [was a] last-minute change . . . created an enormous problem . . . [resulting in many] members who think the change was more about incumbency protection than about dual-office holding."[115]

Another proposal presented in the beginning of 2007 by Assemblywoman Jennifer Beck (R- Mercer and Monmouth) attempted to place an immediate ban on the practice. Beck's proposal included language that effectively prevented any current dual elected office holders from continuing in both their offices past the effective date of her proposed bill.[116] The proposal went further than most previous proposals and outlawed the simultaneous holding of local appointed positions due to the recognition that serious conflicts could arise in such situations.[117] Additionally, the bill proposed an ultimatum that specified that any legislator "simultaneously [holding] an appointive position in county or municipal government, shall resign from the legislature

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111 *See* Jonathan Tamari, *Dual Office Ban Bill on Fast Track at Statehouse*, ASBURY PARK PRESS (Asbury Park, N.J.), May 24, 2007.

112 *See* Elisa Ung, *N.J. Promises Ban on Dual Offices: A Measure Stalled this Week, but a State Senate Leader Vowed a Law would Pass by Year's End*, THE PHILADELPHIA INQUIRER, Feb. 7, 2007.

113 *Id.*

114 *Id.*

115 *Id.*

116 Assem. B. 3972, 212th Leg., 2nd Sess., (N.J. 2007) (amending both the original dual-office holding authorization as well as the incompatible offices statute to provide that anyone still holding multiple elective offices thirty days after the bill's effective date will be forced to forfeit all except the one most recently elected to).

117 *Id.* (amending portions of N.J. STAT. ANN. § 40A:9-4 (West 1993)) (The bill proposed amending relevant portions of the original dual-office holding authorization to read, "it shall be unlawful for a member of the Legislature of the State to hold simultaneously any elective or appointive office or position in county or municipal government.").

or the appointive offices or positions held by the thirtieth days following the effective date."[118] Beck's proposal was ambitious in its goals to rid the State of dual-office holding in all aspects. Unfortunately, because Beck was in the political minority, the chance of such a bill passing was almost impossible, especially when a much weaker bill including a grandfather clause could not even pass.

These conflicting plans evidenced the need for compromise in the Legislature regarding the appropriate degree of reform for the practice of dual-office holding. Governor Corzine tried to nudge the Legislature to pass a dual office prohibition by publicly pressuring the Legislature into enacting a bill prior to the signing of the budget in July.[119] In response to these statements by the Governor, Assemblyman Michael Panter (D-Monmouth) presented a plan that he believed would that he believed would represent a sufficient compromise with the inclusion of a grandfathering clause.[120] The bill Assemblyman Panter presented on May 21, 2007, was immediately fast tracked by the Assembly Speaker with no committee hearing, [121] and exactly a month later, on June 21, 2007, was passed by the Senate.[122] Only two senators voted against the bill, Senators Robert Martin and Nicholas Sacco, each of whom justified their opposition to the bill for different reasons.[123] When Governor Corzine signed the bill into law on

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[118] *Id.* (If a legislator failed to resign in such a situation the proposed bill would force the legislator to give up all offices except the one he was most recently elected to).

[119] Tamari, *supra* note 111.

[120] *Id.*

[121] *Assemblywoman Beck Says New Democrat Bill Targeting Dual Office Holding Misses Mark*, U.S. STATE NEWS, May 24, 2007; *see also* New Jersey Legislature Bill History, http http://www.njleg.state.nj.us/Default.asp (search 2006-2007 legislative session for Assem. B. 4326. The history page indicates that the bill was introduced for First Reading, without reference, and immediately issued for a Second Reading on May 21, 2007) (last visited Feb. 28, 2008).

[122] *See* New Jersey Legislature Bill History, *supra* note 121 (history page indicates that the Assembly resolution was substituted for the pending Senate bill and was approved by a vote of 33-2 on June 21, 2007).

[123] Interview with former Senator Robert Martin, Professor, Seton Hall University School of Law, in Newark, N.J. (Jan. 15, 2008). (Senator Martin voted against the bill because he believed it was not strong enough with the grandfathering clause. In contrast, Senator Nicolas Sacco voted against it because he was a dual office holder at the time, also serving as Mayor of North Bergen, and he believed dual office holding was beneficial to the New Jersey political system).

September 4, 2007,[124] it appeared as though the practice of dual office holding was finally going to be reformed after years of false starts and internal legislative debate over how to best regulate the practice.

D. Specific Reforms Proposed in the New Dual-Office Holding Ban

The 2007 legislation directly amends both the original dual-office holding authorization passed in 1962,[125] as well as the statute enumerating the public offices that would be considered incompatible.[126] The 2007 law amended the original authorization by removing the term "elective office," to currently read, "[i]t shall be lawful for a member of the Legislature of the State to hold simultaneously any appointive office or position in county or municipal government."[127] In regard to the incompatible office statute, the newly added language extends this ban to define which offices a member of the Legislature can hold, while also including a "grandfather clause" permitting current dual office holders to continue to hold both positions:

> No person shall hold the office of member of the Senate or the General Assembly of this State and, at the same time, hold any other elective public office in this State, except that any person who holds the office of member of the Senate or General Assembly and, at the same time, holds any other elective public office on the effective date of P.L. 2007, c. 161 [February 1, 2008] may continue to hold that office of member of the Senate or that office of member of the General Assembly, and may hold that other elective public office at the same time if service in the Senate or the General Assembly and the other elective office are continuous following the effective date of P.L. 2007, c. 161.[128]

This new law was clearly a key point in the road to ethical

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124 New Jersey Legislature Bill History, *supra* note 121 (history page indicates that the resolution was approved as P.L. 2007, ch. 161 on September 4, 2007).

125 *See* N.J. Pub. L. 2007, ch. 161.

126 *Id.; see also* N.J. STAT. ANN. § 19:3-5 (West 1989).

127 N.J. STAT. ANN. § 40A:9-4(2) (West 2008).

128 N.J. STAT. ANN. § 19:3-5 (West 2008) (The original incompatible office statute only limited a member of the General Assembly of the Senate from holding the following offices: "elector of President and Vice-President of the United States, member of the United States Senate, member of the House of Representatives, county clerk, register, surrogate or sheriff.").

reform in New Jersey, but due to the various competing factions in the Legislature more meaningful reform was not achieved.

V. *NEED FOR FURTHER REFORM—PROPOSALS TO CURE DEFECTS IN THE CURRENT LAW BANNING DUAL-OFFICE HOLDING*

The passage of the 2007 dual-office holding prohibition sparked intense criticism from media outlets throughout the state, which contended that the statute was too weak.[129] These critics found that the most egregious flaw was the grandfather clause, which they bemoaned as the result of routine political compromise leading to a less efficient and weaker law: "To those in the Statehouse—and no place else—such an exemption is perfectly logical; it's all part of the legislative process. Politics dictated there be an exception for current officeholders. Without it, there would have been no law."[130]

Another issue that the 2007 prohibition failed to contemplate was a clause preventing a legislator from also holding an appointed municipal or county government position.[131] Some journalists and commentators recognized the numerous problems that could arise without regulation of these appointed positions: "The legislation does nothing to get rid of more serious affronts to sound public policy, like the powerful legislator who gets a no-show job at a public university, thereby enhancing his public pension two or three-fold, and then generates special grants for that university."[132] While a solution to the inclusion of a grandfather clause is fairly straightforward, the issues surrounding legislators holding a local appointed position are harder to resolve due to the sheer variety of positions available and the absence of any limit on the number of outside offices a legislator can hold.

A. *Proposal for an Immediate Ban*

The addition of the grandfather clause in the current

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[129] *See* sources cited *supra* note 6.

[130] *Inching Toward Reform*, *supra* note 6, at 14.

[131] N.J. STAT. ANN. § 40A:9-4(2).

[132] Richard Muti, *Defending the Double Dipper*, THE BERGEN RECORD (Hackensack, N.J.), June 21, 2007, at L13.

legislation was necessary in order to ensure the bill's passage, especially in an environment where some of the most influential and powerful lawmakers held local elected offices.[133] This is not to say, however, that efforts were not made by other legislators to impose a ban that would prevent all legislators from holding any elective public office.[134] The problem with these previous attempts at reform was the failure to consider the closely divided nature of the Legislature between the two political parties. In such a system, a practice that has been in effect for over forty years cannot be completely eliminated without some form of compromise. Therefore, the current legislation needs to be reformed in an incremental fashion to impose some bright line rules by first attempting to eliminate the grandfather clause for those persons holding two elective offices prior to February 1, 2008. Although a complete elimination of second-held elected offices did not pass in 2007, those crafting a new bill could attempt a less drastic elimination, in order to make it more politically acceptable. One way this might be achieved is by instituting a time deadline, like the next legislative election in 2009, when the fourteen legislators currently holding an elected municipal or county office[135] will have to decide whether to keep their seats in the Legislature or give

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133 *See* O'Neill, *supra* note 2, at 33, Appendix: New Jersey's Dual Office Holders (listing state legislators holding other elected office as of March 28, 2006. Included on this list were a number of state legislators like Sharpe James and Mims Hackett, who wielded great influence in Trenton but have since been indicted on corruption charges and forced to give up their seats).

134 *See supra* notes 116-18 and accompanying text (describing Beck's proposal advocating for a ban on both elected and appointed offices).

135 *See* Current List of Legislators Holding Elected Municipal or County Office (Revision of Appendix to O'Neill Article, *supra* note 133. Updates compiled from New Jersey Legislative Roster and individual member biographies, *available at* http://www.njleg.state.nj.us/members/roster.asp. SENATE - Nicholas Sacco (Dist. 32), Mayor of North Bergen, Hudson County; Paul Sarlo (Dist. 36), Mayor of Wood-Ridge, Bergen County; Robert Singer (Dist. 30), Lakewood Township Committee, Ocean County; Brian Stack (Dist. 33), Mayor of Union City, Hudson County; Stephen Sweeney (Dist. 3), Gloucester County Freeholder. ASSEMBLY - John Burzichelli (Dist. 3), Mayor of Paulsboro Borough, Gloucester County; Ralph R. Caputo (Dist. 28), Essex County Freeholder; Anthony Chiappone (Dist. 31), City of Bayonne Council, Hudson County; Ronald Dancer (Dist. 30), Mayor of Plumstead Township, Ocean County; Joseph Egan (Dist. 17), New Brunswick City Council, Middlesex County; John Mc Keon (Dist. 27), Mayor of West Orange, Essex County; Paul Moriarty (Dist. 4), Mayor of Washington Township, Gloucester County; Gary Schaer (Dist. 36), Passaic City Council & Acting Mayor; Daniel M. Van Pelt (Dist. 9), Mayor of Township of Ocean, Ocean County).

them up in favor of their local positions. Such a bill would most likely pass both chambers of the Legislature, as only five out of forty senators and nine out of eighty assemblymen currently continue to hold an elected position.[136] Additionally, with the imposition of a time deadline at the next election cycle, those current dual office holders might find it more difficult to encourage support from other legislators who are single office holders, especially when most constituents are against the practice.

B. Instituting New Laws to Restrict Legislators from Holding Appointed Offices—Perspectives from Other States

A second reform that the Legislature should consider is the imposition of certain restrictions on the number and type of specific appointed offices that members of the Legislature can continue to hold. After the passage of the 2007 legislation, a New Jersey based public policy institute conducted a statistical investigation into the number of legislators as well as elected municipal and county officials who were also holding appointed offices.[137] This investigation found that the continued ability of these elected officials to hold local appointed positions blocked aspiring politicians from entering the system because of the concentration of power in these few dual-office holders.[138] Because of this continued division of power, certain restrictions need to be placed on the number and types of local appointed offices a legislator can hold. To prevent these limitations from becoming too burdensome, however, there must be a degree of moderation imposed so that a typical legislator is still left with viable options for employment outside of his or her part-time position as a state elected official.[139]

1. Florida's Dual-Office Holding Ban—Problems Regarding a Lack of Clarity over Key Terms

A number of states have outlawed the practice of dual-office

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136 *Id.*

137 *See* O'Neill & Schulter, *supra* note 3, at 22-24.

138 *Id.* at 12.

139 *Id.* at 11 ("It would be an overstatement to say that every instance of combining elected with non-elected job-holding causes a problem.").

holding, some imposing much more comprehensive restrictions than those currently in place in New Jersey. Florida is an example of a state where the State Constitution itself was amended to include a version of a dual-office holding ban, providing that:

> No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.[140]

This prohibition is meant to apply "to both elected and appointed offices,"[141] but there has been controversy as to what exactly constitutes an office.[142] There is no definition for the term "office" in the Florida Constitution, so it has been left to the state judiciary to attempt to interpret and define the term. Various Florida courts have held that: "The term 'office' implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an 'employment' does not comprehend a delegation of any part of the sovereign authority."[143] Based on this dichotomy between "office" and "employment," the courts decided that a proper examination of what constituted an office must focus on "the nature of the powers and duties of a particular position."[144] Following this standard when asked to issue a number of opinions as to what positions would fall under the ban's purview,[145] the Florida Attorney General concluded that positions like city attorney or chief of police could not be held in conjunction with another state office.[146] However, the Attorney General concluded that positions such as assistant public defender, assistant state attorney, or a city engineer could be held in conjunction with other offices due to the fact that they were subject to the direction

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140 FLA. CONST. art. II, § 5(a).

141 Robert A. Butterworth & Joslyn Wilson, *One is Enough— Florida's Constitutional Dual Office Holding Ban Prohibition*, 20 STETSON L. REV. 307, 308 (1999).

142 *Id.* at 309.

143 *Id.* at 310.

144 *Id.*

145 *Id.* at 311.

146 *Id.* (citing Op. Att'y Gen. Fla., No. 69-2 (1969)).

and control of a superior.[147]

The New Jersey Legislature, when and if it revisits the issue of dual office holding, should lay out a precise definition of an "office" in order to avoid the problems Florida encountered. A sufficiently detailed definition should use the Florida Attorney General's opinions that distinguished between positions with inherent official powers and positions where the person is acting more as an agent by following a higher official's orders.[148] Nevertheless, this distinction might not be sufficient when applied to state legislators who hold another position like assistant city attorney, because such legislators may still have conflicts between the city they work for and the greater legislative district they represent.

2. Michigan's Dual-Office Holding Ban—Threat that too Broad of a Ban Would Unnecessarily Limit a Legislator's Autonomy Regarding Outside Employment

Other states have avoided the weaknesses of Florida's provision by creating much narrower bans that specifically reference state legislators and the practice of holding additional public offices. While such bans are pragmatic because they leave little to be interpreted, they also pose the risk that they will preclude legislators from holding any other governmental position, even if the position's duties create minimal conflicts of interest. Michigan is one of the states that imposes a strict ban on legislators holding other elective or appointed positions by specifying in its Constitution that: "No person holding any office, employment or position under the United States or this state or a political subdivision thereof, except notaries public and members of the armed forces reserve, may be a member of either house of the legislature."[149] The Convention Comments for this specific provision indicate that it "will allow people holding offices or

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147 Butterworth & Wilson, *supra* note 141, at 312 (citing Op. Att'y Gen. Fla., No. 69-05 (1969), Op. Att'y Gen. Fla., No. 71-296 (1971), Op. Att'y Gen. Fla., No. 77-31 (1977)) (indicating that the Attorney General based these conclusions on the finding that the ban "does not generally apply to those persons who are not vested with official powers in their own right but rather merely exercise certain powers as agents of governmental officers").

148 *Id.* at 311-12.

149 MICH. CONST. art. IV, § 8.

positions to run for the legislature, but since dual office-holding is prohibited a legislator-elect would be obliged to resign his prior office or employment as a condition precedent to taking his seat."[150] This language has effectively banned a legislator from holding any other public position, elected or appointed. However, in response to this provision, a number of legislators have complained that their outside public positions are unlikely to create a conflict of interest.

Some of these legislators requested the advice of the Michigan Attorney General on the legality of holding another office. Due to the strict language of the Constitution, most of these opinions advised that a legislator could only hold one public office.[151] The Attorney General's willingness to narrowly abide by the language of the State Constitution was evident in an opinion where the issue under consideration involved whether a newly elected legislator could take an unpaid leave of absence from public school employment during his tenure in elected office.[152] The Attorney General found that resignation from public school employment was required under the statute.[153] He emphasized that anyone "who fails to resign from public-school employment vacates the public-school employment position upon acceptance of the legislative office."[154]

Other than the exceptions specifically mentioned in the provision, the Michigan Attorney General has been unwilling to enumerate any other public positions that a legislator can simultaneously hold. The Attorney General's Office will only authorize the holding of another position if it definitively concludes that the other job was a private sector position.[155] One such example was the opinion decreeing that a legislator could also hold a position as a director or officer of a county nonprofit

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150 *Id.* (Convention Comment).

151 *See* Op. Att'y Gen. Mich., No. 6165 (June 29, 1983) (holding that resignation from public school employment by a member of the legislature is required in order to comply with art. IV, § 8); *see also* Op. Att'y Gen. Mich., No. 6075 (June 14, 1982) (precluding a member of the legislature from accepting employment by a community college district).

152 Op. Att'y Gen. Mich., No. 6165, *supra* note 151.

153 *Id.*

154 *Id.*

155 *See* Op. Att'y Gen. Mich., No. 6983 (May 28, 1998).

agricultural society because of the lack of governmental control.[156] The opinion indicated that, for a position to qualify as part of a public entity, "a local governing body must possess significant control over the appointment and removal of the corporation's directors."[157] Based on this opinion, positions on an economic-development board or a waste- planning board were found to be public.[158]

One of the reasons that Michigan might have imposed such strict limitations on legislators holding locally appointed positions was the fact that the state has a full-time Legislature.[159] In such a system, prohibiting legislators from holding non-controversial public positions, such as public-school teacher, is more acceptable because state legislators are already engaged in a full-time position and earning a respectable salary. Presumably, however, those states without a full-time Legislature cannot implement such overreaching prohibitions on dual-office holding, especially when the legislators in those states are dependent on income from a second job outside of the Legislature. Therefore, New Jersey will need to consider the dependence of its legislators on full-time and part-time positions in the local governments and draw definitive lines as to which positions a legislator can continue to hold without posing undue conflicts of interest.

3. Louisiana's Dual-Office Holding Ban—Taking Account of the Flaws of Other States and Creating a Model Statute

Louisiana serves as a good example of a state that took account of the perils that Florida, Michigan, and other states faced in implementing their dual-office holding regulations.[160] O'Neill and Schluter felt that the Louisiana statute was a useful model that New Jersey could use in fashioning a more comprehensive dual-office holding ban.[161] The statute avoids the

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156 *Id.*

157 *Id.*

158 *Id.*

159 Peter Nicholas, *Gov. Wants a Part-Time Legislature*, L.A. TIMES, April 7, 2004, at 1 (indicated that there are four states with full time legislatures: California, New York, Pennsylvania, and Michigan).

160 *See* LA. REV. STAT. ANN. §§ 42:61-66 (2004).

161 O'Neill & Schluter, *supra* note 3, at 15.

administrative pitfalls of the Florida provision by defining the relevant terms contained in the statute, such as "elective office" and "appointive office," or by explicitly listing the offices included in each branch of state government.[162] Additionally, the "Prohibitions" section specifies a large number of particular offices that may not be held simultaneously.[163]

Following Louisiana's model, New Jersey's first step should be the implementation of a similar ban, but only relating to state legislators. The Legislature would need to decide where to draw appropriate boundary lines with respect to certain categories of publicly appointed offices. In Louisiana, the Legislature instituted a wide-ranging prohibition providing that "[n]o person holding an elective office in the government of this state shall at the same time hold another elective office, a full-time appointive office, or employment in the government of this state or in the government of a political subdivision thereof."[164]

New Jersey should use this provision as the basis for enacting needed reforms. The most acceptable and efficient reform would be a complete ban on state legislators holding any full-time appointive positions. Such a reform would be justified because legislators' part-time elected positions already require an intensive time commitment, making another full-time position too burdensome.[165]

The drafters of the Louisiana statute also focused on part-time appointive offices, which O'Neill and Schluter explained in their examination of the statutory framework as follows: "A state-elected official in Louisiana cannot hold another position, even part time, in local government. The only exception is that the state elected official can hold a part-time appointment in the same branch as the elected office or a part-time appointment to a local office, such as, say, a planning board."[166] The New Jersey

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[162] *See* LA. REV. STAT. ANN. § 42:62 (2004).

[163] LA. REV. STAT. ANN. § 42:63 (1995)

[164] LA. REV. STAT. ANN. § 42:63(C) (1995).

[165] *See* Nicholas, *supra* note 159 (finding that in seven states, including New Jersey, part-time lawmakers put in roughly 80 percent of the time it takes to do a full-time job).

[166] O'Neill & Schluter, *supra* note 3, at 15-16 (in examining the relevant sections of the Louisiana statutes, O'Neill and Schluter created a comprehensive chart of what offices a person could legitimately hold at the same time under the statutory

Legislature will need to impose stricter limits on part-time appointed offices, considering that many of these positions, like a municipal attorney, continue to pose serious conflicts for the state legislator.[167] Therefore, it appears the best option would be for New Jersey state legislators to craft a blanket restriction on local part-time appointed offices and then include in a section of exemptions any local part-time appointed offices that the Legislature deems acceptable to hold simultaneously. When deciding the particular positions to exempt from a ban, the Legislature should focus on those that do not create a high degree of potential conflicts. Such restrictions would, in the future, help prevent a repeat of recent ethical lapses where legislators took advantage of municipal attorney positions,[168] or used low show jobs at state institutions to increase their yearly salary.[169]

In order to determine the particular part-time exemptions to include in New Jersey, the Louisiana statute is again instructive.[170] Of particular importance is a provision regulating part-time appointive service on a local board or committee by limiting a state official's service to those boards that are "solely advisory in nature."[171] The implementation of such an exemption in New Jersey would be beneficial considering that service in these advisory part-time appointed positions does not permit its members to make any binding decisions on the affairs of a city or municipality that otherwise could create conflicts with legislative responsibilities.

Another important exemption that Louisiana took into account was the provision allowing "a school teacher or person employed in a professional educational capacity in a grade school, high school, other educational institution, parish or city school

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restrictions).

167 *Id.* at 2 (discussing the ethical issues faced by former Sen. Bennett due to his role as a municipal attorney).

168 *See id.* (describing the involvement of former Republican State Senate leader, John Bennett, as a municipal attorney for Marlboro Township and charges that he and his firm overcharged the town).

169 *See id.* (describing Senator Wayne Bryant's $40,000 per year low show job at UMDNJ and his efforts to funnel state funds to the institution in return).

170 *See* LA. REV. STAT. ANN. § 42:66 (2006).

171 LA. REV. STAT. ANN. § 42:66 (A)(5) (2006).

board [to hold] at the same time an elective or appointive office." [172] New Jersey should consider including similar exemptions, especially when dealing with teachers at middle schools, high schools, or even adjunct professors at a state college. More troublesome issues arise when dealing with tenured professors at a state college, as was evidenced by the case involving former Assembly Speaker, Jack Collins.[173] Finally, an outright ban should be placed on legislators holding any administrative position in public high schools or state colleges and universities due to the inherent conflicts that would result between a legislator's duty to his or her entire district and the duty as an administrator of his particular school.

4. Numerical Limitations—Using North Carolina's Constitution and Statutes as an Example of Capping the Number of Appointed Positions a Legislator Can Hold

The New Jersey Legislature is not only plagued by the potential conflicts that arise from the types of appointed positions a legislator can hold but also by the unlimited number of positions each individual legislator can hold. Former Republican Senate Leader John Bennett was an example of such a legislator holding numerous posts outside of his service as a legislator:

> The[se] multiple posts enabled him to collect a pension based on a combined salary of $188,640—more than double the $65,000 he earned as co-president of the Senate. He amassed that high annual salary by drawing attorney's salaries from more than half a dozen communities within and outside his Legislative district, including Marlboro Township, Little Silver and Keansburg.[174]

To avoid such issues in the future, New Jersey should consider implementing provisions limiting the number of local

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[172] LA. REV. STAT. ANN. § 42:66 (B) (2006).

[173] Democratic Party of N.J. Inc. v. Collins, 537 A.2d 1305 (1987) (case involving Senator Collins' role as a tenured professor at Glassboro State and whether this was in violation of the Constitutional prohibition on legislators holding a state position of profit. The New Jersey Supreme Court eventually remanded to the lower court but the case was settled and there was no final disposition on the legality of this issue).

[174] Dunstan McNichol, *Bennett's Pension Tops All in Senate History*, THE STAR LEDGER (Newark, N.J.), Feb. 19, 2004, at 33.

part-time appointed positions a legislator is allowed to hold. The New Jersey Legislature could use the General Statutes of North Carolina as a model on how to appropriately limit the number and type of offices that an elected state official can hold. The North Carolina statute specifies that: "Any person who holds an elective office in State or local government is hereby authorized by the General Assembly, pursuant to *Article VI, Sec. 9 of the North Carolina Constitution* to hold concurrently *one other appointive office,* place of trust or profit, in either State or local government."[175] This statute was passed under the authorization of the North Carolina Constitution, which indicates that no state official can hold more than one elected office and which provides a limit on the number of appointive positions to guide the Legislature in deciding whether to follow the Constitution or provide for an even stricter regulation.[176]

New Jersey can use North Carolina's constitutional and statutory provisions in crafting its own numerical limitations on the appointive offices legislators are permitted to hold. New Jersey would send a strong message to all those politicians currently holding multiple local-appointed offices by definitively promulgating that elected state officials are only allowed to hold one part-time appointed position at the local government level.[177]

VI. CONCLUSION

The current version of the dual-office holding legislation in New Jersey needs to be reformed to take into account the various loopholes and inadequacies contained in the law. After years of half-hearted efforts at reform, the last three or four years have presented the New Jersey State Legislature with a great opportunity to cure the ethical issues that have plagued government in Trenton. Unfortunately, this chance for reform

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175 N.C. GEN. STAT. § 128-1.1(b) (2007) (emphasis added).

176 *See* N.C. CONST. art. VI, § 9 (1962). "No person shall hold concurrently any two or more appointive offices or places of trust or profit, or any combination of elective and appointive offices or places of trust or profit, *except as the General Assembly shall provide by general law*" (emphasis added). *Id.*

177 *See* O'Neill & Schluter, *supra* note 3, at 6 (listing members of the state legislature that hold other publicly appointed positions. Since this article was published a number have left the legislature but Senators Sacco, Sarlo, and Singer all still serve in dual posts).

was marginalized when certain entrenched legislators prevented an immediate ban by allowing current legislators holding two elected offices to continue in this practice.[178] Not only did the new legislation fail to regulate those current dual-office holders, but it also allowed state legislators to continue to serve in local appointed governmental positions, both full-time and part-time.[179] This provision in particular will allow the practice of dual-office holding to continue without any check on the potential conflicts that positions, such as a municipal attorney or the member of an appointed school board, may pose.

Because of these concerns, additional reforms are needed, and, in order to implement an effective system, the Legislature must observe the practices of other states in creating its own dual office holding regulations. The examples of legislation in Florida and Michigan provide contrasting examples of states that either failed to provide sufficient detail and explanations in legislation (i.e. Florida),[180] or a that enacted too strict of a ban that prevented legislators from holding any form of a public job, no matter how minor it may be (i.e. Michigan).[181] A good balance between these two extremes is presented by Louisiana, whose legislation provides detailed definitions of what constitutes an elected and appointed office and then provides useful delineations between these two categories.[182]

The New Jersey Legislature can use Louisiana's legislation as a template for determining which specific appointed offices legislators could continue to hold. Specifically, New Jersey would be best served by preventing current legislators from holding any sort of local full-time appointed position. In regard to part-time appointed positions, it seems like the most effective bill would be one that sets a strict prohibition on local part-time appointed positions and then provides for some limited exceptions, like serving on a local advisory board or serving as a part-time school teacher. Essentially, these exemptions would allow a legislator to hold any position that does not require the person to make

178 *See* Pub. L. 2007, ch. 161.

179 *Id.*

180 *See* FLA. CONST. art. II, § 5(a).

181 *See* MICH. CONST. art. IV, § 8.

182 *See* LA. REV. STAT. ANN. §§ 42.61-66.

substantive decisions regarding the operation of a county or municipality. A final problem any new legislation should address is the number of part-time appointed positions a legislator can hold, due to the fact that some politicians have taken advantage of multiple part-time positions to increase their pensions. North Carolina sets out a model provision limiting a state official to one other appointive position.[183]

Until more specific provisions such as these are included in its legislation, New Jersey's political culture will not be able to overcome its unethical reputation. Further reform must be accomplished and achieved soon to prove to the citizens of New Jersey and those lawmakers who continue to take advantage of the system that this state is serious about transforming its ethical reputation.

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[183] *See* N.C. GEN. STAT. § 128-1.1(b).