

# NEWS

*From Friends of Tony Castro*

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**Castro Campaign: DiFiore Committed Official Misconduct**  
**Requests Governor Appoint Attorney General as Special Prosecutor;**  
**June 18<sup>th</sup> Press Conference by Chiefs of Police Violates Several State Laws**

**FOR IMMEDIATE RELEASE:**

**Contact:**

**Monday, June 29, 2009**

**Aaron Kershaw**

**Spokesperson**

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***“Quis custodiet ipsos custodes?”***

In a letter to Governor David A. Paterson released today, the Castro Campaign requested that the Attorney General open a wide-ranging investigation into the violation of several state laws, including official misconduct by the Westchester District Attorney Janet DiFiore, as a result of events surrounding her recent endorsement by Chiefs of Police.

“Janet DiFiore solicited, accepted and participated in an endorsement of her candidacy for reelection by Chiefs of Police who are barred by the Election Law – one of the very state laws she is charged with enforcing – from using their official authority in any manner to influence the political views of any citizen or against any political organization,” the letter states. “In so doing, she violated her duty as a public servant and received a reward for that official misconduct.”

“Also troubling is the fact that the endorsement and press conference was arranged and produced by the purported Executive Director of this police organization which derives the majority, if not all, of its funds from taxpayer dollars,” the letter continues. “This is an impermissible, unconstitutional use of public funds for private political expression. Clearly, Westchester’s local governments do not support this Chiefs’ organization with the intent that it engage in political activity!”

Tony Castro said, “In America, no one is above the law – not even a District Attorney or forty-four Chiefs of Police.”

“The public has a right to know the answers to the many unsettling questions this matter raises,” Castro said. “The actions of Janet DiFiore in this matter raise substantive questions as to her fitness for the office of District Attorney.”

“In addition to violating the law on political activity by Chiefs of Police, it is almost certain that violations of the law regarding the use of public funds for political purposes occurred,” Castro said. “While it remains to be seen if the amounts are significant and widespread, in the administration of justice, appearances do matter. This is exactly why I decided not to accept campaign endorsements or campaign funds from police organizations and urged Ms. DiFiore to do the same.”

“There is an old Latin saying: ‘*Quis custodiet ipsos custodes?*’ meaning ‘Who will watch the watchers?’,” Castro said. “In a free, democratic society, the District Attorney is supposed to be watching the police – not conspiring to break the law with them for her personal political advantage.”

The campaign’s letter to the Governor is attached.

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# *Friends of Tony Castro*

188 E. Post Road -- Suite 304  
White Plains, New York 10601  
(914) 358-1817

June 29, 2009

Hon. David A. Paterson  
Governor of New York  
State Capitol  
Albany, New York 12224

Dear Governor Paterson:

I derive no satisfaction from being compelled to request that you direct and authorize the Attorney General to undertake an investigation into the violation of several state, and possibly federal, laws, including official misconduct by Westchester County District Attorney Janet DiFiore, in connection with the recent “endorsement” of her candidacy by an organization calling itself the Westchester Chiefs of Police Association (cf. attached copy of news posting citing press release).

The State Board of Elections has opined that Section 17-110 of the Election Law does not bar a police officer *as a private citizen* from exercising the same rights of political association many take for granted. However, in amending this section of the law in 1983 to make that clear, neither your predecessor nor the Legislature intended to loosen the strictures on the use of a police officer’s official powers for political purposes. Governor Cuomo wrote in approving this Chapter:

“„continuing prohibitions against a police officer’s use of his official power for political purposes sufficiently insure that the actions of the police officers will not be affected by partisan political considerations.”

On its face, the press release proves that Ms. DiFiore was endorsed not by a group of private citizens but by Chiefs of Police. If further evidence is needed, one need only view a video record of the session: some of the participating Chiefs were in uniform and no disclaimers were made. In fact, statements were offered that it was on the basis of the working relationship between the District Attorney’s Office and the Chiefs of Police that the endorsement was being made.

As a former prosecutor in Bronx County, no one has greater respect than I for the grit and honor with which police officers serve. However, a District Attorney must retain independence and impartiality for those rare events when it is the conduct of police officers themselves that is at issue. The relationship between Ms. DiFiore and the Chiefs

is improper both in terms of the law and in terms of the higher standard that ought to be expected of a prosecutor and a member of the New York Bar.

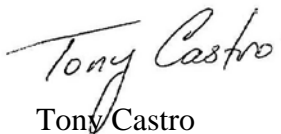
Based on the information provided herein and in the attachments hereto, Janet DiFiore solicited, accepted and participated in an endorsement of her candidacy for reelection by Chiefs of Police who are barred – by the very state law she is charged with enforcing – from using their official authority in any manner to influence the political views of any citizen or against any political organization. In so doing, she violated her duty as a public servant and received a reward for this official misconduct.

Also troubling is the fact that the endorsement and press conference was arranged and produced by the so-called Executive Director of this organization which derives the majority, if not all, of its funds from taxpayer dollars. This is an impermissible, unconstitutional use of public funds for private political expression. Clearly, Westchester's local governments do not support this Chiefs' organization with the intent that it engage in political activity!

Finally, if this Chiefs' organization is one and the same as that with a similar name listed as a Publication 78 organization on the IRS website, political activity by the organization is prohibited under the Internal Revenue Code because of its status as a 501(c)(3) tax-exempt organization. Of note to the state government is that no Westchester Chiefs' organization is listed, as required, with the Attorney General's Charities Bureau.

Since the District Attorney's Office of Westchester County is conflicted in investigating this matter and since these allegations speak directly to the fitness of the incumbent to hold public office, I pray that you will authorize a thorough and expeditious investigation.

Very truly yours,



Tony Castro  
on behalf of Friends of Tony Castro

Attachments (2)

cc: Hon. Peter J. Kiernan  
Counsel to the Governor

Hon. Andrew Cuomo  
Attorney General of New York

New York State Board of Elections

**From LoHud.com:**

**Police chiefs endorse DiFiore**

June 18, 2009 15:33 PM

This morning, police chiefs throughout Westchester publicly backed Janet DiFiore's bid for a second term at District Attorney. The announcement was made at Half Moon Bay restaurant in Dobbs Ferry.

Here's the official statement:

**FOR IMMEDIATE RELEASE**

In a unanimous vote, the Westchester County Chiefs of Police Association, for only the second time in its history, has endorsed a candidate for elected office; the Association has endorsed District Attorney Janet DiFiore for re-election as Westchester County District Attorney.

The first time the Association endorsed a candidate for elected office was four years ago, when it endorsed then-Judge Janet DiFiore for District Attorney.

The Westchester County Chiefs of Police Association is comprised of law enforcement executives: commissioners and chiefs of police from forty-four local and state police agencies in Westchester County.

District Attorney DiFiore received this year's endorsement in recognition of "[her] nuts and bolts understanding of police operations and the unique aspects of prosecuting crimes in Westchester County", said Association President Chief Joseph Benefico of the Pelham Police Department. "Your accomplishments in the first term of office validate our previous endorsement and warrant this one. Not only have you created many worthy crime solving and crime prevention programs, you have unfailingly displayed a fair, resolute and thorough approach to criminal prosecution."

"Over the past three and a half years as District Attorney, I have worked very hard to enhance public safety by working closely with community and law enforcement partners, ensuring fairness and integrity in criminal prosecutions. Improving crime fighting intelligence, and educating the public on crime prevention. These proactive strategies define the role of a modern prosecutor," said District Attorney Janet DiFiore after accepting the Association's endorsement. "To be recognized and acknowledged for this work by the professionals you work with every day is an honor and an affirmation of all that we have worked to accomplish."

**Analysis In Support of Request for Investigation of the June 18<sup>th</sup> Endorsement  
Of Westchester District Attorney Janet DiFiore By Chiefs of Police**

**POINT I. A Chief of Police endorsing Janet DiFiore (D-C) for re-election as District Attorney commits a misdemeanor under Section 17-110 of the Election Law. Under state law, if the Chief of Police of a second class city commits this misdemeanor, he/she is dismissed from office.**

The plain language of Section 17-110<sup>1</sup> of the Election Law makes it a misdemeanor for a police commissioner or police officer to use his or her official power or authority in any manner to affect the political views of any citizen or to solicit, collect or receive money for any political fund, club, association, society or committee.

This prohibition is no laughing matter. Second Class Cities Law at Section 144<sup>2</sup> provides that any officer or member of the Police Department who violates 17-110 of the Election Law **SHALL** be dismissed from office. (The provision applies to all six city chiefs of police in Westchester.) According to the press release issued by the purported Association on June 18<sup>th</sup> the support among the Chiefs for Ms. DiFiore is “unanimous” among the “forty-four local and state police agencies in Westchester County”<sup>3</sup> which would lead the observer to believe it includes all six city police chiefs.

While the private expression of a police official’s political views might pass muster<sup>4</sup>, depending on the circumstances, the press conference staged by the so-called Westchester Chiefs of Police Association and Ms. DiFiore makes it clear that the endorsement is given in their capacity as Chiefs of Police and not as private citizens. In fact, much is made of the fact that Ms. DiFiore is the first District Attorney to twice receive the endorsement; perhaps her predecessors knew something Ms. DiFiore should have known – the applicable law!

The plain language of the statute also makes it a misdemeanor for a police officer to use his/her “...official power or authority against any political ... organization...”<sup>5</sup> It is indisputable that an endorsement of DiFiore for reelection is an endorsement against the political campaigns of Tony Castro (D-I) and Dan Schorr (R).

Were it not illegal in New York, political endorsements by Chiefs of Police would nonetheless violate model standards of conduct.

The Independent Commission Report on the Los Angeles Police Department by former Secretary of State Warren Christopher says this about political endorsements by Chiefs of Police:

“Because the Chief’s office is inherently powerful, it is unseemly for the Chief to use that position to influence the political process. It is particularly ironic to create a system to insulate the Chief from improper political pressure, and then have the Chief use that protected position to campaign on behalf of politicians who thereby become indebted to him.”<sup>6</sup>

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The Model Policy on Standard of Conduct of the International Association of Chiefs of Police recommends:

“Officers shall be guided by state law regarding their participation and involvement in political activities.”<sup>7</sup>

In the absence of state law, the IACP recommends:

“...officers shall be guided by the following examples of prohibited political activities during working hours, while in uniform, *or otherwise serving as a representative of this agency* [emphasis added]:

- a. Engage in any political activity;
- b. Place or affix any campaign literature on city/county-owned property;
- c. Solicit political funds from any member of this agency or another governmental agency of this jurisdiction;
- d. Solicit contributions, signatures, or other forms of support for political candidates, parties, or ballot measures on property owned by this jurisdiction;
- e. Use official authority to interfere with any election or interfere with the political actions of other employees or the general public;
- f. Favor or discriminate against any person seeking employment because of political opinions or affiliations;
- g. *Participate in any type of political activity while in uniform* [emphasis added].

**POINT II. By soliciting, accepting and participating in an endorsement of her candidacy by Chiefs of Police, the District Attorney committed the crimes of Receiving Reward for Official Misconduct in the Second Degree, a felony, and Official Misconduct, a misdemeanor, under the Penal Law.**

A public servant is guilty of receiving reward for official misconduct in the second degree, a felony, when the public servant solicits, accepts or agrees to accept any benefit from another person for having violated his or her duty as a public servant.<sup>8</sup>

A public servant is guilty of official misconduct, a misdemeanor, when, with intent to obtain a benefit he or she knowingly refrains from performing a duty which is imposed by law or is clearly inherent in the nature of the office.<sup>9</sup>

The district attorney’s duty is to ensure that offenses against the public result in the initiation of criminal prosecutions. While the District Attorney has considerable discretion in how he/she performs his/her duties, he/she should reasonably know the law and must be fair and unbiased. Violations of the law may not be ignored on the basis of the occupation of the perpetrator of the offense. When a prosecutor’s office has a conflict, the District Attorney may ask the court to appoint a private attorney to handle the case at the office’s expense or the Governor may direct the Attorney General to serve

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as an outside prosecutor. In this instance, the District Attorney herself is compromised and since only the Governor has the power of removal, the request is properly made to him.

It is indisputable that the District Attorney is a public servant in the meaning of the penal law. It is indisputable that it is the **SWORN** duty of the District Attorney to uphold all the laws of the State of New York (including the Election Law).

The facts clearly demonstrate that Janet DiFiore ignored the violation of Election Law by the Chiefs of Police and as a consequence was rewarded with their endorsement of her candidacy for re-election. In the meaning of the Penal Law, Janet DiFiore knowingly refrained from prosecuting an egregious violation of the plain language of the Election Law to obtain a benefit. In fact, Ms. DiFiore solicited and accepted the reward of the Association's endorsement while violating her duty as a public servant.

Even were the law silent on the subject, the District Attorney's membership in the purported Association is still troubling on its face. The Code of Conduct for Political Activity of the New York State District Attorneys Association provides:

“District Attorneys and Assistants shall not:

1. Be a member or serve as an official of any political committee, club, organization or group having a political purpose...”<sup>10</sup>

By its actions on June 18<sup>th</sup>, the purported Police Chiefs Association clearly has as its purpose the endorsement of candidates for political office.

**POINT III. The payment of membership fees or other fund-raising charges on behalf of a police officer by a municipality to the purported association of Chiefs of Police is an unconstitutional private application of public funds for political purposes.**

It is well established in New York law that a municipality may not do indirectly what it cannot do directly.<sup>11</sup>

A municipality may not expend funds when the object of the expenditure is " 'patently designed to exhort the electorate to [make an avowed, public commitment] in support of a particular position advocated by [one political faction]' ".<sup>12</sup> This principle is rooted in Article VII of the New York State Constitution which provides, in pertinent part, “Neither the credit nor the money of the state shall be given or loaned to or in aid of any private corporation or association or private undertaking.”<sup>13</sup>

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Since a municipality may not directly fund the exhortation of its Chief of Police to the county electorate to support a particular position, it may not so indirectly (through membership fees and the purchase of tickets to an annual golf outing or dinner).

On information and belief, membership dues for each of the forty-four member chiefs of the purported Association are paid with taxpayer dollars through the claim/voucher system. Also on information and belief, some annual dinner reservations are paid for the same way. Clearly, Westchester's local governments do not support this Chiefs' organization with the intent that it engage in political activity!

**POINT IV. The organization calling itself Westchester County Chiefs of Police Association has failed to register as required by law with the Charities Bureau of the Attorney General's office and has failed to report thereto as required.**

According to the Secretary of State's website, the Westchester Police Chiefs Association, Inc. first filed on June 26, 1957 as a domestic not-for-profit corporation.<sup>14</sup>

As such, it need only (1) keep correct and complete books, records of account and minutes of the proceedings of its members, board of directors and executive committee, if any; (2) keep a record containing the names and addresses of all members, the number of capital certificates held by each member and the dates when they respectively became the owners of record thereof; and (3) hold a meeting of members annually for the election of directors and the transaction of other business on a date fixed by or under the by-laws.<sup>15</sup>

It is not known whether the purported Association that held the press conference on June 18<sup>th</sup> is the successor to that incorporated on June 26, 1957 nor is it known whether the above-listed requirements for a not-for-profit corporation have been faithfully met.

Regardless, many not-for-profit corporations formed for charitable purposes are required to register with the Office of the Attorney General Charities Bureau<sup>16</sup> as are associations whose fund-raising is not limited to their own memberships. It can be determined readily whether this has been done through the Attorney General's website.

According to Section 171-a of the Executive Law, a charitable organization includes a law enforcement support organization as defined in subdivision 11, to wit:

“Any organization, association, union or conference of or purporting to be of current or former law enforcement officers, including, without limitation, peace officers and police officers as defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law, sheriffs, deputy sheriffs, detectives, investigators or constables or any auxiliary or affiliate of such an organization, association, union or conference composed of one or more such organizations.”

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The section following, 172, requires all charitable organizations, except those exempted in 172-a,<sup>17</sup> to register with the Charities Bureau in the manner prescribed by the statute. Section 172-b imposes the additional requirement of annual reports from organizations so registered.

A Charities Bureau Research Search on the Attorney General's website reveals no registration for the Westchester Police Chiefs Association, Inc. or for that of the Westchester Chiefs of Police Association.

Since the purported Association that held the press conference on June 18<sup>th</sup> solicits the bulk of its funds from membership fees paid for by municipal tax dollars and since other fundraising is also not limited to its own membership, whichever Association this may be is nonetheless in violation of the Executive Law requirements regarding registration with the Charities Bureau.

**POINT V. A Westchester County Police Chiefs Association Inc. appears on the website of the Internal Revenue Service as a Publication 78 organization, specifically as a tax-exempt public charity under Section 501(c)(3) of Internal Revenue Code, to which contributions are 50% deductible. If the Association making the announcement is one and the same as the corporation listed on the IRS website, then it has violated Federal law as well.**

From the IRS website:

**The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations**

Under the Internal Revenue Code, all **section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office.** [Emphasis added.]

Contributions to political campaign funds or **public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity.** Violating this prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise taxes ... *(Page Last Reviewed or Updated: May 11, 2009.)*

**POINT VI. The District Attorney and the purported Association may have committed other violations of law and/or rules of conduct.**

It is unknown, but possible, that the following also occurred:

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- Public servants appearing at the June 18<sup>th</sup> press conference were NOT on their own time;
- Public funds were used to pay for the three different meetings at which the endorsement was discussed, formally voted on and announced.
- The District Attorney authorized the use of taxpayer funds to pay the purported Association for membership fees (for herself and for her chief investigator) while seeking, accepting and participating in their political endorsement of her candidacy;
- The District Attorney has violated federal law.
- The District Attorney has violated several standards set by the New York Rules of Professional Conduct for attorneys;<sup>18</sup>
- The purported Association has failed to comply with federal and state requirements in its role as an employer of the (part-time?) Executive Director.

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<sup>1</sup> **§ 17-110. Misdemeanors concerning police commissioners or officers or members of any police force.**

Any person who, being a police commissioner or any officer or member of any police force in this state:

1. Uses or threatens or attempts to use his official power or authority, in any manner, directly or indirectly, in aid of or against any political party, organization, association or society, or to control, affect, influence, reward or punish, the political adherence, affiliation, action, expression or opinion of any citizen; or ...

3. Solicits, collects or receives any money for, any political fund, club, association, society or committee, is guilty of a misdemeanor.

<sup>2</sup> **§ 144. Political activity prohibited.** Any officer or member of the police department who violates any provision of section 17-110 of the election law shall be dismissed from office.

<sup>3</sup> <http://www.lohud.com>, **Police chiefs endorse DiFiore**, *ibid*.

<sup>4</sup> New York State Board of Elections: "...a police officer **as a private citizen** [emphasis added] may now endorse a political candidate as long as the endorsement is not given in such a manner as to coerce or intimidate a voter to vote for a particular candidate ... The facts surrounding how the endorsement is given and whether or not it was given in such a way as to intimidate or coerce a voter must be determined on a case by case basis." From 1983 Opinion #9.

<sup>5</sup> *Op. cit.* cf. Endnote 2.

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<sup>6</sup> Christopher, Warren, Chairman, Independent Commission on the Los Angeles Police Department, Report of the Independent Commission on the Los Angeles Police Department, 1991, p. 220.

<sup>7</sup> Retrieved from: <http://www.theiacp.org>.

<sup>8</sup> **§200.25 Receiving reward for official misconduct in the second degree.** A public servant is guilty of receiving reward for official misconduct in the second degree when he solicits, accepts or agrees to accept any benefit from another person for having violated his duty as a public servant.

Receiving reward for official misconduct in the second degree is a class E felony.

<sup>9</sup> **§195.00 Official misconduct.** A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or

2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a class A misdemeanor.

<sup>10</sup> Retrieved from: <http://www.nysdaa.org>.

<sup>11</sup> Commco v Amelkin, 62 NY2d 260, 476 NYS2d 775; Signacon Controls Inc v Mulroy, 32 NY2d 410, 345 NYS2d 527, *inter alia*.

<sup>12</sup> Matter of Shulz v. State of New York, 205 AD2d 912, quoting Matter of Phillips v Maurer, 67 NY2d 672, 674 [emphasis in original].

<sup>13</sup> At subdivision 8.

<sup>14</sup> Retrieved from: [http://appsext8.dos.state.ny.us/corp\\_public/corpsearch.entity\\_search\\_entry](http://appsext8.dos.state.ny.us/corp_public/corpsearch.entity_search_entry).

<sup>15</sup> Cf. Not-for-Profit Corporation Law, esp. sections 603 and 621.

<sup>16</sup> Cf. *Not-for-Profit Corporations FAQs* retrieved from: <http://www.dos.state.ny.us/corp/nfpfaq.htm#special>.

<sup>17</sup> To be exempted by this section "...law enforcement support organizations..." are required to confine solicitation of contributions to their membership.

<sup>18</sup> **RULE 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees (f)** A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

**(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official. [emphasis added].**

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**RULE 8.4: Misconduct.** A lawyer or law firm shall not:

- (a)** violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer; [emphasis added]**
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [emphasis added]**
- (d) engage in conduct that is prejudicial to the administration of justice; [emphasis added]**
- (e)** state or imply an ability:
  - (1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or
  - (2) to achieve results using means that violate these Rules or other law;
- (f )** knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (g)** unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or **(h)** engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.