Analysis: New York City Mayor Rudy Giuliani may consider seeking another term as mayor despite a term limits rule in effect.

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NOAH ADAMS, host:

In New York, people could be forgiven if they're a bit confused about what's going on in the mayor's race. The primary was supposed to happen on the 11th of September. It's now rescheduled for tomorrow. Mayor Rudolph Giuliani is barred by term limits from running again. But the two-term mayor who's become very popular here for his leadership during the crisis is suddenly sending mixed signals about whether or not he might try to keep his job. NPR's Andy Bowers reports.

ANDY BOWERS reporting:

At yesterday's Prayer for America service in Yankee Stadium, emcee and famous Chicagoan Oprah Winfrey gave voice to what many New Yorkers clearly feel.

Ms. OPRAH WINFREY (Talk Show Host): He's the man of the hour, a man whose extraordinary grace under pressure in the days since this devastating attack has led him to be called America's mayor.

(Soundbite of audience applauding and cheering)

Ms. WINFREY: He's the mayor of New York City...

(Soundbite of audience applauding and cheering)

Ms. WINFREY: ...ladies and gentlemen, Rudy Giuliani!

BOWERS: And then there was this surprise endorsement from New York Governor George Pataki on Friday.

Governor GEORGE PATAKI (Republican, New York): The mayor's been a great mayor. And I'll tell you, if I were a resident of New York City, I'd write him in.

BOWERS: In the first days after the disaster, Giuliani said he still supported term limits as he did when they were proposed a decade ago. But in recent days, he has said simply that he doesn't want to talk about politics. Then this morning, both The New York Times and The New York Daily News ran stories citing sources close to the mayor. The gist: he might be looking for a way to run. But at a morning news conference, Giuliani didn't embrace or puncture that trial balloon. He simply let it float there.

Mayor RUDOLPH GIULIANI (Republican, New York City): And as soon as I have time, I will think about it and I'll talk to the people that I trust the most and get their advice, and then I'll make a statement. But I'm not ready to make a statement now.

BOWERS: Political analysts say it would take a lot of effort by Giuliani to convince the state legislature and/or city council to alter term limits. However, by declining to rule out a campaign for the November general election, Giuliani did leave the six main candidates in tomorrow's primary in a tough spot. Speaking on member station WNYC, one said he might sue to stop a change in term limits, while another said he might offer Giuliani his line on the ballot. A third, Fernando Ferrer, noted that the eight-year limit was passed by the public, twice.

Mr. FERNANDO FERRER (New York Mayoral Candidate): People who try to overturn the will of the people, the will of an electorate,

overwhelming will of the electorate, do so at their own peril.

BOWERS: But Giuliani's former deputy mayor, Randy Mastro, believes many in the city are now questioning term limits.

Mr. RANDY MASTRO (Former Deputy Mayor to Giuliani): And a lot of New Yorkers are saying, `We need Rudy Giuliani at this critical time, and we want to have the opportunity to be heard and to have our voices and our votes count.'

BOWERS: Still, a big question facing Giuliani is whether by running any overt campaign for re-election, he might diminish his current status as a beloved leader, and find himself once again a mere politician. Andy Bowers, NPR News, New York.

(Soundbite of music)

ROBERT SIEGEL (Host): You're listening to ALL THINGS CONSIDERED from NPR News.

NEW YORK CITY
CHARTER REVISION COMMISSION
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Final Report

Keeping Our City's Progress Going into the Next Century

September 1, 1999

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EXECUTIVE SUMMARY

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The Commission is proposing changes to the Charter to be submitted to the voters of the City of New York at a referendum this coming November 1999 in these seven areas:

Budget

Civil Rights

Elections

Government Reorganization

Immigrant Affairs

Procurement

Public Safety

THE BUDGET PROCESS:
Ensuring Fiscal Responsibility

- The Charter should limit year-to-year increases in City-funded spending to the inflation rate. In the event of an emergency or other need in the best interest of the City, the Mayor and the Council may jointly lift the cap for that fiscal year. The Charter should also require an explanation for each instance where an increase in an agency's budget exceeds the rate of inflation, and that for all legislative mandates, including home rule messages that may result in unfunded legislative mandates, fiscal impact statements be issued at the time of passage.

- The Charter should require that at least 50% of any surplus revenue be placed in a Budget Stabilization and Emergency Fund to be used for an emergency or other need that the Mayor and the City Council jointly determine is in the best interests of the City or, if not needed by the end of the fiscal year, for the prepayment of debt service costs.

- The Charter should provide that at least a two-thirds vote of the Council would be needed to pass any local law or resolution to impose a new tax or increase an existing tax. To override a Mayoral veto to such a law, the Council would need an enhanced supermajority four-fifths vote.

CIVIL RIGHTS:
Protecting Individuals from Discrimination

- In order to strengthen the City's public policy of eliminating unlawful discrimination based on race, color, religion, creed, age, national origin, alienage, citizenship, gender, sexual orientation, disability and membership in other protected classes, the City's Commission on Human Rights should be codified in the Charter, and the protections of the City's Human Rights Law enforced through the Charter.

ELECTION ISSUES:
Empowering the Electorate

- No change in the interim line of mayoral succession should be considered at a referendum vote in November 1999. The voters should be permitted to decide, however, at a referendum

vote in November 1999, whether to revise the Charter to provide that special elections be held within two months to fill a vacancy in the office of the Mayor (to become effective January 1, 2002), similar in format to the procedure set forth in the Charter to fill vacancies in the offices of the Public Advocate, Comptroller, Borough Presidents and members of the City Council, and as is done in major cities throughout the United States, including Los Angeles, Houston, Dallas, Denver and Minneapolis.[1]

GOVERNMENT REORGANIZATION:
Improving Government Operations

- The Administration for Children's Services should be established as a Charter agency.

- The Department of Health and the Department of Mental Health, Mental Retardation and Alcoholism Services should be consolidated to create a new Department of Public Health and Mental Hygiene Services as a Charter agency.

- An Organized Crime Control Commission should be created to handle the current regulatory, investigative and licensing functions of agencies that oversee the private carting industry, public wholesale food markets and shipboard gambling.

- Domestic violence services coordination should occur within the Mayor's Office of Operations as a Charter mandate to coordinate City services relating to the prevention of domestic violence.

IMMIGRANT AFFAIRS:
Providing Services to All Eligible People

- In order to strengthen the City's public policy to make City services available to all eligible persons regardless of alienage and citizenship status, the Mayor's Office of Immigrant Affairs and Language Services and this policy should be codified in the Charter. Moreover, the Charter should provide that the City, as part of its inherent power to determine the duties of its employees, may require confidentiality in order to preserve the trust of individuals who have business with City agencies and that the Mayor, in the exercise of this power, may issue

rules guaranteeing, to the fullest extent permitted by State and federal law, the confidentiality of information relating to immigration status and other private matters.

PROCUREMENT:
Promoting Efficiency, Protecting Integrity

- The Charter should be amended to streamline the procurement process by eliminating detailed requirements concerning bid deposits and multi-step sealed proposals, raising the small purchase limit to $100,000 and making it easier for the City to procure goods, services or construction from, through, or with another governmental entity.

- The Charter should explicitly authorize a centralized integrity review of vendors through pre-qualification and other means, clarify the City's authority to deny specific contracts to corrupt businesses by eliminating the inflexible "debarment" provision and leave the particulars regarding the process to be followed in such instances to the Procurement Policy Board.

PUBLIC SAFETY:
Promoting Gun Safety, Protecting Our Children

- The Charter should be amended to create "gun-free" school safety zones within 1,000 feet of every school in the City.

- The Charter should be amended to require that persons purchasing or obtaining firearms be required to purchase or obtain safety locking devices for all firearms at the time purchased or obtained, and to use such a safety locking device when storing all firearms, or else face criminal penalties.

ENDNOTES FOR THE EXECUTIVE SUMMARY

[1] To effectuate this proposal, and to reflect the practical allocation of power that already exists, the Charter would also be amended to remove the Public Advocate's purely ceremonial role to "preside" over the City Council. This revision would become effective January 1, 2002.

INTRODUCTION

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INTRODUCTION

This report summarizes the work of the 1999 Charter Revision Commission. It describes our proposals for the November 1999 ballot and addresses many other ideas for improving the Charter that we believe merit further study. The recommendations that we are proposing for the November 1999 ballot are designed to ensure that the progress this City has made in recent years continues into the next century. It is our hope that these reforms become a permanent part of the way in which our City does business.

Our proposals are based on a review of the entire Charter. We examined more than 100 proposed changes suggested by members of the Commission, the public, and the Commission Staff. We analyzed in detail more than 40 such proposals, and studied 14 of them even further. Our work focused on nine substantive areas: the budget process, civil rights, elections, government integrity, government reorganization, immigrant affairs, land use, procurement, and public safety. We have proposed changes in all of those areas, except for government integrity and land use, which we recommend should be further studied.

We did an enormous amount of work over the past twelve weeks. We conducted an extensive outreach campaign through a dozen newspapers, television, the World Wide Web, the *City Record*, and mass-mailings of notices to approximately 4,000 people to generate proposals for Charter revision. The Staff provided us with a 250-page report of preliminary recommendations addressing 60 separate issues and a 20-page supplemental report regarding four additional topics. The reports, proposals, and recommended text changes to the Charter were sent to the thousands of people on our mailing list and made available on the Web. During July and August 1999, we met together in public for the equivalent of an entire work-week. The transcripts of our public work exceed 1,500 pages. We heard from more than 40 elected officials, and took testimony from members of the public, including 30 invited experts. We held eight public meetings and six public hearings, including at least one in each borough. Our meetings and hearings were repeatedly televised in their entirety; and all transcripts were made available on the Web. Our work was public, extensively covered by the media, and fruitful. It produced proposed Charter revisions for the November 1999 ballot, as well as many ideas worthy of further study.

Our proposed Charter revisions seek to institutionalize reforms that have been tested, proven successful, but have yet to become a permanent part of our City's constitution. The

Charter changes effected by the 1989 Charter Revision Commission were largely experimental in nature. Faced with a Court decision declaring the City's governmental structure unconstitutional, the 1989 Charter Revision Commission restructured the City's government in a manner that had never been attempted in this City and hoped that the changes would be effective. We have learned a lot in the ten years since those changes occurred about what has worked and what has not worked. This Commission has therefore focused on correcting the mistakes of the past and on making those reforms permanent that have served our City so well in recent years.

Over the past decade, we have learned that fiscal responsibility is critical to a strong economy; that this City must be a leader in protecting individuals from discrimination, hate and fear; that this is a city of immigrants, which must provide services to all eligible persons, regardless of citizenship or alienage; that City government is most effective when voters have the right to elect their leaders; that protecting our children and families from abuse must be a top priority; that our public health needs must be addressed in a comprehensive way; that government can overcome the scourge of organized crime; that we can get projects done and social services provided more efficiently and without corruption; and that we must do all we can to protect our children from gun violence. These ideas have improved the quality of life in our City, but they must be made part of our City's fabric. By institutionalizing our City's recent successes, this Commission hopes to ensure that this progress continues into the next century.

A. Overview of the Charter Revision Process

The New York City Charter is the basic document that defines the organization, power, functions and essential procedures and policies of City government. As a "short form" charter, it sets forth the institutions and processes of the City's political system and defines the authority and responsibilities of elected officials — the Mayor, Council, Comptroller, Borough Presidents, and Public Advocate — and City agencies in broad strokes while leaving the details of operation to local law and agency rule-making. Unlike the United States Constitution, which is rarely amended, the City's Charter is a fluid document that is often amended. Indeed, over the past decade, the Charter has been amended more than 80 times -- approximately once every six weeks.

In the United States, city governments receive their legal authority from the states in which they are located. In the State of New York (the "State"), municipalities have broad authority to structure how they operate by virtue of the Home Rule provisions of the State

Constitution and the Municipal Home Rule Law. The City's Charter, along with the State Constitution, the Municipal Home Rule Law and other State statutes, provides the legal framework within which it may conduct its affairs.

Under State law, charter revision may occur as an ongoing process through the passage of local laws. There are limitations on that authority, such as there can be no curtailment of powers of an elected official. A charter can also be revised pursuant to a State or city charter revision commission, which has the authority to put proposals before the voters. A charter revision commission can put proposals before the voters regarding all elements of a charter, including the curtailment of powers of an elected official as well as provisions that could also be adopted through local law. Municipal Home Rule Law ("MHRL") Section 36(4) permits the Mayor to establish a "charter commission" in New York City. The composition of a mayoral charter commission must consist of nine to fifteen members. The members must be City residents and may hold other public offices or employment. The Mayor designates the chair, vice-chair and secretary of the commission pursuant to MHRL Sections 36(4) and 6(d).

Charter commissions are not permanent commissions. MHRL Section 36(6)(e) limits the term of a charter commission. A commission expires on the day of the election at which a proposed new charter or amendments prepared by a commission are submitted to the voters. However, if a commission fails to submit a new charter or any amendments to the voters, the commission expires on the day of the second general election following the commission's creation. There are no prohibitions against the reappointment of a commission or appointment of a new commission upon the expiration of an existing commission. This Commission's Chair has publicly stated his willingness to continue to serve.

A charter commission may propose a broad set of amendments that essentially "overhauls" the entire charter, or may narrowly focus upon certain areas and explain why such an approach is preferable in a report to the public. MHRL § 36(5)(a); see Matter of Cruz v. Deierlein, 84 N.Y.2d 890, 892-893 (1994). The proposed amendments must be consistent with general State laws and can only effect changes that are otherwise within the City's local legislative powers as set forth in the State Constitution and the MHRL.

The proposed amendments must be filed with the City Clerk for action by the voters no later than the second general election after the commission's creation, and must be voted on at a general or special election held at least sixty days later. The proposed amendments may be submitted to voters as one question, or a series of questions or alternatives. MHRL § 36(5)(b).

B. The Commission Membership

Mayor Rudolph W. Giuliani appointed the 1999 Charter Revision Commission on June 15, 1999, pursuant to MHRL Section 36.[1] The Mayor named as members of the Commission:

- Randy M. Mastro, Chair. Co-Partner In Charge of NYC Office, Co-Coordinator of Litigation Practice Group, Gibson Dunn & Crutcher, 1998–Present. Deputy Mayor for Operations, 1996-1998. Mayor's Chief of Staff, 1994-1996. Partner/Litigator, Gibson, Dunn & Crutcher, 1989-1993. Adjunct Associate Professor, Fordham Law School, 1988-1993. Deputy Chief, Civil Division, AUSA, SDNY, U.S. Attorney's Office, 1985-1989. Associate, Cravath, Swaine & Moore, 1982-1985. Law Clerk, N.J. Supreme Court Justice Alan B. Handler, 1981-1982. Trustee, City University of New York.

- Richard J. Schwartz, Vice-Chair. President and CEO, Opportunity America, 1997-Present. Senior Advisor to the Mayor, 1994-1997. Assistant Commissioner, Department of Parks and Recreation, 1984–1991.

- Abraham Biderman, Secretary. Executive Vice President, Lipper & Company, LP. Commissioner, Department of Housing Preservation and Development, 1988–1989. Commissioner, Department of Finance, 1986-1987. Member, 1998 Charter Revision Commission.

- Amalia V. Betanzos. President, Wildcat Service Corporation, 1978-Present. Chair, Commission on the Status of Women, 1995–Present. Chair, National Puerto Rican Coalition, 1997–Present. Board Member, New York City Board of Education, 1987-1990. Trustee, Catholic Charities, 1989-Present. Commissioner, Youth Services Agency, 1972–1973. Executive Secretary to Mayor John Lindsay, 1972. Commissioner, Relocation and Management Services in the Housing and Development Administration, 1970-1972. Member, 1983, 1988, 1989 and 1998 Charter Revision Commissions.

- Karen Boykin-Towns. Manager of State Corporate Affairs (with responsibility for government and public affairs in New York City), Pfizer Inc., 1996-Present. Board-member, Interfaith Medical Center, 1999. New York State Commission for a Healthy New York, 1997–Present. Twelve Towns YMCA, 1998–Present. Non-Profit Connection, 1997–Present. NAACP National Health Committee, 1996-Present.

- Kenneth A. Caruso. Partner, Shaw Pittman. Chairman, Gambling Control Commission, 1997-Present. Director, Metropolitan Transportation Authority, 1995-Present. Deputy Associate Attorney General of the United States, AUSA, SDNY, U.S. Department of Justice, 1981–1984.

- Paula M. Dagen. Principal, Morgan Stanley Dean Witter. Counsel, Office of Management and Budget, 1989-1992. Member, Mayor's Advisory Committee on Appointments. Board Member, Off-Track Betting Corporation.

- Carl L. Figliola, Ph.D. Professor, Department of Health Care & Public Administration, Long Island University, 1971-Present. Member of the Long Island Regional Planning Board,

1989–1994. Trustee of the Queens Borough Public Library, 1986–1993. First President of the Queens Borough Library Foundation, 1990-1993.

- Lisa Lehr, M.S. Community & Senior Activist. Co-Chair, W 90s/W100s Neighborhood Coalition. Community Board 7, Manhattan, 1994-1998. Senior Action Line staff, 1987-Present.

- Yvonne Liu. Co-Owner & Vice President of the following radio stations from 1992–Present: New York Multicultural Radio Broadcasting, Inc./WPAT-AM 930, Way Broadcasting, Inc./WKDM-AM 1380, WNJR-AM 1430, WZRC-AM 1480. Co-Owner & Vice President, Sino Radio Broadcasts Corporation (Sinocast), 1985-1992.

- Imam Izak-el M. Pasha. Resident Imam of Masjid Malcolm Shabazz, 1993-Present. NYPD Muslim Police Chaplain. Member, Police Academy Board of Visitors. Council Member, NYC 2000 Millennium Committee. Member, Commission on Human Rights, 1997-Present.

- Herbert Rubin. Senior Partner, Herzfeld & Rubin, 1940s-Present. Member of Judicial Screening Committees: U.S. Senator Daniel Patrick Moynihan (1970s–Present), Mayors Koch, Dinkins and Giuliani (1978-Present) and U.S. Senator Charles Schumer (1998-Present). Member, Board of Editors, New York Law Journal, 1973-Present. Member, 1998 Charter Revision Commission.

- Mary Crisalli Sansone. Founder, Congress of Italian-American Organizations, 1964. Founder, Community Understanding for Racial and Ethnic Equality, 1986. Member, 1998 Charter Revision Commission.

- Tosano J. Simonetti. Executive Director of Security, MacAndrews and Forbes Holdings Inc., 1997-Present. First Deputy Police Commissioner, 1996-1997 (Member of NYPD for 40 years). Member, Civilian Complaint Review Board, 1996–1999.

- Spiros A. Tsimbinos. Attorney in the State of New York for 30 years. President, Queens County Bar Association, 1994-1995. Legal Counsel and Chief of Appeals, Queens County District Attorney Office, 1990-1991. Member, 1998 Charter Revision Commission.

The Commissioners' backgrounds and experiences are diverse. The Commission includes five lawyers, three executives of human service providers, two investment bankers, two other business executives, two former prosecutors, a former law enforcement officer, a community activist, a religious leader and a professor. They sit on the boards of a number of not-for-profit organizations that serve the City and have varied political affiliations. The Commission includes individuals who have served in the Lindsay, Beame, Koch, Dinkins and Giuliani Administrations. One member served on the 1983, 1988 and 1989 Charter Revision Commissions, and five members served on the 1998 Charter Revision Commission. Six of the Commissioners are women, four are minorities (including two African-Americans, one Hispanic, and one Asian-American), and two are immigrants.

C. The Commission Staff

The Commission was mostly staffed by career public servants with considerable expertise in City government. Claude M. Millman, the Executive Director, was an Assistant United States Attorney in the Southern District of New York from September 1989 through June 1996. During the Clinton Administration, Mr. Millman became the Chief of the Environmental Protection Unit of that office. He joined the City in 1996, where he has served as a Deputy Commissioner of the Trade Waste Commission and the City Chief Procurement Officer. Mr. Millman has never been affiliated with any political party or campaign.

Steven Stein Cushman, the Commission's General Counsel, has been employed by the City since 1988. In 1998, Mr. Cushman became the Deputy Chief of the Contracts and Real Estate Division of the Law Department, and from 1995 to 1998, he was Assistant Chief of the Environmental Law Division of that office. He was Assistant Counsel to the Department of Environmental Protection from 1993 to 1995 and an Assistant Corporation Counsel in the Affirmative Litigation Division of the Law Department from 1988 to 1993.

The Commission's four Deputy Directors, Jan English (Administration), Jose Nicot (Education and Human Services), Heather Shaw (Community Development and Business Services), and Angelica Tang (Immigrant Affairs and Language Services), have worked in City government for periods ranging from 5 to 20 years. All but one of the Deputy Directors joined City government during prior Administrations.

Many members of the Staff were attorneys at the City's Law Department, which is a professional, independent law office that has represented, among others, the Mayor, the Public Advocate, the Comptroller, and the City Council. In addition, some staff support came from the private sector – particularly attorneys and others from the law firm of Gibson, Dunn & Crutcher, LLP. The Staff's two Research Directors (Timothy Stark and Masha Zager) have each worked for the City for more than a decade.

The Staff brought a wealth of experience to the areas studied by the Commission: One member was experienced regarding the City's budget process. Another used to be employed by the City Commission on Human Rights. A third was an expert in election law. Three worked at City oversights in the human service area. Three worked on the City's efforts to combat organized crime. Other Staff members worked at the Department of Employment, Immigrant Affairs, and the Department of City Planning. Two had expertise in environmental law. Three were experts in procurement. This considerable expertise enabled the Staff to present sound

recommendations to the Commission and the public in less than three weeks from the date of the Commission's first meeting.

D. The Commission's Public Outreach and Proceedings

The Commission developed its proposals for the November 1999 ballot by: (1) initiating a multi-media public outreach campaign to solicit public proposals for Charter revision; (2) distributing to the public a Staff report setting forth recommended revisions to the Charter text and the grounds for the proposed revisions; (3) questioning the Staff concerning the Staff report and proposals at televised public meetings; (4) holding a televised public hearing in each of the five boroughs to receive public comment on the proposed Charter revisions; (5) questioning 30 experts at two televised public meetings, and elsewhere, concerning the Staff proposals; (6) deliberating the merits of the proposals and selecting those worthy of consideration for inclusion on the November 1999 ballot at a televised public meeting; (7) distributing to the public a summary of the remaining proposals in English, Spanish, and Chinese and inviting the public to a citywide public hearing concerning those proposals; (8) holding the televised public hearing to receive additional public comment on the remaining proposals; and (9) deliberating and voting on the proposals at two televised public meetings.

The public was afforded a month to submit proposed Charter changes before the Staff made its preliminary recommendations, and the Commission remained open to new public proposals throughout the process. Moreover, almost all of the issues considered by the Commission were made public two months before the Commission's final hearing and vote, and the proposed text changes to the Charter were made public more than one month before the final public hearing. As a result, the public was able to shape the Commission's agenda and critique the proposed Charter revisions.

On June 24, 1999, Chair Mastro initiated the campaign to solicit public proposals for revisions to the Charter by issuing a "Solicitation of Proposed Revisions to the New York City Charter," together with a notice of the Commission's first public meeting. The notices were published in a dozen newspapers including publications directed at members of the African-American, Hispanic, Caribbean, Chinese, Russian and Korean communities.[2] The notices were also published on a daily basis in the *City Record*, on the Web, and on Crosswalks, the City's cable-access television station. Finally, the notices were sent by mail to approximately 4,000 interested persons. In response to the Chair's solicitation, the Commission Staff received

hundreds of letters, telephone calls and E-mails requesting information and submitting proposals for Charter revisions. In just two months (from the last week of June, 1999 through August 29, 1999) there were over 4,600 "hits" on the Commission's Web-site by people seeking Commission reports, notices, and other information and checking the meeting and hearing schedule.

On July 1, 1999, the Commission held its first meeting, at which the Chair provided the Commissioners and the public with a proposed schedule, informed the Commissioners that he had issued a solicitation for proposed revisions to the Charter, announced that he intended to release, the following day, a list of issues for the Staff to consider, and encouraged the Commissioners and the public to raise issues not necessarily brought up by the Commission Staff. The Chair stressed that the Commission was convened to review the entire Charter in a fair and non-judgmental way and that all meetings, hearings and forums conducted by the Commission would be open to the public.

The Commission's full schedule of subsequent meetings, public hearings and forums was published initially on July 19, 1999, in the *New York Times*, *Noticias del Mundo* and the *World Journal* (in Chinese), and, during the following week, in ten other newspapers – the *Daily News*, the *Post*, *Newsday*, the *Beacon*, *Caribbean Life*, *Amsterdam News*, *El Diario*, the *Korean Times*, *Sing Tao*, *and Novoye Russkoye Slovo*. This list includes publications that serve the African-American, Hispanic, Chinese, Russian, Korean and Caribbean communities. The schedule was also mailed to approximately 4,000 interested persons, announced on the Web, and published on a daily basis in the *City Record*.

A second Commission meeting was held on July 22, 1999, at which the Staff orally presented proposals for revising the Charter and submitted a 250-page public report entitled, "Preliminary Recommendations Regarding Charter Revision: A Staff Report." The Staff recommended that the Commission consider approximately 40 proposals for the November 1999 ballot and summarized the public proposals received by the Commission in response to the Chair's solicitation.

On July 29, 1999, the Commission met again, this time to question the Staff about the Staff report and to discuss issues that came up during their review of the report. At the end of the meeting the Commission voted unanimously to depart from the Staff's recommendations in the following ways: It would not eliminate the Art Commission or the Hardship Appeals Panel; it would modify the budget proposal imposing a 4% cap on City spending to limit the Mayor's power by providing that the Mayor would need to work jointly with the Council in order to lift

the cap; it would consider a clarification and consolidation of the powers and duties of the Office of Administrative Trials and Hearings; and it would consider whether to give the Mayor's Commission to Combat Family Violence Charter status.

On July 30, 1999, the Chair issued a "Notice of Commission Resolution and Opportunity for Public Comment" summarizing the Commission's resolution of the prior evening and requesting public comments on the proposals before the Commission. The notice was published in the original 13 newspapers and in the *City Record.* Moreover, together with a revised edition of the Staff report, it was made available on the Web and mailed to approximately 4,000 interested persons.

The Commission held public hearings on the proposals before it on August 5 (Queens), August 9 (Staten Island), August 10 (Bronx), August 11 (Brooklyn) and August 12 (Manhattan). All of the hearings began at 7:00 p.m. Two ended around midnight. All members of the public who wished to do so were afforded an opportunity to speak. Members of the public were urged to limit their remarks to three minutes as a courtesy to the other speakers, but all were permitted to conclude their remarks, and many spoke for five minutes or more. More than 300 members of the public testified, including 40 elected officials in person or by submission. All of the hearings were repeatedly televised on Crosswalks.

The Commission held public meetings on August 6 and 13, 1999, for the purpose of hearing expert testimony from invited speakers. These experts addressed most of the issues being considered by the Commission including the budget process, civil rights, elections, government integrity, government reorganization (child welfare, public health, organized crime, and domestic violence), immigrant affairs, land use and procurement. These two meetings, each of which lasted approximately four hours, were repeatedly televised on Crosswalks.

On August 17, 1999, the Commission held a public meeting to consider the various proposals, the public comments received and the expert testimony. Prior to the meeting, the Chair had asked each Commissioner expected to attend the meeting to report on a topic of particular interest to that Commissioner. Accordingly, at the meeting, each Commissioner reported on a topic and made recommendations to the Commission regarding which proposals were worthy of further consideration for the November 1999 ballot. After considerable deliberation, the Commission voted to consider 14 proposals for the November 1999 ballot and recommend that the other proposals be studied further at a later date. The Chair emphasized that the Commission was only voting to consider the 14 proposals and that no final decision would be made until after hearing additional public comment on August 26, 1999.

The Commission then issued a summary of the 14 proposals, entitled "Proposals Being Considered By the Commission for November 1999 Referenda." The summary, together with a notice of public hearing, was published in 15 newspapers[3] (in English, Spanish, Chinese, Korean and Russian, as appropriate) between August 23 and August 26, 1999 and in the *City Record.* The notice, which indicated that copies of the summary in English, Spanish, and Chinese could be obtained from the Commission and were also available on the Web, was mailed to approximately 4,000 interested persons in English, Spanish, and Chinese. The notice itself was also posted on the Web in English, Spanish and Chinese.[4]

On August 26, 1999, the Commission held a citywide public hearing for comment on the 14 proposals still under consideration for inclusion on the November 1999 ballot. Spanish and Chinese translators were available to assist speakers. More than 50 members of the public testified including six elected officials.

On August 27, 1999, the Commission met to discuss the remaining proposals and the public comments received the prior day. The Commission decided to delay voting on the proposals, and agreed to consider the effective dates of the proposals and whether to place the proposals on the ballot individually, in groups or as one question addressing all proposed changes.

On September 1, 1999, the Commission held its final public meeting. At that time, the Commission voted to issue this report and make recommendations for submission to the voters on the November 1999 ballot.

E. Public Awareness of the Commission's Work

As described above, the Commission undertook extensive outreach efforts to solicit ideas on how to revise the Charter and obtain comments on the various proposals before the Commission. In addition, the Commission's work was also covered by the media as well as the Commission's critics. As a result, the Commission's work was highly-publicized.

Between June 15, 1999 (the date that the Mayor convened the Commission) and August 26, 1999 (the date of the Commission's final public hearing), the City's five daily newspapers (*New York Times*, *Daily News*, *New York Post*, *Newsday* and *Staten Island Advance*) referred to the Commission in more than 60 articles, editorials, and letters. The Commission was referenced in the *New York Times*, on average, every third day during that period. In total, the

Commission's work was covered in more than 100 articles that appeared in more than twenty news publications.

The Commission's work was also covered on television and radio, including WNBC-TV, WABC-TV, New York 1-TV and WBBR-Radio. For example, New York 1 provided extensive analysis of the process on its programs "New York Close-Up" and "Inside City Hall." It televised interviews of Chair Mastro, Public Advocate Mark Green, former Mayor Edward Koch and others, as well as reporter round table discussions. New York 1 also televised press conferences held by Mayor Giuliani and Public Advocate Green, as well as interviews and clips of speeches given by a number of activists and public officials with varying opinions of the Commission's work. In addition, New York 1 posted the Commission's schedule of meetings and hearings on its Web-site, together with commentary and updates on the process.

F. Critiques of the Commission's Work

Some members of the public made substantive comments regarding how the Charter could be improved. These substantive comments, which are discussed in the following chapters, were of great help to the Commission in determining how to fashion its proposals for the November 1999 ballot. Other members of the public, principally from the Working Families Party and ACORN, criticized the Commission, its process and work. They principally complained about the Commission's process and objected to one of the Commission's wide array of proposals: the Staff's recommendation that any mayoral vacancy be filled by a special election to be held within 60 days of such vacancy, the procedure used to fill vacancies in all other elected offices in the City.

1. Procedural Critiques

On the procedural front, the critics complained, among other things, that: (1) public hearings to revise the Charter should not be held during the summer; (2) the Commission was not holding enough public hearings; (3) as a general matter, the Commission was moving too quickly (which is precisely the opposite of the usual complaint about governmental institutions moving too slowly); (4) the public hearings were inadequate; (5) the Commissioners were appointed by the Mayor; and (6) the make-up of the Commission was not reflective of the City's population.

Of course, it is not at all surprising that those who object to the substance of this Commission's work would also criticize its process. Indeed, it is ironic that the 1989 Charter

Revision Commission, which was repeatedly hailed by this Commission's critics as having employed a model process, contemporaneously faced much of the same criticism that this Commission received.

The 1989 Charter Revision Commission first presented the public with its proposals for Charter change approximately two months before the Commission's August 2, 1989 final vote. The public had less than 16 days to comment on its proposed text changes, which were made available to approximately 2,000 members of the public. The Commission's ten public hearings were held during the summer -- between May 31 and July 21, 1989. Hearings were not televised in their entirety, and there was no internet to simplify that Commission's communication with the public.

These elements of the 1989 Charter Revision Commission's process were sharply criticized by its opponents.[5] Some urged that "the 1989 commission postpone its referendum until after the November election to give the people time to digest the complicated proposals."[6] They argued that the 1989 Commission's timetable "would not allow" for "a knowledgeable review . . . by the public," and that the "substance [was] so confusing to the public" that it could not be knowledgeable."[7] "Those supporting a delay noted that, in just two dizzying months after the Supreme Court's decision in late March, the charter commission considered and then dismissed a dizzying array of alternatives. Since civic groups had great difficulty keeping up, they said, the average citizen would have been hard pressed to do so."[8] Moreover, a "coalition of black and Hispanic civic groups" opposed the proposals, "advocated most passionately for a slowdown" and described the Commission as "a very elitist operation."[9] "[T]he coalition disrupted a charter commission meeting with a 10-minute demonstration" to voice their demands for a delay.[10] Demonstrators referred to the 1989 Charter Revision Commission as a "Koch-appointed Commission," asserted that a failure to postpone the referendum would mark the City as "one of the last bastions of institutionalized racism" and left "chanting 'Schwarz, Schwarz, Have You Heard? [New York] is not Johannesburg.'"[11] Apparently, other critics asserted that the Commission's motives were personal; for some reason, the Commission had to "keep stressing that the changes they ha[d] proposed so far [we]re not aimed at any particular elected official, only the office the person [held]."[12]

One writer summarized the criticisms of the 1989 Charter Revision Commission as follows:

> Critics charged that the commission's haste forestalled an effective citywide debate. Discussion of the 400 single-spaced pages of proposals was squeezed into

> four months, although the commission had been around for nearly three years in various incarnations. The actual time for debate was even less: Most of the document was thrown together in two weeks to meet Schwarz's August 2 deadline. When Mayor Koch or the New York Times signaled disapproval of this or that proposed section, Schwarz and his staff were forced to stay up all night removing or revising the offending passages. Schwarz set such a fast pace that some commissioners complained that they had no chance to read what they were voting on.[13]

Like both the 1988 and 1989 Charter Revision Commissions, this Commission held public hearings during the summer. In the City that never sleeps, summertime was the right time for each of these Commissions to solicit public input.[14] Moreover, in this Commission's case, our public hearings were well attended, and the Commission heard from more than 40 public officials and more than 350 members of the public.

The 1989 Charter Revision Commission relied to some extent on work done by the 1988 Charter Revision Commission.[15] Similarly, we were fortunate to have the benefit of work produced by the 1998 Charter Revision Commission. Five of our members served on that Commission, which started its effort by soliciting ideas for Charter revision and holding five exploratory hearings throughout the five boroughs on issues in the budget process, elections, government integrity, government reorganizations, land use and procurement areas. Moreover, that Commission's staff report concerning non-partisan elections and other issues for further study were helpful to this process.

While the 1989 Charter Revision Commission had to propose sweeping changes in the governmental structure, we held roughly the same number of public hearings to obtain comments on our proposals. The 1988 Charter Revision Commission held six initial public hearings and another five after issuing its proposals. The 1989 Charter Revision Commission held five public hearings after issuing its proposals and another five after distributing its proposed text changes. The 1998 Charter Revision Commission held five initial public hearings and another two after issuing its proposals. We solicited written public proposals, issued our own proposals together with proposed text changes, and then held six public hearings.

Moreover, we held hearings in all five boroughs at convenient, prominent locations.[16] Of course, in a City like ours, it is impossible to satisfy everyone. For example, the Bronx Borough President criticized our location choice in the Bronx, just as the Brooklyn Borough President criticized the 1989 Charter Revision Commission's choice in Brooklyn.[17]

All of these facilities were able to accommodate more than 200 people. Moreover, we continued our hearings until all speakers were heard, which on two occasions was around

midnight. While some members of the public had to wait to be seated, all who wanted to speak got the opportunity to speak.[18]

Finally, our Commission was as diverse as the 1988 and 1989 Charter Revision Commissions. The 1988 Commission had four women, two African-Americans, three Hispanics and no Asian-Americans. The 1989 Commission had four women, three African-Americans, three Hispanics, and no Asian-Americans. This Commission has six women, two African-Americans, one Hispanic, and one Asian-American. Moreover, this Commission is also politically diverse. It consists of ten Democrats (including the Chair, Vice-Chair and Secretary), three Republicans, one Liberal and one Independent.

2. Substantive Critiques

Most of the critics who attacked our work did not wait to see what we would propose. They prejudged us, and when we proved them wrong, they criticized us on different grounds anyway. These critics charged that the Commission was appointed to carry out a "political vendetta" by attempting to change the line of mayoral succession. Early in the process, however, we demonstrated that our work would not be about any one man or one issue. We decided at the outset that we would not change the line of mayoral succession at this time. Instead, we proposed that the Public Advocate continue to succeed the Mayor but that the voters be empowered to elect a new Mayor within 60 days, at a special election, just as they are currently empowered by the Charter to fill vacancies in every other City elected office. At the same time we proposed to study in detail 40 other proposals regarding the budget process, civil rights, elections, land use, government reorganization, government integrity, immigrant affairs and procurement, which were eventually narrowed to these 14 proposals.

Our only goal in recommending these proposals has been to ensure that we institutionalize the positive governmental reforms that have served our City so well in recent years in such areas as fiscal integrity, civil rights, immigrant's rights, public health, fighting organized crime, preventing child abuse and domestic violence, and gun safety. One reform that we want extended and guaranteed in the Charter is the notion that voters should be empowered to elect their leaders. In 1988, the City amended the Charter to provide that vacancies in all elected offices, except the Mayor, would be filled through special elections. That electoral system has worked well over the past decade. It is time to extend that approach to the mayoralty. In making that recommendation, we are motivated only by the most fundamental of principles: democracy.

Our critics claim that it would be wrong for the Commission to "change the rules in the middle of the game." However, democracy is not a game or a sporting event. The people have

the right to change the rules of their government if they so choose. Under our proposal, the Public Advocate will still succeed to the mayoralty in the event of a vacancy, but the voters will now decide whether they would like the opportunity to vote for a new Mayor within 60 days of the vacancy, just as they currently have that opportunity when a vacancy occurs in any other City elected office.

The voters have often made such choices. For example, in 1988, the voters approved a "sensible" proposal of the 1988 Charter Revision Commission to require that vacancies in the offices of the Public Advocate, Comptroller, Borough Presidents, and City Council be replaced through special elections.[19] The Charter amendment provided that the revision would take effect on January 1, 1989 – a mid-term change. In the absence of the 1988 amendments, a vacancy in a borough presidency occurring in January 1989 would have been filled for the remainder of the term by an individual by majority vote of the Council's borough delegation. Similarly, a vacancy in the Council would have been filled by the remaining members of the Council. By changing these rules in the middle of an electoral cycle, the voters extinguished the power of the Council members to appoint individuals to fill vacancies in those offices.

The "rules of the game" have also been changed mid-term regarding mayoral vacancies. In 1980, the State legislature amended Section 2-a of the General City Law to provide that the City Council President (now Public Advocate) would act as Mayor in the event of a vacancy only until the mayoral vacancy could be filled at that year's *general election* (as the law now provides), rather than for the remainder of the mayoral term (as the law previously provided). The amendment took effect immediately, on June 3, 1980, and thus would potentially have reduced by one year the period during which then-City Council President Carol Bellamy would have served if Mayor Koch had vacated the mayoralty before September 20, 1980. There was nothing unfair about that change enacted by the State without a referendum in the middle of a mayoral term; similarly, here, there is nothing unfair about this Commission's proposed change.

The question therefore becomes not whether the "rules of the game" can be changed mid-term but, rather, whether the proposed change is fair. Surely, it is fair to give voters the chance to decide whether they prefer a special election within 60 days of a mayoral vacancy just as it was fair in 1988 to make that same change mid-term regarding other elected offices in our City and just as it was fair in 1980 to make that change mid-term regarding mayoral vacancies.

Notwithstanding these observations, the concerns raised about this one special election proposal have overshadowed the importance of our total body of work. Those concerns, while misguided in our view, have persisted. Therefore, to eliminate any questions about this

Commission's work, to promote public confidence in this process, and to ensure full and fair consideration of all of this Commission's substantive proposals, the Commission has decided to recommend that this special election proposal only become effective as of January 1, 2002.

G. The Commission's Recommendations

The 1999 Charter Revision Commission will be the last one of this century. Since the five boroughs were united into one great city over one hundred years ago, the Charter has evolved in a fluid fashion, amended by the City Council, by referenda and by the State legislature hundreds of times. Despite the cry of critics, this Commission has sought from the beginning to promulgate proposals that are germane to the problems and issues New Yorkers face as we move into the next millennium. In the last several years, the City has experienced a renaissance. New York is again the undisputed "Capital of the World." The City has renewed itself through a commitment to fiscal integrity and social responsibility and public safety.

This Commission's proposals seek to make permanent our progress. We have proposed, among other things, to mandate prudence and restraint with the public purse; to extend permanent protections to immigrants and minority groups; to protect children by making the Administration for Children Services an independent Charter agency; to prevent domestic violence by requiring essential coordination of such services; and to ban guns within 1,000 feet of all schools and to require safety locks on all firearms. Our proposed Charter reforms are about our children's future and how the City will be governed into the next century.

Other Charter revision commissions have basically presented their proposed changes as a single revision through a single ballot question. For example, although one might very well have viewed the sweeping changes proposed by the 1989 Charter Revision Commission as multiple changes, that Commission viewed the bulk of its changes as bound by a singular theme -- that of abolishing the Board of Estimate and distributing its powers. The 1989 Commission could have broken that question down into many parts but chose not to do so. Instead, because its work was guided by one unifying principle it presented that body of work as one ballot proposal that had to stand or fall on its own. The only issue presented as a separate ballot question in 1989 involved the Landmarks Preservation Commission which was of intensive interest to the landmarks community but of a wholly separate type from that Commission's other work.[20]

This Commission is recommending Charter reform to be adopted or rejected by the voters through the ballot in November 1999. Our work has also been guided by one unifying

principle: making proven reforms permanent. If we do this, we will fulfill the "Athenian Oath of Fealty" to leave our City better than we found it.

We have accomplished so much together as a City in recent years. Let's keep the progress going into the next century. Our children's future depends upon it.

ENDNOTES FOR THE INTRODUCTION

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[1] The Mayor consulted with other elected officials, such as Council Speaker Peter Vallone, before making these appointments and, in the case of Speaker Vallone, even offered him the opportunity to recommend candidates for appointment.

[2] The advertisements were placed in the *New York Times*, *Noticias del Mundo,* the *World Journal,* the *Daily News*, the *Post*, *Newsday*, the *Beacon*, *Caribbean Life*, *Amsterdam News*, *El Diario*, the *Korean Times, Sing Tao, and Novoye Russkoye Slovo.*

[3] These publications included the original thirteen plus the *Staten Island Advance* and *Jewish Press.*

[4] In addition to foreign language versions of the proposals, interpretation in American Sign Language was provided at all public meetings, hearings and forums.

[5] On July 21, 1989, just twelve days before the 1989 Charter Revision Commission's final vote, that Commission heard testimony urging a delay. Peter Williams of the Center for Law and Justice of Medgar Evers stated: "Due to the short time allowed to us for review, the result has been unwanted pressure to respond. This is an inadequate manner to obtain democracy. . . our position is for delaying until 1990." Alexander Staber of the Brooklyn Assembly of Progressive Organization said: "You talk to the people in the communities, they don't know what is going on here." Raoul Rodriguez of the Coalition for 20 Million Dollars said: "The process used in creating these proposals has been rushed, extremely confusing and highly exclusive to the general population." He concluded: "[W]e feel that the citizenry and its advocates have been severely handicapped in participating in this process, and we strongly urge that the Commission appeal to the courts for a delay on the vote until 1990." Denise Outram, President of the Metropolitan Black Bar Association, stated: " [W]e feel as though communities across the City need more time in order to understand and respond to a number of these issues." Assembly Member Joseph Ferris said: The Commission's report "is something that about 99.99% of population doesn't even know exists. . . there's not enough time to respond." Transcript of the Brooklyn Public Hearing (July 21, 1989) at 229, 230, 289, 439, 481, 482, 494, 495, 533; see also Transcript of the Staten Island Public Hearing (July 17, 1989) at 11, 46, 71, 75, 115, 167, 184, 185; Transcript of the Manhattan Public Hearing (July 18, 1989) at 113; Transcript of the Queens Public Hearing (July 19, 1989) at 94, 380, 381; Transcript of the Bronx Public Hearing (July 20,1989) at 49, 367.

[6] "Shulman Becomes Target of Darts; Charter hearing becomes referendum," *Newsday* at 8 (June 8, 1989).

[7] "Charter Panel Facing More Pressure to Delay Vote," *New York Times* at B1 (June 20, 1989).

[8] Id.

[9] Id.

[10] Id.

[11] Frederick A. O. Schwarz, Jr. & Eric Lane, The Policy and Politics of Charter Making, 42 N.Y.L. Sch. L. Rev. 923, 929 (1998).

[12] "A View From City Hall, Early Chart on the Winners of Revision," *Newsday* at 6 (July 3, 1989).

[13] Robert Fitch, "Foundations and the Charter: Making New York City Safe for Plutocracy," *The Nation* at 709 (Dec. 11, 1989).

[14] Indeed, the 1988 and 1998 Commissions held 15 of their 21 public hearings during the summertime.

[15] The 1989 Charter revisions were not the product of a two-and-a-half year public process, as some claimed at our public hearings. Because the schedules of the 1988 and 1989 Charter Revision Commissions were dictated by the litigation concerning the Board of Estimate, the process was on hold for a year. The district court declared the Board unconstitutional in November 1986. The 1988 Commission first met in January 1987, held exploratory hearings in Spring 1987, and announced an initial proposal in March 1988. After the Supreme Court agreed to take the case in April 1988, however, the proposal was tabled, and the Commission pursued unrelated issues from April to August 1988. Those unrelated issues were put to the voters in November 1988. Mayor Koch then appointed a new Commission chaired by Frederick A. O. Schwarz, Jr. that included many but not all of the previous Commission's membership. The issue of how to restructure the government without the Board was not taken up again until one year later after the Supreme Court affirmed the lower court's ruling. Indeed, most of the 1989 Commission's work took place between April and August 1989.

[16] The Queens hearing, held at Queens Borough Hall, was directly accessible by four major subway lines. The two Brooklyn hearings at Metro-Tech Center were blocks from the borough's downtown hub and accessible by eleven subway lines. Manhattan's public hearing at Cabrini Hospital was easily reached by the Lexington Avenue subway line. The hearing at Calvary Hospital in the Bronx was accessible by the number six train and two bus lines that stop directly outside the hospital. The Staten Island hearing, held at the Petrides Center, was accessible by a bus line and by car, a principal means of transportation for Staten Islanders.

[17] Frederick A. O. Schwarz, Jr. & Eric Lane, The Policy and Politics of Charter Making, 42 N.Y.L. Sch. L. Rev. 723, 757 (1998).

[18] The crowd only exceeded capacity at hearings where members of the Working Families Party and ACORN packed into the rooms. The hearings cleared after buses arrived to take them home.

[19] Editorial, "Charter Revisions Made Mysterious," *New York Times* at A30 (Sept. 14, 1988).

[20] In addition to this Commission and the 1989 Charter Revision Commission, four other Charter revision commissions were convened during the past 25 years. The 1975 Charter Revision Commission placed ten questions on the ballot, but only endorsed six of them. The 1983 Charter Revision Commission divided its revision into three questions. The 1988 Charter

Revision Commission initially proposed two questions – one concerning campaign finance reform and voter assistance and another summarizing the other proposals. When those proposals were criticized as vague, it divided its work into five questions. The 1998 Charter Revision Commission summarized its various campaign finance reforms in a single question.

Questions have been raised about whether these Charter changes should be made by referendum, as opposed to legislation, and whether these changes are consistent with the types of changes made by previous Charter revision commissions. These changes basically fall into three categories: (i) changes that can only be made by Charter referendum (e.g., budget proposals, special election proposal, some of the procurement proposals); (ii) changes that provide enhanced protection of executive or legislative action if made by Charter referendum (e.g., human rights, immigrants' rights, executive coordination of City services to prevent domestic violence); and (iii) changes that will only occur if made by Charter referendum because of legislative inaction (e.g., Administration for Childrens' Services, Department of Public Health and Mental Hygiene Services, Organized Crime Control Commission, gun safety locks, some of the procurement proposals). These types of proposals are consistent with the practice of prior Charter revision commissions. For example, the 1998 Charter Revision Commission's campaign finance reform proposal could have been accomplished by legislation, but differed from legislation passed at or about that same time. Similarly, the 1989 Charter Revision Commission proposed many Charter changes that could have otherwise occurred through executive or legislative action, such as establishing certain new procedures for awarding City contracts, monitoring equal employment practices of City agencies, facilitating equal opportunity in City contracting, making City records available to the public, and establishing the Landmarks Preservation Commission as an independent agency. Likewise, the 1988 Charter Revision Commission proposed certain changes that could have otherwise occurred through executive or legislative action, such as City agency reporting requirements on capital maintenance, executive authority to establish controls to ensure agency effectiveness and integrity, and campaign finance reforms, which could have been accomplished by legislation but differed from legislation passed at or about that time.

THE BUDGET PROCESS:

ENSURING FISCAL RESPONSIBILITY

SECTION I

SECTION I

THE BUDGET PROCESS

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I. THE BUDGET PROCESS

(Chapters 6, 9 and 10)

Tremendous strides have been made in recent years to improve the fiscal health of the City. Difficult decisions have been made to rein in the growth of government spending and to return money to New Yorkers through carefully targeted tax cuts designed to increase job growth and encourage business investment. The City has learned the fundamental principles of fiscal responsibility: (1) limit budget growth to inflationary and emergency increases; (2) reduce taxes and only increase them in the rare circumstance where there is a broad consensus supporting a tax; and (3) save a substantial portion of any budget surplus for the future. Having witnessed the benefits of adhering to these principles of fiscal responsibility, we must now institutionalize them in the Charter. We must revise the Charter to discourage irresponsible increases in City spending and limit the imposition of new taxes or tax increases – the taxes that hinder private sector growth. These proposed changes will ensure the City's fiscal stability into the next century.

A. OVERVIEW: THE BUDGET PROCESS

The City budget process involves many governmental entities in both active and advisory roles, including the Mayor, the Council, the Borough Presidents, the Community Boards and the Comptroller. In addition to those entities, the State Financial Control Board, the Office of the State Deputy Comptroller for New York City, the Independent Budget Office and various other groups review the City's budget.

Chapter 10 of the Charter establishes the budget process, while Chapters 6 and 9 establish the requirements for the expense and capital budgets respectively. The Charter requires that the Mayor submit to the Council a preliminary and an executive budget, each of which must present a complete financial plan for the City and its agencies. Charter § 225(a). Each budget must consist of three parts: the expense budget, which must include proposed appropriations for the operating expenses of the City including debt service; the capital budget and program; and the revenue budget, which must set forth the estimated revenues and receipts of the City. Charter § 225(a).

The Charter establishes the City's fiscal year as beginning on July 1st and ending on June 30th. Charter § 226. By a date set by the Mayor, the head of each agency must submit to the Mayor a detailed estimate of expense budget requirements and capital budget and program

requirements for the agency for the ensuing fiscal year and the three succeeding fiscal years as well as a detailed estimate of all receipts, from sources other than taxes, that the agency anticipates collecting during the fiscal year. Charter § 231(a). These departmental estimates must be provided expeditiously by the Mayor to the Borough Presidents. Charter § 231(a).

By January 16th of each year, the Mayor is required to submit a preliminary budget and a four-year financial plan to the City Council. Charter § 236. The Charter then requires a period of review that includes Community Board review (Charter § 238), Borough Board hearings (§ 241), Borough President recommendations to the Mayor (§ 245), a report of the Independent Budget Office (§ 246), and City Council preliminary budget hearings (§ 247).

The executive budget and budget message is due by April 26 of each year. Charter § 249(a). Following its submission, the Borough Presidents submit to the Mayor and the Council a response to the executive budget, and the City Council holds hearings on the executive budget. Charter §§ 251, 253.

The Charter specifies the format of both the preliminary expense budget and the executive expense budget. Charter § 100. Each expense budget consists of units of appropriation that represent the amount requested for a particular program, purpose, activity or institution. Charter § 100(c). Each unit of appropriation must be described programmatically and supported by line items. Charter § 100(e). Within the expense budget, the Mayor must identify the discretionary increases, of which five percent is allocated and distributed by formulas to the five Borough Presidents. Charter § 102. Borough Presidents are also allocated nine-tenths of one percent of the cost of capital projects for expense budget requirements. Charter § 102-a. The Charter also requires a contract budget that sets forth by agency each major category of contractual services. Charter § 104.

Chapter 9 of the Charter sets forth the requirements for the format and content of the departmental estimates completed by agency heads for capital projects, the preliminary capital budget and the executive capital budget. Charter §§ 212-14. The preliminary capital budget must include: (1) a financial plan covering estimates of capital expenditures for the four ensuing years, (2) departmental estimates for capital projects with cash flow requirements and funding sources for each project, (3) a capital program status report setting forth the appropriations for each project with year-to-date expenditures, and (4) a summary description of each project. Charter § 213. The executive budget must set forth each capital project including the Borough Presidents' proposed projects. Charter § 214(a). The executive capital budget must include a statement of the amounts needed to complete the projects initiated in prior years and those

proposed in the executive budget, including amounts needed for amendments, contingencies and future projects. Charter § 214(b)(1). It must also contain a statement of the likely impact on the expense budget of staffing, maintaining and operating those capital projects. Charter § 214(b)(2).

The Charter also requires that the Mayor issue a ten-year capital strategy on April 26th of every odd-numbered year. Charter §§ 215, 248. Prior to doing so, the Department of City Planning and the Office of Management and Budget issue a preliminary strategy, due on November 1, and the City Planning Commission holds a hearing and issues a report on the preliminary strategy. Charter §§ 215, 228.

In adopting the budget, the Council may amend the executive budget to increase, decrease, add or omit any unit of appropriation or to change a term and condition. Charter § 254(a). However, within five days of the Council's action, the Mayor may veto any increase or addition to the budget, any unit of appropriation or any change in a term or condition. Charter § 255. By a two-thirds vote, the Council may override any disapproval by the Mayor. However, if the Council does not act within ten days of the disapproval, the expense budget is deemed adopted as modified by the Mayor. Charter § 255.

If the expense budget is not adopted by June 5th, the expense budget and tax rate adopted for that fiscal year are deemed extended to the new fiscal year until a new expense budget is adopted. Charter § 254(d). Similarly, if the capital budget and capital program have not been adopted by June 5th, the unutilized portions of all prior capital appropriations are deemed reappropriated. Charter § 254(e).

Once the budget is adopted, it must be certified by the Mayor, the Comptroller and the City Clerk. Charter § 256. The Mayor then submits to the Council a statement of the total projected revenues for the next fiscal year excluding those of the general fund and taxes on real property. Charter § 1515. The Council is required to use this information to fix property tax rates. Charter § 1516.

Subject to the quarterly spending allotments, changes within units of appropriation in the expense budget may be made by the head of each agency at any time during the fiscal year. Charter § 107(a). In addition, the Mayor may transfer part or all of any unit of appropriation in the expense budget to another unit, provided that, if the proposed transfer is between two agencies or would result in more than a 5% or $50,000 increase or decrease from the adopted budget, the Mayor must notify the Council of the proposed action and afford the Council 30 days from the first stated Council meeting following such notification to disapprove the

proposed change, notify the Comptroller of the transfer, and publish a notice of the transfer in the *City Record* as soon as possible. Charter § 107(b). The capital budget can be amended using the same process that is followed in adopting it, which includes the right of the Council to approve the proposed amendment as submitted or increase or decrease the proposed appropriation, but only if funds are available within the capital budget and the applicable program category. Charter § 216.

B. Limiting Government Spending Through (1) Imposing an Inflation-Based Cap on Increases in City-Funded Spending, (2) Requiring Explanations of Agency Increases Above the Rate of Inflation, and (3) Requiring Fiscal Impact Statements for all Unfunded Legislative Mandates

Issue: Should the Charter encourage fiscal responsibility by (1) limiting increases in City-funded spending to the inflation rate, (2) requiring explanations of agency increases above the rate of inflation, and (3) requiring fiscal impact statements for all unfunded legislative mandates?

Relevant Charter Provisions: Charter §§ 33, 249, 250 and 254.

Discussion: Disciplined spending practices over the past several years have strengthened the economy and enabled the City to produce record surpluses. If the City had not changed its course of spending growth, however, no surplus would have been produced, the strong economy notwithstanding. A major component of the City's recent success in improving the City's fiscal stability has been its willingness to make difficult funding choices, thereby avoiding falling into a pattern of spending all available resources.

The Commission believes that the budget processes set forth in the Charter should build on the successes of recent years by mandating fiscal responsibility. First, the Charter should establish a cap limiting year-to-year projected increases in City-funded spending to the rate of inflation. The inflation-adjusted cap could only be lifted if the Mayor and the Council jointly agree that an emergency exists or that it is otherwise in the City's best interest to spend at a level above the cap. Second, the Charter should require an explanation in the Mayor's executive budget for each agency whose budget increase exceeds the rate of inflation. Similarly, where the Council budget increases agency appropriations by a level that exceeds the rate of inflation, the Council budget resolution would have to include an explanation for the increase. Third, the

Charter should require fiscal impact statements to be prepared concurrently with home rule messages sent by the City to the State legislature. Because home rule messages frequently have economic consequences analogous to local laws, the City Council should be required to prepare fiscal impact statements in considering such measures, just as they do in adopting local laws.

1. Inflation-Based Cap on Increases in City-funded Spending

The best way to ensure long-term fiscal stability is to limit the rate of growth in spending. The Commission considered several ways of amending the Charter to limit City-funded spending. The Staff originally proposed to set a cap on spending of 4%. While a spending cap would benefit the City, such a cap must be tied to inflation rather than set at an arbitrary rate such as 4%. Indeed, even if a 4% cap were consistent with the average inflation rate, it might be too high during times of low inflation and too low during times of high inflation. A cap linked to inflation, on the other hand, should automatically reflect changing economic conditions.

The Consumer Price Index ("CPI") for the region is an appropriate and reasonable inflation indicator to use for this purpose. It is one of the few such indicators calculated on a regular basis and, therefore, the most appropriate indicator for these proposals.

For almost a decade, the City's disciplined spending choices have resulted in average spending increases below the CPI. Not since 1990-91 did the City's adopted budget increase faster than the CPI. From 1984-85 through 1990-91, however, the budget increased faster than the CPI every year. [1]

If the Charter were revised to include an inflation-based spending cap, the City would join the national trend to limit year-to-year spending increases. At least 23 states currently have some limitation on expenditure or revenue growth. [2] For example, in 1992, Connecticut adopted a constitutional provision limiting appropriation growth to the greater of personal income growth or inflation growth. In 1994, Florida adopted a constitutional provision limiting revenue growth to a five-year average of personal income growth. The Commission believes that these measures have contributed to fiscal stability in those states where they have been adopted.

An inflation-based cap on City spending will ensure that the government does not spend in an undisciplined fashion during prosperous economic times. More importantly, during less prosperous times, the inflation-based cap would prevent the City from continuing to increase spending at imprudent rates, leaving taxpayers to finance the costs. If the expenditure of taxpayer dollars is constrained by a spending cap, elected officials will need to consider competing interests and prioritize when producing a budget.

Some public speakers testified that circumstances would arise where the City budget would increase faster than the rate of inflation. They gave such examples as a surge in the crime rate requiring the hiring of more police, a substantial increase in the number of children enrolled in public schools, a collective bargaining initiative, and a spike in the City's welfare rolls. The proposed Charter revision is already designed to address circumstances such as these. The proposed revision would enable the Mayor and the Council jointly to lift the cap in a particular fiscal year on the ground that it would be in the City's best interest to do so. Thus, for example, the Mayor and Council could lift the cap to provide for additional spending necessitated by a collective bargaining agreement if to do so would in their collective judgment be in the City's best interest. However, even if a determination were made to increase the cap in a particular year, spending would not be undisciplined. The cap would merely be readjusted to a more appropriate level for that one year. Thus, while the proposed Charter revision encourages fiscal restraint, it does not hamstring in any respect the City's ability to respond to changing circumstances or emergency situations in order to make responsible management decisions.

Without a limitation, taxpayers are left only to hope that their elected officials will control costs as they have learned to do in recent years. A Charter change that institutionalizes such fiscal responsibility through an inflation-based limit on increases in spending will provide assurance to the City's taxpayers that the City's budget will remain stable into the next century. Moreover, it will discourage unwise annual spending increases that would inevitably lead to higher taxes in the future.

2. Explanation for Agency Increases Above Inflation

The Charter should also discourage imprudent spending increases by requiring an explanation in the Mayor's budget message for each agency whose budget increase exceeds the rate of inflation. Similarly, where the Council budget increases agency appropriations by a level that exceeds the rate of inflation, the Council budget resolution should also include an explanation for the increase.

Requiring an explanation for agency increases above the rate of inflation would hold elected officials accountable for disproportionately high increases in spending. To the extent that there is an important public policy goal being achieved through this increase, the explanation would help educate the City's taxpayers regarding those spending choices. As Comptroller Alan G. Hevesi noted in his comments to the Commission regarding the Staff's proposal to require

explanations regarding budget increases, "this is a straight disclosure issue that makes the budget more comprehensible to [the City's] citizens."[3]

The Commission considered requiring explanations for increases in any unit of appropriation that exceeded the rate of inflation but concluded that an explanation at the agency level would be more meaningful. At the Commission's expert forum on August 13, 1999, Christopher Augostini, Deputy Director of the Office of Management and Budget, testified that the budget contains more than 600 units of appropriation, that anticipated expenditures might be moved from one unit of appropriation to another within an agency for various reasons, and that explanations regarding individual units of appropriation might cause budget critics to get "lost in the detail" without obtaining any explanation why overall funding for an agency should be increased at a rate greater than inflation. Similarly, Professor Charles Brecher of New York University testified that "detailed explanations by unit of appropriation" would be "a cumbersome procedural burden without much substantive contribution to the budget debate." Accordingly, the Commission rejected the Staff's initial approach in favor of requiring an explanation for any increase in an agency's budget that exceeds the inflation rate.

3. Fiscal Impact Statements for Home Rule Messages

The Commission considered many proposals to address the problem of unfunded mandates. As explained below, certain proposals were deferred for further study. However, the Commission concluded that the Charter should require that a fiscal impact statement be prepared for any unfunded legislative mandate and for any home rule message submitted by the Council to the State Legislature that may result in an unfunded legislative mandate.

Although Section 33 of the Charter requires that fiscal impact statements accompany proposed laws or budget modifications, it does not apply to home rule messages sent by the Council to the State. If the purpose of fiscal impact statements is to ensure that lawmakers fully confront the economic consequences of their actions, home rule messages should be included. Mandating the inclusion of a fiscal impact statement with home rule messages will promote better informed and more accountable policy-making. Because home rule messages frequently have economic consequences analogous to local laws, the City Council in considering such measures should be required to prepare fiscal impact statements as they do with local laws.

Proposal: The Charter should limit year-to-year increases in City-funded spending to the inflation rate. In the event of an emergency, or other need in the best interest of the City, the Mayor and the Council may jointly lift the cap for that fiscal year. The Charter should also require an explanation for each instance where an increase in an agency's budget exceeds the rate of inflation, and that for all legislative mandates, including home rule messages that may result in unfunded legislative mandates, fiscal impact statements be issued at the time of passage.

Proposed Charter Revisions:

Section 1. The section heading of section 33 of the charter is amended to read as follows:

§ 33. Local laws, home rule requests and budget modifications; fiscal impact statements. a. No proposed local law or budget modification shall be voted on by a council committee or the council unless it is accompanied by a fiscal impact statement containing the information set forth in subdivision b of this section. A fiscal impact statement containing the information set forth in subdivision b of this section shall also be prepared in connection with a home rule request.

b. A fiscal impact statement shall indicate the fiscal year in which the proposed law, legislation that is the subject of a home rule request (hereinafter, "home rule request") or modification would first become effective and the first fiscal year in which the full fiscal impact of the law, home rule request or modification is expected to occur; and contain an estimate of the fiscal impact of the law, home rule request or modification on the revenues and expenditures of the city during the fiscal year in which the law, home rule request or modification is to first become effective, during the succeeding fiscal year, and during the first fiscal year in which the full fiscal impact of the law, home rule request or modification is expected to occur.

c. All agency heads shall promptly provide to any council committee any information that it requests to assist it in preparing a fiscal impact statement.

d. Each fiscal impact statement shall identify the sources of information used in its preparation.

e. If the estimate or estimates contained in the fiscal impact statement are inaccurate, such inaccuracies shall not affect, impair, or invalidate the local law, home rule request or budget modification.

§ 2. Section 249 of the charter is amended by adding a new subdivision e to read as follows:

e. 1. Except as provided in paragraph two of this subdivision, the aggregate amount of city-funded expenditures in the executive expense budget for the ensuing fiscal year shall not exceed, by more than the rate of inflation, the estimate of city-funded expenditures for the current fiscal year included in the budget message pursuant to subdivision seventeen of section two hundred fifty.

2. Notwithstanding paragraph one of this subdivision, the aggregate amount of city-funded expenditures in the executive expense budget for the ensuing fiscal year may exceed the limit set forth in paragraph one of this subdivision where the mayor determines that it is in the best interest of the city to exceed such limit. In such case, the mayor shall propose an alternate limit, and the aggregate amount of city-funded expenditures in the executive expense budget for the ensuing fiscal year shall not exceed the alternate limit. If the mayor proposes an alternate limit, the budget message shall contain an explanation of the reason or reasons the mayor proposed the alternate limit.

3. For purposes of this subdivision, "city-funded expenditures" shall mean an amount equal to the net total amount of general fund expenditures less expenditures funded from the capital budget and categorical grants, whether from state, federal or other sources.

4. For purposes of this subdivision, "rate of inflation" shall mean the rate of change of the consumer price index for all consumers determined by the bureau of labor statistics for the New York area for the most recent twelve-month period available as of April first.

§ 3. Section 250 of the charter is amended by adding two new subdivisions, 17 and 18, to read as follows:

17. A statement of estimated city-funded expenditures, as defined in paragraph three of subdivision e of section two hundred forty-nine, for the current fiscal year.

18. If the mayor proposes an alternate limit on the aggregate amount of city-funded expenditures in the executive expense budget for the ensuing fiscal year pursuant to paragraph two of subdivision e of section two hundred forty-nine, an explanation of the reason or reasons the mayor proposed the alternate limit.

§ 4. Section 250 of the charter is amended by adding a new subdivision 19 to read as follows:

19. With respect to city-funded expenditures, an explanation for any increase in an agency budget in the executive expense budget for the ensuing fiscal year that, measured against the comparable agency budget for the current fiscal year, as modified in accordance with section one hundred seven, exceeds the rate of inflation. For purposes of this subdivision, the terms "city-funded expenditures" and "rate of inflation" shall have the same meanings as provided in paragraphs three and four of subdivision e of section two hundred forty-nine, respectively.

§ 5. Subdivision a of section 254 of the charter is amended to read as follows:

a. The council may not alter the budget as submitted by the mayor pursuant to section two hundred forty-nine except to increase, decrease, add or omit any unit of appropriation for personal service or other than personal service or any appropriation for any capital project or add, omit or change any terms or conditions related to any or all such appropriations; provided, however, that each increase or addition must be stated separately and distinctly from any items of the budget and refer each to a single object or purpose; and, provided, further, that the aggregate amount appropriated for capital projects shall not exceed the maximum amount of appropriations contained in the mayor's certificate issued pursuant to subdivision sixteen of section two hundred fifty; and provided, further, however, that the aggregate amount of city-funded expenditures appropriated in the expense budget shall not exceed (i) the limit set forth in paragraph one of subdivision e of section two hundred forty-nine, or (ii) the alternate limit proposed by the mayor pursuant to paragraph two of such subdivision, if the council shall by resolution approve such alternate limit, or (iii) an alternate limit jointly agreed upon by the mayor and the council pursuant to a written determination of the mayor and a resolution of the council. If the mayor proposes an alternate limit pursuant to paragraph two of subdivision e of section two hundred forty-nine and the council does not by resolution approve such alternate limit pursuant to (ii) above, and the mayor and the council do not jointly agree upon an alternate limit pursuant to (iii) above, then the council shall adopt a budget in accordance with this section and the aggregate amount of city-funded expenditures appropriated in the expense budget shall not exceed the limit referred to in (i) above.

§ 6. Section 254 of the charter is amended by adding a new subdivision f to read as follows:

f. If an increase by the council in city-funded expenditures to an agency budget in the expense budget shall result in an increase in a budget for the ensuing fiscal year that, measured against the comparable agency budget for the current fiscal year, as modified in accordance with section one hundred seven, exceeds the rate of inflation, then the council shall provide a written explanation for such increase at the time of adoption of the expense budget. For

purposes of this subdivision, the terms "city-funded expenditures" and "rate of inflation" shall have the same meanings as provided in paragraphs three and four of subdivision e of section two hundred forty-nine, respectively.

C. Placement of 50% of any Budget Surplus into a Budget Stabilization and Emergency Fund

Issue: Should a portion of net surplus revenues be used to fund a budget stabilization and emergency fund to be used for emergency relief or to prepay debt service, thereby reducing debt costs and enhancing long-term fiscal stability?

Relevant Charter Provision: Charter § 107.

Discussion: In June 1997, upon learning that the City would experience a budget surplus, the Mayor and the Speaker of the Council agreed to improve the City's long-term fiscal position by placing a portion of the surplus in a fund that could be used to address problems that might arise on a "rainy day" or, if any of the funds remained at the end of the fiscal year, prepay some of the following year's debt service. This prudent fiscal practice has served the City well. A "rainy day" arrived this year when the State eliminated the City's commuter tax. Moreover, the unexpended funds were used to reduce the City's debt service costs and thereby improve the City's financial condition.

The Charter must ensure that during strong economic times when the City benefits from a significant increase in tax revenues, the City will capitalize on that opportunity by using a portion of the additional resources to prepay future debt service payments. Such payments could include the retiring of long-term debt as well as the payment of the following year's interest payments. Creating a budget stabilization and emergency fund as a separate unit of appropriation for the prepayment of future debt service payments, and requiring a portion of any budget surplus to be placed in that fund, would enable the City to use current resources to improve the City's financial future.

When an unexpected surplus occurs during the fiscal year, there is often tremendous pressure for elected officials to spend the resources. If the City simply increases spending to the higher revenue level, however, the chance to make a lasting improvement for the future is lost. In fact, if in good times City spending climbs as fast as or faster than revenues, no surplus will exist, despite a strong economy. Thus, when an economic downturn occurs, the City would be unprepared for the reductions in revenue and increased demand for services. A Charter

amendment requiring that a portion of the surplus revenues be placed into a budget stabilization and emergency fund guarantees taxpayers that at least some of the surplus will be used to enhance the City's long-term fiscal condition in preparation for the inevitable downturn in the economy, and the opportunity for improved fiscal stability will not be lost to undisciplined boom-time spending.

The proposed Charter amendment would provide that when surpluses arise during the year at least 50% of those budget surpluses would be placed into a budget stabilization and emergency fund for the purpose of prepaying future years' debt costs. Such costs would include either future years' interest payments or the retirement of long-term debt. Implementing this fiscally prudent budgetary practice will enable the City to continue on a path to long-term fiscal stability.

The Commission considered public comments questioning the method that would be used under the proposal to determine whether a surplus exists. The Commission's proposal to require the use of a budget stabilization and emergency fund in the event of a surplus, however, would not modify the Charter's current process for determining whether there is a surplus. Net surplus revenues are identified when the City-funded revenues that are received are higher than the City-funded revenues identified in the budget at the time of adoption. If there are net surplus revenues, the Mayor may propose a budget modification to appropriate the surplus revenues, with the proposed modification being effective only if approved by the Council pursuant to Charter § 107. When the Mayor proposes and the Council approves a budget modification to incorporate net surplus revenues, 50% of the net surplus revenues would be placed in the budget stabilization and emergency fund.

The Commission also considered comments from the public, including from Comptroller Alan G. Hevesi, that surplus revenues should be available to prepay long-term debt and for pay-as-you-go capital financing. The Commission agrees that some flexibility to use a portion of these funds for pay-as-you-go capital or long-term debt reduction is appropriate and has provided for that need. The Commission is proposing that 10% of the fund may be used for pay-as-you-go capital financing. Flexibility with respect to long-term debt is also assured, given that the retirement of long-term debt is encompassed within the proposal's, "debt service."

The Commission also considered public comments seeking clarification as to under what circumstances it would be "in the best interest of the City" to transfer the funds from the budget stabilization and emergency fund. The Commission notes that the best interest standard is used in other places in the Charter. See § 312 (a)(6) (displacement of City workers); § 312 (b)(2)

(award of the contract to someone other than the low bidder); § 322 (selection of a procurement method other than a competitive sealed bid); § 803(b) (power of the Department of Investigation to launch investigations). The standard authorizes the Mayor and the Council to determine jointly what is in the City's best interest. An example might be where an unforeseeable emergency situation occurs in the City that requires substantial unbudgeted expenditures, such as a weather condition. Funds would be transferred to another account subject to the budget modification procedures set forth in Charter § 107, requiring the Mayor and the Council's joint agreement.

Proposal: The Charter should require that at least 50% of any surplus revenue shall be placed in a Budget Stabilization and Emergency Fund to be used for an emergency or other need that the Mayor and the City Council jointly determine is in the best interests of the City or, if not needed by the end of the fiscal year, for the prepayment of debt service costs.

Proposed Charter Revision:

§ 1. Section 107 of the charter is amended by adding a new subdivision f to read as follows:

f. If net surplus revenues are appropriated in the budget, then at least fifty percent of such revenues shall be appropriated to the budget stabilization and emergency unit, a separate unit of appropriation within the debt service agency, the purpose of which shall be the prepayment of future years' debt service. Up to ten percent of the amounts appropriated to the budget stabilization and emergency unit may be used for pay-as-you-go capital financing. Part or all of the budget stabilization and emergency unit of appropriation may be transferred pursuant to subdivision b of this section.

D. Limitations On Imposing New Taxes Or Raising Existing Taxes

Issue: Should a supermajority vote of the Council be required to impose new taxes or increase existing taxes? Should a Mayor's disapproval of a new tax or a tax increase be overridden only by an enhanced Council supermajority?

Relevant Charter Provisions: Charter §§ 34 and 37.

Discussion: An important element of the City's recent fiscal prudence has been the reluctance of the City's leadership to impose new taxes or raise existing taxes. At one time, however, elected officials continued to increase City-funded spending without regard to the projected revenues. Instead of making tough spending choices, mayors were content to continue

high levels of spending and to raise taxes. In 1992, City tax revenue as a share of personal income reached 9%.

In the more recent years, however, the City's elected officials have been reluctant to tax, and serious efforts have been made to reduce the tax burdens in the City. Tax reductions have been implemented that by FY 2003 will save taxpayers $8.8 billion. The measures adopted have caused the percentages of City tax revenue as a share of personal income to drop to 7.6%. The reductions were possible because of disciplined spending plans and a strong economy, leading the City towards fiscal stability. Over the past six fiscal years, instead of tax increase programs being in the executive budget, there have been tax reduction programs.

To institutionalize this successful approach to municipal governance, the Charter must be amended to make it more difficult to tax the public. Numerous jurisdictions around the country have already taken such steps. The City should join this national trend by requiring in the Charter that a two-thirds vote of the Council be needed to pass any local law or resolution that would impose a new tax or increase an existing tax instead of the current requirement of only a bare majority. The Charter should also require that, in the event that the Mayor vetoes the local law, an enhanced supermajority four-fifths vote of the Council be required to override the veto, rather than the current requirement of only a two-thirds vote.

This proposal would discourage future Mayors from seeking legislation to increase the tax burden in the City. Mayors would be more affected by these proposals than legislators. Virtually every new tax or tax increase that occurred over the past decade was first proposed by the Mayor. [4] Thus, this proposal would restrict Mayors as much or more than legislators. Taxpayers deserve to have elected officials face stringent requirements before taxes can simply be increased or added. To return to a pattern of tax increases would be a setback for the City. Requiring a supermajority for passage and an enhanced supermajority to override a veto would prevent such a return, protect the City's taxpayers and promote a healthy business environment.

In considering whether to propose a supermajority requirement, the Commission reviewed other such laws across the country. Thirteen states already require a supermajority to increase taxes. [5] The supermajority requirements range from a 60% requirement in Mississippi and Oregon, to a 67% requirement in states such as Arizona, California, Colorado, and South Carolina, to a 75% requirement in Oklahoma and Arkansas. At the August 9, 1999 public hearing before the Commission, Congressman Vito Fosella stated the following in support of this proposal:

> This idea is not new or radical. Our founding fathers required that in matters of extreme importance to our nation, that a supermajority vote of the House of Representatives and/or Senate is required. Indeed, as the Federal Government is coming out of decades long run of budget deficits, I along with 170 other members of Congress have sponsored the Tax Limitation Amendment. This amendment to the United States Constitution would require a two thirds vote of Congress before any new tax increase or new tax can be imposed. Such a constitutional amendment would prevent reckless spending, and enforce the stewardship of public funds that are generated by hardworking Americans. A similar power for the City Council would have the same impact for New York and prevent a repetition of the mistakes of the past.[6]

The Commission considered public comments questioning whether the real property tax should also be subject to the supermajority requirement. The Commission does not believe that the real property tax can be included in the proposal because the real property tax is categorically different from the multitude of other taxes that the City has imposed on its citizens and businesses. Real property tax rates are fixed by the Council, pursuant to Charter § 1516, to "produce a balanced budget within generally accepted accounting principles for municipalities." The real property tax rates are set by the Council after adoption of the budget to ensure that the budget is balanced, as the City is required to do by State law. If the City finds during the year that it is running a deficit rather than a surplus, the City may adjust the real property tax to ensure that it ends the year with a balanced budget, as it is required to do by State law. In addition to using real property taxes to balance the budget, the City has also pledged the revenue from real property taxes against the City's debt service obligations. The Commission is also concerned that limitations on real property taxes may negatively affect the City's bond rating. Theoretical future taxes that have not been adopted, of course, have not been pledged against any debt service obligations.

The crucial issue for the City is not the real property tax but all the other taxes to which the City's businesses and residents have been subjected. Over the years the City has imposed such varied taxes as a commercial rent tax, a vault tax, a commercial vehicle tax, a mortgage recording tax, a hotel room occupancy tax, an unincorporated business tax, and a utility tax. Fortunately, many of these taxes have been reduced or eliminated over the last six years. However, it is these kinds of taxes – the taxes that adversely affect the business climate and impose a hardship on the City's residents – to which this proposal is directed. The current Mayor and City Council Speaker have cut taxes. But what of the next Mayor and Speaker?

Holding the line on taxes has helped improve our City's economy. We must continue this progress by making it harder to raise taxes in the future.

Proposal: The Charter should provide that at least two-thirds vote of the Council would be needed to pass any local law or resolution to impose a new tax or increase an existing tax. To override a Mayoral veto to such a law, the Council would need an enhanced supermajority four-fifths vote.

Proposed Charter Revision:

Section 1. Section 34 of the charter is amended to read as follows:

§34. Vote required for local law or resolution. Except as otherwise provided by law, no local law or resolution shall be passed except by at least the majority affirmative vote of all the council members. No local law or resolution that imposes a new tax or increases an existing tax shall be passed except by the affirmative vote of at least two-thirds of all the council members. Nothing in the foregoing sentence shall be construed to affect the vote required to pass a local law or resolution that relates to the extension of an existing tax, or to the imposition or extension of a tax that expired within one year prior to passage by the council of the local law or resolution so imposing or extending such tax, or to the annual tax rates on real property.

§ 2. Subdivision b of section 37 of the charter is amended to read as follows:

b. if the mayor approves the local law, the mayor shall sign it and return it to the clerk; it shall then be deemed to have been adopted. If the mayor disapproves it, [he or she] the mayor shall return it to the clerk with his or her objections stated in writing and the clerk shall present the same with such objections to the council at its next regular meeting and such objections shall be entered in its journal. The council within thirty days thereafter may reconsider the same. If after such reconsideration the votes of two-thirds of all the council members be cast in favor of repassing such local law, it shall be deemed adopted, notwithstanding the objections of the mayor, provided, however, that a local law that imposes a new tax or increases an existing tax shall be deemed adopted, notwithstanding the objections of the mayor, if after such reconsideration the votes of at least four-fifths of all the council members be cast in favor of repassing such local law, provided, further, however, that nothing in the foregoing proviso shall be construed to affect the vote required to repass a local law that relates to the extension of an existing tax, or to the imposition or extension of a tax that expired within one year prior to passage by the council of the local law so imposing

or extending such tax, or to the annual tax rates on real property. Only one vote shall be had upon such reconsideration. The vote shall be taken by ayes and noes, which shall be entered in the journal. If within thirty days after the local law shall have been presented to [him or her] the mayor, the mayor shall neither approve nor return the local law to the clerk with his or her objections, it shall be deemed to have been adopted in like manner as if the mayor had signed it. At any time prior to the return of a local law by the mayor, the council may recall the same and reconsider its action thereon.

D. Other Issues

1. Budget Modification Reform

Charter § 107 sets forth the procedures for modifications. A budget modification is a change to the current year budget after adoption. The Charter provides that, subject to the quarterly spending allotments, changes within units of appropriation may be made by the head of each agency. The Mayor may transfer part or all of any unit of appropriation to another, except that if the transfer (1) is between agencies, or (2) results in more than a 5% or $50,000 increase or decrease from the adopted budget, the Mayor is required to notify the Council of the proposed action. The Council then has 30 days from the first stated Council meeting following notification to disapprove the proposed change. When the modification is to a Borough President item, the Mayor may make the recommendation subject to approval of the relevant Borough President. Once the transfer is completed, written notice must be given to the Comptroller and published in the City Record.

The Commission considered a proposal to amend the modification level that would trigger Council approval by retaining the 5% limitation but increasing the dollar threshold from $50,000 to $100,000. The restriction on Mayoral modification was added by the 1975 Charter Revision Commission, which believed that empowering the Council to "disapprove of a proposed mayoral modification within a specified period of time (i.e., thirty days) would strengthen legislative review." [7] Rather than empowering the Council to disapprove all budget modifications, the 1975 Charter Revision Commission recommended a 5% threshold. The 1975 Charter Revision Commission recognized that some degree of managerial flexibility needed to be retained so that the City had the ability to respond quickly to changing circumstances. In its Preliminary Charter Recommendations, the Commission wrote that "in order not to enmesh the City in a myriad of details and disputes over minor modifications, the Mayor should be

authorized to make transfers, as at present, between units of appropriation within an agency to a cumulative maximum of a 5-percent increase or decrease in any unit."[8]

Recognizing that the Charter remained too restrictive in this area, the 1989 Charter Revision Commission added a $50,000 threshold as an alternative measure. This expanded the City's capacity to make small necessary changes without the time constraint of waiting for a Council modification.

The Commission considered whether the $50,000 threshold has become too low to meaningfully allow the City to adjust units of appropriations to meet changing needs. Since 1989, the City's budget has increased by 43%, to a total of $35.33 billion for FY 2000. The Commission expected, therefore, that raising the limit to $100,000 would maintain the mayoral management flexibility that the 1989 Charter Revision Commission sought to create.

It is unclear, however, whether the amendment would be useful. In considering the proposal, the Commission looked at the number of budget modifications that would no longer be subject to Council review if the current Charter limit on modifications were expanded. The proposal would have affected only modifications to units of appropriation within the same agency where the modification was for an amount greater than 5% of the entire unit and between $50,000 and $100,000. Modifications that were Citywide, such as financial plans, revenue modifications and modifications between agencies, would have still required Council approval. The proposal would have provided additional flexibility only to those units of appropriation where $100,000 is greater than 5% of the total unit – those units of appropriation that are less than $2 million. For those units above $2 million, the change would have been irrelevant because it would not increase the agency's flexibility to act without Council approval.

For FY 1999 only three modifications were subject to Council approval because they were over the Charter established limits of 5% or $50,000. Of these three, there were no modifications transferring funds from one unit of appropriation to another within the same agency, for more than $50,000 but less than $100,000, and within units of appropriation that were less than $2 million. Therefore, in Fiscal Year 1999, no Council approval of modifications would have been avoided by this proposal.

On August 13, 1999, the Commission agreed that the case has not been made that the proposed amendment would be useful. However, it should not be rejected at this time. While the proposal might cover only a limited number of budget modifications, it might lead to improved governmental efficiency in those limited circumstances. Accordingly, the proposal

should be considered further to determine whether additional mayoral flexibility is needed. Moreover, with future study, it could be improved to cover a wider set of circumstances.

2. Education Initiatives

The Commission is keenly aware of the need to improve public education in the City and considered potential revisions to the Charter to improve education. Providing our children with quality education is clearly essential to ensure the continued success and prosperity of the City.

The Commission considered a proposal to amend the Charter to provide for a mandatory annual appropriation to the office of the Mayor of an amount equal to one percent of the City-funded portion of the operating expense budget of the Board of Education to be used for educational initiatives. Under the proposal, the Mayor's Office would be authorized to use these funds for the creation and implementation of innovative programs to benefit the City's more than one million school age children and to expand their educational opportunities.

This new funding would not be at the expense of, but rather in addition to, the funding provided to the Board of Education. Therefore, it would constitute an increase in spending on education. Over the past five years, one percent of the Board's City-funded operating expense budget ranged between $39 and 52 million as outlined below:

1% of City-Funded Board of Education Operating Expense Budget for Additional Discretionary Education Programs ($ millions)						
	1995	1996	1997	1998	1999	2000 (Exec)
City Funded BOE Expenses	$3,868	$3,857	$4,082	$4,479	$4,915	$5,217
1 % for Education	$39	$39	$41	$45	$49	$52

A Charter-required "set aside" of funding would not be new. The Charter currently has two requirements setting aside appropriations for particular purposes. The Charter provides for mandatory appropriations to the Independent Budget Office and the Borough Presidents. Under Charter § 211 and 102, each Borough President is entitled to allocate 5% of the discretionary increases in the expense budget and 5% of the capital budget. Also Charter § 259 provides for

annual appropriations to the Independent Budget Office equal to at least ten percent of those made to the City's Office of Management and Budget.

Nevertheless, more debate is required as to whether the proposal would contribute to the improvement of educational opportunities for the City's children and how such a Charter amendment would affect the balance of power between the Mayor and the Council. Accordingly, the Commission deferred action on this issue in a vote on August 17, 1999.

3. Ban On Unfunded Mandates

Elected officials have in the past enacted mandatory programs without answering the hard questions of which taxes to raise or which other programs to cut in order to obtain the funds to pay for the new programs. To address this problem, the Commission considered whether to propose amending Section 33 of the Charter to require a budgetary treatment of new programs that would be roughly comparable to that which Charter § 217 already requires for new capital programs. Just as legislators must ensure that funds are available for new capital projects before such projects can be authorized, so legislators would be forced to specify how new general programs are to be paid for without relegating the problem by default to the judiciary.

Specifically, the Commission considered whether to propose revising the Charter to state that a newly-enacted measure is to be construed as mandatory only to the degree that funds are actually appropriated to implement that new law. If no funds are allocated, the law, while remaining in effect as an authorization, would not be mandatory. The imposition of fiscal responsibility in this manner would operate as a "truth in government" measure, forcing the City government to confront and resolve the hard choices presented by important but costly popular programs. A second component of this proposal for future consideration would require that fiscal impact statements not only identify the cost of the legislation but would also identify a specific funding source to pay for the cost of the legislation.

Many questions were raised about this proposal during the public comment period. The primary questions concerned how to determine whether sufficient funds have been appropriated and who makes that determination. The proposal under consideration left resolution of these issues to the courts. While that may be appropriate, the Commission believes that further study and public debate on these two questions, and the proposal as a whole, is warranted. Therefore, on August 17, 1999, the Commission concluded that this issue should be considered further.

4. City Council Budget Process

Charter § 247 states that, by March 25th of each year, the Council must hold hearings on the programs, objectives, and fiscal implications of the preliminary budget; the statements of budget priorities of the Community Boards and Borough Boards; the draft ten-year capital strategy; the Borough Presidents' recommendations and the status of capital projects and expense appropriations previously authorized. In addition, Section 253 states that between May 6 and May 25, the Council must hold hearings on the budget as presented by the Mayor. The Council may hold the hearings as a body or through its committees. Officers of agencies and representatives of Community Boards and Borough Boards have the right and, if requested by the Council, the duty to appear and be heard in regard to the executive budget and to the capital and service needs of the communities, boroughs and the City.

The question arose of whether the Council's operating budget should be subject to the same hearing process as other agency budgets. The current budget process does not provide for a hearing on the Council's budget. Yet a hearing on the Council's budget might enhance the public participation in the budget process. On July 29, 1999, the Commission agreed that future study and public debate are warranted on the issue of whether the public should be permitted to participate in the adoption of the Council's budget, as it does with respect to all other City agency budgets.

CHART 1

Spending Rate Changes--City Funds*In $000's

Fiscal Years	Current Year Forecast	CPI	Limit	Adopted Budget	Below/ (Over) the Limit
99-00	$24,357	1.4%	$24,698	$23,814	$884
98-99	$23,766	1.5%	$24,122	$22,982	$1,140
97-98	$22,762	2.7%	$23,377	$22,584	$793
96-97	$21,376	3.4%	$22,103	$21,901 **	$202
95-96	$20,840	1.8%	$21,215	$20,891 **	$324
94-95	$21,038	2.5%	$21,564	$21,260	$304
93-94	$20,675	3.8%	$21,461	$21,451	$10
92-93	$20,181	3.1%	$20,807	$20,272	$535
91-92	$18,888	6.1%	$20,040	$19,932	$108
90-91	$17,979	6.0%	$19,058	$19,291	($233)
89-90	$17,212	5.4%	$18,141	$18,591	($450)
88-89	$15,803	5.0%	$16,593	$17,495	($902)
87-88	$15,019	3.4%	$15,530	$15,957	($427)
86-87	$13,790	3.9%	$14,328	$14,814	($486)
85-86	$12,994	3.8%	$13,488	$13,803	($315)
84-85	$11,619	5.5%	$12,258	$12,376	($118)
83-84	$10,771	5.3%	$11,342	$11,305	$37
82-83	$10,213	6.5%	$10,877	$10,640	$237
81-82	$9,343	10.8%	$10,352	$9,960	$392

* City Funds = Total Funds (net of Intra-city) less Capital funds and Categorical funds from state, federal and other sources. Other Categorical funds for the current year forecasts for 95-96 and prior reflect estimates based on data in the Comptroller's Annual Reports.

** FY 96 & FY 97 Adopted Budgets adjusted to exclude Water & Sewer Pay as you go Capital of $407 million and $607 million respectively.

8/18/99GrowthAdoptLimit1

CHART 2

STATE-BY-STATE SUMMARY OF TAX AND EXPENDITURE INCREASE LIMITATIONS

State	Limitation	Adopted
Alaska	Appropriations growth limited to cumulative growth in population and inflation	1982
Arizona	Appropriations limited to 7.23% of personal income growth	1978
California	Appropriation growth limited to cumulative growth in population and inflation.	1979
Colorado	General fund growth limited to 6% of general fund expenses from the previous year; Revenue growth limited to cumulative growth in population and inflation.	1991 1992
Connecticut	Appropriations growth limited to greater of personal income growth or inflation.	1992
Florida	Revenue growth limited to a 5 year average of personal income growth.	1994
Hawaii	Appropriations limited to a 3 year average of personal income growth.	1978
Idaho	Appropriations limited to 5.33% of personal income.	1980
Louisiana	Revenue growth limited to 1977 to 1979 growth in state personal income; Appropriation growth limited to per capita personal income growth.	1979 1993
Massachusetts	Revenue growth limited to growth in wages and salaries.	1986
Michigan	Limits income tax collection to 9.49% of personal income.	1978
Missouri	Revenue limited to 5.64% of personal income.	1980
Montana	Appropriations growth limited to personal income growth.	1981
Nevada	Expenditure growth limited to the cumulative growth in population and inflation.	1979
New Jersey	Appropriations growth limited to personal income growth.	1990
North Carolina	Appropriations limited to 7% of state personal income.	1991
Oklahoma	Spending limited to a 12% yearly increase	1985
South Carolina	Appropriations growth limited to personal income growth.	1980, 1984
Tennessee	Appropriations growth limited to personal income growth.	1978
Texas	Appropriations growth limited to personal income growth.	1978
Utah	Appropriations growth limited to cumulative growth in population, inflation and personal income.	1986
Washington	Appropriations growth limited to cumulative growth in population and inflation.	1993

Sources: The National Association of Budget Offices
Mandy Rafool, "State Tax and Expenditure Limits," National Conference of State Legislatures, January 1997. The University of Colorado at Boulder.

CHART 3

STATES WITH SUPER MAJORITY REQUIREMENTS ON LEGISLATIVE TAX POWER**

State	Date of Adoption	Majority Required	Applies To
Arizona	1992	2/3	All taxes
Arkansas	1934	3/4	All taxes except sales and alcohol
California	1979	2/3	All taxes
Colorado	1992	2/3	Emergency taxes
Delaware	1980	3/5	All taxes
Florida	1971	3/5	Corporate income taxes
Louisiana	1966	2/3	All taxes
Mississippi	1970	3/5	All taxes
Nevada	1996	2/3	All taxes
Oklahoma	1992	3/4	All taxes
Oregon	1996	3/5	All taxes
South Dakota	1996	2/3	All taxes
Washington	1993	2/3	All taxes

Source: Mandy Rafool, "State Tax and Expenditure Limits" National Conference of State Legislatures, January 1997. The University of Colorado at Boulder.

**Note: In the New York region, both New York State and New Jersey are considering super majority legislation. In New York, Gov. Pataki proposed a constitutional amendment to require a two-thirds majority vote in both houses to pass any state tax increase. The Legislature is considering a bill to require a three-fifths majority in both houses to pass any bill to enact, raise or continue any tax, fee or assessment. The New Jersey State Legislature is considering several versions of similar bills.

END NOTES FOR SECTION I

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[1] See attached chart 1.

[2] See attached chart 2.

[3] Written statement of Comptroller Alan G. Hevesi.

[4] The only exception was the "Safe Streets, Safe City" income surcharge, which was supported by both the City Council and the Mayor.

[5] See attached chart 3.

[6] Transcript of the Staten Island Public Hearing, August 9, 1999, at 37. Supermajority requirements are not uncommon under State and local law. See, e.g., Matter of Lenihan v. Blackwell, 209 A.D.2d 1048 (4th Dep't), leave to appeal denied, 84 N.Y. 2d 808 (1994) (provision of the Erie County Charter required a two-thirds vote of the county legislature to increase sales and use taxes); see also N.Y. Town Law § 265 (three-fourths majority needed by certain local legislative bodies to adopt zoning changes if protest petitions are filed); N.Y. Village Law § 7-708 (same); N.Y. General City Law §§ 23(2)(b) (provision, which may be superseded in some jurisdictions, originally required three-fourths vote of local legislative body for sale or lease of any city real estate or franchise), 83 (three-fourths majority needed by certain local legislative bodies to adopt zoning changes if protest petitions are filed); N.Y. MHRL § 20(4) (requires two-thirds vote, with mayoral certificate of necessity, for local laws enacted before the otherwise required waiting period); N.Y. General Municipal Law §§ 239-m, 239-n (requires a "majority plus one" of local "referring bodies," which precedent indicates can be local legislative bodies, when they seek to act contrary to recommendation by regional or county planning agency); Charter § 1301(2)(f) (leases of certain wharf property other than at public auction require three-fourths majority of Council); Modern Landfill, Inc. v. Town of Lewiston, 181 A.D.2d 159 (4th Dep't 1992) (describes locally legislated town board supermajority requirement for waste disposal or landfill variances); Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 225 A.D.2d 187 (3d Dep't 1996) (describes provision of Albany charter that requires two-thirds majority of common council for taking of real property for public purpose or use).

[7] Preliminary Recommendations of the State Charter Revision Commission for New York at 88.

[8] Id.

CIVIL RIGHTS:
PROTECTING INDIVIDUALS FROM DISCRIMINATION

SECTION II

II CIVIL RIGHTS

Issue: In order to strengthen the City's public policy of eliminating unlawful discrimination based on race, color, religion, creed, age, national origin, alienage, citizenship, gender, sexual orientation, disability and other protected classes, should the City Commission on Human Rights be codified in the Charter and should the powers of the Commission to enforce the Human Rights Law be stated in the Charter?

Relevant Charter Provision: None.

Discussion: This City has long been a leader in the battle against discrimination and in the protection of civil rights. In 1944, Mayor Fiorello H. LaGuardia issued an executive order creating the Mayor's Committee on Unity, the purpose of which was "to make New York City a place where people of all races and religions may work and live side by side in harmony." Eleven years later, Mayor Robert F. Wagner and the City Council passed Local Law 55, enlarging the powers of the Committee and renaming it the Commission on Intergroup Relations ("COIR"). In 1958, in keeping with its pioneering role in protecting civil rights, the City enacted Local Law 80. Local law 80, the first statute in the country of its kind, banned racial discrimination in private housing. Local Law 80 also empowered the COIR to investigate and prosecute cases of such discrimination. Four years later, the COIR was granted additional enforcement powers and was officially renamed the New York City Commission on Human Rights.

Since that time, the City has continuously expanded the scope and effectiveness of its civil rights protections. For example, in 1986 the City prohibited discrimination based on sexual orientation. Similarly, five years ago, the City instituted a number of administrative reforms to make the Commission on Human Rights more efficient and responsive to the public. As a result, the productivity of the Commission on Human Rights, measured in terms of cases resolved by each investigator, has approximately doubled since 1994. Finally, over the past two years, the City has passed landmark domestic partnership legislation and amended numerous laws and regulations to provide that domestic partners be accorded rights that traditional spouses of City employees enjoy. This progress in expanding both the scope and vigor of our civil rights laws has been of vital importance to the fight against prejudice and hate in this City.

To ensure that such progress continues into the next century, the Commission on Human Rights should be accorded Charter status and the Commission's powers to enforce the protections of the Human Rights Law should be stated in the Charter. As the City Human Rights Law recognizes in its introductory section, there is no greater danger to the health, safety, and welfare of the City of New York and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on race, color, religion, creed, age, national origin, alienage or citizenship status, gender, sexual orientation, disability, marital status and whether children are or may be residing with a person. The Commission on Human Rights is the agency charged with eliminating the injustices that arise from prejudice, intolerance and bigotry; and the importance of pursuing this mission justifies codifying the agency in the Charter. Including the Commission on Human Rights and its powers in the Charter will illustrate the City's continued commitment to civil rights and make it more difficult for future City leaders to eliminate those protections, thereby ensuring the continuation of the City's significant progress in the fight against unlawful discrimination.

The notion of incorporating the Commission on Human Rights and its powers to enforce the Human Rights Law into the Charter is made all the more compelling by the fact that City law offers protections not available under State or federal law with respect to the treatment accorded to sexual orientation, alienage and citizenship status. Under State and federal statutory provisions regarding employment discrimination, an employer may fire an employee solely because the employer dislikes the employee's sexual orientation. It is only the City's Human Rights Law that makes such conduct illegal. Thus, were the Commission on Human Rights to be abolished or the Human Rights Law repealed, there would be no administrative enforcement agency that individuals could turn to in seeking protection from such discriminatory conduct.

While the difference between the City's Human Rights Law and its state and federal counterparts is most striking in their respective treatment of sexual orientation, alienage and citizenship status, the scope of protection afforded to other protected classes also differs from one statute to another. In numerous specific situations, individuals of one or another protected class may have rights under the City Human Rights Law that would not be available under otherwise applicable State or federal legislation. By establishing the Commission on Human Rights as a Charter agency — one that cannot be easily abolished as a result of the vicissitudes of politics — these locally granted rights are rendered more secure.

By specifically referring to the Human Rights Law in the Charter and by granting the Mayor the power to enforce that law, the Commission hopes to lessen the likelihood that the ordinary legislative process will attenuate or eviscerate the protections that the Human Rights Law provides for victims of discrimination. Moreover, incorporating into the Charter the fundamental truth that the well-being of the City of New York depends on the elimination of bias, prejudice, unlawful discrimination, and bigotry from the civic life of the City will be of great symbolic value.

The New York City Human Rights Law is a lengthy and highly detailed statute that establishes the Commission on Human Rights and that contains complex provisions defining unlawful discriminatory conduct. Because the Human Rights Law is itself too long and complicated to be directly codified into the Charter, the approach taken here is to refer specifically to it as providing the basis for the City's anti-discrimination policies. The goal is to insulate the statute from the vagaries of the political process. Thus, the proposed revision of the Charter will confer considerable protection against any attempt to undermine the fundamental goal of achieving a fair and discrimination-free society. These very important protections, and the obligations they impose on private and public parties, already exist by virtue of local law. Thus, the proposed revision is designed simply to erect appropriate obstacles to any efforts to undermine the City's fundamental opposition to invidious forms of discrimination.

During the public comment period, the Commission heard significant support for the Commission's civil rights proposals from Queens Borough President Claire Shulman, as well as various other participants at the Commission's public meetings, who spoke in support of the proposals. In addition, Deputy Commissioner Randolph Wills, testifying on an expert panel on behalf of Marta B. Varela, Chair of the Commission on Human Rights, endorsed the proposals.

It might be argued that if State or federal legislation is amended someday to provide equal or greater protections than that provided by the City statute, the City agency will become duplicative of corresponding human rights agencies on the State or federal level. A City agency, however, unlike an otherwise identical State or federal one, is uniquely accountable and, typically, responsive to City constituents. Accordingly, because of the importance of ensuring such responsiveness and because of the profound importance of eliminating unlawful discrimination, the Commission proposes establishing the City Human Rights Commission as a Charter agency and ensuring through the Charter that the rights that it enforces are preserved.

Proposal: In order to strengthen the City's public policy of eliminating unlawful discrimination based on race, color, religion, creed, age, national origin, alienage, citizenship, gender, sexual orientation, disability and membership in other protected classes, the City's Commission on Human Rights should be codified in the Charter, and the protections of the City's Human Rights Law enforced through the Charter.

Proposed Charter Revision:

The charter is amended by adding a new chapter 40 to read as follows:

CHAPTER 40

NEW YORK CITY HUMAN RIGHTS COMMISSION

§ 1. Declaration of intent. It is hereby declared as the public policy of the city of New York to promote equal opportunity and freedom from unlawful discrimination through the provisions of the city's Human Rights Law, Chapter 1 of Title 8 of the Administrative Code of the city of New York.

§ 2. § 900. The mayor shall be authorized to issue such executive orders as he or she deems appropriate to provide for city agencies and contractors to act in accordance with the policy set forth in this chapter.

§ 3. § 901. a. The New York city commission on human rights is hereby established and continued.

b. The commission shall have the power to eliminate and prevent unlawful discrimination by enforcing the provisions of the New York city human rights law, and shall have general jurisdiction and power for such purposes. It may, in addition, take such other actions as may be provided by law against prejudice, intolerance, bigotry and unlawful discrimination.

§ 4. § 902. The commission shall consist of fifteen members, to be appointed by the mayor, one of whom shall be designated by the mayor as its chairperson and shall serve as such at the pleasure of the mayor. The chairperson shall devote his or her entire time to the chairperson's duties and shall not engage in any other occupation, profession or employment. Members other than the chairperson shall serve without compensation for a term of three years. In the event of the death or resignation of any member, his or her successor shall be appointed to serve for the term for which such member had been appointed.

§ 5. § 903. Functions. The functions of the commission shall be:

1. To foster mutual understanding and respect among all persons in the city of New York:

2. To encourage equality of treatment for, and prevent discrimination against, any group or its members:

3. To cooperate with governmental and non-governmental agencies and organizations having like or kindred functions; and

4. To make such investigations and studies in the field of human relations as in the judgment of the commission will aid in effectuating its general purposes.

§ 6. § 904. Powers and duties. The powers and duties of the commission shall be:

1. To work together with federal, state and city agencies in developing courses of instruction, for presentation to city employees and in public and private schools, public libraries, museums and other suitable places, on techniques for achieving harmonious intergroup relations within the city of New York, and engage in other anti-discrimination activities.

2. To enlist the cooperation of various groups, and organizations, in mediation efforts, programs and campaigns devoted to eliminating group prejudice, intolerance, hate crimes, bigotry and discrimination.

3. To study the problems of prejudice, intolerance, bigotry, discrimination and disorder occasioned thereby in all or any fields of human relationship.

4. (a) To receive, investigate and pass upon complaints and to initiate its own investigation of:

(i) Group- tensions, prejudice, intolerance, bigotry and disorder occasioned thereby.

(ii) Unlawful discrimination against any person or group of persons, provided, however, that with respect to discrimination alleged to be committed by city officials or city agencies, such investigation shall be commenced after consultation with the mayor. Upon its own motion, to make, sign and file complaints alleging violations of the city's human rights law.

(b) In the event that any such investigation discloses information that any person or group of persons may be engaged in a pattern or practice that results in the denial to any person or group of persons of the full enjoyment of any right secured by the Human Rights Law, in addition to making, signing and filing a complaint upon its own motion pursuant to paragraph a of this subdivision, to refer such information to the corporation counsel for the purpose of commencing a civil action pursuant to chapter four of title eight of the administrative code.

5. (a) To issue subpoenas in the manner provided for in the civil practice law and rules compelling the attendance of witnesses and requiring the production of any evidence relating to any matter under investigation or any question before the commission, and to take proof with respect thereto;

(b) To hold hearings, administer oaths and take testimony of any person under oath; and

(c) In accordance with applicable law, to require the production of any names of persons necessary for the investigation of any institution, club or other place or provider of accommodation.

6. In accordance with applicable law, to require any person or persons who are the subject of an investigation by the commission to preserve such records as are in the possession of such person or persons and to continue to make and keep the type of records that have been made and kept by such person or persons in the ordinary course of business within the previous year, which records are relevant to the determination whether such person or persons have committed unlawful discriminatory practices with respect to activities in the city.

7. To issue publications and reports of investigation and research designed to promote good will and minimize or eliminate prejudice, intolerance, bigotry, discrimination and disorder occasioned thereby.

8. To appoint such employees and agents as it deems to be necessary to carry out its functions, powers and duties: provided, however, that the commission shall not delegate its power to adopt rules, and provided further, that the commission's power to order that records be preserved or made and kept and the commission's power to determine that a respondent has engaged in an unlawful discriminatory practice and to issue an order for such relief as is necessary and proper shall be delegated only to members of the commission. The expenses for the carrying on of the commission's activities shall be paid out of the funds in the city treasury. The commission's appointment and assignment powers as set forth in this subdivision may be exercised by the chairperson of the commission.

9. To recommend to the mayor and to the council legislation to aid in carrying out the purposes of this chapter.

10. To submit an annual report to the mayor and the council which shall be published in City Record.

11. To adopt rules to carry out the provisions of this chapter and the policies and procedures of the commission in connection therewith.

§ 7. § 905. Relations with city departments and agencies. So far as practicable and subject to the approval of the mayor, the services of all other city departments and agencies shall be made available by their respective head to the commission for the carrying out of the functions herein stated. The head of any department or agency shall furnish information in the possession of such department or agency when the commission so requests. The corporation counsel, upon

request of the chairperson, may assign counsel to assist the commission in the conduct of its investigatory or prosecutorial functions.

ELECTIONS:
EMPOWERING THE ELECTORATE

SECTION III

SECTION III
ELECTIONS

A. SPECIAL ELECTIONS TO FILL MAYORAL VACANCIES

B. OTHER ISSUES

1. NON PARTISAN ELECTIONS
2. LINE OF MAYORAL SUCCESSION
3. CAMPAIGN FINANCE REFORM

III. ELECTION ISSUES

City government has become significantly more democratic since 1988. First, the 1988 Charter Revision Commission recommended a Charter amendment that significantly enhanced our democracy by requiring that vacancies in all City elected offices – except for the Mayor – be filled through prompt special elections within 60 days of the vacancy. A decade of experience with this approach has demonstrated that such special elections improve the quality of our representative form of government. Second, voters have had real choices regarding who will lead them. Such choices "help develop better ideas" and "increase voter interest and voter participation."[1] We have learned that government works best when voters elect their leaders from a broad spectrum of candidates. Such competition promotes public confidence in the system. It is now time to institutionalize these same reforms with respect to the City's most important elected office -- the mayoralty. We must ensure that voters are empowered with real choices to elect a new Mayor when a vacancy occurs in that office the same way they are empowered to fill vacancies in every other elected office in this City.

A. Special Elections to Fill Mayoral Vacancies

Issue: Should the Charter's provisions for filling mayoral vacancies be amended to provide for a special election or a different successor or both?

Relevant Charter Provisions: Charter §§ 10, 24, 94.

Discussion: One aspect of the City's electoral system remains undemocratic: the system for filling mayoral vacancies. Voters are currently empowered to fill vacancies in every other City elected office by special election within 60 days of the vacancies. Yet it is surely as important, if not more so, to empower voters to select their new Mayor in the same manner. Under our current system, a mayoral vacancy can be filled by the Public Advocate for a period of up to fifteen months, while for every other elected City office, a vacancy is filled by a special election within sixty days. A decade of experience has shown that these special elections, established by the 1988 Charter Revision Commission, work well. More importantly, as the 1988 Commission understood, they represent the appropriate democratic response to filling vacancies in an elected office. It is inherently undemocratic to prevent the electorate from choosing leaders simply because of a vacancy. The need for voters to make a collective decision about the people and policies that govern their lives is even more critical during a time of

transition. Accordingly, the voters should be empowered to vote for Mayor within sixty days of a vacancy, just as they are empowered to fill vacancies in every other City elected office. However, for the reasons explained later in this discussion, the Commission has decided that this provision should only be effective as of January 1, 2002.

1. Introduction

The Office of the Mayor is the seat of executive power in the City's governmental structure and is the focal point of policies affecting the lives of City residents. As the City's chief executive officer, the Mayor is responsible for the effectiveness and integrity of City government and is the City's single most politically accountable elected official. Providing for the selection of a new Mayor by the voters in the event of a mayoral vacancy ensures democracy, stability and effective government. Accordingly, the Charter should provide for continuity and stability in a time of expected or unexpected mayoral transition until the voters have an opportunity to express their views regarding who should lead them.

The filling of mayoral vacancies was discussed extensively by the 1975 and 1989 Charter Revision Commissions, with several options having been considered. As explained below, these discussions were ultimately derailed by other issues. Moreover, because the current Mayor has publicly stated that he is considering running for the Senate and therefore may vacate his office prior to the expiration of his term, it is particularly timely this year to examine the appropriateness of the City's current Charter provisions governing mayoral succession. Whether or not the office is vacated, the mere possibility raises significant concerns about the wisdom of the current Charter provisions.

The Charter currently provides that, upon a vacancy, the powers and duties of the Mayor devolve upon the Public Advocate and the Comptroller in that order of succession until a new Mayor is elected. If the vacancy occurs prior to September 20 in any year, then an election for a new Mayor is held in the general election of that year. If the vacancy occurs on or after September 20 in any year, then an election for a new Mayor is held in the general election of the following calendar year. The result of this provision is that, if a vacancy were to occur on or after September 20 in any year of the Mayor's term, the Public Advocate could potentially serve as Mayor for more than 15 months before an elected Mayor takes office.

This provision should be amended. While the Commission determined that the interim line of mayoral succession should not be changed at this time, it has recommended that that the Charter be amended through a referendum vote in November 1999 to provide that special

elections be held within two months to fill a mayoral vacancy, so that a mayoral vacancy would be filled in a manner similar to the procedure followed to fill vacancies in the offices of the Public Advocate, Comptroller, Borough Presidents and members of the Council. Special elections to fill vacancies have been adopted in major cities throughout the United States, including, Los Angeles, Houston, Dallas, Denver and Minneapolis. It is time to extend democratic principles to the way we deal with mayoral vacancies.

2. Background and History

The Commission carefully examined the historical context of the City's current provisions. For over twenty-five years charter revision commissions have considered the issue of succession to the mayoralty. The 1989 Charter Revision Commission had substantial discussions on the topic. It is important to recognize that the 1989 Charter Revision Commission debated succession in the larger context of abolishing the Board of Estimate ("the Board") and replacing it with the City government structure we have today.

For most of this century, the Board was the most powerful and important governing body of the City. Established in 1901 and lasting until its abolition in 1989, the Board (at the time it was examined by the 1989 Charter Revision Commission) was comprised of eight members: the Mayor, the City Council President, the Comptroller and the five Borough Presidents. The Mayor, the Council President and the Comptroller each had two votes. Each Borough President had one vote. Membership on the Board was the only significant source of power for the office of the Council President.

The Board exercised authority over some of the City's most important functions and responsibilities. The Board participated in the budget process, granted leases of City property and maintained final authority over the use, development and improvement of City land, including zoning regulations. It also had final approval of all capital projects and City contracts that were not awarded through competitive sealed bids. While the Council had the power to pass local laws and the Mayor was responsible for implementing the City's programs, the Board possessed authority over important policy decisions that affected the City on a daily basis.

In 1989, however, the United States Supreme Court, in Board of Estimate v. Morris, 489 U.S. 688 (1989), declared the Board's voting scheme unconstitutional, holding that it violated the "one man, one vote" principle. Because Borough Presidents held equal amounts of power on the Board, the Court held that residents of some boroughs, such as Staten Island, were over-represented, while residents of other boroughs, such as Brooklyn, were under-represented. The

Court ordered the City either to reorganize or to abolish its most important political structure. Between March 22 and August 2, 1989, the 1989 Charter Revision Commission worked to comply with the Court's ruling.

The 1989 Charter Revision Commission decided that the Board could not be reorganized in a lawful fashion and, accordingly, proposed to abolish it and create a new governance structure for the City that would receive the Board's powers. The Commission wanted to continue the City's tradition of a strong mayoralty and, therefore, folded many of the Board's functions into the Mayor's purview. The Commission also decided that the Council, the legislative branch, should be the primary check on the power of the Mayor. Thus, the Commission expanded the Council's membership from 35 to 51 members and granted the Council power to approve budgets and authority over land use decisions.

The 1989 Charter Revision Commission continued the offices of the Comptroller and the Borough Presidents but with significantly different powers than they had enjoyed by virtue of their seats on the Board. The Comptroller retained certain executive functions including the duty to audit every City agency at least once every four years. Borough Presidents lost a significant amount of power with the end of the Board but were given control over community boards and a certain amount of funding for their boroughs.

The City Council President's role in government underwent a major transformation as a result of the 1989 Charter revision. Like the Mayor and Comptroller, the Council President enjoyed two votes on the Board and, thereby, exercised significant influence on the City's most powerful decision-making body regarding budgetary issues, land use decisions, approval of contracts and zoning regulation changes. The Council President's duties outside of the Board, however, were marginal. As the Council's presiding officer, the Council President could cast a vote to break a tie but was not permitted to vote under any other circumstances. The Vice-Chair of the Council (predecessor to the position of the Speaker) was the person in effective control of the Council, not the Council President.

Although the Council President had little input regarding the day-to-day workings of the legislative body, the Council President was the immediate successor to the mayoralty. This arrangement was rational because the Council President had the same number of votes on the Board as the Mayor and was involved in the day-to-day executive decisions of the Board that affected the City.

But the power and significance of the Council President was eviscerated when the 1989 Charter revision eliminated the Board of Estimate and, correspondingly, the Council President's

votes on that Board. Accordingly, with the decision to eliminate the Board came a heated debate over whether to redefine the Council President's responsibilities or whether to eliminate that office altogether. As part of this debate, the 1989 Charter Revision Commission deliberated extensively over the creation of a Vice Mayor to run for election with, and stand as the immediate successor to, the candidate for Mayor.[2] This proposal died, however, during a heated debate regarding how to increase minority representation in government.

The Vice Mayor proposal was designed by its sponsors as a vehicle to help minority candidates win election to citywide office based on the theory that mayoral candidates would choose to run with a Vice Mayor from a community other than their own to create a broad-based coalition. Opponents of the proposal, however, argued that the creation of a Vice Mayor position would relegate minorities to a secondary role beholden to the Mayor. Others maintained that the Council President could serve as a check on the Mayor that would be lost if the Council President were replaced by a Vice Mayor. After considerable debate, the Commission voted down by the slimmest of margins, 8-6, a motion to abolish the Council President's office and, instead, create a Vice Mayor who would succeed to the mayoralty.

In addition to considering creating a Vice-Mayor, the 1989 Charter Revision Commission debated the role of the Council President (which at the time included the power to succeed to the mayoralty) on several occasions. In the end, however, the Commission voted 9-4 (with one abstention) to retain the office of Council President but to revise its role to that of ombudsman.

The 1989 Charter Revision Commission ultimately retained that office as part of a political compromise: certain Commissioners did not want then-Council President Andrew Stein to be ousted from City government. Indeed, Commission Chair Frederick A. O. Schwarz, Jr. himself has since admitted that the office was kept, in part, to protect the Commission's majority coalition.[3] He also noted that this issue aroused "puzzling passion."[4]

In the 1989 Commission's "Summary of Final Proposals," the Council President is described as "the city's 'Public Advocate' . . . charged with receiving, investigating and attempting to resolve individual citizen complaints."[5] Indeed, as the current Public Advocate has noted, he is the country's only elected ombudsman.[6] In 1993, the City Council passed Local Law 19, officially changing the title of that office from "President of the Council" to "Public Advocate." In passing that law, the Council acknowledged that "the most important duty of the President of the City Council is to serve as the public advocate for the citizens of New York City."[7] In short, the nature of that office was radically transformed and bore little relation to that of its predecessor under the Board of Estimate system.

3. Mayoral Succession in Other Jurisdictions

a. Succession in Other Major Cities in the State of New York

A comparison of the provisions for succession in the State's other large cities is instructive. We note that in those cities where no special election is held, the chief executive and presiding officer are elected at the same time, for the same term, by voters of the entire City. In those cities, therefore, State law mandates that the presiding officer succeed to the mayoralty for the remainder of the unexpired term. See General City Law § 2-a (1).

i. Albany

In Albany, a vacancy in the office of the Mayor is filled by the City Council President, who serves as Mayor for the remainder of the unexpired term.

ii. Buffalo

In Buffalo, the vacancy is filled by the City Council President, who acts as Mayor until the City Council convenes a special election. The winner of that election serves for the remainder of the unexpired term.

iii. Rochester

In Rochester, the Council appoints a successor who must be registered in the same party as the vacating Mayor. If the Council fails to appoint a successor within thirty days of the vacancy, the office is filled at a special election within ninety days of the vacancy. If the Council does so appoint, the successor holds office until the first day of January after the first annual election held in time to permit filing of nominating petitions following the vacancy, at which time a new Mayor must be elected for the remainder of the unexpired term.

iv. Syracuse

In Syracuse, the Council President succeeds to the mayoralty.

v. Yonkers

In Yonkers, a vacancy in the office of the Mayor is filled by a Deputy Mayor who acts as Mayor unless and until the Yonkers City Council designates as Acting Mayor a different Deputy Mayor or Commissioner or Department Head. A special election is held 90 days after the vacancy, but if such election is not legally possible, then the election is conducted as soon thereafter as possible. The election may be scheduled concurrent with a general election so long as an election is held within 120 days of the vacancy. The newly elected Mayor serves for the remainder of the unexpired term. Yonkers is not subject to the General City Law requirement

since its Mayor and presiding officer are not elected for the same term. (The Mayor is elected for a four-year term, and the members of the Council are elected for two-year terms.)

b. Succession in Other Major Cities Across the Country

The experiences of other major cities across the country are also instructive. Many municipalities throughout the country provide for special elections to fill a mayoral vacancy, including Los Angeles, Houston, Dallas, Minneapolis and Denver. Some municipalities, including Nashville, have Vice Mayors who succeed to the mayoralty, though often only until a special election is held. Still other municipalities, such as Boston, Honolulu and Seattle, fill vacancies by the Council President or by appointment of the City Council, usually followed by a special election.

The City of New York is the only municipality in the United States that fills a mayoral vacancy with an independently elected ombudsman. In his August 5, 1999 testimony before the Commission, Public Advocate Mark Green disputed this contention and asserted that "no other city does succession like New York, which is true, if you don't count Albany, St. Louis, Syracuse, Utica and Baltimore."[8] The Public Advocate is incorrect: none of those cities fills mayoral vacancies with an elected ombudsman. Indeed, no other city could do so because, as the Public Advocate himself acknowledges, New York City is the only city in the country with an elected ombudsman.[9] Baltimore, St. Louis, and Albany, for example, each fill mayoral vacancies with a President of the City Council who is elected citywide and is a member of the council who votes on all matters before the council. These are not ombudsman positions but, instead, more like the current Speaker of the City Council or the former President of the City Council – the position that was effectively abolished by the 1989 Charter Revision Commission.

4. Related State and Federal Law

a. State Law

The proposed changes to the Charter to have special elections to fill a mayoral vacancy, as is required in the Charter for every other elected office, are consistent with State law. Section 2-a(1) of the General City Law provides that, where a City's chief executive officer and presiding officer of the local legislative body are elected at the same time for the same term by the voters of the entire City, such presiding officer must be the immediate successor to the mayoralty, and serve for the remainder of the unexpired term. Currently, the Public Advocate "presides over" the Council, and is elected at the same time as the Mayor, for the same term, by

voters of the entire City. However, the City's current succession provisions are "grandfathered," therefore, the City is not governed by Section 2-a of the General City Law. Because it is unclear whether the City's exemption would continue after modifications to the current succession provisions, as a technical matter, the Public Advocate's ceremonial right to "preside" over the Council and stated authority to break a tie vote there should be eliminated.[10]

b. Federal Voting Rights Act

Establishing a special election to fill a mayoral vacancy may require pre-clearance by the United States Department of Justice or the United States District Court for the District of Columbia, because this change could be viewed as an alteration in a "standard, practice or procedure with respect to voting." 42 U.S.C. § 1973c. The Voting Rights Act does not authorize or prohibit such alterations, it simply requires that they do not have the effect of abridging or denying the right to vote on the basis of race or color.

The Commission retained noted voting rights expert Professor Allan J. Lichtman to provide an analysis as to whether these changes would have a detrimental impact on voting power or representation of the City's minority communities and thereby violate provisions of the Voting Rights Act. On August 6, 1999, Professor Lichtman testified at a Commission expert forum concerning election issues and offered preliminary conclusions. He explained that he was analyzing data regarding special elections in the City for offices including Council member seats and special elections around the country for citywide vacancies. Professor Lichtman's initial belief was that, even though voter turn-out has generally been lower at special elections to fill Council seats in the City, a special election to fill a mayoral vacancy could very well have a turn-out commensurate with that of a mayoral race at a general election:

> If it's a highly publicized mayoral election like the one in Chicago after the death of Mayor Washington, they also had one in Omaha, a highly publicized Mayoral election, the turnout in fact could be extremely high, so I'm not at all certain whether looking at Council, Senate and Assembly districts really tells you much about what might happen if you had a highly publicized general election for Mayor.
>
> But the bottom line is to the extent we're able to look at New York City, to the extent I've been able to look at other cities, there does not appear to be a substantial correlation specifically between turnout, fallout and race and minorities have been able in other places like Memphis which is about evenly divided between whites and minorities to win citywide special elections.[11]

Professor Lichtman has since advised the Commission of the results of his research. After the August 6, 1999 expert forum, Professor Lichtman conducted a thorough analysis of the

recent special elections in the City and other municipalities with high minority populations. Specifically, he analyzed data for seven special elections for State Assembly and Senate, Congressional and Council positions between 1992 and 1998. Professor Lichtman also reviewed special elections in Washington, D.C., Chicago and Memphis. He concluded that, if such data is indicative of what would occur in a New York mayoral special election, there is no evidence that special elections are likely to disadvantage minority voters by producing large reductions in minority turnout relative to the reductions in white turnout. Indeed, he inferred from the data that in a citywide special election minority turnout is likely to be high relative to white turnout if a minority candidate of choice of minority voters is competing for office. The Commission also consulted with attorney J. Gerald Hebert, a legal expert on the Voting Rights Act, who worked at the United States Department of Justice for over twenty years and served as Acting Chief, Deputy Chief and Special Litigation Counsel in the Voting Rights Section of the Civil Rights Division at the Justice Department. After reviewing the opinions of Professor Lichtman and Mr. Hebert, the Commission concluded that that filling a mayoral vacancy through a special election (using the procedure proposed here) would not violate the Voting Rights Act.

5. Proposal to Adopt Special Elections

There are two paramount principles that guided the Commission in structuring an appropriate and effective provision for succession: empowering voters and ensuring stability of office until an election can take place. The first principle is rooted in the democratic ideal that, when possible, the right to choose elected officials should be returned to the voters upon the disappearance of the most recent evidence of their collective will. Such is already the case with vacancies in the offices of the Comptroller, the Public Advocate, the Borough Presidents and City Council members. The Charter provides for elections upon vacancies in these offices, no matter when in the term the vacancy occurs. It is just as important if not more so, to hold such a special election when the vacancy occurs in the mayoralty.

Government achieves its legitimacy from the authority conferred upon it by the electorate. It is hard to image that an unelected Mayor could effectively govern this City for an extended period. At the core of a democratic government is the notion that leadership is earned, not inherited or granted. Public confidence in government comes with the understanding that we choose the policies affecting us by choosing a leader, and that these policies can be reversed by electing someone else. The current system of having the Public Advocate fill a mayoral vacancy for up to fifteen months does not correspond with fundamental notions of democracy. Indeed the

very role of a Public Advocate is to be watchdog over the Mayor, yet in the advent of a mayoral vacancy, this public critic of the sitting administration would take over as Mayor. This creates an internal inconsistency that defies logic.

Although the Commission decided at the outset not to consider any change in the line of mayoral succession at this time, the Commission believes that voters should have the opportunity to elect a new Mayor in the event of a vacancy as soon as possible, just as the Charter provides for filling vacancies for every other elected City office. Voters should be empowered to determine their leadership and the policies that will affect their lives. They should not have to wait an extended period of time before getting their say. Elections have the statutory effect of ensuring that voters get the government and the policies they want.

The Commission received and considered much public testimony and written submissions on this issue. The public comments in support of the proposal focused on the fundamental value of democracy: providing the voters with the opportunity to select their leaders. Among the elected officials who expressed their support for this proposal were Comptroller Alan Hevesi, Queens Borough President Claire Shulman, Staten Island Borough President Guy Molinari, State Senator Guy Velella, Assembly Member John Ravitz, and Council Members Priscilla Wooten, Noach Dear, Tom Ognibene, James Oddo, Steven Fiala and Martin Golden.

Certain speakers who opposed this proposal testified that this Commission would be changing mayoral succession rules adopted by every Charter Revision Commission since 1830. Our proposal, of course, does not change the line of succession: the Public Advocate still succeeds to the mayoralty in the event of a vacancy. We are merely recommending that the voters have their say through a special election within two months of the vacancy. Moreover, it is only since 1989 that the Charter has provided that a vacancy in the mayoralty will be filled by an ombudsman, rather than an official involved in the formulation and implementation of City policies. Only one Charter Revision Commission, just ten years ago, discussed the provision to have an elected ombudsman serve as Mayor for up to 15 months, and it barely left that provision intact after heated debates and close votes regarding the creation of a Vice Mayor position and potential elimination of City Council President Andrew Stein's job.

Critics have further attacked the proposal on the grounds that it would be wrong for the Commission to "change the rules in the middle of the game." Democracy, however, is not a sporting event. Voters have the right to alter the rules of their government at any time. By the logic of the critics, no law or referendum that effects any aspect of a public office holder's

powers or duties could go into effect until after an election. Government would have to do all its meaningful work in the last year of an election cycle.

The voters have often made choices that changed rules in the middle of a term. As discussed in this report's introduction, in 1988, the middle of a term, voters approved Charter amendments that changed the succession provisions for every City office except the mayoralty. These provisions require that vacancies in the offices of the Public Advocate, Comptroller, Borough Presidents, and City Council be filled through special elections. Prior to the 1988 amendments, a vacancy in a borough presidency would have been filled for the remainder of the term by an individual chosen by a majority vote of that borough's delegation in the Council. By changing these rules in the middle of an electoral cycle, the voters extinguished the power of the Council members to appoint individuals to fill vacancies in those offices. Before these changes the Comptroller effectively had the power to name his successor, since the Charter named the appointed First Deputy Comptroller as successor. The Comptroller lost this power mid-term with the institution of special elections.

In 1980, the State legislature, again in the middle of a term, also changed the "rules of the game" regarding mayoral vacancies. Effective June 3, 1980, the State legislature amended Section 2-a of the General City Law to provide that the City Council President (now Public Advocate) would act as Mayor in the event of a vacancy only until the mayoral vacancy could be filled at a *general election* (as the law now provides), rather than for the remainder of the mayoral term (as the law previously provided). Therefore, as a result of this change, had Mayor Koch vacated his office before September 20, 1980, City Council President Carol Bellamy would have served as Mayor only until the 1980 general election and not for the rest of Mayor Koch's term, ending January 1, 1982, as the law had provided when both of them took office.

The Commission also heard testimony that the City has no experience with special elections to fill citywide vacancies and, therefore, should not provide for one to fill a mayoral vacancy. The City does, however, have significant experience with special elections to fill Council seats. Since their inception a decade ago through the Charter revisions of 1988, nonpartisan special elections to fill Council vacancies have become part of the City's electoral landscape. The procedure was upheld in City of New York v. Board of Elections, Index No. 41450/91 (Sup. Ct. New York Co.), aff'd __ A.D.2d __, (1st Dep't), lv. app. den., 77 N.Y.2d 938 (1991). Indeed, the City has already been witness to many such elections, including three earlier this year.

The Charter also already provides for special elections to fill the other citywide offices of the Public Advocate and the Comptroller. One of the ironies of this debate is that, if the Public Advocate succeeded to the Office of the Mayor, under current provisions, the Charter provides for a special citywide election to be held within 60 days to fill the vacancy in the Office of the Public Advocate[12].

Some members of the public suggested that the proposal to elect a new Mayor in the event of a mayoral vacancy should not be adopted because, theoretically, the proposal could result in up to four Mayors in one year, counting the Mayor who vacated the office and the Public Advocate who succeeded as a caretaker for 60 days until the special election was held. The proposal, however, would increase the number of possible mayors by only one over the current Charter provisions, and only if the voters decided to make a change. Moreover, the proposal tracks the system in place for every other elected office in the City. For example, the same potentiality could occur now regarding the Comptroller. Should the Comptroller's office become vacant, the First Deputy Comptroller would succeed to the Comptroller's office. Within 60 days, however, a special election would be held and a new Comptroller elected. The Commission does not believe that the people should have a lesser say over who their Mayor is than they do over their Comptroller, Public Advocate, Borough President, or Council member.

Some opponents of this proposal have questioned whether the people can be entrusted with the right to select their Mayor in the event of a mayoral assassination. These critics have attempted to color the issue by creating the most horrific hypothetical scenario under which succession would take place. They ask how the country would have fared if an election had been required 60 days after the assassination of President John F. Kennedy. The President's assassination, however, is not an analogous situation. President Kennedy had a running-mate, Vice-President Lyndon Johnson, someone who shared his policies and platform. When a Vice-President succeeds to the Presidency, voters are assured of an administration's continuity. The City has no such parallel successor. This Commission believes that the principle of allowing the people to choose their leaders does not vary depending on the circumstances that created the vacancy. To the contrary, it is even more important in a time of crisis to permit the electorate to choose a person capable of leading and bringing people together.

Finally, the Public Advocate claimed that he is being targeted by this Commission because he is an independent official who is a frequent critic of the Mayor.[13] Nothing could be farther from the truth.[14] Indeed, this Commission decided not to consider abolishing the Public Advocate's Office or removing the Public Advocate from the line of mayoral succession.

Moreover, this special election proposal is but one of 14 substantive changes to the City Charter that this Commission is recommending in such areas as budget, civil rights, government reorganization, immigrant affairs, procurement and public safety.

Moreover, the Commission is charged with reviewing the entire Charter and recommending changes that it finds in the best interest of the City. It is then up to the voters to decide whether to ratify those changes. There is nothing inappropriate or unfair about this Commission letting the voters decide whether they would prefer to have a special election in the event of a Mayoral vacancy.

Notwithstanding these observations, the concerns raised about this one special election proposal have overshadowed the importance of our total body of work. Those concerns, while misguided in our view, have persisted. Therefore, to eliminate any questions about this Commission's work, to promote public confidence in this process, and to ensure full and fair consideration of all of this Commission's substantive proposals, the Commission has decided to recommend that this special election proposal only become effective as of January 1, 2002.

This Commission's proposal provides for mayoral vacancies to be filled in the same manner as vacancies are filled for every other City elected office, including the Public Advocate, the Comptroller, the Borough Presidents and the members of the City Council. The vacancy would be filled within two months of its occurrence at a nonpartisan special election, and a partisan general election would then ordinarily follow in November.

Under the Commission's proposal, if, at any nonpartisan special election for a citywide office no candidate receives forty percent or more of the vote, the two candidates receiving the most votes would advance to a run-off election to be held on the second Tuesday succeeding the date of the initial election. This run-off election is appropriate since special elections generally produce a crowded field and the victor for important citywide offices should be required to demonstrate a substantial threshold of support. Moreover, in primary elections prior to a general election, the Election Law requires run-off elections for the offices of the Mayor, Comptroller and Public Advocate in the event no candidate receives forty percent or more of the vote. Election Law § 6-162. As the Election Law recognizes, candidates for these offices should be required to demonstrate a significant and substantial level of popular support that would help confer a legitimacy necessary for these officials to govern the City.

Proposal: No change in the interim line of mayoral succession should be considered at a referendum vote in November 1999. The voters should be permitted to decide, however, at a referendum vote in November 1999, whether to revise the Charter to provide that special elections be held within two months to fill a vacancy in the office of the Mayor (to become effective January 1, 2002), similar in format to the procedure set forth in the Charter to fill vacancies in the offices of the Public Advocate, Comptroller, Borough Presidents and members of the City Council, and as is done in major cities throughout the United States, including Los Angeles, Houston, Dallas, Denver and Minneapolis. Moreover, to effectuate this proposal, and to reflect the practical allocation of power that already exists, the Charter should be amended to remove the Public Advocate's ceremonial role to "preside" over the City Council, effective January 1, 2002.

Proposed Charter Revisions:

Section 1. Subdivision b of section 10 of the charter is amended to read as follows:

b. In the case of a failure of a person elected as mayor to qualify, or a vacancy in the office caused by the mayor's resignation, removal, death or permanent inability to discharge the powers and duties of the office of mayor, the powers and duties of the mayor shall devolve upon the public advocate, the comptroller or a person selected pursuant to subdivision c of section twenty-eight, in that order of succession, until a new mayor shall be elected as provided herein. [If the vacancy shall occur before the twentieth day of September in any year, such vacancy shall be filled in the general election held in that year, otherwise it shall be filled in the general election held in the following year. The term of the person then elected mayor shall begin on January first after such election and shall expire on the date when the term of the mayor originally elected would have expired. Upon the commencement of the term of the thus elected mayor, the public advocate or the comptroller then acting as mayor shall complete the term of the office to which such person was elected if any remains.]

§ 2. Subdivision c of section 10 of the charter should be re-lettered subdivision d, and a new subdivision c should be added to read as follows:

c. 1. Within three days of the occurrence of a vacancy in the office of the mayor, the person acting as mayor shall proclaim the date for the election or elections required by this subdivision, provide notice of such proclamation to the city clerk and the board of elections and publish notice thereof in the City Record. After the proclamation of the date for an election to be

held pursuant to paragraphs four or five of this subdivision, the city clerk shall publish notice thereof not less than twice in each week preceding the date of such election in newspapers distributed within the city, and the board of elections shall mail notice of such election to all registered voters within the city.

2. If a vacancy occurs during the first three years of the term, a general election to fill the vacancy for the remainder of the unexpired term shall be held in the year in which the vacancy occurs, unless the vacancy occurs after the last day on which an occurring vacancy may be filled at the general election in that same year with party nominations of candidates for such election being made at a primary election, as provided in section 6-116 of the election law. If such a vacancy occurs in any year after such last day, it shall be filled for the remainder of the unexpired term at the general election in the following year provided, however, that no general election to fill a vacancy shall be held in the last year of the term, except as provided in paragraph nine of this subdivision. Party nominations of candidates for a general election to fill a vacancy for the remainder of the unexpired term shall be made at a primary election, except as provided in paragraph five of this subdivision.

3. If a special or general election to fill the vacancy on an interim basis has not been previously held pursuant to paragraphs four, six, seven and eight of this subdivision, the person elected to fill the vacancy for the remainder of the unexpired term at a general election shall take office immediately upon qualification and shall serve until the term expires. If a special or general election to fill the vacancy on an interim basis has been previously held, the person elected to fill the vacancy for the remainder of the unexpired term at a general election shall take office on January first of the year following such general election and shall serve until the term expires.

4. If a vacancy occurs during the first three years of the term and on or before the last day in the third year of the term on which an occurring vacancy may be filled for the remainder of the unexpired term at a general election with party nominations of candidates for such election being made at a primary election, as provided in section 6-116 of the election law, a special or general election to fill the vacancy on an interim basis shall be held, unless the vacancy occurs less than ninety days before the next primary election at which party nominations for a general election to fill the vacancy may be made and on or before the last day on which an occurring vacancy may be filled for the remainder of the unexpired term at the general election in the same year in which the vacancy occurs with party nominations of candidates for such election being made at a primary election, as provided in section 6-116 of the election law.

5. If a vacancy occurs after the last day in the third year of the term on which an occurring vacancy may be filled for the remainder of the unexpired term at a general election in each year with party nominations of candidates for such election are being made at a primary election, as provided in section 6-116 of the election law, but not less than ninety days before the date of the primary election in the fourth year of such term, a special or general election to fill such vacancy for the remainder of the unexpired term shall be held.

6. Elections held pursuant to paragraph four or five of this subdivision shall be scheduled in the following manner: a special election to fill the vacancy shall be held on the first Tuesday at least forty-five days after the occurrence of the vacancy, provided that the person acting as mayor, in the proclamation required by paragraph one of this subdivision, may schedule such election for another day no more than ten days after such Tuesday and not less than forty days after such proclamation if the public advocate or the comptroller determines that such rescheduling is necessary to facilitate maximum voter participation; except that

(a) if the vacancy occurs before September twentieth in any year and the first Tuesday at least forty-five days after the occurrence of the vacancy is less than ninety days before a regularly scheduled general election or between a primary and a general election, the vacancy shall be filled at such general election; and

(b) if the vacancy occurs before September twentieth in any year and the first Tuesday at least forty-five days after the occurrence of the vacancy is after a regularly scheduled general election, the vacancy shall be filled at such general election; and

(c) if the vacancy occurs on or after September twentieth in any year and the first Tuesday at least forty-five days after the occurrence of the vacancy is after, but less than thirty days after, a regularly scheduled general election, the vacancy shall be filled at a special election to be held on the first Tuesday in December in such year.

7. All nominations for elections to fill vacancies held pursuant to paragraphs four and five of this subdivision shall be by independent nominating petition. A signature on an independent nominating petition made earlier than the date of the proclamation required by paragraph one of this subdivision shall not be counted.

8. A person elected to fill a vacancy in the office of the mayor at an election held pursuant to paragraph four of this subdivision shall take office immediately upon qualification and serve until December thirty-first of the year in which the vacancy is filled for the remainder of the unexpired term pursuant to paragraph two of this subdivision. A person elected to fill a

vacancy in the office of the mayor at an election held pursuant to paragraph five of this subdivision shall take office immediately upon qualification and serve until the term expires.

9. If a vacancy occurs less than ninety days before the date of the primary election in the last year of the term, the person elected at the general election in such year for the next succeeding term shall take office immediately upon qualification and fill the vacancy for the remainder of the unexpired term.

10. If at any election held pursuant to this subdivision for which nominations were made by independent nominating petitions, no candidate receives forty percent or more of the vote, the two candidates receiving the most votes shall advance to a run-off election which shall be held on the second Tuesday next succeeding the date on which such election was held.

§ 3. Subdivision c of section 24 of the charter is amended by adding a new paragraph 10 to read as follows:

10. If at any election held pursuant to this subdivision for which nominations were made by independent nominating petitions, no candidate receives forty percent or more of the vote, the two candidates receiving the most votes shall advance to a run-off election which shall be held on the second Tuesday next succeeding the date on which such election was held.

§ 4. Subdivision c of section 94 of the charter should be amended by adding a new subdivision 10 to read as follows:

10. If at any election held pursuant to this subdivision for which nominations were made by independent nominating petitions, no candidate receives forty percent or more of the vote, the two candidates receiving the most votes shall advance to a run-off election which shall be held on the second Tuesday next succeeding the date on which such election was held.

§ 5. Subdivision e of section 24 of the charter should be amended as follows.

e. The public advocate [shall preside over the meetings of the council and] shall have the right to participate in the discussion of the council but shall not have a vote [except in case of a tie].

§ 6. Section 46 of the charter is amended to read as follows:

§ 46. Rules of the council. The council shall determine the rules of its own proceedings at the first stated meeting of the council in each year and shall file a copy with the city clerk. Such rules shall include, but not be limited to, rules that the chairs of all standing committees be elected by the council as a whole; that the first-named sponsor of a proposed local law or resolution be able to require a committee vote on such proposed local law or resolution; that a majority of the members of the council be able to discharge a proposed local law or resolution

from committee; that committees shall provide reasonable advance notice of committee meetings to the public; that all committee votes be recorded and made available to the public. Such rules shall provide for one or more of the fifty-one voting members of the council to preside over the meetings of the council in the manner specified therein. Such member or members shall be selected in accordance with the method provided in such rules.

B. Other Issues

1. Nonpartisan Elections

The Commission also considered whether elections for the Mayor and other citywide offices should be conducted on a nonpartisan basis, as is done in major cities throughout the United States, including Los Angeles, Chicago, Houston, Detroit, Dallas and Boston. After careful consideration of the issue and of the public testimony, as well as expert testimony offered by election lawyers and voting rights experts, the Commission decided to defer any resolution of this issue. The issue deserves further public debate regarding how the proposal would affect candidates for public office. In addition, more study is required regarding the practical limitations posed by the City's existing voting machines.

At the Commission's August 6, 1999 expert forum on this subject, the Commission heard testimony regarding whether the establishment of nonpartisan elections would violate the Voting Rights Act. The Commission heard convincing testimony by Professor Lichtman that the switch from partisan to nonpartisan elections would not violate the Act.

In addition, it appears that the City has the legal authority under State law to conduct nonpartisan elections. The authority to do so derives from Article IX of the State Constitution and Municipal Home Rule Law § 10. Further, the Court of Appeals of the State of New York has held that cities possess the authority to establish nonpartisan elections notwithstanding State Election Law. Bareham v. City of Rochester, 246 N.Y. 140 (1927). Indeed, the City's nonpartisan election scheme used to fill Council vacancies was recently upheld in City of New York v. Board of Elections, Index No. 41450/91 (Sup. Ct., New York Co.), aff'd, __ A.D.2d __ (1st Dept), lv. app. den., 77 N.Y.2d 938 (1991).

Moreover, nonpartisan elections are common. Indeed, as of 1990, more than 80% of the nation's 76 cities with populations of 200,000 or more elect their mayors with nonpartisan elections, according to the National League of Cities. It is possible that nonpartisan elections for citywide offices would allow for a wider spectrum of political views since candidates would not

have to filter their positions through the screen of a party machine. A nonpartisan system might encourage a diversity of candidates and opinions and could help to improve voter turnout at City elections. Potential candidates who might not otherwise run for office would have the opportunity to do so without modifying their beliefs. While it is possible that these candidates may not be as well financed as those supported by parties, such candidates could have access to public matching funds by participating in the City's voluntary campaign finance program. Thus, when coupled with the campaign finance program, nonpartisan elections might widen the electoral field to a broader group of candidates, and offer voters more choices in their leaders and policies.

The Commission also heard testimony, however, in support of partisan elections. At the Commission's August 6, 1999 expert forum, for example, Stanley Schlein, counsel to the State Assembly Election Law Commission, testified in support of "the right of the citizenry to coalesce behind a banner, behind a name, behind a philosophy and run candidates for office under that flag." In Mr. Schlein's words, running for office on a partisan basis is an element of the "freedom of political association [that] is the foundation of this democracy.[15]"

At the August 6, 1999 expert forum, the Commission also heard testimony regarding the practical difficulties of implementing nonpartisan elections. Both Stanley Schlein and Lawrence Mandelker, counsel to the New York State Republican Committee and former treasurer for the campaign of Mayor Koch, stated that there would be significant practical difficulties in implementing nonpartisan elections because of the City's antiquated voting machines. In light of this testimony, the Commission decided on August 17, 1999, to make no recommendation regarding non-partisan elections at this time.

2. Line of Mayoral Succession

The Commission decided not to propose any change in the line of mayoral succession at this time. However, the Commission recommended that the issue be considered further at a later date. In addition to the Public Advocate, there are several possible alternatives: the Comptroller, the Speaker of the Council, a newly created Vice Mayor and a Deputy Mayor.

a. Public Advocate

The Public Advocate is currently the immediate successor to the mayoralty. The most significant power of the office is that of an ombudsman, i.e., an officer that monitors government operations and investigates complaints. Though the Public Advocate maintains a seat on a limited number of boards, the office exercises virtually no executive functions other than

managing a small office and staff. As previously explained, the powers of the Public Advocate are not those formerly exercised by the Council President as a member of the now defunct Board of Estimate.

Our Public Advocate is the only elected ombudsman in the country. The Public Advocate monitors and investigates actions of the executive branch but has no responsibilities for the development or implementation of programs or for the provision of services.

b. Comptroller

The Comptroller possesses several significant executive functions and is responsible for the fiscal integrity of the City. The Comptroller is empowered to audit all City agencies and all matters relating to the City's finances and to settle and adjust all claims against the City. The Comptroller is also responsible for the registration of contracts for the procurement of goods, services and construction. Hence, the Comptroller does exercise certain functions that are comparable to those of the executive branch. Conversely, the responsibility to audit and monitor the executive branch may put the Comptroller institutionally at odds with the executive branch on various issues.

c. Speaker of the City Council

The Speaker is the leader of the City Council, elected by the Council members. The Speaker does not possess an executive function and is not a citywide elected official, but is the head of the legislative body that adopts, among other items, the City's budget. On the other hand, the Mayor provides a check on the Council by approving or vetoing local laws passed by the Council. If the Speaker succeeded to the Mayor on an interim basis, this check could be lost. While some jurisdictions have the Council vote on a successor to the Mayor in the event of a vacancy, in our system, if the Council had that power, it would in all likelihood elect the Speaker.

d. Vice Mayor

As discussed above, the 1989 Charter Revision Commission considered establishing an office of the Vice Mayor. The Commission also received public comments and heard testimony in support of creating a Vice-Mayor position, most notably from Speaker Vallone, who proposed creating such an office for the 2001 election. Such an office would eliminate the need for a special election to fill a mayoral vacancy. However, creating the office would represent a significant alteration of the City's electoral structure and would require framing the specific powers and duties of the office. In addition, such a proposal might raise some of the issues that the 1989 Charter Revision Commission could not resolve. Accordingly, creation of this office

would necessitate thorough deliberation. The Commission believes that such a proposal may have merit and believes that the proposal should be given serious consideration in the future.

e. Deputy Mayor

The Charter provides that the Mayor may appoint Deputy Mayors as appropriate. While Deputy Mayors are not elected officials, they are authorized to perform such duties and responsibilities as the Mayor delegates to them. Of the successor options, the Deputy Mayor, similar to the Vice Mayor, is likely to subscribe to the views of the vacating Mayor and would be a person likely to continue that Mayor's policies. Indeed, in effect, a Deputy Mayor acts as the Mayor for the first nine days of certain types of mayoral vacancies. Moreover, Suffolk County has, at least as of the 1980's, provided for such a process involving succession by a deputy county executive.[16] Accordingly, it might be appropriate for a Deputy Mayor to act as a caretaker of the mayoralty for a short period pending an election.

3. Campaign Finance Reform

The Commission believes that there may be further reforms that could improve the City's voluntary campaign finance program. However, because of the 1998 campaign finance reform by both Charter revision and the local law, the Commission concluded, on July 29, 1999, that it would be appropriate to monitor and evaluate the effectiveness of these provisions before making any further revisions.

ENDNOTES FOR SECTION III

[1] Frederick A. O. Schwarz, Jr. & Eric Lane, The Policy and Politics of Charter Making, 42 N.Y.L. Sch. L. Rev. 723, 748 (1998).

[2] This Commission's discussion of the possibility of creating an Office of the Vice-Mayor, specifically proposed by Council Speaker Peter Vallone in his testimony before the Commission, is found in the Other Issues part of this section.

[3] Frederick A. O. Schwarz, Jr. & Eric Lane, The Policy and Politics of Charter Making, 42 N.Y.L. Sch. L. Rev. 723, 820 (1998).

[4] Id. at 818.

[5] Summary of Final Proposals, New York City Charter Revision Commission, August 1989, at 19.

[6] Mark Green & Laurel Eisner, The Public Advocate for New York City: An Analysis of the Country's Only Elected Ombudsman, 42 N.Y. L. Sch. L. Rev. 1093, 1095 (1998).

[7] Memorandum in Support, Local Law 19 of 1993.

[8] Transcript of Queens Public Hearing, August 5, 1999, at 22.

[9] Mark Green & Laurel Eisner, The Public Advocate for New York City: An Analysis of the Country's Only Elected Ombudsman, 42 N.Y.L Sch. L. Rev. (1998)

[10] The Charter provides that the Public Advocate "shall preside over the meetings of the council and shall have the right to participate in the discussion of the council but shall not have a vote except in case of a tie." Charter section 24(e). These provisions are either nonsensical or do not reflect the actual role of the Public Advocate. As a practical matter, the Speaker of the Council presides over the Council. Moreover, there never has been an occasion for the Public Advocate to cast a tie-breaking vote, nor could there ever be such an occasion in a 51-seat body. In fact, the Charter is internally inconsistent in this regard. Local law requires an affirmative vote of a majority of all Council members to be passed, meaning that 26 votes by Council members are always required to pass any legislation or resolution; therefore, a tie can never occur. Municipal Home Rule Law § 20(1); Charter § 34. Given that the Public Advocate's role as presiding officer of the Council is a legal fiction resulting from a political compromise, it should be eliminated. This technical change would also remove any legal doubt regarding the City's ability to require a prompt special election in the event of a mayoral vacancy.

[10] Transcript of the Meeting of the Charter Revision Commission, August 6, 1999, at 136-37.

[12] The Charter unequivocally provides for a prompt special election in event of a vacancy in the office of Public Advocate. That provision, however, has never been pre-cleared by the Department of Justice. Accordingly, it would be necessary to have the provision pre-cleared before implementing it. The 1988 Charter Revision Commission recommended that State law be changed prior to doing so. Specifically, that the Commission was concerned that Section2-a(2)

might pre-empt the provision regarding Public Advocate vacancies. Of course, any legal uncertainties regarding whether a special election could be held to fill a vacancy in the office the Public Advocate would be eliminated through this proposed Charter revision.

[13] Transcript of Queens Public Hearing, August 5, 1999, at 19.

[14] Indeed, Commissioner Karen Boykin-Towns summed it up best when she said: "[T]he bottom line is that the voters should be the ones to decide. Not that anyone asked me, but I voted for Mark Green. I think he is a very good elected official, very effective. But to be honest with you, when I voted for him, I never thought about him being mayor. He would probably be a wonderful mayor as are a number of candidates who might be interested in that position. . . . But given the opportunity to vote for a mayor, then I would see all the candidates. I think that the opportunity for people to have that choice is fundamental. . . . [U]ndemocratic is not something that I think can be attached to this. I am sorry if the Public Advocate and/or his representatives and/or his friends or anyone else feels that this Commission is out to get him. I know that I am not, but I am not trying to think about one person, who I am very fond of and I think is doing an excellent job." Transcript of the Meeting of the Charter Revision Commission, August 17, 1999, at 49-50.

[15] Transcript of the Meeting of the Charter Revision Commission, August 6, 1999 at 101

[16] See Baranello v. Suffolk County Legislature, 126 A.D.2d 296 (2d Dep't 1987).

GOVERNMENT INTEGRITY:

FOSTERING AN OPEN AND HONEST GOVERNMENT

SECTION IV

SECTION IV

GOVERNMENT INTEGRITY

A. Full Time City Council

B. Limitations on Outside Earned Income and Acceptance of Honoraria

C. All Council Members Should Receive Same Total Compensation

D. Conflict of Interest and Financial Disclosure Rules

E. Union Finances

F. Term Limits

G. Salary Increase for Elected and Other Officials

IV. GOVERNMENT INTEGRITY

(Chapters 2, 49 and 68)

The Commission decided not to recommend any changes in this area because it preferred to do a comprehensive review of the City's conflicts of interest rules. The Commission, however, believes that further evaluation of various issues in this area should be undertaken.

A. Full Time City Council

The Charter requires "every head of an administration or department or elected officer except council members who receives a salary from the city" to serve full-time. Every Charter revision commission since 1975 has discussed the possibility of requiring full-time service from City Council members by prohibiting all outside employment and/or placing limits on income earned outside of the Council. With Council members recently receiving a 28% pay increase, the Commission considered whether to require Council members to devote their full time to the duties of their office and not engage in any outside employment, as is required of all other elected officials. However, the Commission decided to defer resolution of this issue.

Historically, legislative service in the United States has not been considered a profession or full-time occupation. Prevailing political culture preferred to view the legislator as a citizen whose primary livelihood came from non-political activities. Over the past century, however, as the growing complexity of modern society has more and more required lawmakers to possess expert knowledge, legislatures at all levels have become increasingly professional, with members who devote their entire working day solely to activities related to their positions. Indeed, Congressional representatives are now required to work full-time.

The Commission looked to Los Angeles as an instructive parallel for New York City. Both cities are governed through a similar Mayor-Council structure in which the Council has the power to pass local legislation and amend and approve budgets submitted by the Mayor. Furthermore, like New York City Council members, Council members in Los Angeles serve four-year terms and are limited to two consecutive terms. Los Angeles Council members are the highest paid municipal legislators in the nation at $113,000 per year, but they are required by their charter to work full-time; New York City legislators are now the third highest paid, at $90,000 per year. While there are only 15 Los Angeles Council members compared to 51 in New York City, the New York City Council faces more difficult and complex governance issues.

New York City's government has more responsibilities than that of Los Angeles because it has authority over five counties. The Los Angeles Council, like the legislatures in many other large cities, governs only a portion of a larger county, and the county government exercises significant authority over the city's affairs. Moreover, because of its size, New York City poses problems different in scope than other cities. As the 1999 Quadrennial Advisory Commission, chaired by Richard Gelb, noted, New York City's 51 legislators are responsible for the governance of the "most complex municipality in the United States."

The Charter revisions proposed by the 1989 Charter Revision Commission significantly increased the power of the New York City Council. Most notably, the Council was given critical roles in the budget and land use processes. These reforms were intended to create a Council that was an effective counterweight to a strong Mayor. Nevertheless, the 1989 Charter Revision Commission ultimately decided not to include full-time service in its recommendations because it believed that a pay raise would necessarily accompany the change.

The issue, however, should no longer turn on the amount the Council is paid. As discussed earlier, Council members' annual salaries recently jumped from $70,500 to $90,000, and, as a result, the City's legislators will now become the third highest paid municipal legislators in the nation. Moreover, the City might benefit by requiring Council members to serve full-time. Council members might better develop areas of expertise without the distraction of outside employment. Moreover, because of the Charter's limits on the number of terms that elected officials can serve, in 2001, nearly 80% of current Council members will be forced to leave office. Obligating Council members to work full-time might ensure that the new Council members familiarize themselves with Council procedures and their new responsibilities more rapidly. Finally, requiring legislators to serve full-time by prohibiting them from seeking outside employment might reduce the risk of the conflicts of interest that can arise from dual employment.

The Commission heard arguments that full-time service might discourage people whom might otherwise be willing to serve from running for public office. Without the ability to earn outside income, it was suggested, the salary of a Council member may not be sufficient to attract those who could earn substantially more in the private sector. Any such effect, on the other hand, might be reduced by the recent increase in Council members' salary. Moreover, many Council members claimed that they already work more than the average "full-time" work-week on Council business and that most members do not have significant outside employment or

income. If the current Council is approximately reflective of those who will seek elective office, then the change would not have much impact on those likely to want to serve.

The Commission heard expert testimony from Richard Briffault, a Professor at the Columbia University School of Law and the Executive Director of the Legislative Draft and Research Fund, who cited several arguments both for and against a full-time Council. Overall, though, he urged that the Commission study the matter further before proposing a Charter amendment. Robert Kaufman, a member of the 1995 and 1999 Quadrennial Advisory Commissions, also testified on the issue of a full-time Council. While he personally supported the idea, he was careful to point out that the Quadrennial Commissions' recommendations on the level of the salary increase for the Council were based on the assumption of a part-time Council. He noted that any proposed amendment regarding full-time service would have to address that issue.

Although the Commission generally believes that requiring all elected officials to serve full-time would be a positive change for the City, the Commission agrees with Professor Briffault and Mr. Kaufman that the issue merits further study. Therefore, the Commission deferred reaching any final conclusion on this issue in a vote held on August 17, 1999.

B. Limitations on Outside Earned Income and Acceptance of Honoraria

The Commission considered whether to place limitations on the receipt of outside earned income and acceptance of honoraria by elected officials and agency heads. In addition to outside employment, legislators and agency heads have the ability to use their public positions for other forms of private gain. For example, lawmakers accept honoraria, stipends or other rewards offered as compensation for services such as appearances before private organizations. The acceptance of such gifts may create an appearance of impropriety. To reduce the possibility for corruption and the appearance of impropriety, many legislatures place limits on the amount and/or percentage of this type of earned income. For example, members of the United States Congress are not permitted to earn any honoraria and are limited in the amount and source of additional outside income they may earn. Restricting outside employment and additional earned income may reduce the appearance of impropriety caused by the potential for conflicts of interest.

The Commission heard expert testimony on the subject from Mark Davies, Executive Director of the City's Conflict of Interest Board. Mr. Davies believed that clearer rules about

outside earned income and honoraria would be helpful, but that the City's current rules are, for the most part, effective. He also expressed concerns about placing limits on honoraria, because this could force officials to spend campaign funds on activities such as attendance at charity events.

The Commission believes that the issues raised by Mr. Davies deserve further consideration. The Commission also believes that all issues related to the compensation of Council members, including this proposal and others, should be addressed together. Therefore, the Commission decided on August 17, 1999, that limitations on outside earned income and honoraria should be considered in the future.

C. All Council Members Should Receive the Same Total Compensation

The Commission considered whether all Council members (except for the Council Speaker and minority leader) should receive the same total compensation. Charter § 26 (b) sets the pay of each Council member at $90,000 per year. This section also permits payment of an additional allowance, fixed by Council resolution (and thus, not requiring approval of the Mayor), for "additional services pertaining to the additional duties of such positions." These allowances have sometimes been called "lu-lus." Prior to 1989, the Charter did not contain specific provisions concerning additional allowances for Council members. However, it was common practice for the Vice-Chairman of the Council (the predecessor to the Speaker) to distribute stipends to members who held positions within the Council, such as committee chairs. The 1989 Charter Revision Commission codified this process in Charter § 26 (b).

Currently, at least 75% of all Council members receive or are eligible to receive stipends. The only Council members who are not awarded allowances are first-term members and Republicans. The stipends range from $3,000 to $35,000.

While it is common for the leadership of a legislature to receive higher compensation, such payments are generally limited to speakers and majority and minority leaders. In Congress, for example, the salaries of the leadership, specifically the Speaker of the House, President Pro Tempore of the Senate, and majority and minority leaders of both houses, are higher, but all other Representatives and Senators receive equal pay. Indeed, federal law establishes uniform base salaries among House Representatives, Senators, and U.S. District Court judges. See 103 Stat. 1716, 1766 (1989). The only additional compensation for committee chairs and ranking

members comes in the form of increased office, personnel, and expense budgets, not additional personal salary allowances.

Although the entire Council must pass a resolution for these stipends to be paid, the Speaker of the Council distributes the payments. This practice causes Council members to depend on the Speaker for their stipends. The propriety of such an arrangement has subjected the Council (as well as similarly situated State bodies) to public criticism. Critics of the process have argued that the Council leadership could use the stipends to reward those who vote as the Council leadership desires and to punish those who dissent. Indeed, one Council member who testified before the Commission at the August 5, 1999 public hearing in Queens used this fact to support the current system. He stated that "you have to have some way of maintaining control and focusing members of the legislative body on a certain goal of the leadership, and . . . the ability to provide perks in whatever forms it may take is certainly an attribute not to be dismissed." Other Council members testified, however, that the stipends merely compensate the recipients for the extra work that they perform in connection with chairing committees.

The Commission believes that further study should be conducted on this issue and also believes that all issues related to the compensation of Council members should be examined at the same time. Therefore, on August 17, 1999, the Commission deferred taking any action on the issue of equal compensation for Council members.

D. Conflict Of Interest and Financial Disclosure Rules

The Commission considered a proposal to clarify that the City's conflicts of interest law covers District Attorneys and Assistant District Attorneys. Charter Chapter 68 provides for the regulation of ethical conduct of public servants. Charter § 2602 establishes the Conflicts of Interest Board, which is charged with promulgating rules and issuing advisory opinions on ethical issues pertaining to certain City employees and public servants. Further, Chapter 68 explicitly prohibits certain kinds of unethical conduct and requires that certain officials disclose information regarding their finances.

Chapter 68 clearly applies to District Attorneys because their expenses "are paid in whole or in part from the City treasury." Charter § 2601(2). However, at least one District Attorney has claimed to be exempt from the prohibitions and requirements of this important chapter. Apparently, the claimed exemption was based on the fact that the definition of elected official in Chapter 68 does not include District Attorneys. Charter § 2601(10).

However, Mark Davies, the Executive Director of the City's Conflict of Interest Board, testified before the Commission at the August 13, 1999 expert panel that this problem is not a significant one. The District Attorney that initially claimed an exemption from Chapter 68 retreated from that position when confronted by an opinion from the City's Corporation Counsel. While Mr. Davies stated that it might be helpful to clarify Chapter 68, he also identified other areas of Chapter 68 that need comprehensive revision. He noted, for example, that the Conflict of Interest Board should be provided with greater independence in the event that a future Mayor or Council is unsympathetic to the need for the maintenance of high ethical standards.

While the Commission believes that it would be useful to clarify that District Attorneys are subject to the City's ethical regulations, the Commission does not believe that Chapter 68 should be revised on a piecemeal basis. Chapter 68 should be revised after further study of the issues raised by Mr. Davies and others. Accordingly, the Commission voted on August 17, 1999 not to propose any changes to Chapter 68 of the Charter at this time and, instead, to codify comprehensive changes in the future.

E. Union Finances

It has been proposed that public employee organizations and their officers and employees should be required to file financial disclosure statements and otherwise be subject to the City's financial disclosure rules. This kind of "sunshine law" might help to prevent abuses in the future. However, legislation is pending before the Council that could accomplish this result, and the Commission believes that the Council should be permitted a reasonable time to consider the legislation. In the event that the Council fails to act in this area, however, it may be appropriate to consider such a proposal in the future.

F. Term Limits

The Charter currently limits City elected officials to two terms. As a result, roughly 80% of the Council members will soon simultaneously exit office, and the current Mayor, Comptroller, Public Advocate, and four of the five Borough Presidents will be required to leave their offices at the end of their current terms. However, the voters have twice expressed their opinions on this issue via referenda and have chosen to adopt term limits for City officials. Accordingly, on July 29, 1999, the Commission decided not to revisit term limits or to consider

the issue of whether term limits should be staggered to reduce the potential disruption to the City's government at this time.

G. Salary Increases for Elected and Other Officials

At least one community board and one City Council Member (John Sabini) urged the Commission to amend the Charter to require that increases in the salaries of elected officials take effect in the following term. Even when merited, salary increases for elected officials are often criticized. In an attempt to minimize such criticism, the City has established the Quadrennial Advisory Commission which renders reports recommending changes in salaries. On July 29, 1999, the Commission decided not to resolve the issue of whether salary increases should be effective only in the following term. This issue, as well as the issue of the Actuary's salary, may be appropriate for future consideration.

GOVERNMENT REORGANIZATION:

IMPROVING GOVERNMENT OPERATIONS

SECTION V

SECTION V

GOVERNMENT REORGANIZATION:

A. ADMINISTRATION FOR CHILDREN'S SERVICES

B. DEPARTMENT OF PUBLIC HEALTH & MENTAL HYGIENE SERVICES

C. ORGANIZED CRIME CONTROL COMMISSION

D. COORDINATION OF DOMESTIC VIOLENCE SERVICES

E. OTHER ISSUES

V. GOVERNMENT REORGANIZATION

The current Administration has used local laws, executive orders and appointments to effect significant reorganizations of the Executive branch of the City's government. At least four of these reorganizations have been extremely successful. First, the Mayor created the Administration for Children's Services ("ACS") to prevent child neglect and abuse and otherwise improve the welfare of children. Second, the Mayor appointed Dr. Neal L. Cohen as Commissioner of the Department of Health ("DOH") and Commissioner of the Department of Mental Health, Mental Retardation and Alcoholism Services ("DMH"), thereby effectively merging those agencies and illustrating that the clients of both agencies could benefit through the resulting symbiotic relationship of their service providers. Third, through the adoption and enforcement of a series of local laws, the Mayor demonstrated that the City's resources can be marshaled effectively to root organized crime out of legitimate industries. Finally, the Mayor created a Commission to Combat Family Violence within the Mayor's Office to coordinate the efforts of the various City agencies that provide services to prevent domestic violence and to assist victims of domestic violence.

Noting that these experiments have proven successful, the Commission has proposed to incorporate these four reorganizations into the Charter. Only one of the proposals, the merger of DOH and DMH, was met with any opposition at all, and even the opponents of that proposal uniformly acknowledged the success of Commissioner Cohen in integrating the two agencies into a single entity. Nevertheless, with respect to each successful reorganization, the Council has either failed to take action to make the improvement permanent or attempted to roll back a proven advance. It is evident, therefore, that the legislature will not support these reforms and that they will be in jeopardy in the future. Accordingly, to ensure that the City's progress in these areas continues into the next century, it is imperative that the voters act to memorialize these governmental reorganizations in the Charter.

A. Administration for Children's Services

Issue: Should the Administration for Children's Services become a Charter agency?

Relevant Charter Provision: None.

Discussion: On January 11, 1996, the Mayor issued Executive Order 26, which created the Administration for Children's Services ("ACS") to oversee the various child-related services

that had previously been the responsibility of the City's Human Resources Administration ("HRA"). ACS has been operating as an independent agency pursuant to that Executive Order for more than three years. The City has recently been praised as having made significant strides in improving child welfare. Moreover, the decision to create an independent agency to address the issue is now widely accepted as the City's most important reform of the child welfare system. To protect the City's children in the next century, we must make that reform permanent by establishing ACS as a Charter agency.

ACS is comprised of three former divisions of HRA: the Child Welfare Administration, the Agency for Child Development and the Office of Child Support Enforcement. The Mayor created ACS to fully integrate these three programs to better serve the interests of children in need. Over the past three and a half years, the Council has considered proposed legislation to establish ACS as a Charter agency, but has yet to act on it.

ACS acts as a child protective service and is charged with: receiving and investigating reports of child abuse and neglect; assisting families at risk by addressing the causes of abuse and neglect; providing children and families with day care and preventative services to avert the impairment or dissolution of families; and placing a child in temporary foster care or permanent adoption when preventive services cannot redress causes of family neglect. ACS provides opportunities for children's growth and development through Head Start services. Additionally, ACS provides services to ensure that parents who are legally required to provide child support do so.

In the past, the City's delivery of child welfare services was often criticized, especially in the wake of highly publicized incidents of child abuse. As an independent agency pursuant to an Executive Order, however, ACS has set out to address these problems. In fact, as ACS Commissioner Nicholas Scoppetta testified before the Commission at the expert forum on August 6, 1999, "the very creation of ACS was the first major, and perhaps most important, reform of a long-neglected child welfare system."

On December 19, 1996, ACS released its "Reform Plan," which extensively outlined its goals and strategies for improving services to New York City's children. Among the many reforms made since ACS became an independent executive agency is the reduction in the average child protective caseworker's caseload from 27 in June 1996 to 12.4 in February 1999. Additionally, ACS reported a record high of $318 million in child support collections in Fiscal Year 1998 compared with $241 million in Fiscal Year 1996. The agency now requires higher qualifications for newly hired caseworkers, and awards merit-based pay increases to caseworkers

who show a high degree of professionalism or who participate in continuing education. These changes have been vital to the institutional improvement of ACS' workforce.

ACS has focused its attention on finding permanent homes for those children who can no longer be reunited with their biological families. In all, ACS completed 3,848 adoptions during Fiscal Year 1998. Indeed, an independent ACS is consistent with, and helps the City to fulfill its obligations under, the 1998 settlement reached in Marisol v Giuliani, ("Marisol"), which concerned charges that the City was not meeting all of its child welfare responsibilities. Among other things, the settlement in Marisol established a Special Child Welfare Advisory Panel to monitor ACS. The panel has since commended ACS on its "thoughtful, coherent, broad and appropriately ambitious" Reform Plan, and describes it "as consistent with the most informed current thinking about urban child welfare reform across the country."

The responsibilities of ACS are among the most important social service responsibilities of the City. An independent ACS brings direct accountability to child welfare and allows for resources and efforts to be focused solely on the needs of children. Child welfare should be the main concern of one agency rather than only one of many concerns addressed by a larger agency such as HRA. In addition, as a Charter agency, ACS would have rule-making authority, providing the agency with increased latitude in promulgating regulations for the benefit of the City's children.

While ACS is currently functioning as an independent agency, it is vital that it be made a part of the Charter to ensure its permanent independence and its continued effectiveness in caring for the needs of the City's children. ACS' experience and record of accomplishment as an independent body since 1996 demonstrates that an independent ACS dramatically improves the welfare of the City's children. Its establishment as a Charter agency is long overdue.

Proposal: The Administration for Children's Services should be established as a Charter agency.

Proposed Charter Revision:

Section 603 of the Charter, as amended by Local Law 19 of 1999, should be amended to read as follows:

§ 603. Powers and duties. Except as otherwise provided in [chapter] chapters 24-A and 24-B, the commissioner shall have the powers and perform the duties of a commissioner of social services under the social services law, provided that no form of outdoor relief shall be

dispensed by the city except under the provisions of a state or local law which shall specifically provide the method, manner and conditions of dispensing the same.

A new chapter 24-B should be added to the charter to read as follows:

CHAPTER 24-B

ADMINISTRATION FOR CHILDREN'S SERVICES

§ 615. Administration; commissioner. There shall be an administration for children's services the head of which shall be the commissioner of children's services.

§ 616. Deputies. The commissioner shall appoint at least one deputy commissioner.

§ 617. Powers and duties. a. The commissioner shall have the powers and perform the duties of a commissioner of social services under the social services law for the purpose of fulfilling his or her responsibilities under this chapter. The commissioner shall have the power to perform functions related to the care and protection of children including, but not limited to:

1. performing the functions of a child protective service, including without limitation, the receipt and investigation of reports of child abuse and maltreatment;

2. providing children and families with preventive services for the purpose of averting the impairment or disruption of families which could result in the placement of children in foster care; enabling children placed in foster care to return to their families; and reducing the likelihood that a child who has been discharged from foster care may return to such care;

3. providing suitable and appropriate care for children who are in the care, custody, or guardianship of the commissioner;

4. providing appropriate child pre-school services; and

5. providing services to ensure that legally responsible parents provide child support.

b. Wherever the powers and duties of an agency other than the administration for children's services as set forth in the charter or administrative code confer any authority over the areas of child welfare, child development or child support enforcement within the jurisdiction of the commissioner of children's services pursuant to section six hundred seventeen of this chapter, such powers and duties shall be deemed to be within the jurisdiction of the administration for children's services and shall be exercised by such administration; provided that such other agency may exercise such powers and duties where required by state or federal law.

B. The Department of Public Health and Mental Hygiene Services

Issue: Should the Department of Mental Health, Mental Retardation and Alcoholism Services ("DMH") be consolidated with the Department of Health ("DOH"), to create a new agency called the Department of Public Health and Mental Hygiene Services?

Relevant Charter Provisions: Chapters 22 and 23.

Discussion: In February 1998, the Mayor effectively merged the Department of Health ("DOH") and the Department of Mental Health, Mental Retardation and Alcoholism Services ("DMH") by appointing Dr. Neal L. Cohen as Commissioner of both agencies. At approximately the same time, the Mayor sought legislation to reflect the de facto merger. The Council declined to act. Since that time, the agencies, under Commissioner Cohen's stewardship, have demonstrated that the City has much to gain by ensuring that the services provided by these agencies are coordinated. Given that the reorganization has proven successful, it should now be made a permanent element of the City's structure.

A permanent merger of the agencies is needed to ensure that the City maintains its historic position as a leader in the areas of public health and mental hygiene. DOH has been a pioneer in the areas of disease control and prevention, health education, child health, environmental health and infant mortality reduction. DMH has played an invaluable role in developing multiple services that enable people with mental disabilities to live and work successfully in their communities. However, a growing professional consensus believes that today's complex health problems are best addressed through the integration of health and mental hygiene services. The City must remain at the cutting edge of the health and mental hygiene fields by implementing integrated programs in those areas.

Many of the City's most pressing public health concerns, such as suicide, AIDS, tuberculosis, youth violence, teen pregnancy, domestic violence and child abuse, have clear health and mental health components. For example, according to DOH's data, more than 40 percent of adults living with AIDS have a history of substance use, and more than 12 percent of tuberculosis patients have a history of alcohol or substance abuse, or both. In attempting to deal with these public health problems, the City's two existing public health agencies often reach out to the same populations, but historically did not adequately coordinate or integrate the services they provided. By eliminating this bifurcated public health system in the Charter, the City could improve the overall health of its residents through a coordination of services and increased access to health care.

In considering this proposal, the Commission examined the experiences of other governments across the country. Consolidation of public health with mental hygiene agencies is

a national trend that has been accelerated by the growing importance of Medicaid managed care. The benefits of this type of reorganization have been widely recognized. Consolidations of this nature have been implemented in eleven states (Arizona, Colorado, Delaware, Florida, Hawaii, Illinois, Maryland, Michigan, Montana, New Hampshire and Wyoming), several large cities (including Chicago and San Francisco) and in three counties in New York State (Schuyler, Wayne and Oswego). The experience in other jurisdictions has been that reforms of this type have been successful and generally enjoy the support of the medical community.

On August 6, 1999, the Commission heard from a panel of experts in support of the consolidation. The panel included Commissioner Cohen and Dr. Alan Siskind, the executive director of the Jewish Board of Family and Children's Services. Commissioner Cohen stated the merger would strengthen the City's position as a leader in public health and mental hygiene and allow the City to "integrate public health and mental hygiene programs when appropriate, reduce duplication of effort, promote community involvement and better oversee the extension of managed care to Medicaid users." Dr. Siskind, in expressing his emphatic support of the merger, stated that "[i]n light of the frequent interconnection between the problems that give rise to health and mental health needs, there is general reason to favor integrative approaches to meeting those needs."

However, at public hearings throughout the five boroughs, the Commission received comments from advocates of the mentally retarded and developmentally disabled who expressed concern that the needs of these groups would be lost in a larger bureaucracy devoted to a broad range of health and mental hygiene issues. Yet these advocates praised the performance of the two agencies, and, in particular, the work of Commissioner Cohen. Moreover, although the agencies have in effect been merged, the Administration has preserved and maintained all of the programs previously offered by the two agencies and either preserved or increased the funding for these programs. Accordingly, experience with the de facto merger has demonstrated that the needs of the mentally retarded and developmentally disabled have not and will not be neglected in an integrated agency.

In fact, the merger has created new opportunities to enhance the well-being of people with mental retardation and developmental disabilities. Operating as a merged entity over the eighteen months, the agency (1) has used DOH's relationships with family health providers to raise awareness in the medical community regarding mental health and rehabilitation issues; (2) has begun to identify training needs for health providers and to establish standards of care for Medicaid managed care plans that incorporate mental, physical and developmental disability

concerns; (3) has, through public education, brought attention to public health concerns that often coexist with mental retardation such as alcohol addiction, asthma and other respiratory illnesses; and (4) has reduced the marginalization of the mental disabilities, including mental retardation, by bringing them into integrated health and disability planning and policy discussions, affording greater opportunities for innovative care.

In addition, to ensure that a merger of the two agencies does not result in a reduction in services for any of their constituencies, the Commission made several changes to the proposed Charter revision language, many of which were proposed by groups that initially opposed the merger. Specifically, the Commission: (1) changed the name of the new agency to the Department of Public Health and Mental Hygiene Services; (2) provided that the new Deputy Commissioner for Mental Hygiene would report directly to the Commissioner; (3) required separate budgetary units of appropriation for the mental health, mental retardation and alcoholism services units; (4) provided that the Deputy Commissioner for Mental Hygiene would coordinate contracts between the community-based providers and the agency's procurement staff; (5) required that there be executive coordination of mental retardation and developmental disability services within the Mayor's Office of Operations to ensure that the agency addresses the needs of that community; (6) required a review of the merger, after the second and fourth year, to be conducted by the Mayor's Office of Operations; (7) required that the Early Intervention program be administered in the Division of Mental Hygiene; (8) required the Commissioner to develop plans and mechanisms to ensure participation and communication with local community and advocacy groups at the borough level; and (9) included a maintenance of effort clause, which should ensure that the current funding stream for mental health services remains intact.

The Commission contacted the individuals and organizations that initially opposed the merger, informed them of many of the amendments described above, and urged that they comment in writing or testify at the Commission's August 26, 1999 public hearing. Several groups and individuals initially opposed to the merger, including the Interagency Council of Mental Retardation and Developmental Disabilities Agencies and New York State Assemblyman James Brennan, stated that the changes described above addressed their concerns regarding the merger.

In addition, OHEL Children's Home and Family Services, Hospital Audiences Inc., the Chaps Organization, HeartShare Human Services, Cumberland Diagnostic and Treatment Center and Brookdale University Hospital testified in support of the merger. These groups testified that

the proposed consolidation would improve the quality as well as the access to healthcare in this City by providing better coordinated, more comprehensive and more efficient services. These comments together with indications of support from many experts in the field persuaded the Commission that DOH and DMH should be merged to create a new Department of Public Health and Mental Hygiene Services.

Proposal : The Department of Health and the Department of Mental Health, Mental Retardation and Alcoholism Services should be consolidated to create a new Department of Public Health and Mental Hygiene Services as a Charter agency.

Proposed Charter Revision:

§ 1. The chapter heading of chapter 22 of the charter, as added by local law number 25 for the year 1977, should be amended to read as follows:

Department of Public Health and Mental Hygiene Services

§ 2. Subdivision a of section 551 of the charter, as added by local law number 25 for the year 1977, should be amended to read as follows:

a. There shall be a department of public health and mental hygiene services, the head of which shall be the commissioner of public health and mental hygiene services who shall be appointed by the mayor. The department shall have and exercise all powers of a local health department set forth in law. Notwithstanding any other provision of this charter to the contrary, the department shall be a social services district for purposes of the administration of health-related public assistance programs to the extent agreed upon by the department, the department of social services and the department of homeless services. Appropriations to the department for mental health, mental retardation and alcoholism services shall be set forth in the expense budget in separate and distinct units of appropriation. In determining the annual amount of city funds, as defined in paragraph three of subdivision e of section two hundred forty-nine, to be appropriated by the city for mental health, mental retardation and alcoholism services, the following provision shall apply: in the event that the executive budget proposes a decrease in city funds measured against the budget for the current fiscal year, as modified in accordance with section one hundred seven, for the units of appropriation for mental health, mental retardation and alcoholism services, the executive budget shall not propose a greater percentage decrease in city funds measured against the budget for the current fiscal year, as modified in accordance with section one hundred seven, for the units of appropriation for mental health, mental retardation

and alcoholism services than has been proposed for the units of appropriation for public health services. If, however, in his or her discretion, the mayor determines that it is in the city's best interest to submit an executive budget at variance with the requirements of this provision, the mayor shall include an explanation of the basis for this variation as part of the budget message.

§ 3. Section 552 of the charter, as added by local law number 25 for the year 1977, should be amended to read as follows:

§ 552. Deputy commissioners. The commissioner may appoint [four] deputy commissioners, one of whom shall have the same qualifications as the commissioner [and one of whom shall be designated as the deputy commissioner for addiction programs and who shall be responsible for the drug treatment and drug prevention programs authorized by law]. One of the deputy commissioners shall have the qualifications established pursuant to the mental hygiene law for a director of community services of a local governmental unit, and shall be the director within the department of the division of mental hygiene services. Such division shall be and shall exercise the powers of a local governmental unit for purposes of the mental hygiene law, and the deputy commissioner heading such division shall have the powers of a director of community services of a local governmental unit as set forth in or pursuant to such law, and shall report directly to the commissioner. In the exercise of such powers, such deputy commissioner shall coordinate the fiscal and programmatic administration of contracts awarded by the department for mental health, mental retardation, and alcoholism services.

§4. Subdivision a of section 555 of the charter is amended to add a new paragraph (2) to read as follows:

(2) At the conclusion of the second year following the establishment of the department pursuant to this section, and again at the conclusion of the fourth year following such establishment, the mayor's office of operations shall conduct a review and submit a report to the mayor comparing such periods with the period preceding such establishment with regard to the department's delivery of mental health, mental retardation and alcoholism and substance abuse services, the access of consumers and their families to such services, and the administration and oversight of contracts for the delivery of such services.

§ 5. Paragraph (1) of subdivision b of section 555 of the charter, as renumbered by vote of the electors at a general election held on November 8, 1988, should be amended to read as follows:

(1) Compel the attendance of witnesses, administer oaths and compel the production of books, papers and documents in any matter or proceeding before the commissioner.

§6. Section 556 of the charter should be REPEALED and reenacted to read as follows:

§ 556. Functions, powers and duties of the department. Except as otherwise provided by law, the department shall have jurisdiction to regulate all matters affecting health in the city of New York and to perform all those functions and operations performed by the city that relate to the health of the people of the city, including but not limited to the mental health, mental retardation, alcoholism and substance abuse-related needs of the people of the city. The jurisdiction of the department shall include but not be limited to the following:

a. General functions. (1) enforce all provisions of law applicable in the area under the jurisdiction of the department for the preservation of human life, for the care, promotion and protection of health and relative to the necessary health supervision of the purity and wholesomeness of the water supply and the sources thereof;

(2) maintain an office in each borough and maintain, furnish and operate in each borough office health centers and health stations or other facilities which may be required from time to time for the preservation of health or the care of the sick;

(3) exercise its functions, powers and duties in the area extending over the city, and over the waters adjacent thereto, within the jurisdiction of the city and within the quarantine limits as established by law;

(4) receive and expend funds made available for public health purposes pursuant to law;

(5) arrange, with the approval of the mayor, for the rendition of services and operation of facilities by other agencies of the city;

b. Review of public health services and general public health planning.

(1) develop and submit to the mayor and council a program for the delivery of services for the mentally disabled, including construction and operation of facilities;

(2) determine the needs of the mentally disabled in the city, which determination shall include the review and evaluation of all mental hygiene services and facilities within the department's jurisdiction;

(3) engage in short-range, intermediate-range and long-range mental hygiene planning that reflects the entire array of city needs in the areas of mental health, mental retardation and developmental disabilities and alcoholism and substance abuse services within the department's jurisdiction;

(4) implement and administer an inclusive citywide planning process for the delivery of services for people with mental disabilities; and design and incorporate within that planning

process, consistent with applicable law, standards and procedures for community participation and communication with the commissioner at the borough and local community level;

(5) establish coordination and cooperation among all providers of services for the mentally disabled, coordinate the department's program with the program of the state department of mental hygiene so that there is a continuity of care among all providers of services, and seek to cooperate by mutual agreement with the state department of mental hygiene and its representatives and with institutions in such department and their representatives in pre-admission screening and in post-hospital care of persons suffering from mental disability;

(6) receive and expend funds made available for the purposes of providing mental health, mental retardation and developmental disability and alcoholism and substance abuse related services;

(7) administer, within the division of mental hygiene, the unit responsible for early intervention services pursuant to the public health law; and

(8) in accordance with section five hundred fifty-five of this chapter, determine the public health needs of the city and prepare plans and programs addressing such needs.

c. Supervision of matters affecting public health.

(1) supervise and control the registration of births, fetal deaths and deaths;

(2) supervise the reporting and control of communicable and chronic diseases and conditions hazardous to life and health; exercise control over and supervise the abatement of nuisances affecting or likely to affect the public health;

(3) make policy and plan for, monitor, evaluate and exercise general supervision over all services and facilities for the mentally disabled within the department's jurisdiction; and exercise general supervisory authority, through the promulgation of appropriate standards consistent with accepted professional practices for the care and treatment of patients within such services and facilities for the mentally disabled within the department's jurisdiction;

(4) except as otherwise provided by law, analyze and monitor hospitals, clinics, nursing homes, and homes for the aged, and analyze, evaluate, supervise and regulate clinical laboratories, blood banks, and related facilities providing medical and health services and services ancillary thereto;

(5) to the extent necessary to carry out the provisions of this chapter, the mental hygiene law and other applicable laws and when not inconsistent with any other law, arrange for the visitation, inspection and investigation of all providers of services for the mentally disabled, by the department or otherwise;

(6) conduct such inquiries into services and facilities for the mentally disabled as may be useful in performing the functions of the department, including investigations into individual patient care, and for such purpose the department may exercise the powers set forth in section five hundred fifty-five of this chapter and shall, consistent with the provisions of the mental hygiene law, have access to otherwise confidential patient records, provided such information is requested pursuant to the functions, powers and duties conferred upon the department by law;

(7) supervise and regulate the public health aspects of water supply and sewage disposal and water pollution;

(8) supervise and regulate the public health aspects of the production, processing and distribution of milk, cream and milk products, except for such inspection, regulation and supervision of the sanitary quality of milk and cream distributed, consumed or sold within the city as performed by the New York department of agriculture and markets pursuant to section seventy-one-l of the agriculture and markets law;

(9) except as otherwise provided by law, supervise and regulate the public health aspects of the food and drug supply of the city and other businesses and activities affecting public health in the city;

(10) supervise and regulate the removal, transportation and disposal of human remains;

(11) supervise and regulate the public health aspects of ionizing radiation, the handling and disposal of radioactive wastes, and the activities within the city affecting radioactive materials, excluding special nuclear materials in quantities sufficient to form a critical mass;

(12) in furtherance of the purposes of this chapter and the mental hygiene law, make rules and regulations covering the provision of services by providers of services for the mentally disabled;

d. Promotion or provision of public health services.

(1) maintain and operate public health centers and clinics as shall be established in the department;

(2) engage in or promote health research for the purpose of improving the quality of medical and health care; in conducting such research, the department shall have the authority to conduct medical audits, to receive reports on forms prepared or prescribed by the department; such information when received by the department shall be kept confidential and used solely for the purpose of medical or scientific research or the improvement of the quality of medical care;

(3) produce, standardize and distribute certain diagnostic, preventive and therapeutic products and conduct laboratory examinations for the diagnosis, prevention and control of disease;

(4) promote or provide for public education on mental disability and the prevention and control of disease;

(5) promote or provide for programs for the prevention and control of disease and for the prevention, diagnosis, care, treatment, social and vocational rehabilitation, special education and training of the mentally disabled;

(6) promote or provide diagnostic and therapeutic services for maternity and child health, family planning, communicable disease, medical rehabilitation and other diseases and conditions affecting public health;

(7) promote or provide medical and health services for school children and the ambulant sick and needy persons of the city;

(8) promote or provide medical and health services for the inmates of prisons maintained and operated by the city;

(9) within the amounts appropriated therefor, enter into contracts for the rendition or operation of services and facilities for the mentally disabled on a per capita basis or otherwise, including contracts executed pursuant to subdivision e of section 41.19 of the mental hygiene law;

(10) within the amounts appropriated therefor, execute such programs and maintain such facilities for the mentally disabled as may be authorized under such appropriations;

(11) use the services and facilities of public or private voluntary institutions whenever practical, and encourage all providers of services to cooperate with or participate in the program of services for the mentally disabled, whether by contract or otherwise;

e. Other functions.

(1) prior to the sale, closing, abandonment of a city hospital or transfer of a city hospital to any other hospital or facility, hold a public hearing with reference to such proposed sale, closing, abandonment or transfer; publish notice of such public hearing in the City Record and in such daily newspaper or newspapers published in the city of New York as shall be selected by the commissioner, such publication to take place not less than ten days nor more than thirty days prior to the date fixed for the hearing; and adjourn such hearing from time to time, if necessary, in order to allow persons interested to attend or express their views;

(2) submit all materials required by the mental hygiene law for purposes of state reimbursement;

(3) provide for membership on such state or federally authorized committees as may be appropriate to the discharge of the department's functions, powers and duties; and

(4) perform such other acts as may be necessary and proper to carry out the provisions of this chapter and the purposes of the mental hygiene law.

§ 7. Subdivision (b) of section 557 of the charter, as amended by local law number 59 for the year 1996, should be amended to read as follows:

(b) The commissioner with respect to the office of chief medical examiner shall exercise the powers and duties set forth in [paragraphs] paragraph one [two, three, and four] of subdivision a of section five hundred fifty-five of this chapter, but shall not interfere with the performance by the chief medical examiner or his or her office of the powers and duties prescribed by the provisions of this section or any other law.

§ 8. Subdivision (e) of section 557 of the New York city charter is amended to read as follows:

The chief medical examiner [and all deputy chief medical examiners, associate medical examiners, assistant medical examiners, junior medical examiners and medical investigators may administer oaths and take affidavits, proofs and examinations as] or his or her designee shall have power to require the attendance and take testimony under oath of such persons as he or she may deem necessary and to require the production of books, accounts, papers and other evidence relative to any matter within the jurisdiction of the office.

§ 9. Section 568 of the city charter is REPEALED and reenacted to read as follows:

§ 568. Mental hygiene advisory board. a. (1) There shall be a mental hygiene advisory board which shall be advisory to the commissioner and the deputy commissioner for mental hygiene services in the development of community mental health, mental retardation, alcoholism and substance abuse facilities and services and programs related thereto. The board shall have separate subcommittees for mental health, for mental retardation and developmental disabilities, and for alcoholism and substance abuse. The board and its subcommittees shall be constituted and their appointive members appointed and removed in the manner prescribed for a community services board by the provisions of the mental hygiene law. Pursuant to the provisions of such law, such members may be reappointed without limitation on the number of consecutive terms which they may serve.

(2) Members of the mental hygiene advisory board and its subcommittees shall serve thereon without compensation except that each member shall be allowed actual and necessary expenses to be audited in the same manner as other city charges.

(3) No person shall be ineligible for membership on the board or its subcommittees because such person holds any other public office, employment or trust, nor shall any person be made ineligible to or forfeit such person's right to any public office, employment or trust by reason of such appointment.

b. (1) Contracts for services and facilities under this chapter may be made with a public or private voluntary hospital, clinic, laboratory, health, welfare or mental hygiene agency or other similar institution, notwithstanding that any member of the board or its subcommittees is an officer or employee of such institution or agency or is a member of the medical or consultant staff thereof.

(2) If any matter arises before the board or any of its subcommittees directly involving a public or private voluntary hospital, clinic, laboratory, health, welfare or mental hygiene agency or other similar institution of which any member of the board or such subcommittee is an officer, employee or on the medical or consultant staff thereof, that member shall participate in the deliberations of the board or of such subcommittee on the matter only insofar as to provide any information requested of such person by the other members of the board or subcommittee, and that member shall not participate further in the deliberations of the board or subcommittee on the matter after having provided the required information.

§ 10. Chapter 22 of the city charter should be amended by adding two new sections 569 and 570, to read as follows:

§ 569. Definitions. When used in this chapter: "mentally disabled" means those with mental illness, mental retardation, alcoholism, substance dependence or chemical dependence as these terms are defined in section 1.03 of the mental hygiene law; or any other mental illness or mental condition placed under the jurisdiction of the department by the mayor; "provider of services" means an individual, association, corporation or public or private agency which provides for the mentally disabled; "services for the mentally disabled" means examination, diagnosis, care, treatment, rehabilitation, training, education, research, preventive services, referral, residential services or domiciliary care of or for the mentally disabled, not specifically limited by any other law. Notwithstanding the foregoing, planning and programs for persons with substance dependence or chemical dependence shall be conducted by the department, and the department may act as a "local agency" to conduct substance abuse programs and seek

reimbursement therefore pursuant to provisions of the mental hygiene law relating to funding for substance abuse services, as deemed appropriate by the commissioner in recognition of the programs currently administered by the New York state office of alcoholism and substance abuse services or its successor agency under article nineteen of the mental hygiene law.

§ 570. Construction clause. The provisions of this chapter relating to services for the mentally disabled shall be carried out subject to and in conjunction with the provisions of the mental hygiene law.

§11. Chapter 23 of the charter should be REPEALED.

§12. Paragraphs 1 and 3 of subdivision b of section 1403 of the charter, paragraph 1 as amended by local law number 65 for the year 1996 and paragraph 3 as added by local law number 50 for the year 1991, should be amended to read as follows:

(1) The commissioner shall have charge and control over the location, construction, alteration, repair, maintenance and operation of all sewers including intercepting sewers and sewage disposal plants, and of all matters in the several boroughs relating to public sewers and drainage, and shall initiate and make all plans for drainage and shall have charge of all public and private sewers in accordance with such plans; and shall have charge of the management, care and maintenance of sewer and drainage systems therein. In addition, the commissioner shall have the authority to supervise and adopt rules regarding private sewage disposal systems, other than community private sewage disposal systems, and to prescribe civil penalties for the violation of such rules of no more than ten thousand dollars per violation, and, except as otherwise provided in section six hundred forty-three of this charter, to issue permits pursuant to such rules for the construction and maintenance of such private sewage disposal systems. With regard to community private sewage disposal systems, the commissioner shall have the authority to perform inspections, and to issue notices of violation for violations of any provisions of the New York city health code relating to private sewage disposal, which shall be served and returnable as provided by law for violations of the New York city health code, and the power to perform such other duties with regard to the supervision and regulation of such systems as may be lawfully delegated to him or her by the board of health or department of public health and mental hygiene services.

(3) Nothing in this subdivision shall be construed to limit the authority or powers of the commissioner of public health and mental hygiene services, the department of public health and mental hygiene services, or the board of health relating to the declaration or abatement of nuisances, or the enforcement of applicable public health laws or rules.

§ 13. Subdivision a of section 1404 of the charter, as amended by local law number 71 for the year 1985, should amended to read as follows:

a. There shall be in the department an environmental control board consisting of the commissioner, who shall be chairman, the commissioner of sanitation, the commissioner of buildings, the commissioner of public health and mental hygiene services, the police commissioner, the fire commissioner and the commissioner of consumer affairs, all of whom shall serve on the board without compensation and all of whom shall have the power to exercise or delegate any of their functions, powers and duties as members of the board, and six persons to be appointed by the mayor, with the advice and consent of the city council, who are not otherwise employed by the city, one to be possessed of a broad general background and experience in the field of air pollution control, one with such background and experience in the field of water pollution control, one with such background and experience in the field of noise pollution control, one with such background and experience in the real estate field, one with such background and experience in the business community, and one member of the public, and who shall serve for four-year terms. Such members shall be compensated at the rate of one hundred fifty dollars per day when performing the work of the board. Within its appropriation, the board may appoint an executive director and such hearing officers, including non-salaried hearing officers and other employees as it may from time to time find necessary for the proper performance of its duties.

§ 14. Subparagraphs (a) and (e) of paragraph 15 of subdivision a of section 2903 of the New York city charter, subparagraph (a) as amended by local law number 43 for the year 1995 and subparagraph (e) as added by local law number 88 for the year 1981, should be amended to read as follows:

(a) The commissioner shall issue a special vehicle identification parking permit to a New York city resident who requires the use of a private automobile for transportation and to a non-resident who requires the use of a private automobile for transportation to a school in which such applicant is enrolled or to a place of employment, when such person has been certified by the department of public health and mental hygiene services or a provider designated by the department or the department of public health and mental hygiene services, who shall make such certification in accordance with standards and guidelines prescribed by the department or the department of public health and mental hygiene services, as having a permanent disability seriously impairing mobility. A permit shall be issued to such person upon his or her application. A permit shall also be issued to such person upon application made on such person's behalf by a

parent, spouse, guardian or other individual having legal responsibility for the administration of such person's day to day affairs. Any vehicle displaying such permit shall be used exclusively in connection with parking a vehicle in which the person to whom it has been issued is being transported or will be transported within a reasonable period of time. Such permit shall not be transferable and shall be revoked if used on behalf of any other person. Any abuse by any person to whom such permit has been issued of any privilege, benefit or consideration granted pursuant to such permit, shall be sufficient cause for revocation of said permit.

(a) Certifications by the department of public health and mental hygiene services of applications for special vehicle identification permits shall be made at those district health offices designated for such purpose by the commissioner of public health and mental hygiene services. At least one such district health office shall be designated in each borough for special vehicle identification permit certifications. Such certifications shall be available by appointment at each of said borough health offices, or an alternative location within the borough as designated by the commissioner by regulation, on a regular basis.

§15. Declaration of findings. The city of New York recognizes that services for people suffering from mental retardation and developmental disabilities are provided by programs administered within a number of different city agencies, as well as by non-governmental entities. The city of New York further recognizes the need for coordination and cooperation among city agencies and between city agencies and non-governmental entities that provide such services.

§ 16. Section 15 of the city charter is amended by adding a new subdivision e to read as follows:

a. There shall be mental retardation and developmental disability coordination within the office of operations. In performing functions relating to such coordination, the office of operations shall be authorized to:

1. develop methods to: (a) improve the coordination within and among city agencies that provide services to people with mental retardation or developmental disabilities, including but not limited to the department of public health and mental hygiene services, the administration for children's services, the human resources administration, department of youth and community development, the department of juvenile justice, and the department of employment, or the successors to such agencies, and the health and hospitals corporation and the board of education; and (b) facilitate coordination between such agencies and non-governmental entities providing services to people with mental retardation or developmental disabilities;

2. review state and federal programs and legislative proposals that may affect people with mental retardation or developmental disabilities and provide information and advice to the mayor regarding the impact of such programs or legislation;

3. recommend legislative proposals or other initiatives that will benefit people with mental retardation or developmental disabilities; and

4. perform such other duties and functions as the mayor may request to assist people with mental retardation or developmental disabilities and their family members.

C. Organized Crime Control Commission

Issue: Should the various agencies that currently regulate and license public wholesale food markets, the private carting industry, and shipboard gambling be consolidated into an Organized Crime Control Commission that would continue these present functions in a more efficient organizational structure?

Relevant Charter Provisions: None.

Discussion: In recent years, the City has achieved what had been believed impossible: it has rooted out organized crime from several Mafia-dominated industries. The Fulton Fish Market and other wholesale food markets, the private carting industry, and the shipboard gambling business have been effectively regulated to remove the Mafia's influence from those sectors of the economy. The impact on the economy has been enormous. In the private carting area alone, the waste-removal bills of City businesses have been cut by $750 million and thousands of jobs have been added to the economy. It is time to make such reforms permanent and ensure that they are not rolled-back by incorporating them in the Charter and consolidating the various City programs that have been engaged in this effort. In this way, we will ensure that the "mob-tax" that New Yorkers were compelled to pay for decades will not be exacted in the next century.

In certain areas of the economy, organized crime syndicates have, through threats, violence and extortion, exacted an involuntary "tax" from law-abiding residents—a tax that sometimes doubled or tripled the cost of services. Furthermore, this "tax" collected by organized crime groups did not go to pay for public services but instead to reward and promote criminal activity. For all too long it was believed that this "tax" was an inescapable reality of conducting business, and that it was beyond the power of government to rectify. The City's recent efforts demolished that myth.

Traditionally, the task of fighting organized crime was assigned primarily to criminal law-enforcement agencies such as the police department and prosecutors' offices. There were some notable successes in disrupting the activities of the organized crime families, and federal and State criminal prosecutions resulted in the incarceration of numerous participants in organized crime activities. In recent years, however, the City expanded that effort by imposing stringent regulatory and licensing requirements on public wholesale food markets and on the commercial waste carting industry. Recognizing that criminal prosecution alone would not eliminate the influence of organized crime, the City began to regulate areas of economic activity that had long been infiltrated by organized crime. In 1995, Local Law 50 was adopted to eliminate the influence of organized crime in the Fulton Fish Market. That local law empowered the Department of Business Services, with the assistance of the Department of Investigation, to license and conduct background investigations on designated businesses and organizations having dealings in the Fulton Fish Market. In 1997, Local Law 28 expanded this effort to the other public wholesale markets. In 1996, Local Law 42 created a new agency, the Trade Waste Commission, to oversee, regulate and license the private carting industry. Finally, in 1997, Local Law 57 established the Gambling Control Commission to eliminate any organized crime influence from gambling ships sailing out of the City into international waters on so-called "cruises to nowhere."

After these regulatory schemes were established, the prices charged by private carters and by merchants at the Fulton Fish Market and at other public wholesale markets decreased significantly. For example, prices in the commercial waste carting industry have fallen on average more than 50 percent, resulting in a savings to local businesses of more than $750 million a year.

The proposed Charter revision would make these changes permanent and coordinate the City's efforts in this area. It would create an Organized Crime Control Commission charged with combating organized crime in the areas already regulated by the City and consolidate the work of the existing agencies in this area. As noted above, these agencies deal with the Fulton Fish Market and other wholesale food markets (regulated by the Department of Business Services and the Department of Investigation), the private waste carting industry (regulated by the Trade Waste Commission), and gambling "cruises to nowhere" (regulated by the Gambling Control Commission).

The proposed Charter revision would in no way increase the City's regulatory, licensing, or investigative jurisdiction. Indeed, the purpose of the revision is to consolidate and

institutionalize what is being done, not to expand the authority of the mayoral agencies. For example, the Organized Crime Control Commission would not have the authority to license businesses in the construction industry. While legislation to expand the City's regulatory and licensing powers in this area has been pending before the Council (a notion supported by some Commissioners), the Commission determined that it would not be appropriate at this time to effect such an expansion of the City's organized crime control efforts through a Charter revision. The Commission concluded that, if the City's authority were to be expanded in this manner, it would be best if such jurisdiction were added to the Organized Crime Control Commission's powers by the Council and Mayor through the ordinary legislative and executive process. Thus, while the proposed revision would not preclude such an expansion through the future adoption of a Local Law by the Council and the Mayor, it would not directly expand the scope of the City's current regulatory, licensing, or investigative authority.

Nevertheless, consolidation of the City's current efforts would be extremely valuable to the City's efforts in the areas that the City is already authorized to regulate. Each of the City's current programs deals with a different area of economic activity but performs similar regulatory, licensing and investigative functions; and each places a special emphasis on background investigations of applicants to determine whether they are of good character and fitness and whether they have had contact with known organized crime figures and activities. However, each agency's efforts to discharge these duties are hampered because relevant information is often scattered among the various agencies and among various other law-enforcement authorities. Notwithstanding the fact that the same organized crime figures sometimes infiltrate the different economic activities that are currently regulated, there is no formal structural mechanism in place to ensure cooperation among the various agencies or to prevent duplication of effort. The proposed revision would eliminate this deficiency in the City's current governmental structure.

Thus, the proposed Organized Crime Control Commission would consolidate and oversee the regulatory, licensing, and investigative functions of the existing agencies that deal with organized crime activities. The programs dealing with the Fulton Fish Market at the Department of Business Services and the Department of Investigation, the Trade Waste Commission, and the Gambling Control Commission would be consolidated into the new agency, which would operate under the new name of the Organized Crime Control Commission.

On August 6, 1999, the Commission received testimony from four organized crime experts who strongly endorsed the proposal. Lewis D. Schiliro, Assistant Director-in-Charge of

the New York Division of the Federal Bureau of Investigation, applauded the City's efforts to regulate crime-ridden economic activities and stressed that the fight against organized crime required participation by local governments to supplement traditional federal law-enforcement efforts.[1] Thomas D. Thacher II, of Thacher Associates, LLC, strongly endorsed the proposed Organized Crime Control Commission and noted that a sustained regulatory system was necessary to supplement the more episodic nature of traditional criminal prosecutions. Edward T. Ferguson, Chairman and Executive Director of the New York City Trade Waste Commission, stressed that consolidating the City's existing regulatory programs was a necessary response to the fact that organized crime does not compartmentalize its activities and instead attempts to operate in all three of the areas that the City currently regulates. Marybeth Richroath, the Executive Assistant Coordinator at the Mayor's Office of the Criminal Justice Coordinator, testifying on behalf of Steven M. Fishner, the Criminal Justice Coordinator, stated that administrative efficiencies could be achieved by the consolidation through eliminating duplications of effort and through promoting information-sharing. Based on these and other comments, the Commission concluded that the Charter should be revised to create an Organized Crime Control Commission.

Proposal: An Organized Crime Control Commission should be created to handle the current regulatory, investigative and licensing functions of agencies that oversee the private carting industry, public wholesale food markets and shipboard gambling.

Proposed Charter Revision

A new chapter 32 is added into the Charter to read as follows:

CHAPTER 32
ORGANIZED CRIME CONTROL COMMISSION

§ 770. Declaration of Intent. For many decades, organized crime has exerted a corrupting and destructive influence on certain sectors of the economy of the city of New York. For example, organized crime activities have pervaded the public wholesale food markets, the private garbage carting industry and the gambling industry. That influence can be diminished and ultimately eliminated through sustained law enforcement efforts and regulatory programs aimed at removing organized crime from these areas of the city's economic life. Therefore, in pursuit of the goal of eliminating organized crime, it is necessary and appropriate to centralize and coordinate certain city programs in a single authority.

§ 770. Commission. There shall be an organized crime control commission which shall be comprised of a full-time chairperson appointed by the mayor and of the commissioners of the department of business services, the department of consumer affairs, the department of investigation, the police department and the department of sanitation or their designees. The commission shall have a staff, serving under the direction of the chairperson, which may include investigators, auditors, attorneys, members of the New York city police department and such other personnel as may be appropriate to accomplish the commission's tasks.

§ 771. Jurisdiction and authority. a. Not withstanding an inconsistent provision of the administrative code, the commission shall have all of the jurisdiction and authority conferred on (i) the department of business services and the department of investigation pursuant to chapters one-A and one-B of title twenty-two of the administrative code and local law 50 of 1995, local law 27 of 1998 and local law 28 of 1997 relating to the fulton fish market, other seafood distribution areas and other public wholesale markets, (ii) the New York city trade waste commission pursuant to chapter one of title sixteen-A of the administrative code and local law 42 of 1996 relating to commercial waste removal and (iii) the New York city gambling control commission pursuant to chapter one of title twenty-A of the administrative code and local law 57 of 1997 relating to the regulation of shipboard gambling.

b. The commission shall have such other jurisdiction and authority as shall be conferred upon the commission by local law.

§ 772. Powers. The commission shall have the full range of investigative and regulatory powers available to the city of New York and within its jurisdiction and authority, including, without limitation, the power to issue subpoenas for documents and for testimony, the power to compel the attendance of persons to produce documents and to give testimony under oath, and the power to promulgate rules and regulations.

§ 773. Cooperation with other agencies. The commission shall provide such assistance to the mayor and other agencies as requested and shall establish liaison and information-sharing arrangements with other law enforcement, prosecutorial, investigative and regulatory agencies as it deems appropriate.

D. Domestic Violence

Issue: Should the Charter require executive coordination of City services relating to the prevention of domestic violence?

Relevant Charter Provisions: None.

Discussion: One of the most important initiatives pursued in recent years by the City has been its effort to combat domestic violence. The lynchpin of this effort was the Mayor's creation of a Commission to Combat Family Violence ("CCFV"), which has coordinated the services of the many City agencies that deal with this issue. The problem of domestic violence is a critical issue in this City. Forty-nine percent of all female homicide victims in the City are killed in intimate partner or family homicides. It is also estimated that as many as 25% of all women visiting City hospital emergency rooms do so as a result of domestic violence. To prevent these crimes and help victims, the City's services must be coordinated. The Mayor's experiment to do so through executive coordination has proven successful. To institutionalize that successful reform, the Commission proposed revising the Charter to establish domestic violence services coordination within the Mayor's Office of Operations.

On April 26, 1994, Mayor Giuliani signed Executive Order 8, which established the CCFV. The CCFV is comprised of representatives of several City agencies and optional mayoral appointees, with the Director of the Mayor's Office for Health Services and the Criminal Justice Coordinator, or their designees, serving as chairpersons. It is charged with formulating City policy and programs on all issues relating to domestic violence and improving the coordination of systems and services for victims of family violence. Additionally, the CCFV develops and maintains mechanisms to ensure appropriate City responses to family violence situations and raises awareness of the different aspects of domestic violence through extensive public education campaigns.

Since its creation, the CCFV has initiated a variety of programs including the Domestic Violence Hotline, the only citywide hotline of its kind in the nation; the Alternatives to Shelter Project, offering victims of domestic violence the option of remaining in their homes and communities with the aid of home alarms and other devices; and a pilot program which provides enhanced substance abuse services to Domestic violence victims. The CCFV has also worked with other City agencies to develop targeted programs for dealing with domestic violence victims. For example, in 1994, the New York City Police Department implemented "Police Strategy #4," which provides an aggressive pro-arrest policy for domestic violence-related crimes and places specially trained Domestic Violence Prevention Officers in each police precinct. Also, all City public hospitals now include domestic violence screening in their emergency room procedures and each facility has a full-time Domestic Violence Coordinator.

Finally, the CCFV has initiated several public education campaigns including a recent initiative focusing on teen relationship abuse.

The CCFV has made significant progress in improving programs and access to services for victims of domestic violence. As a result of the increased efforts of CCFV and the citywide policies on domestic violence, in Fiscal Year 1998, the New York City Police Department made over 26,000 family-related arrests. This was a 9% increase from the previous year. Additionally, the four year-old Domestic Violence Hotline received over 84,000 calls, more than 4,000 of which came from teenagers. These are just a few examples of the advancements made as a result of the City's intensified, aggressive policies on domestic violence as coordinated by the CCFV.

Given the success of the CCFV experiment, the Charter should require executive coordination of domestic violence services. Specifically, the Mayor's Office of Operations should be charged with coordinating services relating to the prevention of domestic violence. Institutionalizing such coordination would ensure that the City's new focus on combating domestic violence becomes a permanent part of the way the City does business.

Proposal: Domestic violence services coordination should occur within the Mayor's Office of Operations as a Charter mandate to coordinate City services relating to the prevention of domestic violence.

Proposed Charter Revision

§ 1. Declaration of legislative findings. The city of New York recognizes that domestic violence is a public health crisis that threatens hundreds of thousands of households each year and that respects no boundaries of race, ethnicity, age, gender, sexual orientation or economic status. The city of New York further recognizes that the problems posed by domestic violence fall within the jurisdiction and programs of various City agencies and that the development of an integrated approach to the problem of domestic violence, which coordinates existing services and systems, is critical to the success of the city of New York's efforts in this area.

§ 2 Section 15 of the charter is amended by adding a new subdivision d to read as follows:

d. There shall be domestic violence services coordination within the office of operations. That office, in coordinating domestic violence services, shall have the following powers and duties:

1. To formulate policies and programs relating to all aspects of services and protocols for victims of domestic violence;

2. To develop methods to improve the coordination of systems and services for domestic violence;

3. To develop and maintain mechanisms to improve the response of city agencies to domestic violence situations and improve coordination among such agencies; and

4. To implement public education campaigns to heighten awareness of domestic violence and its effects on society and perform such other functions as may be appropriate regarding the problems posed by domestic violence.

E. Other Issues

1. The Department of Employment

The Department of Employment ("DOE") provides occupational training, job-oriented literacy training, job placement, and various supportive services to economically disadvantaged adults, youth, elderly persons and dislocated workers. The primary source of funding for these programs has come from the federal government through the Job Training Partnership Act ("JTPA"). Notwithstanding the importance of its mission, it has been difficult for DOE to coordinate its provision of services with the many other agencies that service its clients. As a result, the potential of the City's employment training and placement programs has not been maximized.

In July 1999, the Mayor took a significant step towards coordinating such services by transferring responsibility for administering JTPA funds for "economically disadvantaged adults" to the Human Resources Administration ("HRA" -- the City agency with overall responsibility for providing services to this population). This reorganization was particularly compelling because HRA was already providing employment training and placement services to members of the same population. The Mayor's experiment prompted the Commission to study whether the reform should be institutionalized and expanded by eliminating DOE and transferring its functions to the various agencies that are the primary service providers for its targeted populations.

Specifically, the Commission considered whether the Department of Youth and Community Development, which oversees numerous youth programs, should be charged with providing the youth population with employment-related services, and whether the Department for the Aging, which has developed strong ties with the elderly population by providing the elderly with meals, senior center programs, legal assistance and other social services, should be responsible for the employment-related programs targeted at that population. The Commission considered whether the proposed government reorganization would maximize the effectiveness of DOE's programs.

However, on August 17, 1999, the Commission deferred resolution of the issue and recommended that it be studied further. The HRA experiment is just beginning. Moreover, other changes in the way that employment-related services are provided will be implemented next year. Indeed, the JTPA will expire on June 30, 2000, and a new funding scheme will then be implemented through the federal Workforce Investment Act. While the new statutory scheme may warrant a reorganization in the City's approach to providing employment training and placement services, the Commission was not prepared to recommend a Charter revision to do so at this time.

2. The Department of Records and Information Services and the Department of Citywide Administrative Services

The Commission examined whether the functions of the Department of Records and Information Services ("DORIS") should be performed by the Department of Citywide Administrative Services ("DCAS"). On August 17, 1999, the Commission deferred any resolution of that issue and recommended that the issue be examined further.

DORIS is charged with maintaining and storing the City's records and managing the City's archives, specifically the Municipal Archives and the Municipal Library. DCAS is the City agency responsible for providing administrative services to all City agencies, such as the acquisition of goods, and for managing the City's real estate holdings, including space for the storage of records. The merger of DORIS into DCAS has been urged on four grounds.

First, DORIS is heavily dependent on the acquisition of real estate, which is the province of DCAS. DORIS' critics have claimed that DORIS has been unable to fully meet the record storage needs of its client agencies because of a lack of space. Additionally, the proliferation of record storage space in agency facilities has gone relatively unmonitored in recent years, and has required intervention by the Mayor's Office of Operations. Since DCAS is the agency

responsible for managing and acquiring the City's real estate holdings, some have suggested that bringing the agency under DCAS would maximize coordination and ensure that ample storage space is always available for City records.

Second, DORIS manages the City's Municipal Archives and, in doing so has, in recent years, developed a growing relationship with the DCAS-managed New York City Store. Specifically, the two entities have collaborated on the sale of items such as postcards and historic City photographs. It has been argued that this collaboration would be more efficient if the entities were part of the same agencies.

Third, it has been argued that merging DORIS into DCAS would further the Charter's intention to consolidate all agency support services in one agency—DCAS. Along with managing city real estate, DCAS provides City agencies with administrative support in the procurement and civil service areas. Since record storage is an agency support function, it would certainly be appropriate to require DCAS to provide that service.

Fourth, as a comparatively small agency, DORIS has had only limited abilities to devote staff to or develop any expertise in administrative functions such as budget, personnel and purchasing. DCAS, on the other hand, has a large central administrative staff that performs such functions and could provide DORIS with additional support services such as improved technology and internship programs. Indeed, allowing DCAS to absorb DORIS' administrative functions could even result in a slight administrative savings.

At its public hearings, the Commission received testimony both in support and in opposition to the proposed merger. In order to ensure that these opposing views are fully considered, the Commission decided on August 17, 1999 not to resolve the issue at this time.

3. The Art Commission

The Art Commission is part of the Office of the Mayor and was established in 1898. Its primary function is to review and approve designs and plans for works of art or structures to be purchased or erected on or over any City owned property. Additionally, it has general advisory oversight over all works of art belonging to the City. The Art Commission is composed of an 11-member board consisting of representatives from the Mayor's Office, the Metropolitan Museum of Art, the New York Public library and the Brooklyn Museum of Art. The Board must also consist of one painter, one sculpture, one architect and three lay members.

In its preliminary recommendations to the Commission, the Staff suggested that the Art Commission's functions are unduly burdensome, that its essential functions are duplicative of

programs at other agencies, and that meaningful savings could be achieved by abolishing it. The Staff identified as unnecessary burdens the requirements that any agency performing a construction or renovation project of any City owned structure submit its plans to the Art Commission for final review and approval, and that certain projects set aside funds to purchase Art Commission-approved works of art. The Staff also noted that the Department of Parks and Recreation already exercises jurisdiction over structures and works of art located within the New York City park system, and that the Landmarks Preservation Commission has jurisdiction over structures that are within historic districts or that primarily concern a landmark or a landmark site.

However, the Commission also received numerous public comments advocating for the continued existence of the Art Commission. One letter in particular, written by Landmarks Preservation Commission Chair Jennifer J. Raab, stressed the importance of having an independent entity like the Art Commission review the design quality of all projects on public property. She urged that because the Art Commission has a wide focus and long institutional memory, it is best equipped to assess the appropriateness of proposed streetscape improvements or installations of public art. She conceded, however, that some changes to the Art Commission's structure might deserve further study, such as changing the composition of the Commission and making it more accountable to the Mayor.

The Commission concluded that the issues regarding the Art Commission were too complex to be resolved without further study. Accordingly, on July 29, 1999, the Commission deferred further consideration of whether the Commission should be abolished or reorganized.

4. The Hardship Appeals Panel

Chapter 74 of the Charter provides for a hardship appeals panel to hear challenges to decisions by the Landmarks Preservation Commission denying applications for certificates of appropriateness, based on the grounds of hardship, to demolish, alter or reconstruct improvements that are exempt from real property taxes. Noting that since its creation in 1989, the hardship appeals panel has never convened or decided an appeal, the Staff recommended that it be eliminated.

Members of the public, including Landmarks Preservation Commission Chair Jennifer Raab, did not agree. Supporters of the Hardship Appeals Panel argued that, although it has never met, it provides substantial comfort to the not-for-profit organizations that it was designed to protect.

The Hardship Appeals Panel was created in 1989 after a debate concerning proposed changes to the Landmarks Law. Initially, religious organizations sought an exemption from this law. When others disagreed, a compromise was reached to create the Hardship Appeals Panel. The Commission

determined that there is no reason to upset that compromise at this time – the Hardship Appeals Panel costs the City nothing other than two pages of Charter text that memorialize it. Accordingly, on July 29, 1999, the Commission announced that it would defer consideration of all issues concerning the Hardship Appeals Panel.

5. The Office of Administrative Trials and Hearings (OATH)

OATH is the City's central administrative tribunal with the authority to conduct administrative adjudications for City agencies, boards and commissions, including state-created authorities or entities that are fully or partly City-funded. Administrative adjudication is a "quasi-judicial" process: that is, a judicial function conducted within the executive branch of government. It takes the form of a trial or hearing in which an administrative law judge serves as the trier of fact. Generally, administrative adjudication may be needed when a governmental agency seeks to take an action that affects certain legally protected rights of an individual. Similar to the role of the courts, central administrative tribunals serve as a protective barrier to unwarranted or improvident executive action. In a central administrative tribunal, such as OATH, the judges are fully independent of the agencies whose advocates appear before them; the judge has the same relationship with the prosecution as with the defense.

OATH was established by executive order in 1979 and was made a Charter agency in 1988, as part of the Charter revisions which created the City Administrative Procedure Act ("CAPA"). OATH's administrative law judges are full-time managerial employees appointed by the chief administrative law judge. Including the chief administrative law judge, there are ten administrative law judges who are subject to the same Code of Judicial Conduct as are the judges of the State Unified Court System. The Chief Administrative Law Judge is appointed by the Mayor for an unspecified term. The remaining administrative law judges at OATH are appointed for five year terms (they may be re-appointed), and can only be removed for cause.

Charter § 1048 provides that OATH "shall conduct adjudicatory hearings for all agencies of the city, unless otherwise provided for by executive order, rule, law or collective bargaining agreements." The presumption, therefore, is that OATH shall conduct the city's administrative hearings, but the City can decide on a case-by-case basis that certain hearings should be conducted by a City agency instead of by OATH. OATH typically adjudicates cases concerning personnel discipline, license and regulatory enforcement, real estate and contract disputes, human rights violations, and loft law violations.

OATH is, and is widely perceived as, an independent and highly professional body. As OATH's jurisdiction expands, and the number of cases referred to OATH increases, it is important that the public's perception of, and confidence in, the City's central tribunal system remain strong. To ensure this confidence, OATH should be perceived as an agency that conducts itself in a professional and independent manner in all legal and administrative matters.

The Commission received suggested Charter revisions regarding OATH from OATH's Chief Administrative Law Judge. On July 29, 1999, the Commission directed the Staff to review those proposed changes. After receiving a report from the Staff, the Commission considered the following recommendations regarding the procedural rules governing OATH's adjudications, OATH's budgetary powers, the term of the Chief Administrative Law Judge, and whether other City tribunals should be consolidated under OATH.

a. Procedural Rules

Currently, adjudications at OATH may be conducted under two separate sets of procedural rules: OATH's rules or the referring agency's rules. Charter § 1049(3)(d) provides that "if agency rules are silent as to a particular matter, the rules of the office of the administrative trials and hearings shall apply." Thus, adjudications are governed by OATH's rules only in the absence of the particularized rules of a referring agency. Many City agencies have adopted procedural rules that OATH must follow, at least under certain circumstances.[2]

As OATH's Chief Administrative Law Judge noted in her suggestions to the Commission, the presence of varying procedural rules may undermine the integrity of an independent tribunal which is built, in part, on its ability to regulate the course and conduct of the adjudications it conducts. OATH has demonstrated its willingness and ability to amend its rules to accommodate any unique procedural requirements associated with the different types of cases it hears.[3]

The Commission believes that it would be preferable for OATH, and not individual agencies, determine OATH's procedural rules for all its actions. Before such an action could be taken, however, an analysis would have to be conducted of all particularized agency rules, a determination would have to be made as to which circumstances need to be accommodated by OATH, and OATH would have to adopt new rules governing these circumstances. Accordingly, the Commission deferred resolution of this issue.

b. Budget Authority

OATH is an independent mayoral agency. Charter § 829 provides that the Mayor may direct DCAS to perform specified administrative functions for OATH, including budget

administration, purchasing and internal audit. Currently, DCAS estimates and administers OATH's budget, and has included OATH in its annual budget to facilitate these responsibilities. As a result, however, the Commissioner of DCAS has final approval on many matters concerning OATH's budget and purchasing authority. Although this system may create administrative efficiencies, the intent of Charter § 829 was not to effectively transfer the control of OATH's budget to DCAS, but only to provide that DCAS act as a resource to OATH on these matters.

OATH hears appeals of actions taken by the DCAS Commissioner and, therefore, OATH's budget should not be dependent on an agency for which it adjudicates administrative actions. Moreover, OATH's integrity as an independent tribunal may be perceived as compromised if OATH does not have the ability to estimate and make decisions its own budget. Therefore, to ensure that OATH is perceived as an independent agency of government, OATH should have the authority to prepare its budget proposal. However, the Charter already authorizes OATH to have its own budget authority and code. Moreover, in response to an inquiry by the Commission Staff, the Office of Management and Budget and DCAS agreed to implement a change in procedure that would result in OATH becoming a separate agency for budgetary purposes. Given that OATH, rather than DCAS, will now propose and control the makeup of its own budget, there is clearly no need to revise the Charter to address this matter at this time.

c. Term of the Chief Administrative Law Judge

As discussed earlier, the Chief Administrative Law Judge is appointed by, and serves at the pleasure of, the Mayor for an unspecified term. The administrative law judges at OATH, however, are appointed by the Chief Administrative Law Judge for five-year terms and may only be removed for cause. Charter § 1049. As noted by the Chief Administrative Law Judge, the five-year term of office for administrative law judges demonstrates their independence from extraneous influences and ensures respect for their administrative authority. The Chief Administrative Law Judge has urged that the same principle should apply to her position.

It is important that the position of Chief Administrative Law Judge, as the presiding judge of the City's administrative adjudication system, be independent of any potential political influences of the municipal bureaucracy. However, it is also important that the Mayor be able to select agency heads, including the Chief Administrative Law Judge. To ensure that these competing considerations are fully evaluated, the Commission recommended that the issued be studied further.

d. Tribunal Consolidation

The Commission also analyzed whether the Charter should be modified to increase OATH's jurisdiction. As explained earlier, the Charter currently provides that all administrative hearings are to be conducted by OATH "unless otherwise provided for by executive order, rule law, or collective bargaining agreements." Charter § 1048. To increase OATH's jurisdiction by Charter revision, therefore, would require either eliminating the City's discretion to determine how to conduct its hearings, or to depart from past practice and specify certain hearings that must be heard by OATH. Although consolidating hearings at OATH could potentially promote greater independence, professionalism and economies of scale throughout the City's administrative adjudication system, the Commission does not recommend such a change at this time.

As an initial matter, OATH's jurisdiction has been steadily increasing under the current process. Initially, after OATH was created in 1979, OATH's caseload consisted almost entirely of disciplinary cases brought by mayoral and non-mayoral agencies against their employees. However, after the 1988 Charter revisions, OATH's caseload began to diversify considerably. City agencies, including the Taxi and Limousine Commission, Department of Buildings, Loft Board, and Department of Health, began referring all or a portion of their cases pertaining to their licensing and regulatory authority to OATH. Prevailing wage and prequalified vendor appeal cases involving city contractors were also referred to OATH. In 1997, the tribunal of the Commission on Human Rights was consolidated into OATH. Most recently, in July 1999, the Procurement Policy Board amended its rules to include OATH in its contract dispute resolution board proceedings that decide contractor's claims arising from the administration of city contracts, including construction contracts. OATH's caseload reflects its growing role. In FY 1999, OATH received 2,383 cases for adjudication — up from the 1,793 cases it received in FY 1998.

There are, moreover, legal issues that would need to be resolved before some elements of the consolidation could be accomplished. OATH does not have the power to docket and enforce money judgments against private parties that exists in the so called "high volume" city tribunals that a proposed consolidation may embrace. These tribunals include the Environmental Control Board ("ECB") and the Parking Violations Bureau ("PVB"). It is not clear that such docketing and enforcement powers can be provided for in a Charter revision. Without these powers, consolidation of certain administrative tribunals created pursuant to State law would not be in the City's interest.

There are also technical problems that would need to be resolved before consolidating the tribunals. For instance, many of the City's tribunals, such as the Tax Commission and the Tax Appeals Tribunal, are highly specialized. Substituting the specialized approach to adjudicating certain administrative cases for a more generalized approach taken by OATH may undercut the City's ability to effectively adjudicate highly technical matters.

Consequently, while consolidation of some of the City's tribunals at OATH may be beneficial, each consolidation should be reviewed independently. This is the approach currently provided for in the Charter and has resulted in a steady increase in OATH's jurisdiction during the past decade. The Commission, accordingly, did not propose any changes to the Charter regarding OATH's jurisdiction.[4]

6. The Taxi and Limousine Commission

The Taxi and Limousine Commission is charged with various, sometimes conflicting, responsibilities. It is empowered, inter alia, to set rates, to develop a general transportation policy, to protect consumers, to set safety standards, to consider noise and air pollution controls, to promote access for people with disabilities, and to evaluate the fitness of drivers. It is plain that these functions overlap with the programs of various other agencies, including the Departments of Consumer Affairs, Transportation and Environmental Protection and the Commission on Human Rights. The Taxi and Limousine Commission also adjudicates various infractions by taxi drivers, a function that parallels the Department of Finances' adjudication of parking violations.

The extent of the overlapping functions between the Taxi and Limousine Commission and other agencies make a broad spectrum of reorganization proposals appropriate for consideration, ranging from the transfer of a few specified functions to other agencies to the complete merger of the Taxi and Limousine Commission into another agency. Because of the complexity of the questions presented, on June 29, 1999, the Commission decided not to resolve any issues concerning the Taxi and Limousine Commission at this time and recommended that potential consolidations be studied in the future.

7. Ongoing Charter Review

The Charter is comprehensive in scope and detailed in its provisions, and experience has demonstrated the advisability of altering and amending its provisions from time to time. Indeed, the City Council has altered the Charter approximately 80 times in the last ten years. In light of

the persistence of this phenomenon, the Commission considered recommending establishing a standing Charter Revision Board that could establish standard mechanisms to receive and evaluate proposals for Charter amendments and that could make recommendations for revisions to the Mayor and the City Council. There are, however, some legal obstacles that would need to be considered. Under the Municipal Home Rule Law, for example, such a board could not be styled a "commission" empowered to submit proposals directly to City voters. In addition, before such a proposal is recommended, it would be appropriate to study the history of the Board of Statutory Consolidation, which was established in the 1930's by Section 7-301 of the Administrative Code and had functions broadly similar to those that would be exercised by a Charter Revision Board. The State's analog to the board was the "Law Revision Commission" created in 1934 pursuant to Section 70 of the State Legislative Law. Among other purposes, it was created to examine the State's common law, statutes and judicial decisions to discover defects and anachronisms in the law, to receive and consider suggestions, and to make recommendations to the legislature regarding how to cure defects. A Charter Review Board would therefore be in some ways similar to the State's Board of Statutory Consolidation and, in other respects, similar to the State's Law Revision Commission. Given that a decision to create such a board would warrant further research, some of a historical nature, the Commission decided on July 29, 1999, to defer this issue for future consideration.[5]

8. The Board of Standards and Appeals

The Board of Standards and Appeals is an independent board located within OATH. Its basic function is to consider the granting of variances and the issuing of special permits, including hearing and deciding appeals arising from decisions or determinations of the Commissioner of Buildings, any order, requirement or decision of the Fire Commissioner, and any order, requirement or decision of the Commissioner of Transportation made in relation to the structures and uses of waterfront property under his jurisdiction. In its actual functions, the Board of Standards and Appeals often resembles a court of equity, granting hardship exemptions and variances in light of the applicant's unusual circumstances. Its operations are often technical, arcane, and complex, and its decisions sometimes conflict with those of other agencies. On July 19, 1999, the Commission decided to defer this issue for future consideration.

9. The Borough Presidents

Ten years ago, the powers and duties of the Borough Presidents were greatly diminished by the 1989 Charter Revision Commission. Accordingly, the City should now begin evaluating whether those changes were beneficial and whether any further changes would be appropriate. The Commission, however, believes that an examination of the Borough Presidents' role in our government would involve complex issues regarding the degree to which City government should be centralized. On July 29, 1999, the Commission decided that, given the long history of the Borough Presidents and the complexity of the issues presented, it would defer this issue for future consideration.

10. The Office of Public Advocate

The Commission considered various issues concerning the office of the Public Advocate. Ultimately, the Commission concluded that the issue of whether that office should continue to exist should be deferred for further study. However, the Commission decided that the Charter should be amended to eliminate the Public Advocate's role as the Council's presiding officer, which is purely ceremonial, and power to break a tie vote, which is inconsistent with other Charter provisions.

The Public Advocate is the City's ombudsman and is charged with monitoring and investigating complaints regarding City services and programs, making proposals to improve such services and programs, and investigating individual complaints concerning administrative actions of the City. By the current Public Advocate's own admission, there is no other elected ombudsman in the country.[6]

The position of Public Advocate was created as part of a political compromise during the 1989 Charter revision process as a successor office to that of the President of the Council (then held by Andrew Stein). When the Board of Estimate was abolished in 1989, there was no reason to retain the Council President position, which had as its primary function, a significant role on the Board of Estimate. Faced with this reality, the 1989 Charter Revision Commission decided to create a new ombudsman role for the office — later re-named "Public Advocate" — to help citizens resolve complaints and monitor the City's delivery of services. The controversial decision to retain the Council President position with a new ombudsman role won approval after a motion to abolish the office and to replace it with a Vice Mayor failed by an 8-6 vote. This decision, which was roundly criticized by City newspaper editorial boards at the time, remains

controversial to this day.[7] Indeed, the Chair of the 1989 Charter Revision Commission, Frederick A. O. Schwarz, Jr., described the intensity of that debate as "extraordinary, considering that this was not the most important question in the light of our overall task," and added that "there certainly seemed to be a puzzling passion on this issue."[8] City newspaper editorial boards have continued to call for the elimination of the Public Advocate position.[9]

The Commission received comments from some members of public suggesting that the office of the Public Advocate should be retained because the Public Advocate had helped them with one problem or another. The issue of whether to retain the position of Public Advocate, however, should not turn on whether an individual who held that position helped certain constituents. It should be based on whether, given all the other governmental institutions available to assist members of the public, there is any reason to require in the City's constitution that the taxpayers bear the expense of an elected ombudsman. Nevertheless, the Commission decided on July 29, 1999, that the issue of whether the Charter should require an elected ombudsman warranted further study and deferred any resolution of that issue.[10]

11. The Independent Budget Office

The Independent Budget Office ("IBO") performs the function of providing budget information to the public and to elected officials. As its title indicates, the IBO is not under the control of the Mayor. The office is modeled on the Congressional Budget Office and is meant to be a non-partisan independent body. The Charter requires that the IBO's budget not be less than 10% of the budget for the Office of Management and Budget.

Rather than being the only source of budgetary information independent of the Mayor, the IBO simply adds another fiscal monitor to the many public and private entities already engaged in reviewing and analyzing the City's budget. The Council, Comptroller, State Financial Control Board and State Comptroller already monitor and issue reports regarding the Mayor's budget proposals and financial plans. Borough Presidents maintain fiscal staffs and participate in the process. Various citizen and advocacy groups monitor the City's budget process closely. In addition, the City periodically prepares official statements in connection with the issuance of bonds and notes. The IBO is another vehicle for analyzing substantially the same budget information. At a time when the City must make critical fiscal decisions to ensure the funding of vital services, it is appropriate to ask whether the City needs an additional budget office or whether the City's elected officials should be allowed to decide to what extent such an office should be funded at the expense of other important City services.

To adequately make an assessment as to whether the analyses provide a benefit to the City, however, it would be necessary to analyze the reports and information that the IBO has provided since it commenced operations in 1996 and compare them with the information and analysis available from other sources. On July 29, 1999, the Commission decided to take no action at this time, but to consider this issue in the future.

12. A Centralized Franchise Agency

The Commission considered consolidating the franchise/concession/revocable consent and related management functions of the Departments of Transportation, Information Technology and Telecommunications and Consumer Affairs into a single administrative unit, either as a division of the Department of Business Services or as a separate agency. In addition to consolidating these functions, the Commission considered whether the Council's ability to amend authorizing resolutions and review franchises under the Uniform Land Use Review Procedure should be changed. However, on July 29, 1999, the Commission decided to defer this technical, complex issue for future consideration.

13. Appointments to Boards and Commissions

The Commission considered whether the terms of persons appointed to the City's boards and commissions should run contemporaneously with the terms of the officials that appoint them. If such an amendment were adopted, terms of mayoral appointees to various entities, such as the City Planning Commission, would run contemporaneously with the term of the appointing Mayor, while the terms of each person appointed by a Borough President would run contemporaneously with the term of the appointing Borough President. Recognizing that the number of potentially affected officials rendered the issue highly complex, the Commission decided on July 29, 1999, to defer this issue for future consideration.

14. The Office of Payroll Administration and the Financial Information Services Agency

The Office of Payroll Administration ("OPA") is responsible for coordinating matters of payroll policy among City agencies. This includes running the "Payroll Management System," which is the City's payroll and timekeeping software, distributing the City payroll, managing the City's payroll bank accounts and maintaining the integrity and accuracy of the payroll system as a whole. OPA is overseen by two directors who receive no compensation for their services. The

Mayor appoints one director and the Comptroller appoints the other. Currently, OPA consists of a staff of approximately 100 personnel and is headed by an Executive Director who is appointed by the Mayor.

The Financial Information Services Agency ("FISA") is responsible for implementing and managing the "financial management system," otherwise known as "FMS," which is the overall budgetary accounting system for the City of New York. While OPA distributes the payroll checks, FISA is the agency that actually produces the checks for City employees. FISA is also responsible for the data processing operations of those City personnel whose duty it is to organize and compile the City's central financial records and data. FISA is headed by three directors who receive no compensation for their services. Currently, FISA consists of approximately 220 personnel and is headed by an Executive Director appointed by the Mayor.

The Commission considered the issue of whether these two agencies should be merged. To that end, the Staff interviewed employees of the Office of Management and Budget and other City agencies regarding the functions and performance of OPA and FISA. The Commission concluded that, while consolidation might provide the City with some minimal degree of administrative cost savings, the two offices are currently running efficiently and perform very few, if any, functions that could be considered overlapping. Accordingly, on July 29, 1999, the Commission decided that it would not be appropriate to consolidate OPA and FISA at this time.

ENDNOTES FOR SECTION V

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[1] Director Schiliro was represented at the forum by Kevin Donovan, Acting Special Agent-in-Charge of the Federal Bureau of Investigation's Criminal Division in New York, who read Director Schiliro's statement and answered questions raised by the Commission.

[2] See, e.g., Title 1, Chapter 13, of the Rules of the City of New York ("RCNY") (rules governing Department of Buildings cases).

[3] See, e.g., RCNY Title 48, Subchapter C (OATH's rules governing cases regarding the Commission on Human Rights).

[4] OATH's Chief Administrative Law Judge also submitted proposals requesting salary increases for OATH's administrative law judges. The Commission does not view specific salary levels as an appropriate subject for Charter revision and did not analyze that proposal.

[5] Members of the public suggested that the Commission propose a Charter revision to ban or limit the convening of future Charter revision commissions. Such a Charter revision would not be legal under State law.

[6] Mark Green & Laurel Eisner, The Public Advocate for New York City: An Analysis of the Country's Only Elected Ombudsman, 42 N.Y. L. Sch. L. Rev. 1093, 1095 (1998).

[7] See Editorial, "First Draft of Government," *New York Times* at A26 (Apr. 26, 1989); Editorial, "New York City Elections: Mark Green for Public Advocate," *New York Times* at A20 (Oct. 26, 1993).

[8] Frederick A. O. Schwarz, Jr. and Eric Lane, The Policy and Politics of Charter Making, 42 N.Y. L. Sch. L. Rev. 773, 818 (1998).

[9] See Editorial, "A Needless Office; But Green would bring it talent," *Newsday* at 68 (Oct. 29, 1993); Editorial; "Time to Chop City's Dead Wood," *Daily News* (Jan. 13, 1997); Editorial, "Advocate This, Mark Green," *Daily News* (Feb. 13, 1997); Editorial, "Chart New Course For the City," *Daily News* (May 3, 1998).

[10] As explained in Section III.A of this report, the Commission proposes that these powers be removed because the Public Advocate's power to "preside" is ceremonial because the Speaker runs the Council, and the Public Advocate's stated power to break a tie vote there is meaningless because it is not legally possible for there to be a tie vote over a local law in the Council. See Municipal Home Rule Law § 20(1); Charter § 34; the changes proposed in that section will clarify the City's ability to design an appropriate procedure to fill mayoral vacancies

IMMIGRANT AFFAIRS:
PROVIDING SERVICES TO ALL ELIGIBLE PEOPLE

SECTION VI

SECTION VI
IMMIGRANT AFFAIRS

A. MAYOR'S OFFICE OF IMMIGRANT AFFAIRS

B. GUARANTEEING AVAILABILITY OF CITY SERVICES TO IMMIGRANTS

C. PROTECTING CONFIDENTIALITY

D. PUBLIC COMMENTS

VI. IMMIGRANT AFFAIRS

In recent years, as anti-immigrant passions have swept some parts of the country and as the federal government has become less hospitable towards immigrants, we have learned that local laws that protect immigrants are, for many New Yorkers, their most valuable rights. The immigrants who come to this City – like other New Yorkers – need shelter, education and employment. When immigrants residing here fear seeking social services or assisting the police in solving crimes, we all suffer. We cannot rely on either the federal or State governments to protect immigrant rights. The City must provide leadership in this area. While the City has done so, federal laws have jeopardized the protections afforded. Moreover, we must ensure that our commitment to the welfare of immigrants endures. To ensure that immigrant populations continue to be protected by the City in the next century, the reforms that we have achieved must be enhanced and incorporated in the Charter.

Issue: Should the Charter provide that City services be available to all eligible persons regardless of alienage and citizenship status, and that an Office of Immigrant Affairs and Language Services will implement this and other policies concerning immigrant affairs? Should the Charter provide that the City, as part of its inherent power to determine the duties of its employees, may require confidentiality to preserve the trust of individuals who have business with City agencies, and that the Mayor may issue rules guaranteeing, to the fullest extent permitted by State and federal law, the confidentiality of information collected from those who need such protection, such as immigrants?

Relevant Charter Provision: None.

Discussion: The importance of immigration to the City cannot be overstated. New York City is the nation's preeminent "world city." The presence of the Statue of Liberty and Ellis Island highlights the critical role that immigrants have played in promoting the City's vitality and cosmopolitan spirit. Approximately one third of the City's current residents were born abroad, and an even larger percentage of those born here are the children of a parent or parents born abroad. The City also serves as the site for the United Nations and for hundreds of foreign consulates, international organizations, and multi-national companies. The City is a place of countless languages and cultures, and diversity is one of its most persistent distinguishing features.

For the past decade, it has been the City's policy to make its services available to the foreign-born and to facilitate their assimilation into the life of the City. With rare exceptions, an individual's alienage and citizenship status is irrelevant under local law. Indeed, the Human Rights Law forbids unlawful discrimination on the basis of national origin, alienage or citizenship status. The current Administration has actively supported these policies. Nevertheless, to protect immigrant rights from the vicissitudes of politics, the Charter should provide for a Mayor's Office of Immigrant Affairs and Language Services, guarantee City services to all residents, regardless of citizenship or alienage, and protect confidential information provided to agencies, including information regarding immigrant status, to the extent permitted by State and federal law.

A. Mayor's Office of Immigrant Affairs

The City's foreign-born and immigrant populations face many challenges in trying to make use of City services, not the least of which is ignorance as to what City services are available and awkwardness about approaching public workers who speak only English. The public interest is not well served by having significant segments of the City's population avoid using public services. The result is often that crime goes undetected and unpunished, that children go uneducated and that sickness goes untreated.

It is the purpose of the Mayor's Office of Immigrant Affairs and Language Services to fight these harms by, among other activities, engaging in educational and outreach efforts and by maintaining a "language bank" that provides translators for non-English speakers who have dealings with City agencies. This office, which exists solely by executive prerogative, should be provided for in the Charter. Doing so would recognize the special and distinctive needs that immigrants face in assimilating themselves into a new country and the crucial role that immigrants play in the City's life. It would also encourage immigrants to have greater confidence in City government by demonstrating the City's long-term commitment to assist them.

B. Guaranteeing Availability of City Services to Immigrants

In 1989, in order to promote the City's public policy to provide its services to the foreign born and to facilitate their assimilation into the life of the City, Mayor Koch issued Executive Order 124, which provided, inter alia, that "[a]ny service provided by a City agency shall be

made available to all aliens who are otherwise eligible for such service unless such agency is required by law to deny eligibility for such service to aliens. Every City agency shall encourage aliens to make use of those services provided by such agency for which aliens are not denied eligibility by law." Executive Order 124 was renewed by both Mayor Dinkins and Mayor Giuliani.

As the last three mayors have recognized, the City benefits when foreign-born residents use City services. In the words of Executive Order 124, "[i]t is to the disadvantage of all City residents if some who live in the City are uneducated, inadequately protected from crime, or untreated for illness."

Given the importance of this policy, it should be included in the Charter. Doing so will reinforce the City's commitment to its ideals and insulate it from the vagaries of politics. Indeed, if the Mayor is authorized in the Charter to enforce the policy through the Office of Immigrant Affairs and Language Services, it will be difficult for the City to deny residents City services on account of immigrant status, and thus jeopardize the welfare of all the City's inhabitants, in the next century.

C. Protecting Confidentiality

Since at least 1989, when Mayor Koch issued Executive Order 124, it has been City policy to preserve the confidentiality of information regarding immigrant status. Indeed, Executive Order 124 prohibited City employees from providing information about immigrants to federal authorities unless legally obligated to do so. The basis for this policy was the recognition that the public welfare would be harmed if, out of fear of being reported to the federal Immigration and Naturalization Service, immigrants refrained from making use of City services.

Whatever success Executive Order 124 may have had in reassuring City immigrants that they could avail themselves of City services without increasing their chances of being deported was undermined by the passage in 1996 of the Welfare Reform, Illegal Immigration Reform and Immigrant Responsibility Acts and related measures (the "federal legislation") as well as by various court decisions, including most recently the decision of the United States Court of Appeals for the Second Circuit in City of New York v. United States, 179 F. 3d 29 (2d Cir. 1999). The federal legislation prohibits state and local governments from restricting their employees from exchanging information with the Immigration and Naturalization Service

concerning an individual's immigration status. The Court of Appeals for the Second Circuit upheld the constitutionality of the federal legislation against a facial challenge by the City.

Although it deals with confidentiality in general, and is not limited to immigration matters, the Commission's proposed Charter revision regarding confidentiality may enable immigrants who seek City services to do so without fear of deportation. It is likely that neither the federal legislation nor the decision of the Court of Appeals for the Second Circuit would require City employees to disclose information regarding immigrant status if the proposed Charter revision were adopted and implemented in a manner that protects information regarding immigrant status.

In its decision, the Court of Appeals for the Second Circuit stressed that it was upholding the federal legislation only against a facial challenge to its legality--a procedural context that required the City to establish that there is no imaginable set of circumstances under which the federal legislation might be valid. The Court explicitly left open the question of "whether these Sections [of the federal legislation] would survive a constitutional challenge in the context of generalized confidentiality policies that are necessary to the performance of legitimate municipal functions and that include federal immigration status."

The proposed Charter revision would explicitly authorize the development of such generalized confidentiality policies. Such policies would undoubtedly benefit the City in many ways. It is widely recognized that, in a large variety of government programs, confidentiality must be guaranteed if the program's integrity is to be preserved. In areas ranging from income tax returns to medical data to anonymous crime tips and domestic abuse hotlines, confidentiality is guaranteed to ensure that private individuals cooperate with the program. Different government programs may, of course, differ from one another in terms of what degree of confidentiality is necessary to ensure the program's effective functioning. Accordingly, the development of appropriate policies is best left to rule-making.

The Commission's proposed Charter revision would explicitly authorize the Mayor to determine what guarantees of confidentiality are required to preserve the trust and the cooperation of individuals who do business with the City. While decisions by the Mayor regarding the extent to which confidentiality is essential to preserve the integrity and efficient functioning of specific City programs would be general in nature, it is likely that immigrants – who sometimes have to be assured of confidentiality to encourage them to use City services – would be included in such protections. Accordingly, one result of developing generalized

confidentiality policies would be to improve the City's position in any future court challenges to the federal legislation.

D. Public Comments

At its August 6, 1999 expert forum, the Commission heard testimony from three expert witnesses with extensive knowledge of immigrant affairs: Christopher Kui, Executive Director of Asian Americans for Equality; Manuel Matos, Board Member, Northern Manhattan Coalition for Immigrant Rights; and Gary Rubin, Director of Public Policy, New York Association for New Americans. All three strongly supported the Charter Commission's proposals. Mr. Kui also urged that more be done to increase the personnel and funding for the Office of Immigrant Affairs and Language Services.

Members of the public who appeared at the Commission's public hearings, including Queens Borough President Claire Shulman, voiced support for the Commission's proposals regarding immigrant affairs. In addition, the Commission received letters from a number of organizations in support of the proposals. Leonard Glickman, the Executive Vice President of the Hebrew Immigrant Aid Society, wrote in support of any policy that would encourage immigrants to utilize services available to them. The Managing Director of the Korean American Family Service Center, Bona Lee, wrote that in her work she frequently encounters families that are unable to get services in their native language and strongly supports a proposal that would ensure the availability of services in immigrants' own languages, as well as confidentiality. John Kim, President of the New York chapter of the National Association of Korean Americans, submitted testimony at the Commission's Manhattan public hearing on August 12, 1999, strongly supporting the inclusion of immigrant rights protections in the Charter. The Executive Director of the Caribbean Women's Health Association, Inc., Yvonne Graham, sent a letter specifically supporting the proposals to include the Office of Immigrant Affairs and Language Services in the Charter, to make City services available to all eligible persons and to require confidentiality where necessary. The Commission received similar letters of support from UJA – Federation of New York, the National Association of Latino Elected and Appointed Officials, the Executive Director of Hamilton-Madison House (a settlement house that has been assisting the City's immigrants for over 100 years), and Jacqueline Ward, Chair of the Board of Directors of Casita Maria.

Proposal: In order to strengthen the City's public policy to make City services available to all eligible persons regardless of alienage and citizenship status, the Mayor's Office of Immigrant Affairs and Language Services and this policy should be codified in the Charter. Moreover, the Charter should provide that the City, as part of its inherent power to determine the duties of its employees, may require confidentiality in order to preserve the trust of individuals who have business with City agencies and that the Mayor, in the exercise of this power, may issue rules guaranteeing, to the fullest extent permitted by State and federal law, the confidentiality of information relating to immigration status and other private matters.

Proposed Charter Revision:

Section 1. A new section 18 should be added to the Charter creating the Mayor's Office of Immigrant Affairs and Language Services:

§ 18. Immigrant Affairs and Language Services. a. The city recognizes that a large percentage of its inhabitants were born abroad or are the children of parents who were born abroad and that the well-being and safety of the city is put in jeopardy if the people of the city do not seek medical treatment for illnesses that may be contagious, do not cooperate with the police when they witness a crime or do not avail themselves of city services to educate themselves and their children. It is therefore desirable that the city promote the utilization of city services by all its residents, including foreign-born inhabitants, speakers of foreign languages and undocumented aliens.

b. In furtherance of the policies stated in subdivision a of this section, there shall be established in the executive office of the mayor an office of immigrant affairs and language services. The office shall be headed by a director, who shall be appointed by the mayor. The director of the office of immigrant affairs and language services shall have the power and the duty to:

1. advise and assist the mayor and the council in developing and implementing policies designed to assist immigrants and other foreign-language speakers in the city;

2. enhance the accessibility of city services to immigrants and foreign-language speakers by establishing programs to inform and educate immigrant and foreign language speakers of such services;

3. manage a city-wide list of translators and interpreters to facilitate communication between city agencies and foreign language speakers;

4. perform policy analysis and make recommendations concerning immigrant affairs; and

5. perform such other duties and functions as may be appropriate to pursue the policies set forth in subdivision a of this section.

c. Any service provided by a city agency shall be made available to all aliens who are otherwise eligible for such service to the same extent such service is made available to citizens unless such agency is required by law to deny eligibility for such service to aliens.

§ 2. Section 8 of the charter is amended by adding a new subdivision g to read as follows:

g. The city has the power to determine the duties of its employees, and it is essential to the workings of city government that the city retain control over information obtained by city employees in the course of their duties. In the exercise of this power, the mayor may promulgate rules requiring that information obtained by city employees be kept confidential to the extent necessary to preserve the trust of individuals who have business with city agencies. To the extent set forth in such rules, each agency shall, to the fullest extent permitted by the laws of the United States and the state of New York, maintain the confidentiality of information in its possession relating to the immigration status or other private information that was provided by an individual to a city employee in the course of such employee's duties.

LAND USE:

STREAMLINING THE PROCESS

SECTION VII

SECTION VII

LAND USE

A. OVERVIEW: THE LAND USE PROCESS

B. SPECIAL PERMITS

C. MAYORAL VETO OF COUNCIL MODIFICATIONS

D. CPC MODIFICATIONS; SCOPE OF COUNCIL REVIEW

E. REVIEW OF MINOR STREET GRADE CHANGES

F. REVIEW OF OFFICE SPACE ACQUISITIONS

G. TIMETABLE REFORMS

H. RESTRUCTURING TERMS OF CITY PLANNING COMMISSIONERS

I. REDUCING REPORTING REQUIREMENTS

J. EMPIRE CITY SUBWAY COMPANY

VII. LAND USE

(Chapter 8)

The Commission considered several issues concerning the City's land use process, but decided not to recommend any changes in this area because misunderstandings regarding the nature of the Commission's land use proposals required more time for public education and debate. The Commission, however, believes that further evaluation in this area should be undertaken.

A. Overview: The Land Use Process

The Uniform Land Use Review Procedure ("ULURP") governs significant land use decisions in the City. See Charter §§ 197-c, 197-d. First added to the Charter in 1975, ULURP provides certainty in the land use review process by establishing a predictable timetable and a single procedure for the review of most actions. It also defines the role in the process of the Community Boards, the Borough Boards, the Borough Presidents, the City Planning Commission ("CPC"), the City Council and the Mayor.

The CPC, consisting of 13 members, is intended to be a professional body with substantial planning expertise. The Mayor appoints seven members, including the Chair, who is the Director of City Planning. Each Borough President appoints one member, as does the Public Advocate. Other than the Chair, who serves at the pleasure of the Mayor, the members are each appointed for a term of five years and may be removed only for cause. The specific actions subject to ULURP, which are set forth in Charter § 197-c (a), include changes to the City map, changes to the zoning map, site selection for capital projects, housing and urban renewal plans, requests and solicitations for franchises and major concessions, special permits and the acquisition or disposition of real property by the City.

All ULURP actions are subject to approval by the CPC, after review and comment by the Community Board, Borough President and, in some cases, the Borough Board. The Council does not review disapprovals by the CPC. The Council is required to review CPC approvals of zoning map changes, zoning resolution text changes (not subject to ULURP, but requiring Council review under Charter § 197-d(a)(3)), urban renewal plans, community-sponsored land use plans (197-a plans), and certain dispositions of residential buildings to not-for-profit companies. The Council's review of other land use actions, such as the issuance of special

permits, dispositions or acquisitions of real property, and site selections, is discretionary, unless the Borough President triggers a mandatory Council review under the "triple no" provision. Charter § 197-d(b)(2). This procedure may be invoked by the Borough President with respect to actions that are approved or approved with modifications by the CPC, after having been disapproved at earlier stages of the review process by both the Community Board and Borough President.

In reviewing CPC approvals, the Council acts by a majority vote. For the Council to approve an application with modification, it must first refer the proposed modification back to the CPC for a determination whether the modification requires additional review from a land use or environmental perspective. If the CPC determines that additional review is needed, the Council may not proceed to adopt the modification until after the CPC conducts the additional review. If no additional review is needed, then the Council may adopt the application with or without the modification, or turn it down. The Mayor may then veto the Council's action, with that veto subject to override by a two-thirds vote.

Prior to 1989, significant land use decisions were made by the Board of Estimate. As part of the process of eliminating the Board of Estimate and transferring its powers to other bodies and elected officials, the 1989 Charter Revision Commission sought to balance the powers of the CPC, the Council and the Mayor in land use, while recognizing the role of the Council as the final decision maker in the sequence of land use review. Local input through Community Boards, Borough Presidents, and Borough Boards was maintained, although the Borough Presidents' role was diminished in importance by virtue of abolition of the Board of Estimate. A number of constraints on the Council's land use authority were incorporated into Charter mechanisms, in recognition that land use is a field involving the exercise of professional planning expertise as well as political judgment.

While CPC decisions were made subject to City Council review, the powers of the CPC were also preserved and enhanced in several respects. In particular, the Charter provides that only items approved or approved with modifications by the CPC are subject to review by the City Council (Charter § 197-d(a)); CPC disapprovals are, with one limited exception, final. Likewise, Council modifications to CPC actions are subject to CPC review. Charter § 197-d(d). In these ways, the Charter Commission sought to balance the roles of the specialized land use body, the CPC, with that of the political body, the Council.

The Mayor was assigned two key roles in the revised land use process: (1) the power to appoint a majority of the members of the CPC, which was carefully structured to include

members appointed by other elected officials while retaining a mayoral majority; and (2) the power to veto Council land use decisions, subject to override only by a two-thirds vote of the Council. The Charter Commission thus recognized that the land use review process involves an interplay between the executive and legislative branches of government.

However, certain recurrent problems with ULURP have occurred over the past ten years. First, private parties who have gone through ULURP and government officials who are responsible for the process have repeatedly noted that ULURP simply takes too long. The entire process, from the first submission of an application to a final determination, often takes close to a year. Second, despite the efforts of the 1989 Charter Revision Commission to strike a proper balance between the CPC, the Council and the Mayor, certain provisions of the Charter have in practice worked at cross purposes and are in need of adjustment.

The Commission considered many proposals to improve ULURP. However, many members of the public, including Council Speaker Peter Vallone, urged the Commission to consider fully all the possible ramifications of changes in the City's land use review process. Although the Commission believes that the proposals under consideration were targeted measures that would have streamlined ULURP without significantly changing the structure of land use decision-making in the City, the Commission decided to defer action on all land use proposals.

B. Special Permits

Under the zoning resolution, certain zoning requirements relating to the use, bulk and other features of a development may be altered by a special permit under certain conditions. Through its role as final decision-maker with regard to adoption or amendment of the zoning resolution and the zoning map, the Council has the authority to determine what types of special permits may be issued and under what terms, as well as the areas of the City in which they are available. This legislative role is distinct from the essentially administrative task of determining whether a special permit should be granted in a specific instance. Currently, the Council may perform the latter role by choosing to take jurisdiction over special permit applications approved by the CPC, which results in at least 50 days being added to the ULURP process.

Special permits are primarily private sector applications involving site-specific requirements and are of critical importance to many development projects. Given the length of ULURP and the detailed scrutiny special permits receive as part of Community Board, Borough

President, and CPC review, the role of the Council at the tail end of the process deserves reconsideration.

On August 13, 1999, the Commission heard expert testimony that was generally in favor of a Staff proposal to permit City Council review of special permits only where the CPC fails to approve an application by at least a two-thirds vote. David Karnovsky, General Counsel of the Department of City Planning, expressed support for the proposal noting that the proposed Charter revision could cut as many as 70 days from the ULURP timetable for non-controversial special permits. He also suggested that the Commission should consider modifying the proposal to allow for elective Council review of all special permit applications approved by the CPC regardless of whether the vote exceeded two-thirds, when they are considered with any other action requiring CPC approval (e.g. zoning map changes or site selection for capital projects). Brendan Sexton, President of the Times Square Business Improvement District, also expressed support for the proposal, though he suggested that the Commission consider exempting certain special permits, such as those involving bulk and massing, from the revised special permit approval process. Professor Richard Briffault of Columbia University School of Law, noted that the Commission consider allowing for Council review of special permits whenever there is an unfavorable recommendation filed by the affected Community Board or Borough President.

The Commission also heard public testimony on this proposal. Some members of the public commented that ULURP's timetable should be shortened. Other testimony, including that of Council Speaker Vallone, suggested that the Council's role in land use review should not be diminished. The Commission does not believe that the staff proposal would have significantly reduced the Council's role. Since Fiscal Year 1991, the CPC has approved 254 special permits. Of these only 12 (4.7%) were modified by the Council, and none was disapproved.

However, a consensus did not emerge among the experts or the public on how to accomplish the goal of streamlining the Council's participation in ULURP without diminishing its power. Therefore, on August 17, 1999 the Commission decided to delay resolution of this proposal to allow further debate and consideration.

C. Mayoral Veto of Council Modifications

The Charter gives the Mayor veto power over Council actions regarding CPC approvals, subject to override by a two-thirds vote of the Council. This provision was adopted because projects approved by the CPC might nevertheless be modified by the Council in ways to which

the Mayor might object. However, the veto provision is imperfectly suited to this purpose, because it does not allow the Mayor to simply veto a disputed modification. Instead, the Mayor must veto the entire project or action, even if only the modification is objectionable.

Likewise, when the Council is faced with a veto resulting from the Mayor's objection to a modification, it cannot choose to override the Mayor's objection to the modification alone. Instead, it must choose between acquiescing to the Mayor's objection, with the result that the project or action is disapproved and cannot proceed, or overriding the veto, even under circumstances where the Council would otherwise be prepared to abandon the disputed modification in light of the Mayor's objection. This inability to focus the issue on the merits of the disputed modification, rather than the underlying action, may distort the land use review process and produce results that are not in the interest of either the City or the private development community.

The problems caused by the Mayor not being able to target a veto were highlighted during the 1995 controversy over a proposed Pathmark supermarket in Springfield Gardens, Queens. The project required a special permit from the CPC that was subject to elective review by the City Council. The development was supported by the CPC, the Council, and the Mayor because it would provide a valuable amenity to a community underserved by large food stores. However, the Council modified the special permit approval given by the CPC by adding certain conditions, including a requirement that Pathmark provide funding of up to $400,000 for local merchants under a mechanism supervised by local elected officials. These conditions are unrelated to bona fide land use considerations and are of questionable legality.

Following the Council's approval of the special permit with the disputed modifications, the Mayor was faced with the problem of whether to veto a project that would be highly beneficial to the community, but had become the subject of problematic Council modifications. Under Charter § 197-d(e), the Mayor could only veto the project as a whole, and not just the modifications, with the result that the Pathmark supermarket might never be built. The only way to ensure the project's survival was to acquiesce to the Council's modification. The Mayor's eventual decision was to veto the special permit on policy grounds. However, this result should not have been necessary. Had the Charter allowed the Mayor to veto the modification alone, the controversy would have been properly focused on the legal and public policy issues raised by the Council's actions.

The Council confronted a similar dilemma during the period leading up to and following the Mayor's veto, when support for the modifications faded in the face of hostile public opinion.

A decision not to override the Mayor's veto would have resulted in the project being unable to go forward. Override would have allowed the project to go forward, but with modifications that most Council members no longer truly supported. Again, had the Charter allowed the Mayor to veto only the modification, the Council would not have faced this dilemma. In the end, the Council overrode the veto, while re-characterizing the modifications as non-binding and therefore not true conditions of the approval.

In addition to the specific example of the Pathmark case, the City's general experience with mayoral vetoes indicates that the Charter should be revised. Over the past ten years, the CPC has approved 1,705 ULURP applications. The Council has imposed modifications on 191 of those applications. The Mayor, however, has vetoed only two applications during that period, and the Council overrode one of the vetoes (the special permit application for the Queens Pathmark). The small number of mayoral vetoes is not surprising since by the time an application reaches the Mayor it has been shaped by the Department of City Planning and approved by the CPC. For a project to reach the Mayor, the CPC and the City Council must have approved it. The Mayoral veto is reserved for those rare occasions, as in the Pathmark case, when the Mayor has a significant policy disagreement with the Council over modifications they have made. Thus, the Staff recommended that the Charter be amended to allow the Mayor to veto either the Council action as a whole or only the Council's modifications.

The Commission heard expert testimony on this issue. At its August 13, 1999 expert forum, City Planning Department General Counsel David Karnovsky expressed support for the proposed revision noting that the proposed change was consistent with the intent of the 1989 Charter Revision to balance power between the legislative and executive branches of government in the decision-making process. Brendan Sexton also expressed support for the proposed change. Professor Briffault opposed the proposed change because he believed it would enhance Mayoral power. The Commission also received public testimony, including testimony from Council members and Speaker Vallone, opposing the proposal on the basis that it reduced the Council's role in ULURP.

The Commission believes that the proposal would rationalize the process without reducing the role of the Council. It would simply allow a disagreement that a Mayor might have with the Council over modifications to focus on the modifications themselves, not the project as a whole. Ultimately, the Council would retain its ability to impose additional conditions on the land use action through its power to override a mayoral veto. Nevertheless, it

decided on August 17, 1999 that resolution of this proposal should be delayed to allow for further debate and consideration.

D. CPC Modifications; Scope of Council Review

Under the 1989 Charter amendments, land use actions disapproved by the CPC are not reviewable by the Council. Charter § 197-d(a). Thus, for example, a rezoning action disapproved by the CPC cannot be reviewed and approved by the Council. This provision affirms the CPC's role as the "gatekeeper" of the City's land use agenda; items that the CPC finds to be without merit are not subject to action by the Council.

Consistent with this gatekeeper role, if the CPC disapproves some portion of a project and approves the rest, the aspects of the application disapproved by the CPC should not be subject to Council review. This was indeed the practice with the Board of Estimate until the mid-1980s, which, at that time, reviewed CPC actions. However, the current Charter language does not clearly provide for this situation.

As a result, the following situation could occur: the CPC considers an area-wide rezoning, which has been heard and approved by the Community Board and Borough President. The CPC decides that five blocks do not warrant change and therefore removes them from the rezoning area. Consistent with the concept that CPC disapprovals are final, the removal of these blocks should be viewed as the equivalent of a "no" vote by the CPC not subject to further review. However, the Charter provides that this rezoning action would be forwarded to the Council as an approval with modifications, i.e., the CPC's disapproval of the inclusion of the five blocks would be characterized as a modification subject to Council review. Charter § 197-d(a). With the modification thus characterized, the Council would be free to restore the five blocks, as a modification of the CPC's action. The doctrine of scope would not appear to limit the Council's ability to add back the five blocks, since the issue of their potential rezoning was subject to ULURP review and comment by the Community Board, Borough President and the public. The result is that the rezoning of an area may occur over the objection of the CPC, notwithstanding the general principle that CPC disapproval of a rezoning is final.

At the August 13, 1999 forum, all the invited experts expressed support for the proposal. At the public hearings, however, Council members, including Speaker Vallone, opposed any reduction in the Council's role in ULURP. However, over the past ten years, only 14 of the

1,705 applications approved by the CPC were approved with modifications. Therefore, this proposal would not significantly affect the Council's role.

Although the Commission was inclined to conclude that the scope of the CPC action that the Council may modify should be redefined to include only those aspects of an application approved by the CPC, thereby eliminating aspects disapproved by the CPC from further review, it decided on August 17, 1999, to delay resolution of this proposal to allow for further debate and consideration.

E. Review of Minor Street Grade Changes

Minor changes in the levels of streets, typically resulting from repair or reconstruction, require amendment to the recorded street elevation on the City map, a process now subject to ULURP. Since 1995, there have been six ULURP applications solely for changes in the grade of a street less than two feet and all were filed by the City for street reconstruction or repair jobs. Other ULURP applications may have involved street grade changes but involved other actions that triggered ULURP and would not have been affected by the proposal. For the small category of projects that would have been affected by the proposal, months of delay and considerable staff time could be avoided through such a change. No significant land use issues are implicated by changes in street grade of less than two feet. Nevertheless, although there is no reason to delay projects or require the expenditure of significant City agency staff on these actions, the proposal was misunderstood and opposed. Accordingly, on August 17, 1999, the Commission decided to delay resolution of this to allow for future debate and consideration.

F. Review of Office Space Acquisitions

Section 195 of the Charter requires CPC review of the purchase or lease of office space by City agencies. Unlike items subject to review under ULURP, there are no land use issues when the City rents or purchases office space in areas zoned for office use. This fact is recognized in the very nature of the Section 195 process, which requires CPC review only in terms of compliance with "fair share criteria." The policy objective underlying the inclusion of Section 195 in the 1989 Charter Revision was to ensure that, when the City proposes to purchase or lease office space in Manhattan south of 96th Street, consideration will be given to whether the facility can be located elsewhere to support economic development and revitalization of the

City's regional business districts. The Council was given the authority to disapprove these CPC actions by a two-thirds vote.

The principal effect of Section 195 has been to slow the process of obtaining space for City agencies. Practice has shown that it does not serve the purpose of prodding agencies to locate outside of Manhattan or facilitating regional economic development, since there are relatively few instances in which an agency has a real choice of borough location. In most cases, factors related to operational efficiency (e.g., proximity to the agency's local service area) drive the choice of location. Over the past nine years, 141 acquisitions of office space by the City have been subject to the Section 195 review process. Of these, the Council has disapproved only three acquisitions, or less than 1%. Of these, two were for less than 50,000 square feet. One was a proposed lease for the Department of Cultural Affairs that the Council initially disapproved for reasons unrelated to the lease and later approved for the same site. The other proposed lease involved a drug-testing facility located on 125th Street in Manhattan that the Council disapproved on "fair share" grounds. The Council later approved a lease for the same facility to be located in the same neighborhood.

The Commission heard expert testimony on this issue at its August 13, 1999 expert forum. David Karnovsky expressed support for the proposal noting that the proposed revision would make acquiring office space for City agencies less difficult and would also allow the Department of City Planning and the Department of Citywide Administrative Services to dedicate far less staff time to such matters. Professor Richard Briffault also expressed support for this proposal.

To make the acquisition of office space quicker and less burdensome, the Commission is inclined to conclude that the CPC should be eliminated from the Section 195 review process, and that Council authority to disapprove of an office space acquisition should be limited to large acquisitions, defined as those for space of 50,000 square feet or more. This would allow the Council to consider major office acquisitions, such as the relocation of agency headquarters, while eliminating the review for smaller agency branch offices and the like. However, on August 17, 1999, the Commission decided to delay resolution of this proposal to allow future debate and consideration.

G. TIMETABLE REFORMS

The Commission received public testimony, from both private parties and government officials, that ULURP simply takes too long. There are a number of mandated ULURP timetable

provisions, both pre- and post-certification by the Department of City Planning ("DCP") of the completeness of an application, that may be unnecessary to a fair resolution of land use issues. However, ULURP is complex, and further study is required. Therefore, on July 29, 1999, the Commission concluded that the issue of timetable changes should be further studied and resolved at a future date.

H. Restructuring Terms of City Planning Commissioners

The 1989 Charter revision gave the Mayor a majority of the appointments to the new CPC in recognition of the fact that the chief executive should be in a position to set the land use agenda that goes before the Council and that, while land use policy should reflect the input of appointees of other elected officials, the views of mayoral appointees should predominate. At the same time, however, Charter Section 192 staggers the appointments of City Planning Commissioners (other than the Chair, who serves at the pleasure of the Mayor) so that only one mayoral (and one Borough President) appointment is made each year. The result is that an incoming Mayor does not, in fact, have a majority of appointments to the Commission. Indeed, a new Mayor must be well into a second term before having made all seven appointments to the Commission.

Term limits compound this problem, and affect not just the Mayor, but also the Borough Presidents and the Public Advocate. During the first several years of the electoral term beginning in 2002, when all of the appointing elected officials other than Manhattan Borough President Virginia Fields are certain to be out of office as a result of term limits, the Commission will consist for the most part of persons appointed by officials who are no longer in office.

The ostensible purpose of this system of staggered terms was to ensure continuity on the CPC. The importance of continuity should not be dismissed, particularly given the nature of the CPC as an expert land use planning body. In this regard, the system that existed prior to the 1989 Charter amendments emphasized continuity by providing for a seven member CPC, with the Chair serving at the pleasure of the Mayor, and the six other members appointed for eight-year terms. The question, however, is how to balance continuity with accountability and how to allow a new Mayor to have the ability to leave an imprint on land use policy. Restructuring the terms of the Commissioners to be more concurrent with those of the elected officials that appointed them could further this balance.

Changing the terms of City Planning Commissioners, however, should be discussed in the context of a review of the terms of the members of all of the various City Commissions and Boards, a project that would require considerable further study. Accordingly, on July 29, 1999, the Commission decided to defer action on this issue.

I. Reducing Reporting Requirements.

The Charter requires the DCP to prepare a number of annual reports. The DCP has argued that preparation of these reports is time-consuming and that the data gathered have not been useful. The DCP propose amending the Charter to require that these reports — Citywide Statements of Needs, Community District Needs Statements, and Reports on Social Indicators — be issued biennially rather than annually. In addition, the Charter requires the CPC to prepare a Zoning and Planning Report every four years. The CPC maintains that production of the report was time consuming and generated little public interest. DCP has recommended that the requirement for this report could be eliminated.

These proposals may be meritorious. However, they also require further study. Specifically, a determination is needed regarding whether more value comes from the reports than is suggested by the DCP. Accordingly, on July 29, 1999, the Commission decided to defer action on these proposals.

J. Empire City Subway Company

In public comments, submitted in writing on July 15, 1999, and through oral testimony at the Commission's public hearings in Queens on August 5, 1999, and in Manhattan on August 12, 1999, questions were raised as to whether the Charter should be revised to mandate that a franchise be promulgated to override the City's existing contract with the Empire City Subway Company ("Empire"). Also, comments were submitted asking whether the Charter's provisions requiring a public referendum to change local laws relating to a public utility franchises should be revised to make the need for such a referendum discretionary.

In response to the comments, the Commission examined whether the City's longstanding contract with Empire, which dates back to 1891, may foster anticompetitive behavior by Empire because it owns and operates the City's telecommunications conduit system that courses through the public right-of-way in Manhattan and the Bronx. The Commission considered whether the

Charter should be revised to require that a franchise be promulgated by December 31, 2001 to override the Empire contract. [1]

Empire is a wholly owned subsidiary of BellAtlantic and rents space in the system to telecommunications providers that hold City franchises. Pursuant to the contract, the City regulates the fees Empire charges telecommunications providers that occupy the system and may terminate Empire's contract at any time, provided that it purchases the system from Empire. The Commission is not prepared to state at this time that a Charter change is warranted. First, the City's contract with Empire does not appear on its face to foster anticompetitive behavior because the City exercises broad control over the system's operation, maintenance and fee structure. The City's control, therefore, insures that all telecommunications providers are given an adequate level of service, and are charged in a fair and equitable manner to occupy the system. In addition, the Commission is concerned that the proposal might be unconstitutional.

ENDNOTES FOR SECTION VII

[1] A franchise is the contract by virtue of which private individuals exercise their right to use the City's streets in distributing to consumers given services and commodities. It is by virtue of their franchises that these individuals and concerns collect tolls for their public services.

PROCUREMENT:
PROMOTING EFFICIENCY, PROTECTING INTEGRITY

SECTION VIII

SECTION VIII
PROCUREMENT

A. OVERVIEW: THE PROCUREMENT SYSTEM

B. STREAMLINING THE PROCUREMENT PROCESS
   1. The small purchases limit
   2. Procurement with another governmental entity
   3. Bid-deposit requirements
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C. IMPROVING THE INTEGRITY ASSESSMENT SYSTEM

D. OTHER ISSUES
   1. Contract registration
   2. Further streamlining of the procurement process
   3. Emergency procurements
   4. Streamlining determinations whether to contract for services

VIII. PROCUREMENT

(Chapter 13)

The 1989 Charter Revision Commission, reacting to a series of contracting scandals, concluded that the City's constitution should contain extraordinarily detailed procedures regarding procurement. While it created a Procurement Policy Board ("PPB") to develop rules regarding City contracting, the 1989 Charter Revision Commission's obsession with minutia in the Charter's procurement section left the PPB with little discretion. As a result, the City has been saddled with an overly burdensome procurement process that stifles competition and a decentralized and ineffective system for ensuring that City business is denied to corrupt contractors.

In recent years, the City's procurement system, one of the City's most unwieldy and arcane bureaucracies, has become more efficient and less susceptible to corruption despite these Charter problems. These improvements were largely due to the efforts of the PPB, which simplified its rules (as evidenced by a 70% reduction in the number of pages in its rule-book), piloted and then refined a new procurement method for time-sensitive purchases that can cut procurement times in half, spearheaded a "prompt-payment" program that cut the City's late-fees-per-bill by 75% and resulted in 90% timely-payment, worked with its 29-member vendor advisory group to implement a neutral contract dispute resolution process that has been lauded by the contractor community, and designed a centralized integrity assessment program that conducted reviews of more than 500 vendors in 1998.

While these are positive reforms, there is still much to do. It still takes the City nine months on average to enter into a contract using the Request for Proposals process. Given that the City depends on its procurement system to invest approximately seven billion dollars per year in construction and computer-automation projects, human service programs, and other day-to-day needs, that kind of delay is not acceptable. The PPB has demonstrated that it is possible to reform the procurement bureaucracy by cutting red tape while implementing aggressive centralized corruption-prevention programs. It is time to institutionalize that good sense in the Charter.

A. Overview: The Procurement System

The City's procurement of goods, services, and construction is governed by Chapter 13 of the Charter and the PPB rules, as well as by many provisions of State law, including the General Municipal Law ("GML"). As a result of revisions resulting from the 1989 Charter Revision Commission, the Charter's general procurement process is administered primarily by the PPB, the Mayor, and the Comptroller. The PPB adopts rules governing the process generally, the Mayor is responsible for the implementation of the procurement system, and the Comptroller provides oversight through the registration process and its audit responsibilities.

The PPB consists of five members, three of whom are appointed by the Mayor and two of whom are appointed by the Comptroller. Charter § 311(a). The PPB is given broad authority to promulgate rules governing the procurement process;[1] it explicitly does not have the authority to address the award or administration of any particular contract. Charter §§ 311(b), (f). The Charter also specifically requires the PPB to promulgate rules governing methods for soliciting bids or proposals and awarding contracts, the manner in which City agencies shall administer contracts, standards and procedures for determining whether a bidder is responsible, and procedures for the fair resolution of contract disputes. Charter § 311(b).

The Charter gives the Mayor ultimate responsibility for the procurement of goods, services, and construction through specific contracts. For example, under Charter § 317(b), the Mayor (or Deputy Mayor) has a non-delegable duty to review and approve proposed contracts worth more than two million dollars, where the proposed contractor was selected by a method other than competitive sealed bidding, competitive sealed bidding from prequalified vendors, or competitive sealed proposals. In addition, under Charter § 322, written approval of the Mayor is required prior to solicitation of bids or proposals whenever an agency determines that it should use an alternative procurement procedure for a particular procurement or type of procurement. Similarly, prior to filing for registration a contract that has been let by other than competitive sealed bidding, the Mayor must certify that the relevant procedural requisites have been met. Charter § 327(a). Should the Comptroller object to the registration of a particular contract, the Mayor has the obligation to address the objection. Charter § 328.

The Charter provides the Comptroller with a very limited oversight function. The Comptroller is responsible for the registration of contracts and may perform audits of the award and performance of the City's contracts. Under Charter § 328 no executed contract (except in certain circumstances, such as an emergency or accelerated procurement) may be implemented unless it has

been registered by the Comptroller or the Comptroller has failed, within 30 days of the date that the contract was filed with the Comptroller, to inform the Mayor of either the Comptroller's belief that there are no appropriated funds for the contract, that the Mayor or Corporation Counsel failed to issue a necessary certificate of approval, or that the contractor was debarred from dealing with the City, or the Comptroller's objection to registering the contract on the ground that there has been corruption in the letting of the contract or that the proposed contractor is involved in corrupt activity. In the event that the Comptroller objects on corruption-related grounds, the Mayor may direct the Comptroller to register the contract, and the Comptroller must do so within 10 days of such notice. During the registration process, the Comptroller does not "approve" contracts, evaluate the legality of the contract, past performance of the contractor, or the merits of the procurement. The Comptroller's role is limited and virtually ministerial.

As to the specific methods of procurement that may be used, the Charter contains a presumption in favor of competitive sealed bidding. Charter § 312(b)(1). Competitive sealed bidding is where sealed bids are publicly solicited and opened and a contract is awarded to the lowest responsive, responsible bidder; the only variable at issue is price. The presumption in favor of competitive sealed bidding is consistent with the mandate of GML § 103(1), which, with certain exceptions, requires that all contracts for "public work" be awarded "to the lowest responsible bidder . . . after advertisement for sealed bids." Under Charter § 312(b)(1), competitive sealed bidding must be accomplished pursuant to rules of the PPB.

The Charter permits the City to use a procurement method other than competitive sealed bidding in a "special case." Charter § 312(b)(1). A "special case" is defined as a situation "in which it is either not practicable or not advantageous to the city to use competitive sealed bidding" for any of certain enumerated reasons. Charter § 312(c)(1). These reasons include, for example, that "judgment is required in evaluating competing proposals, and it is in the best interest of the city to require a balancing of price, quality, and other factors." Charter §§ 312(c)(1)(ii), 317, and 319. Section 312(c)(1) also authorizes the PPB to define other situations that constitute special cases.

The primary criticism of the City's procurement process, discussed in more detail below, is that it takes too long for the City to enter into contracts. Typically, it takes the City more than four months to enter into a contract through the competitive sealed bid method and more than nine months through the competitive sealed proposals method. Criticisms regarding the procurement bureaucracy come from government officials responsible for the City's procurements, the PPB, the contracting community, and academics familiar with the system.

The 1989 revisions to Chapter 13 of the Charter were supposed to streamline the procurement process and address the existence of opportunities for corruption. [2]However, anecdotal evidence suggests that the process remains "awash in a sea of paper [and] plagued by inordinate delays.[3]" Furthermore, scholarly analysis has argued that overly burdensome procedural requirements intended to prevent corruption may in fact have become counterproductive, in part by producing "a dysfunctional relationship between the City and contractors who know how to exploit a labyrinthine, suspicion-ridden, and inefficient contracting system."[4]

The 1989 Charter Revision Commission also failed in its effort to provide the City with a full array of tools to combat corruption. For example, corrupt contractors have argued (albeit unsuccessfully) that the Charter limits the Mayor's and the agencies' discretion in denying them business. Although such arguments lack merit, they have resulted in needless litigation against the City.

Thus, the 1989 Charter revisions have not resulted in an efficient and cost-effective procurement process. Furthermore, the 1989 Charter revisions were internally inconsistent. Under Charter § 311, the PPB was clearly designed to have the expertise and responsibility to create the rules necessary to effectuate the goals of the Charter.[5] But the arcane and technical procedural rules in the Charter deprive the PPB of the flexibility to use its expertise to adopt and amend rules, as experience dictates, to better meet the goals of the Charter and the needs of the City.

The following sections discuss the Commission's proposed amendments to the Charter's procurement chapter. The proposed changes are primarily designed to achieve two goals: (1) eliminate from the Charter the detailed procedures regarding the mechanics of procurement that, in effect, restrict the PPB's ability to streamline the procurement process; and (2) strengthen the City's ability to identify and deny business to corrupt contractors by providing for a centralized integrity assessment function. The proposed amendments also include minor (but helpful) technical improvements to the Charter.

B. Streamlining the Procurement Process

1. The Small Purchase Limit

Issue: Should the Charter's small purchase provision increase the limit to a level that reflects current prices, while still allowing for future flexibility?

Relevant Charter provision: Charter § 314.

Discussion: The single most effective way to remove red tape from the procurement system is to raise the dollar threshold of the streamlined, but competitive, small purchase procurement process. Under Charter § 314, the PPB and the Council may, by concurrent action, establish dollar limits under which procurements may be made without competition or public advertisement. Currently, the small purchase limits are $25,000 for goods and service; $50,000 for construction and construction-related services; and $100,000 for information technology. See PPB Rules § 3-08(a). However, as a result of the Council's resolution regarding the information technology limit, this higher limit is effective only until January 1, 2001. Id.

The current small purchase limits are unreasonably low, in light of the cost of goods, services, and construction. Procurements in excess of these limits may fairly be called "small purchases." However, the Council has so far refused to agree to increase the small purchase limit to an amount, such as $100,000 for all procurements, that reflects reasonable costs. Indeed, legislation to raise the limit to the level approved by the PPB on June 12, 1997 has languished in the Council for approximately two years. Therefore, it is necessary to specify a $100,000 limit in the Charter. Nonetheless, as future conditions may change costs sufficiently to warrant adjusting the limit either higher or lower, the Charter should retain the power of the PPB and the Council to revise the limit by concurrent action.

It is important to remember that small purchases are still subject to competition. PPB rules mandate that, for procurements worth over $2,500, at least five suppliers must be solicited at random from the appropriate small purchase bidders list and other sources of potential suppliers. PPB Rules § 3-08(d)(1)(iii). While no competition is required for procurements worth $2,500 or less, the agency must still ensure that the price is reasonable and that purchases are distributed appropriately among qualified buyers. PPB Rules § 3-08(d)(1)(ii). However, various formal procedural requirements are not required for small purchases and, therefore, small purchases can be processed quickly and efficiently.

It takes, on average, more than nine months to complete a purchase using the competitive sealed proposals method and more than four months using the competitive sealed bid method. A small purchase, on the other hand, can be processed in about two weeks. See Testimony of Beth Kaswan, former Director of the Mayor's Office of Contracts, before the City Council. The Commission estimates that, by making this single change to the Charter, the time that it takes to process approximately 14% of the City's annual procurement actions will be reduced by at least 88%.

Increasing the small purchase limit will help small City businesses, particularly those owned by women and minorities and based in the City. The City's small purchase process is inviting to bidders that have not learned how to navigate the City's procurement bureaucracy. Moreover, the City's "Bid-Match System" is tied to the small purchase system. Bid-Match is designed to encourage more participation in the procurement process by small firms and those owned by women and minorities. Under Bid-Match, when a City agency makes a small purchase, the agency must alert the Department of Business Services, which helps pair the agency with small vendors and vendors run by women or minorities. Since Bid-Match is tied to the small purchase limit, raising the limit will probably cause more of the City's small and women and minority-owned businesses to compete for City contracts. In fact, based on statistics from Fiscal Year 1997, the Commission estimates that increasing the small purchase limit to $100,000 would bring an additional 1,388 contracts, worth more than 74 million dollars, into the Bid-Match System.

Increasing the small purchase limits will also benefit the community-based not-for-profit organizations that depend on small City contracts to provide important community services. Procurement delays can be devastating to such an organization's cash flow. Such problems will be minimized if the small purchase levels are increased. Indeed, had the small purchase levels been at $100,000, over the past three years the Department of Youth and Community Development, for example, could have processed approximately 500 of its neighborhood and youth service contracts in a few weeks instead of ten months.

2. Procurement with Another Governmental Entity

Issue: Should the Charter contain a provision allowing the City to procure goods, services, or construction from, through or with another governmental entity without competition?

Relevant Charter provision: Charter § 316.

Discussion: Under some circumstances, it is in the City's best interest to purchase goods, services or construction from, through or with another governmental entity. Section 316 of the Charter provides that the City may, without competition, do so "through" the United States General Services Administration, any other federal agency, the New York State Office of General Services, or any other agency of the State of New York. Purchasing through a governmental entity means, in essence, that the City issues a purchase order to a vendor already in a contractual relationship with the other entity. However, the Charter does not contain a provision allowing the City to enter into a

contract with another governmental entity to procure goods, services or construction from that governmental entity without competition or, except in the limited circumstances in Section 316, to purchase through or with that entity.

The Charter should authorize such procurements. There are many situations where it is in the City's interest to acquire something directly from another government, such as when a government agency has acquired certain expertise in a given area. Moreover, the risk of collusion with private contractors does not exist with other governments. Governments, however, often do not enter into competitions for contracts. If the City does not have the flexibility to negotiate directly with the other government, the City cannot take advantage of the opportunities presented by dealing with that entity. Therefore, the Charter should authorize the City to enter into contracts directly with another governmental entity, and to purchase, without limitation, through or with that entity. Furthermore, consideration of the City's interests and the low likelihood of collusion lead to the conclusion that limitations regarding price currently contained in Section 316 are unnecessary.

3. Bid-deposit requirements

Issue: Should the Charter mandate specific requirements governing bid deposits?

Relevant Charter provisions: Charter §§ 313(c), (d).

Discussion: There is no reason such specific requirements should be in a short-form Charter. These types of basic procedural details are more appropriately the responsibility of the PPB.

4. Multi-Step Sealed Proposals

Issue: Should the Charter contain a provision allowing for "multi-step sealed proposals"?

Relevant Charter provision: Charter § 323.

Discussion: Under Charter § 323, "a preliminary request for proposals may be issued requesting the submission of unpriced offers." Submissions made in response to the request may then be used as the basis for competitive sealed bids or proposals, or competitive sealed bids or proposals from prequalified vendors. This section is completely unnecessary, because it adds nothing to the process that is not already present in the Charter. While the section is aimed at providing flexibility to a procuring agency in a situation where the agency is uncertain of the best approach to take regarding a particular procurement, the Charter already contains provisions that

would allow the agency to learn and act on any information it could get from the Section 323 mechanism. Charter Sections 319 and 320 (Competitive Sealed Proposals and Competitive Sealed Proposals from Prequalified Vendors) already allow the agency to negotiate with responsible offerors who submit proposals. Thus, there is no need for the section 323 mechanism of a second solicitation of bids or proposals following the submission of the unpriced proposals. Furthermore, the City's experience since this provision was adopted in 1989 indicates that it is unnecessary.

Proposal: The Charter should be amended to streamline the procurement process by eliminating detailed requirements concerning bid deposits and multi-step sealed proposals, raising the small purchase limit to $100,000 and making it easier for the City to procure goods, services or construction from, through, or with another governmental entity.

Proposed Charter Revision:

Section 1. Subdivision b of section 311 of the charter is amended to read as follows:

b. The board shall promulgate rules as required by this chapter, including rules establishing:

1. the methods for soliciting bids for proposals and awarding contracts, consistent with the provisions of this chapter;

2. the manner in which agencies shall administer contracts and oversee the performance of contracts and contractors;

3. standards and procedures to be used in determining whether bidders are responsible;

4. the circumstances under which procurement may be used for the provision of technical, consultant or personal services, which shall include but not be limited to, circumstances where the use of procurement is (a) desirable to develop, maintain or strengthen the relationships between nonprofit and charitable organizations and the communities where the services are to be provided, (b) cost-effective, or (c) necessary to (i) obtain special expertise (ii) obtain personnel or expertise not available in the agency, (iii) to provide a service not needed on a long-term basis, (iv) accomplish work within a limited amount of time, or (v) avoid a conflict of interest;

5. the form and content of the files which agencies are required to maintain pursuant to section three hundred thirty-four and such other contract records as the board deems necessary and appropriate;

6. the time schedules within which city officials shall be required to take the actions required by this chapter, sections thirteen hundred four and thirteen hundred five, or by any rule issued pursuant thereto, in order for contracts to be entered into, registered and otherwise approved , and recommended time schedules within which city officials should take action pursuant to any other provision of law or rule regarding individual contracts. The promulgation of rules defining time schedules for actions by the division of economic financial opportunity of the department of business services and the division of labor services of such department shall require the approval of each division, as such rule pertain to the actions required of such divisions, prior to the adoption of such rules by the procurement policy board;

7. such requirements for bid deposits as are necessary and practicable;

[7]8. procedures for the fair and equitable resolution of contract disputes; and

[8]9. such other rules as required by this chapter.

§ 2. Subdivision c of section 312 of the charter is amended to read as follows:

1. For the purposes of this chapter, the term "special case" shall be defined as a situation in which it is either not practicable or not advantageous to the city to use competitive sealed bidding for one of the following reasons:

i. specifications cannot be made sufficiently definite and certain to permit selection based on price alone;

ii. judgment is required in evaluating competing proposals, and it is in the best interest of the city to require a balancing of price, quality, and other factors;

iii. the good, service or construction to be procured is available only from a single source;

iv. testing or experimentation is required with a product or technology, or a new source for a product or technology, or to evaluate the service or reliability of such product or technology; [or]

v. it *is* in the best interest of the city to procure or order the good, service or construction from, through, or with another governmental entity; or

[v.]vi. such other reasons as defined by rule of the procurement policy board.

Section 3. Subdivisions c and d of section 313 of the charter are REPEALED:

[c. No bid shall be valid unless accompanied by a deposit in the amount and manner set forth and specified in the proposal; provided, however, that the procurement policy board shall establish such requirements for bid deposits as are necessary and practicable, and, pursuant to rules and standards, may waive the bid deposit requirement for specific classes of purchase or types of transactions. Upon the award of the contract the deposits of unsuccessful bidders shall

be returned to them, and the deposit of the successful bidder shall be returned upon execution of the contract and furnishing of the required security.]

[d. Every invitation for bids shall contain a provision that in the event of the failure of the bidder to execute the contract and furnish the required security within ten days after notice of the award of the contract, the deposit or so much thereof as shall be applicable to the amount of the award made shall be retained by the city, and the bidder shall be liable for and shall agree to pay on demand the difference between the price bid and the price for which such contract shall be subsequently relet, including the cost of such reletting and less the amount of such deposit. No plea of mistake in such accepted bid shall be available to the bidder for the recovery of the deposit or as a defense to any action based upon such accepted bid.]

§ 4. Section 314 of the charter is amended to read as follows:

§ 314. Small Purchases. Notwithstanding any other provision of this charter, the [procurement policy board and the council may, by concurrent action, establish] dollar [limits] limit for procurement of goods, services, or construction, [or construction-related services] that may be made without competition or without public advertisement shall be one hundred thousand dollars. The procurement policy board and the council may, by concurrent action, revise this dollar limit. Awards pursuant to this section shall be made in accordance with rules of the procurement policy board.

§ 5. Section 316 of the charter is amended to read as follows:

§ 316. Intergovernmental procurement. Notwithstanding any other requirement of this chapter,

a. any goods, services or construction may be procured, ordered or awarded through the United States General Services Administration, or any other federal agency [if the price is lower than the prevailing market price,] and

b. any goods, services or construction may be procured, ordered or awarded through the New York State office of general services, or any other state agency, [if the price is lower than the prevailing market price]

§ 6. Subdivision a of section 317 of the charter is amended to read as follows:

a. If, in accordance with section three hundred twelve, it is determined [an agency determines] that the use of competitive sealed bidding is not practicable or not advantageous to the city, [the agency shall select] the most competitive alternative method of procurement provided for by sections three hundred eighteen through three hundred [twenty-two] twenty-three which is appropriate under the circumstance shall be used. [Each agency contract file shall

contain documentation of such determination and of the basis upon which each contract is awarded, as is required by the procurement policy board]

§ 7. Section 323 of the charter is REPEALED and section 322 of the charter is renumbered as section 323. The charter is amended by adding a new section 322 to read as follows:

§ 322. Procurement from, through, or with another governmental entity. In accordance with section three hundred seventeen, any goods, services or construction may be procured or ordered from, through, or with another governmental entity.

§ 8. Subdivision a of section 325 of the charter should be amended as follows:

a. Pursuant to rules of the procurement policy board, each agency shall

1. for each category of goods, services or construction which is regularly procured by the agency, periodically publish in the City Record a notice soliciting the names of vendors interested in being notified of future procurement opportunities in each such category,

2. for each category of goods, services or construction for which the agency prequalifies vendors for future procurement, periodically publish in the City Record a notice soliciting the names and qualifications of vendors interested in being considered for prequalification for such category, and

3. publish in the City Record, and, where appropriate, in newspapers of city, state or national distribution and trade publications, notice of (a) the solicitation of bids or proposals pursuant to section three hundred thirteen and three hundred seventeen through three hundred [twenty-two] twenty-three, where the value of a contract is estimated to be above the small purchase limits, except where the agency has determined pursuant to section three hundred eighteen or three hundred twenty that solicitation should be limited to prequalified vendors;

(b) the award of a contract exceeding the small purchase limits in value. Each such notice of award shall indicate the name of the contractor, the dollar value of the contract, the procurement method by which the contract was let, and for contracts let by other than competitive sealed bidding, a citation of the clause of subdivision b of section three hundred twelve pursuant to which a procurement method other than competitive sealed bidding was utilized.

C. Improving the Integrity Assessment System

Issue: Should the Charter explicitly authorize a centralized integrity review of vendors through pre-qualification and other means, clarify the City's authority to deny specific contracts to corrupt businesses by eliminating the inflexible "debarment" provision, and leave the particulars regarding the process to be followed in such instances to the Procurement Policy Board?

Relevant Charter provisions: Charter §§ 318, 320, 324, 325.

Discussion: In 1996, a task force created by the PPB recommended that the City that centralize its system for evaluating contractor integrity. The task force suggested that a centralization experiment be attempted and that legislative reform follow any successful experiment to ensure implementation of a comprehensive program. The City's subsequent centralization experiment proved successful. However, as the task force expected, some corrupt contractors erroneously asserted (albeit unsuccessfully) that provisions of the Charter precluded such centralization. Accordingly, the Charter should be amended to clarify that a centralized integrity assessment program may be implemented in accordance with the task force's unanimous recommendation. Such a program should include the following elements: (1) replacement of the Charter's rarely-used provisions regarding debarment with a provision authorizing centralized contractor assessment; and (2) revision of the Charter's vendor pre-qualification provision to authorize centralization and make pre-qualification easier to use.

The Charter clearly authorizes agencies to find corrupt contractors non-responsible, even if such a finding has been made concerning the contractor on a prior occasion, and even if the contractor has not been "debarred" under section 335 of the Charter. It also clearly authorizes the Mayor to coordinate the contractor integrity assessment activities of the mayoral agencies. Nevertheless, some corrupt contractors have attempted to use provisions of the Charter, such as the debarment provision (section 335), as a shield against repeated non-responsibility findings. See, e.g., Matter of DeFoe Corp. v. Chapman, N.Y.L.J. (N.Y. Sup. Ct. Apr. 9, 1999). Moreover, they have argued that the Mayor may not advise agencies regarding contractor integrity matters. To prevent such needless litigation, the Charter provision regarding debarment should be eliminated and replaced with a provision clarifying that the Mayor may coordinate the integrity assessment activities of the mayoral agencies, and it should be left to the PPB to address such issues further through its rule-making authority.[6]

The centralized integrity initiative would also be enhanced if the Charter's provisions regarding prequalification are improved. The efficiency of governmental purchasing can be greatly enhanced by the use of prequalified lists. Using such lists, vendor qualifications can be evaluated before a procurement begins, i.e., before the time pressures that typically affect public purchases are felt. Moreover, where a centralized governmental authority creates lists for use by all of the governmental departments, information sharing is maximized.

Unfortunately, the Charter's provisions regarding pre-qualified lists do not achieve these benefits to the greatest possible extent. First, the Charter appears to mandate that each agency maintain a set of prequalified vendor lists. This level of direction by the Charter is inappropriate. The decision whether prequalified vendor lists should be maintained, and whether such lists should be maintained centrally or by individual agencies, belongs properly with the Mayor. Second, the Charter mandates that an agency determination to use competitive sealed bids or proposals from prequalified vendors be made in writing and be approved by the Mayor. The decision as to whether these types of procurements are ones that particularly require mayoral oversight is best left to the PPB.

The 1989 Charter Revision Commission believed that the use of prequalification, a concept new to the Charter (though not to City practice), might reduce competition – which we now know, from our experience since that time, it has not. [7]It appears that the 1989 Charter Revision Commission therefore included competitive sealed bids and proposals from prequalified vendors in the category of procurements for which it required a "second look" by the Mayor[8]. However, the 1989 Charter Revision Commission also acknowledged that one of the advantages of prequalification was that it made procurement more efficient by permitting evaluation of potential vendors' qualifications outside of a particular procurement[9]. This efficiency is reduced by the requirement of mayoral approval. Moreover, pre-qualification is not anti-competitive given that entry to a pre-qualified list is continuously open.

Proposal: The Charter should explicitly authorize a centralized integrity review of vendors through pre-qualification and other means, clarify the City's authority to deny specific contracts to corrupt businesses by eliminating the inflexible "debarment" provision and leave the particulars regarding the process to be followed in such instances to the Procurement Policy Board.

Proposed Amendments:

Section 1. Section 318 of the charter should be amended as follows:

§ 318. Competitive sealed bids from prequalified vendors. In accordance with section three hundred seventeen, bids may be solicited from vendors who have been pre-qualified for the provision of a good, service or construction pursuant to section three hundred twenty-four by mailing notice to each pre-qualified vendor or, if special circumstances require, to a selected list of pre-qualified vendors. Award of the contract shall be made in accordance with the provisions of section three hundred thirteen of this chapter. [A determination to employ selective solicitation for a particular procurement or for a particular category of procurement shall be made in writing by the agency, and approved by the mayor.]

§ 2. Section 320 of the charter should be amended as follows:

§ 320. Competitive sealed proposals from prequalified vendors. In accordance with section three hundred seventeen, proposals may be solicited from vendors who have been pre-qualified for the provision of a good, service or construction pursuant to section three hundred twenty-four by soliciting proposals from [mailing notice to] each pre-qualified vendor or, if special circumstances require, [to] a selected list of pre-qualified vendors. Award of the contract shall be made in accordance with the provisions of section three hundred nineteen. [A determination to employ selective solicitation for a particular procurement or for a particular category of procurement shall be made in writing by the agency, and approved by the mayor.]

§ 3. Subdivision a of section 324 should be amended as follows:

a. The mayor and any agency designated by the mayor may[Agencies shall] maintain lists of pre-qualified vendors. [and entry] Entry into a pre-qualified group shall be continuously available. Prospective vendors may be pre-qualified as contractors for the provision of particular types of goods, services and construction, in accordance with general criteria established by rule of the procurement policy board which may include, but shall not be limited to, the experience, past performance, ability to undertake work, financial capability, responsibility, and reliability of prospective bidders, [and which may be supplemented by criteria established by rule of the agency for the pre-qualification of vendors for particular types of goods, services or construction or by criteria published in the City Record by the agency prior to the pre-qualification of vendors for a particular procurement.] Such pre-qualification may be by categories designated by size and other factors.

§ 4. Section 335 of the charter is REPEALED and a new section 335 is added to read as follows:

§ 335. Centralized evaluation of contractor integrity, performance, and capability. The mayor may evaluate the integrity, performance, and capability of entities that contract with the city, are seeking to contract with the city, or may seek to contract with the city. The mayor may designate one or more agencies to participate in such efforts. The evaluations of the mayor and any agency designated by the mayor may include conclusions regarding whether the entity should be considered a responsible contractor. The mayor and any agency designated by the mayor may make such evaluations and conclusions available to agencies and the public through a centralized database.

D. Other Issues

1. Contract Registration

The Charter gives the Comptroller certain limited powers in connection with the registration of contracts. In most cases, a contract executed pursuant to the Charter may not be implemented until either the Comptroller registers the contract or fails to notify the Mayor within 30 days of it being filed that the Comptroller is declining to do so on the basis of one of the Charter's enumerated grounds. Thus, with two exceptions, the Comptroller must register a contract within 30 days of it being filed. The first exception is that the Comptroller may refuse to register the contract because the Comptroller has information indicating that: (i) there are insufficient appropriated funds to pay the estimated cost of the contract; (ii) a certification by the Mayor (regarding certain procedural requirements) or by Corporation Counsel (regarding the legal authority of the agency to award the contract) has not been made; or (iii) the proposed vendor has been disbarred. The second exception arises when the Comptroller has reason to believe that there was possible corruption in the letting of the contract or that the proposed contractor is involved in corrupt activity. In that circumstance, the Comptroller may object to the registration of the contract in writing to the Mayor. After responding to the objections, the Mayor may require registration despite the Comptroller's objections.

One subject that could be further studied is whether the City should continue to require contract registration. The Charter's provisions regarding registration have few parallels. The New York State Comptroller is the only other Comptroller in the nation that oversees the registration process and has the power to object to the registration of a contract. At the federal level, the Comptroller General may require that an agency not enter into a contract if bid protest is submitted.

However, this decision can be overruled by the agency. In every other municipality in the nation there is no pre-registration process that provides for review by the Comptroller.

Even if it is retained, the Comptroller's contract registration should not be abused. The theory supporting contract registration is that it provides the Comptroller with a bully pulpit to inform the public that the Comptroller believes a contractor is involved in corrupt activity or that there was corruption in the letting of a contract while preserving all accountability in the mayoralty. The Mayor's ability to request that the contract be registered notwithstanding the objection provides a check against the Comptroller, focuses accountability on the Mayor, and protects against interruptions of needed City services. This is the balance that the Charter clearly describes. The problem, however, is that the Comptrollers have found ways of circumventing their limited roles and disrupting the Charter's intent.

The problem is not new. Historically, New York City Comptrollers have used their registration function to interject themselves into policy questions in a manner that had never been intended. The 1975 Charter Revision Commission pointed out that

> There is a natural tendency for comptrollers to confuse their various roles and to use one course of influence in furtherance of other powers . . . . They have been known to hold up the registration of contracts for long periods of time to bolster policy positions or to challenge the decisions of other agencies or bodies[10] . . . .

The 1975 Charter Revision Commission addressed this problem by requiring registration within 30 days.

However, the problem continued to exist, and the 1989 Charter Revision Commission chose to revisit the issue in order to clarify the Comptroller's limited role. "In general, commissioners felt that comptrollers should confine themselves to fiscal issues and not play the wide-ranging policy and political role they often had during the Board of Estimate era. But on the registration of contracts, this line was not clear."[11] The question came down to whether the comptroller's function should be basically ministerial, i.e., limited to verifying the availability of funds, or whether the comptroller should have some policy discretion.[12] The compromise reached by the 1989 Charter Revision Commission called for the Comptroller's role to remain primarily ministerial (checking for sufficient funds, the appropriate certifications, and whether the proposed vendor has been disbarred), with discretion limited to simply raising the possibility of corruption[13]. This compromise (as currently set forth in the Charter) involved a "limited role for the comptroller," and "kept the policy goal of mayoral accountability intact."[14]

Nonetheless, problems have persisted since the 1989 Charter revision. First, the Comptroller has broadened the inquiry as to whether "the proposed contractor is involved in corrupt activity," Charter §328(c), into a wide-ranging evaluation of "integrity".[15] Indeed, the Comptroller has even maintained that he may infer "corruption" from nothing more than a contractor's poor past performance. Furthermore, the Comptroller has taken the position that the Comptroller may refuse to register a contract when the Comptroller has some legal objection to it, despite the fact that the Charter specifically provides for the Mayor to certify the process and Corporation Counsel to approve the contract. Charter §§ 327 and 328(b)(ii). The Comptroller's approach is inconsistent with the 1989 Charter Revision Commission's intent regarding the Comptroller's limited role and results in unnecessary delays.

For example, in 1997 mid-level bureaucrats at the Office of the Comptroller "rejected" five Department of Employment ("DOE") contracts claiming that the Office of the Comptroller was not provided with information that had been demanded. That same year, mid-level bureaucrats "rejected" another DOE contract for allegedly inadequate past performance. This year, the employees at the Office of the Comptroller's office refused to register approximately 50 contracts submitted by the Administration for Children Services' ("ACS") unless ACS agreed to provide the Office of the Comptroller with confidential documents.

The problem, however, is not with the Charter language. The current language is clear enough. The Comptroller should not have engaged in the conduct described above. Moreover, the situation can be ameliorated by the PPB. For example, PPB Rule 4-06(d) is inconsistent with the Charter's language regarding when the Comptroller's 30-day clock begins. Moreover, the PPB has the authority to direct that automated systems used in the registration process deem contracts registered 30 days after the contract is filed with the Comptroller in the event that the Comptroller takes no Charter-authorized action with respect to the contract.

Given that the Charter clearly prohibits the abuses that are currently taking place, and given that the PPB may be able to prevent such abuses, the Commission determined that it would be best to study this issue further. In the event that the Comptroller continues to evade the Charter's requirements regarding registration and thus to frustrate the intent of the 1989 Charter Revision Commission, it may be appropriate to revise the Charter to further limit or eliminate the Comptroller's contract registration role.

2. Further streamlining of the procurement process

There are several procedural provisions in the procurement chapter that appear to be inconsistent with the PPB's broad authority to promulgate rules governing procurement. For example, the Charter contains certain procedural requirements, both in general and for particular types of procurements, and for administrative appeals of various determinations. One could argue that the elimination of these specific procedural requirements would help to streamline the procurement process. Furthermore, the PPB has the expertise and mandate to determine these requirements. Although it may be appropriate for these procedures to be left to rulemaking by the PPB, elimination of these provisions would require further study.

3. Emergency procurements

Under the Charter, emergency procurements are not subject to competitive sealed bidding but instead require only such competition as is practicable under the circumstances. In addition, emergency procurements require the prior approval of the Comptroller and Corporation Counsel. When emergencies arise, the City must be able to act quickly and the Charter must reflect that need. It would be useful to consider whether the mandated prior approval is necessary or appropriate for emergency procurements. However, as amendment of the current provisions would be complicated, because they involve the interplay of the Comptroller, Corporation Counsel, and other mayoral agencies, this issue should be studied further.

4. Streamlining determinations whether to contract for services

Charter Section 312(a) sets forth a complex procedure to be followed when a proposed contract for technical, consultant, or personal services, valued at more than one hundred thousand dollars, will result in the displacement of any city employee. The process includes a cost/benefit analysis prepared by the procuring agency comparing the relative merits of providing the service in question with city employees versus entering into a contract with a vendor to provide the services, and the possibility of a Council hearing. This provision was added by Local Law, over Mayor Giuliani's disapproval, in 1994.

While the displacement of city employees is a serious matter, this intrusion by the Council into the province of the Mayor is burdensome and inappropriate. The current process is designed primarily to slow down procurements and has contributed generally to the overly lengthy time frame for City procurements. The Mayor is the City official responsible for making determinations whether to enter into any particular contract. As with other significant contracts (see, e.g., Charter 317(b) (regarding certain contracts for over two million dollars)), approval by

the Mayor should be sufficient oversight to ensure that the best interests of the City are served. However, as amendment of the current provisions would be complicated, this issue should be studied further.

ENDNOTES FOR SECTION VIII

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[1] In addition, GML § 104-b requires the City to promulgate rules to further the goals of that section. Under GML § 104-b(1), procurements that are not required to be made by competitive sealed bidding must nonetheless be done "in a manner so as to assure the prudent and economical use of public moneys in the best interests of the taxpayers . . . to facilitate the acquisition of goods and services of maximum quality at the lowest possible cost under the circumstances, and to guard against favoritism, improvidence, extravagance, fraud and corruption."

[2] Frederick A. O. Schwarz, Jr. & Eric Lane, The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter; Part II: The Structure and Processes of the New Government, 42 N.Y.L. Sch. L. Rev. 775, 881-882 (1998).

[3] Id. at 881.

[4] Frank Anechiarico & James B. Jacobs, Purging Corruption from Public Contracting: The "Solutions" Are Now Part of the Problem, 40 N.Y.L. Sch. L. Rev. 143, 170 (1995).

[5] See also. Frederick A. O. Schwarz, Jr. & Eric Lane, The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter; Part II: The Structure and Processes of the New Government, 42 N.Y.L. Sch. L. Rev. 775, 893-94 (1998).

[6] Section 328 of the Charter authorizes the Comptroller to notify the Mayor within 30 days of the date that a contract is filed for registration that "the proposed vendor has been debarred by the city in accordance with the provisions of section three hundred thirty-five." The Commission has not proposed deleting that provision because some contractors are presently debarred pursuant to proceedings previously conducted under that original section. Going forward, however, there will be no Charter-based debarment proceedings, and the "de facto" debarment defense (which never had any merit in any event) will no longer be available.

[7] See Structure and Processes, 42 N.Y.L. Sch. L. Rev. at 892.

[8] See id. at 887-88; Minutes of the NYC Charter Revision Commission, May 15, 1989, at 209-12; compare Charter § 319 (no mayoral approval required for determination to use open competitive sealed proposals).

[9] Structure and Processes, 42 N.Y.L. Sch. L. Rev. at 892

[10] Preliminary Report of the State Charter Revision Commission, at 57

[11] Frederick A. O. Schwarz, Jr. & Eric Lane, The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter; Part II: The Structure and Processes of the New Government, 42 N.Y.L. Sch. L. Rev. 775, 894 (1998).

[12] Id.

[13] Id. at 895-96.

[14] Id.

[15] See Frank Anechiarico & James B. Jacobs, Purging Corruption from Public Contracting: The "Solutions" are Now Part of the Problem, 40 N.Y.L. Sch. L. Rev. 143, 155-59 (1995).

PUBLIC SAFETY:
PROMOTING GUN SAFETY, PROTECTING OUR CHILDREN

SECTION IX

SECTION IX
PUBLIC SAFETY

A. "GUN FREE" SCHOOL SAFETY ZONES

B. SAFETY LOCKING DEVICES

IX. PUBLIC SAFETY

Over the past six years, public safety has been one of the City's top priorities. Since 1994, the City's overall crime rate has been reduced by 50 percent and its murder rate has been reduced by 70 percent. Once infamous around the world for its high crime rate, New York City has become the safest large city in America. Nevertheless, the recent deaths and injuries of children from gun violence at schools around the nation are causing local authorities here and elsewhere to reevaluate their public safety efforts to protect children from these horrors. The City has much experience in combating such problems. For instance, here in New York City we require that new shotguns and rifles be sold with safety locks, and we enforce "drug free" school safety zones. These steps in the right direction must be taken further to protect our children from gun violence. In the next century we must strive to provide an even safer City for our children's future.

A. "Gun Free" School Safety Zones

Issue: Should the Charter create "gun-free" school safety zones within 1,000 feet of every school in the City?

Relevant Charter Provisions: None.

Discussion: The tragedies at Columbine High School in Littleton, Colorado, at schools in Arkansas and Kentucky, and most recently at a Los Angeles pre-school, have shattered the notion that schools are safe havens for children. The City's schools are not immune to gun-related incidents. In the last eight months alone, the New York Police Department's School Safety Division reported 34 gun-related incidents in City schools. And, over that period, officers seized 17 handguns. To respond to these encroachments, and to prevent potential bloodshed at City schools, the Charter should be amended to protect all school children from the threat of violence created by the presence of guns in or around their schools.

Federal law currently purports to make it a crime to possess a gun within 1,000 feet of a school.[1] See Gun-Free School Zones Act, 18 U.S.C. § 922(q). The problem with the federal law, however, is that it is riddled with exceptions, including a general exception for all private property and for persons who have a license to carry a gun. See 18 U.S.C. § 922(q)(2)(B)(i) & (ii). As a result, the federal law, while recognizing that the integrity and safety of the nation's schools are urgent priorities, fails to go far enough in protecting the City's children. However,

federal law, by its terms, does not preempt the City from establishing its own gun-free school safety zone law. See 18 U.S.C. § 922(q)(4).[2]

State penal law currently bans possession of a firearm in a school or on school grounds. Penal Law § 265.01(3)(Class A misdemeanor). Possession of a firearm in a school or on school grounds by someone who has been previously convicted of any crime is a Class D felony. Penal Law § 265.02. The Commission believes that this proposal, to make it a misdemeanor to possess a gun within 1,000 feet of a school, is consistent with and furthers the intent of the State Penal Law to keep our children safe from the terrible risks posed by guns in our schools.

While school safety officers attempt to stop students and others from entering school property while carrying guns, their efforts will be aided by creating meaningful gun-free school safety zones. A gun-free school safety zone would prohibit the possession or discharge of any firearm within 1,000 feet of every school in the City, whether public or private. Unlike the federal law which provides broad exceptions to gun possession in school zones, only a limited number of exceptions to possession or discharge, such as possession of a gun for personal safety stored in a home or business, or possession of a gun by a law enforcement official, would be available. Such a law should help reduce gun-related injuries near or at our City's schools. Our children's safety depends upon it.

Proposal: The Charter should be amended to create "gun-free" school safety zones within 1,000 feet of every school in the City.

Proposed Charter Revision:

Section 1. The charter should be amended by adding a new Chapter 18-c to read as follows:

CHAPTER 18-C

PUBLIC SAFETY

§ 2. § 459. Definitions.

b. The term "school" means a public, private or parochial, nursery or pre-school, elementary, intermediate, junior high, vocational, or high school as determined by the penal law.

c. The term "school zone" means in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public, private or parochial elementary, intermediate, junior high, vocational, or high school, or within one thousand feet of the real property boundary line comprising any such school.

d. The term "weapon" means a firearm, rifle, shotgun, or assault weapon, as such terms are defined in section 10-301 of the administrative code, or a machine gun, as defined in penal law section 265.00.

§ 460. Gun-free school safety zones.

a. It shall be a crime for any individual knowingly to possess a weapon at a place that the individual knows, or has reasonable cause to believe, is a school zone.

b. Subdivision a of this section shall not apply where the weapon is:

(i) possessed and kept in such individual's home in a school zone, provided that such individual is licensed or permitted to possess such weapon; or

(ii) possessed and kept at such individual's business in a school zone, provided that such individual is licensed or permitted to possess such weapon.

c. Affirmative defenses to the crime established in subdivision a shall include possession of a weapon:

(i) carried for personal safety between such individual's business, home, or bank in a school zone, provided that such individual is licensed or permitted to possess such weapon;

(ii) just purchased or obtained by such individual and being transported that same day for the first time to such individual's home or business in a school zone where it will be stored, provided that such individual is licensed or permitted to possess such weapon;

(iii) carried between a police department facility for inspection and an individual's business, home, bank, or point of purchase in a school zone, provided that such individual is licensed or permitted to possess such weapon;

(iv) carried between a gunsmith for demonstrably needed repairs and an individual's business or home in a school zone, provided that such individual is licensed or permitted to possess such weapon;

(v) used in a safety program approved by a school in a school zone, or in accordance with a contract entered into between a school within the school zone and the individual or an employer of the individual, provided that such individual is licensed or permitted to possess such weapon.

d. It shall be a crime for any person, knowingly or with reckless disregard for the safety of another, to discharge a weapon in a school zone.

e. Affirmative defenses to the crime established in subdivision d shall include discharge of a weapon:

(i) by an individual for self-defense, provided that such individual is licensed or permitted to possess such weapon;

(ii) for use in a safety program approved by a school in a school zone;

(iii) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual.

f. Any person who violates this section shall be guilty of a misdemeanor, punishable by imprisonment of not more than one year or by a fine of not more than ten thousand dollars, or both.

g. In addition to the penalties prescribed in subdivision f of this section, any person who violates this section shall be liable for a civil penalty of not more than ten thousand dollars.

h. This section shall not apply to a police officer, as such term is defined in section 1.20 of the criminal procedure law, or a federal law enforcement officer, as such term is defined in section 2.15 of the criminal procedure law.

i. The police commissioner may promulgate rules implementing the provisions of this section. The police commissioner shall provide written notice of the requirements of this section to all persons who receive an official authorization to purchase a weapon and to all persons applying for a license or permit, or renewal of a license or permit. Failure to receive such notice shall not be a defense to any violation of this section.

j. The city of New York and its agencies, officers or employees shall not be liable to any party by reason of any incident or injury occurring in a gun-free school safety zone arising out of a violation of any provision of this section.

B. Safety Locking Devices

Issue: Should the Charter require that persons purchasing or obtaining firearms be required to purchase or obtain safety locking devices for each such firearm and to use such a safety locking device when storing such firearm, or else face criminal penalties?

Relevant Charter Provisions: None

Discussion: Each year, many lives are lost because of gun-related violence and negligence. In 1998, for example, more than half of the City's murders resulted from gun-related violence. Children are particularly at risk. Firearms are the leading means of suicide by young people between ages of 15 and 19. And, according to the American Academy of Child and

Adolescent Psychiatry, gun accidents are the fourth leading cause of death for children under age fourteen.

Since the accidental death of 11-year-old Christopher Murphy, who shot himself with a neighbor's gun in 1997, the City has taken steps to eliminate the ability of children and other unauthorized persons to access and use firearms. In 1998, the Council responded to Christopher's tragic death by passing Local Law 21, known as "Christopher's Law" and currently codified at Administrative Code § 10-311 and RCNY, Title 38, Chapters 1-5. The law makes it illegal for any person or business to "dispose of any pistol or revolver which does not contain a safety locking device." Locking devices are mechanisms that prevent an unauthorized person from firing a weapon, meaning a gun's trigger cannot be pulled without the user first unlocking it with a key or combination. Thus, if a child comes into contact with a weapon that is properly secured by a safety locking device, the child is not able to discharge that weapon and the threat of harm to the child and to other persons is diminished.

While "Christopher's Law" was a step in the right direction to address the problem of accidental deaths and irresponsible use of firearms, the law needs to be much stronger to be effective. Currently, although safety locking devices must be sold to gun purchasers, the law does not mandate the use of such devices or impose criminal sanctions for violations. However, while the legislation has been introduced in the Council to require the use of safety locking devices on all firearms in the City and impose criminal sanctions on persons who violate the law, the Council has not acted. The Charter should therefore be amended to ensure that the City's children are protected from accidental or intentional gun violence.

Proposal: The Charter should be amended to require that persons purchasing or obtaining firearms be required to purchase or obtain safety locking devices for all firearms at the time purchased or obtained, and to use such a safety locking device when storing all firearms or else face criminal penalties.

Proposed Charter Revision:

§1. The charter is amended by adding a new chapter 18-C to read as follows:

§ 459. Definitions.

a. The term "safety locking device" means a design adaptation or attachable accessory that will prevent the use of the weapon by an unauthorized user, and includes, but is

not limited to a trigger lock, which prevents the use of the weapon without the alignment of the combination tumblers.

d. The term "weapon" means a firearm, rifle, shotgun, or assault weapon, as such terms are defined in section 10-301 of the administrative code, or a machine gun, as defined in penal law section 265.00.

§ 461. Safety locking devices.

a. Any person who applies for and obtains authorization to purchase a weapon, or otherwise obtains a weapon pursuant to local law, shall be required to purchase or obtain a safety locking device at the time he or she purchases or obtains the weapon.

b. It shall be unlawful for any person or business to give away, give, lease, loan, keep for sale, offer, offer for sale, sell, transfer or otherwise dispose of a weapon, which does not contain a safety locking device.

c. It shall be unlawful for any person to store or otherwise place or leave a weapon in such a manner or under circumstances that it is out of his or her immediate possession or control, without having rendered such weapon inoperable by employing a safety locking device.

d. Any person who violates subdivision a, b or c of this section shall be guilty of a violation, punishable by imprisonment of not more than ten days or by a fine of not more than two hundred fifty dollars, or both.

e. Any person who violates this section having previously been found guilty of a violation of such section, or under circumstances which create a substantial risk of physical injury to another person, shall be guilty of a misdemeanor punishable by imprisonment of not more than six months, or by a fine of not more than five thousand dollars, or both.

f. Any person who violates this section having previously been found guilty of a misdemeanor pursuant to such section shall be guilty of a misdemeanor punishable by imprisonment of not more than one year, or by a fine of not more than ten thousand dollars, or both.

g. In addition to the penalties prescribed in subdivisions d, e, and f of this section, any person who violates this section shall be liable for a civil penalty of not more than five thousand dollars.

h. This section shall not apply to weapons owned or lawfully possessed by a police officer, as such term is defined in section 1.20 of the criminal procedure law, or a federal law enforcement officer, as such term is defined in section 2.15 of the criminal procedure law.

i. The police commissioner shall promulgate rules implementing the provisions of this section. The police commissioner shall provide written notice of the requirements of this section to all persons who receive an official authorization to purchase a weapon and to all persons applying for a license or permit, or renewal of a license or permit. Failure to receive such notice shall not be a defense to any violation of this section. The city of New York and its agencies, officers or employees shall not be liable to any party by reason of any incident or injury arising out of a violation of any provision of this section, or arising out of the use or misuse of, or involving, a safety locking device.

ENDNOTES FOR SECTION IX

[1] The increased importance of areas around schools has already been recognized. Federal and state law, for example, provide heightened penalties for those who possess or distribute drugs within 1,000 feet of a school.

[2] The federal law was initially struck down in U.S. v. Lopez, 514 U.S. 549 (1995), on Commerce Clause grounds. The Court found that, in enacting the law, Congress failed to find a "nexus" between the presence of guns in school zones and interstate commerce. Thereafter, to validate the law, Congress made findings to satisfy the nexus test and codified them at 18 U.S.C. § 922(q)(1)(A)-(I). The Court's decision turned on issues wholly unrelated to the City's ability to establish its own gun-free school safety zone law.

APPENDIX A

Summary of Comments of Elected Officials

The Commission has considered and will continue to consider these elected officials' proposals in the future.

Summary of Comments of Elected Officials

CITY ELECTED OFFICIALS

Public Advocate Mark Green

(August 5, 1999: Transcript p. 16)[1]

Believes that the special election proposal would repudiate the precedent of five Charter revision commissions retaining the current system of succession and would risk a disruptive series of campaigns and transitions.

Opposes the special election provision and urges that the Commission withdraw its proposals.

(August 26, 1999: Transcript p. 4)

Opposes special election provision and believes it is wrong to change the rules midterm.

Believes it is wrong to combine unrelated proposals into one referendum.

Comptroller Alan Hevesi (Written Testimony Submitted August 12, 1999)

Provided a detailed memorandum regarding the 40 items originally proposed, which reflected varying levels of support and opposition.

City Council Speaker Peter Vallone (August 5, 1999: Transcript p. 29)

Believes that the land use and budget recommendations are an attempt to centralize power in the executive branch.

Believes that the mayoral line of succession should be clarified. The Speaker proposes that after the 2001 election, a Vice Mayor position be created. The Vice Mayor would serve as the Mayor's successor, be elected in a general election with the Mayor and hold office for the same term.

Believes that the City needs an Independent Police Investigation Board.

Queens Borough President Claire Shulman (August 5, 1999: Transcript p. 8)

Supports civil rights and immigrant affairs proposals, as well as the idea of a Vice-Mayor.

Believes that the Charter should be amended so that Borough Presidents pre-certify projects for ULURP.

The Franchise Concession Review Committee's jurisdiction should be expanded to include all City Contracts over $100,000 and all contracts awarded by methods other than sealed bid or emergency procurement. Committee members would include the Mayor, the Council, the Speaker, the Comptroller and the Borough President.

Construction contractors should be pre-qualified with bids accepted only from firms that have passed scrutiny from FCRC.

One contractor should not be awarded more than two major construction contracts at one time to prevent over-extension.

For service contracts, the organization's track record should be a larger consideration than the quality of the written proposal.

The 5% of the non-mandated increase in the expense budget that is allocated to the Borough Presidents should be a baseline amount.

Supports special election proposal.

Staten Island Borough President Guy Molinari (August 9, 1999: Transcript p. 4)

Supports the budget recommendations for their focus on fiscal restraint.

Supports the special election proposal because it gives the citizens of New York the power to vote on whom they want to succeed the mayor.

Brooklyn Borough President Howard Golden (August 11, 1999: Transcript p. 4)
(Testimony read into the record by Jeanette Gadson)

Believes that the current procurement process does not provide an opportunity for elected officials to have input into the scope of service until the public hearing prior to award (too late in the process to be meaningful).

Criticized the fact that the only scrutiny for contracts above $10,000 is at agency contract hearings and that the only notice of the hearings is published in the City Record.

The Charter should require agency heads to send a copy of the scope of service for any contract $250,000 and above to the affected Borough President for review and comment at least 20 days prior to the sending of public notices or solicitation.

Proposed the establishment a Procurement Franchise and Concession Review Committee in place of the current structure. This Committee would consist of the Mayor, Corporation Counsel, Office of Management and Budget, the Comptroller and the Borough Presidents.

The ULURP process is lengthy; particularly pre-certification review.

Elected officials should have the opportunity to review citings of City funded programs that are not located on City property (§ 197c)

Explicit pre-certification standards should be adopted with DCP mandated to certify a ULURP application within 60 days.

The voting structure of Borough Boards should be changed under § 95-D from quorum to a simple majority of all members present for a Borough Board vote.

The budget staff proposals (5% cap; supermajority and BSA) give the Mayor significant power and limit the power of the Council to legislate the budget. Removing the Council from the process would deny the public an opportunity to be heard and to influence the outcome.

While it makes sense to eliminate small spaces from CPC and Council review, siting of larger City office space is a useful economic development tool and should remain subject to the current review.

Land use proposal would eliminate important land use powers of the Council and would erode the public participation in the land use review process.

Manhattan Borough President C. Virginia Fields (Testimony read into the record by David Addams)

(Aug. 12, 1999: Transcript p. 14)

The Borough President strongly urges the Commission not to put any recommendations relating to mayoral succession, non-partisan elections or full-time service of the City Council before the voters this November.

The role of the Borough President in the budget process should be enhanced with respect to formulating the executive budget under § 244. There should be consensus between the Mayor and Council on executive budget revenue estimates before budget adoption.

Opposes the 4% cap and the separate $50 million fund for Mayoral educational initiatives.

The Borough President endorses the proposals made by Borough Presidents Golden and Shulman that would give Borough Presidents a 20-day period to review and propose changes to City contracts of more than $250,000.

On land use, the Borough President believes that the problem of delays in the pre-certification process merit review by the Commission.

There should be no change in the land use review process to alter the delicate and appropriate balance that now exists between the Community Boards, the Borough Presidents, the Planning Commission, the Council and the Mayor.

Believes that the Administration for Children's Services, the City Human Rights Commission and the Mayor's Office of Immigrant Affairs and Language Services should become Charter agencies.

Bronx Borough President Fernando Ferrer
(August 10, 1999: Transcript p. 17)

Believes that the 1999 Charter Revision Commission does not give New Yorkers a fair opportunity to participate. Public forums during July and August span too brief a period of time. The summer schedule discourages attendance and discussion. In addition, hearings and meetings have been at sites that are inaccessible to those without a car.

The Council has already rejected the merger of Department of Mental Health and Department of Health.

There should be an independent Civilian Complaint Review Board that is baselined in the budget as a percentage of the NYPD budget. Appointed Civilian Complaint Review Board members should be more reflective of the City and less controlled by one branch.

Believes that mayoral rate-setting boards and authorities should be barred from imposing budget allocations unless the Council grants the authority explicitly.

Budgeting for the delivery of City services, where appropriate, should be by borough and community district.

The preparation of the Mayor's Management Report should be shifted to the Independent Budget Office and should be renamed the Independent Management Report.

Recommends including Borough Presidents, Council Members and Community Boards in the formulation of rules defining and governing major concessions in public spaces.

The Council should be empowered to review Board of Standards and Appeals dispositions, a power once held by the Board of Estimates but not passed on by the 1989 Commission to the Council.

The proposals should not be presented to the voters as a package.

(August 26, 1999: Transcript p. 31)

Proposes delaying special election proposal until the next election cycle.

Believes that the other proposals should be enacted through the legislative process.

Council Member Lucy Cruz (August 10, 1999: Transcript p. 37)
(Testimony read into the record by Laura Valerno)

The Councilwoman opposes the Commission.

Council Member Noach Dear (August 9, 1999: Transcript p. 27)

Supports the proposal that election be held within 60 days should the Mayor's office be vacated during his or her term.

Supports the civil rights, immigrant affairs and government integrity recommendations in their entirety.

Agrees with the recommendation to require Council members to serve full time.

Supports the establishment of the Mayor's Commission to Combat Family Violence as a permanent charter agency.

Council Member Stephen Dibrienza
(August 5, 1999: Transcript p.66)

Believes that certain Commission proposals could be crafted more appropriately in the legislative realm.

Believes that August is the most undemocratic month to hold hearings.

Claims that the land use proposal would exclude Council from roles in approving applications. Believes that impact would be to disenfranchise citizens and neighborhoods.

Criticizes the fact that the special election proposal would go into effect immediately.

(August 26,1999: Transcript p. 24)

Believes proposals should not be combined into one referendum.

Council Member June Eisland (August 10, 1999: Transcript p. 5)

Believes that the recommendation that the Council review special permits granted by the City Planning Commission (CPC) only if CPC approved the permit by less than a 2/3 majority, addresses a problem that does not exist. The Council calls up fewer than seven special permits per year and, on average, makes changes to one per year.

States that the proposal to give the Mayor the option to veto either the entire council action on a CPC decision or only the Council's modification would alter the fundamental balance of power between the two sides of City Hall and should be rejected.

Believes that the proposal to permit the Council to review only those portions of applications that have been approved by CPC decreases Council authority.

Opposes the proposal to remove CPC from review of leases for City office space.

Emphasizes that ULURP process is a necessary part of the system of checks and balances including the Community Boards, the Borough Boards, the Borough Presidents and the City Council.

The pre-certification process on projects before the CPC could be improved.

With respect to succession, nothing should be done until after the 2001 election.

Opposes the consolidation of the Department of Mental Health with the Department of Health.

Council Member Ronnie Eldridge (August 12, 1999: Transcript p. 18)

Opposes the Commission's plan to place a referendum on the ballot this November, citing the fact that this is an off year election.

Believes the Commission is composed of friends and colleagues of the Mayor.

Council Member Stephen Fiala (August 9, 1999: Transcript p. 11)

Opposed 1989 Charter Commission but liked the fact that it gave the Council expanded powers concerning land use. Therefore, he opposes this Commissions recommendations regarding land use, which he believes dilute the Council's power.

He agrees with the proposal to hold a special election for Mayor within 60 days of a vacancy. The proposal would bring the mayoralty in line with all the other city elected offices.

Supports the abolition the Office of Public Advocate. He would like to make the first deputy mayor or a vice-mayor next in the line of succession, then have a special election in 60 days.

He also supports the proposal for full time Council. The job of Council member has become more complex over the years and requires more time.

Council Member Kenneth Fisher (August 11, 1999: Transcript p. 48)

Criticizes budget caps as artificial because they can be lifted by the same officials who impose them.

Urges the Commission not do by Charter what should be done legislatively.

Believes there would be too many elections and/or Mayors in one year under the proposed scenario. (One Mayor ends in December, another from January to February; an election in March then in November.)

Council Member Katherine Freed (August 11, 1999: Transcript p. 68)

Believes the hearing locations are inaccessible. Believes that hearings should not be held in August when people are away.

The Council's powers on land use should not be reduced, specifically the power to review special permits.

Believes that the budget proposals give the Mayor too much power.

Believes that this Charter revision is an end run around the local law process.

Criticizes the special election proposal because she believes that it would change the rules in the middle of the game.

Urges the Commission not to make any recommendations this year.

Council Member Martin Golden (August 11, 1999: Transcript p. 23)

The Commission should establish a process where pay increases take effect following the next municipal election. The State Constitution bars the legislature from voting itself a raise that takes effect during the same session.

When a vacancy occurs, the voters should determine person the best qualified to fill the vacant office. Therefore, he believes that the Charter should be revised to provide that a special election be held within 60 days to fill any vacancy that may occur in the office of the Mayor, Public Advocate, Comptroller, Borough President and members of the City Council.

Council Member Sheldon Leffler (Written Testimony Submitted August 3, 1999)

Believes the process is too rushed and is disrespectful of the Charter and the electorate.

Feels that the government decision making process should be brought closer to the community, particularly in the areas of land use and procurement. Supports the creation of borough planning units.

Council Member Stanley Michels (August 12, 1999: Transcript p. 20)

Believes that the hearings are not accessible.

Believes that special elections have historically produced low turnouts. The Mayor should not be elected with a low turnout.

The Public Advocate is elected on a citywide basis. He has popular support and people are aware that he is the person next in line to become Mayor.

Believes that the imposition of the 4% spending cap is an effort to shift power to the Mayor. The cap would place a restriction on the Council's budget authority.

Opposes mandating 50% of a budget surplus be placed in a stabilization.

Opposes the supermajority tax proposal.

Opposes allowing the Mayor control of 1% of the Board of Education's budget.

Opposes the creation of non-partisan elections.

Council Member James Oddo: (August 9, 1999: Transcript p.20)

Supports full-time council members. The job has grown more complex over the years and to do it correctly the Council member needs to devote his full attention to the job.

Supports the special election proposal.

He also supports the abolition of the Office of the Public Advocate.

Council Member Jerome O'Donovan (August 9, 1999: Transcript p. 47)
(Testimony read into the record by Chris Benton Marzo)

Believes it is extremely important to maintain a balance of power between the City Council and the Mayor.

Does not support changes that would diminish the power of local elected officials.

Council Member Thomas Ognibene (August 5, 1999: Transcript p. 31)

Believes that Council members and the Mayor should be elected on a non-partisan basis.

Council Member Mary Pinkett (August 11, 1999: Transcript p. 30)

Believes that the supermajority proposal would constrict the freedom of the Council to act. The Mayor should not tell the Council how to act.

Believes committee heads work hard and should be paid more.

Believes that the proposed ULURP changes minimize the role of the Council.

Council Member Kathleen Quinn (August 12, 1999: Transcript p.135)
(Testimony read into the record by Maura Keaney)

Opposes the land use proposals made by the Commission.

Council Member Angel Rodriguez (August 11, 1999: Transcript p.114)

Opposes changes to the succession rules.

Believes the budget and land use proposals seek to shift power from the Council to the Mayor.

Council Member John Sabini (August 5, 1999: Transcript p. 38)

Believes that the contracting process does not work effectively because there is not enough public participation.

Believes that the City's planning and land use efforts are working well. Opposes any changes.

Urges the Commission to look closely at limiting the outside income of the Council members.

Believes that pay raises should take effect prospectively.

Council Member Archie Spigner (August 5, 1999: Transcript p. 79)

Supports the Commission's proposal to elevate the Human Rights Commission to a Charter agency to reinforce the City's commitment to opposing unlawful discriminatory practices.

Opposes the Commission's budget and land use proposals.

Believes that the proposal to change the budget modification procedure to 5% or $100,000, whichever is greater, would eliminate the Council's ability to control spending changes in important programs and services. The proposal to increase the vote needed by the Council to increase taxes also restricts the Council's powers.

Believes that limiting Council review to only those special permits that were passed by the City Planning Commission by less a than two-thirds majority may place the needs of the affected communities in jeopardy.

Believes that the Council should retain the power to review leases for office space and should be able to approve applications.

Succession should not be changed.

Opposes the equal pay proposal because it would decrease the control of the leadership.

Council Member Larry Warden (August 10, 1999: Transcript p. 31)

Believes that the merger of the Department of Health and the Department of Mental Health is a mistake.

States that the Public Advocate or the President of the City Council has been in the line of succession for 168 years.

Believes that the Council's land use powers should not be reduced.

Council Member Priscilla Wooten (August 11, 1999: Transcript p. 37))

Supports the special election in the event of a mayoral vacancy.

STATE ELECTED OFFICIALS

Comptroller H. Carl McCall (Written Testimony Submitted August 11, 1999)

Urges the Commission to reconsider plans to place proposals on November ballot. Recommends the extension of the public comment period.

Senator Vincent Gentile (August 9, 1999: Transcript p. 23)

Opposes any changes proposed by this Charter Commission.

Senator Carl Kruger (August 11, 1999: Transcript p. 61)

Believes the mandate relief proposal would allow the Mayor to nullify any law passed by the Council, simply by claiming that the Council had not properly funded it.

States that the Comptroller's authority to stop a City contract from going ahead is an important independent check against abuse and corruption.

Believes that the proposals would also restrict the ability of the Community Boards to deal with zoning and other land use issues.

Opposes the non-partisan election proposals.

Opposes the merger of Department of Mental Health with the Department of Health.

Believes that granting charter status to the Human Rights Commission, the Administration for Children's Services, and the Mayor's Office of Immigrant Affairs and Language Services are worthwhile ideas but do not require a referendum.

Assembly Member Joan Millman (August 11, 1999: Transcript p. 42)

Opposes the special election proposal.

Believes that the budget, land use and procurement changes all limit the power of the Council.

Opposes the merger of the Department of Mental Health with the Department of Mental Health.

Opposes the proposal to remove the Council from the ULURP process when the City Planning Commission approves a special permit with a 2/3 vote.

Assembly Member John Ravitz (August 12, 1999: Transcript p. 7)

Supports Commission's decision not to change the line of mayoral succession.

Supports the special election proposal.

Assembly Member Steve Sanders (August 12, 1999: Transcript p. 4)

Believes there is not enough time for public comment.

Believes that the Charter should be amended so that no future Mayor will be able to convene a Charter Revision Commission more than once in a four-year term without the concurrence of a two-thirds vote of the City Council.

Assembly Member Robert Straniere (August 9, 1999: Transcript p. 39)
(Testimony read into the record by Raymond Fasano)

Generally supports the budget proposals made by the Commission. Specifically supports the allocation of a percentage of the Board of Education budget for discretionary use by the Mayor.

Generally supports the land use recommendations, but believes that land use issues should be decided by local elected officials.

Assembly Member Scott Stringer (August 11, 1999: Transcript p. 53)

Believes sixty days after a mayoral vacancy occurs is not enough time for an election.

Believes that the role of the Office of the Public Advocate should be strengthened.

FEDERAL ELECTED OFFICIALS

Congressman Elliot Engel (August 10, 1999: Transcript p. 34)
(Testimony read into the record by Joseph O'Brien)

Believes that the proposals deserve more time for consideration.

Believes that there should be a review of the proliferation of motels in the Bronx.

Congressman Vito Fosella (August 9, 1999: Transcript p. 34)
(Testimony read into the record by Sherry Diamond)

Believes that the system of checks and balance between the Mayor and the City Council should be strengthened. This could be accomplished either through the use of a 2/3rds super-majority vote in the City Council to raise or impose new taxes and/or raising the super-majority vote to 4/5ths of the City Council to override a Mayoral veto.

Supports the special election proposal.

ENDNOTES FOR APPENDIX A

[1] The Transcript page numbers refer to the Commission's Public Hearings that occurred on the following dates in the specified locations:

AUGUST 5, 1999
Queens Borough Hall
120-55 Queens Blvd. Jury Room, Queens

AUGUST 9, 1999
The Petrides Center
715 Ocean Terrace, Staten Island

AUGUST 10, 1999
Calvary Hospital
1740 Eastchester Road, Bronx

AUGUST 11, 1999
Fire Department Auditorium
9 Metrotech Center, Brooklyn

AUGUST 12, 1999
Cabrini Hospital Center
227 East 19th Street
16th Floor Cafeteria, Manhattan

AUGUST 26, 1999
Fire Department Auditorium
9 Metrotech Center, Brooklyn

APPENDIX B

Summary of Public Proposals Received by the 1999 Charter Revision Commission Through August 31, 1999

SUMMARY OF PUBLIC PROPOSALS

The 1999 New York City Charter Revision Commission received many public comments between June 30, 1999 and August 31, 1999. Many of the letters and e-mail received contained general issues for investigation by the Commission as well as substantive proposals for Charter revision.

This document summarizes the public proposals and categorizes them by the issue areas addressed in the Commission's Final Report. Those issue areas include budget, civil rights, elections, government integrity, government reorganization, immigrant affairs, land use, procurement and public safety. Some issues addressed in the public proposals fell outside the purview of these categories or the Charter in general. All public proposals were reviewed and considered by the Commission.

Budget

Comptroller

- Charter §§ 102 and 211 should be amended to require the Comptroller to clarify the borough allocations of 5% discretionary increases in the expense budget and 5% of the capital budget.

Independent Budget Office

- The Independent Budget Office should be preserved in its current form for the following reasons: it is independent from the Mayor and private donors; it has improved debate on public issues; its decisions serve the public interest and are unbiased; and it provides the public with critical, non-partisan information.

Civil Rights

- The Charter should be amended to permit marriage among gays, lesbians and bisexuals.

Elections

Mayoral Succession

- The line of mayoral succession should be changed, but not be effective immediately.
- A Mayor who is unable to serve his or her full term should be succeeded by another elected official from the same political party.
- An office of Vice-Mayor should be created, and should succeed to the mayoralty.

- The will of the people, as shown in an election, should be continued through to the end of the term. This could be implemented by having the First Deputy Mayor as first in line for mayoral succession.

City Council

- City Council members should be elected based on proportional representation.
- City Council members should have both longer and staggered terms to prevent situations of almost complete Council turnover after a single election.

Government Integrity

Campaign Finance Reform

- No changes should be made to the Campaign Finance Board. Many improvements were made last year and no further changes should be considered until last year's changes have been tested through an election cycle.
- The Voter Guide should identify times when candidates will appear on television. Candidates should be afforded time to address the voters on Crosswalks.

Community Boards

- Community Boards should be examined to ensure that they represent the communities they serve.
- Community Board members should be elected and members should be subject to enhanced financial disclosure and conflict of interest scrutiny.

Financial Audits

- A firm of CPAs should perform an annual "full-scope" audit, and only be able to perform it for four years instead of the eight currently provided for in the Charter.

Access to Government Information

- The cost for copies of public documents should be reduced.
- Computer records should be printable, not just read-only.
- The Charter should be amended to make it mandatory for agency heads to provide requested information to elected officials with reasonable promptness. Failure to provide the information would be a misdemeanor.

Borough Board Voting Procedures

- Borough Board voting procedures in Charter § 85-d should require only simple majority of members present.

Government Reorganization

Proposed Organized Crime Control Commission

- The Commission should not create an Organized Crime Control Commission to combat and eradicate organized crime infiltrating legitimate businesses. The authority for this should remain with the law enforcement agencies.

Taxi & Limousine Commission

- The Commission should clarify that the TLC has the authority to make decisions about licensing drivers, vehicles and businesses regulated by the Commission without interference by the City Council.

Public Advocate

- Various comments suggested that the office provides good information and serves the public interest.

OATH (Office of Administrative Trials and Hearings)

- The Chief Administrative Law Judge should have authority to take budgetary action and OATH should be established as a separate Charter agency.
- The Chief Administrative Law Judge should have a five year term of office upon appointment by the Mayor.
- Eligibility for the positions of Chief Administrative Law Judge and Administrative Law Judge should be increased from five to ten years after admission to the practice of law.
- All administrative law judges, including the chief, should receive the same annual salary that is paid to a judge of the civil court of the City of New York.
- The Chief Administrative Law Judge should receive an additional $20,000 annual salary.
- OATH should have exclusive authority to adopt rules for its proceedings and the Chief Administrative Law Judge should have the authority to adopt rules as appropriate to implement the imposition of sanctions.

Education

- A general overhaul of the Board of Education was suggested with no formal proposal.

Land Use

- Pre-certification standards should be adopted to make the uniform land review process (ULURP) more efficient. If applicants meet the standards, city planning should be mandated to certify the ULURP application within 60 days.

- Charter § 197-c should be amended to include the review of "city funded programs" within ULURP. This will require a review under ULURP of City funded programs that are not located on city-owned or leased property.
- Charter § 203-a should be amended to include the consideration of "non-City facilities," in addition to City facilities, to determine the fair distribution among communities for the location of city facilities.
- Charter § 204-a should be amended to require the inclusion of data and information regarding non-city facilities in the Mayor's Citywide statement of needs.
- Development of excessively tall buildings in mid-town Manhattan should be regulated.
- The management of street architecture, peddlers and cafes should recognize the evolution of neighborhoods.

Procurement

- A number of letters were received on the procurement process calling into question the organization, flexibility and speed of the process.
- Procurement should be done exclusively by competitive bidding even when it has been determined that there is only one source for a good, service or construction.
- The City Record's solicitation of names and qualifications of vendors interested in being considered for pre-qualification for each category should be printed six times a year, instead of "periodically."
- *Diamond Asphalt v. Sander, 92 N.Y.2d 244 (1988),* where the Court of Appeals ruled that as a matter of State law, the City cannot include private utility interference work in its contracts, should be overruled. Thus, the Mayor should have sole responsibility under the Charter to bypass selection of responsible bidders; and private utility work that is done as part of a street reconstruction project should be considered "public work."
- Agency heads should be required to send a copy of the scope of services or the specifications for any procurement of $250,000 or more to the affected Borough President for review and comment at least 20 days before the publication of any notice of intent or notice of solicitation for the procurement, except in cases of emergencies.
- A Procurement, Franchise and Concession Revision Committee (PFCRC) should be established instead of the current Franchise and Concession Review Committee. The PFCRC would consist of the Mayor, Corporation Counsel, the Director of OMB, the

Comptroller, and the affected Borough President. A PFCRC would approve awards regarding non-publicly advertised and non-competitively sealed bids after a public hearing for contracts of $250,000 and above, concessions with revenues of $100,000, and franchises. The PFCRC's approval would be needed to execute the contract.

- The number of public notices and hearings concerning the awarding of contracts should be increased to gain more public input.

Examples of Other Suggestions

- Charter § 1117, which prohibits retirees from being employees of the City unless pension payments are suspended, should be reexamined and possibly changed to avoid an effective "anti-work" or "anti-employment" policy for City retirees.
- Administrative Code Title 13-182 should be repealed to prevent arbitrary and retroactive pension cuts if the New York City Employee Retirement System makes a mistake in calculating pensions.
- The Electrical Code for Multiple Dwellings should be updated.
- The minimum qualifications for building inspectors should be changed.
- The word "taxpayer" should be changed to "member of the public" in all parts of the Charter.
- The Parks Commissioner should be responsible for all trees in "public spaces." More trees should be planted and more attention should be paid to the kinds of trees planted to prevent rampant spread of disease.
- There should be more public toilets.
- Marijuana should be decriminalized

APPENDIX C

Ballot Question

BALLOT QUESTION

Proposal Recommended By The
New York City Charter Revision Commission
September 1, 1999

Question 1 – Charter Change
Should the changes to the City Charter, as proposed by the Charter Revision Commission, be adopted? Among these changes are:

- creating "gun free" school safety zones within 1000 feet of every school in the City, and requiring people purchasing or obtaining firearms to purchase or obtain safety locks for all firearms and to use safety locks when storing all firearms;

- creating a budget stabilization and emergency fund out of City surpluses to fund emergency needs or other needs as determined jointly by the Mayor and the City Council and, if not spent, to prepay debt; limiting City government spending increases generally to the rate of inflation; and requiring a two-thirds vote of the City Council, instead of a simple majority, to increase taxes or impose new taxes;

- establishing the Commission on Human Rights as a Charter agency to protect civil rights;

- protecting immigrants' rights to access City services, and establishing the Mayor's Office of Immigrant Affairs and Language Services as a Charter agency;

- effective as of January 1, 2002, requiring a special election within 60 days of a mayoral vacancy, requiring a run-off if no candidate receives at least 40 percent of the vote in a special election to fill a vacancy for Mayor, Public Advocate or Comptroller, and eliminating the Charter language that the Public Advocate "shall preside over the meetings of the [City] Council";

- simplifying the City's procedures for awarding contracts and centralizing vendor integrity review; and

- reorganizing City government to establish the Administration for Children's Services as an independent agency, to form an Organized Crime Control Commission, to consolidate City agencies to create a Department of Public Health and Mental Hygiene Services, and to require executive coordination of City services to prevent domestic violence.

Appendix D

Abstract

ABSTRACT

These proposed amendments would revise the Charter of the City of New York as follows:

Gun-Free School Safety Zones and Gun Safety-Locking Devices

Currently, neither the Charter nor the Administrative Code prohibits gun possession near schools. This proposal would provide for the creation of "gun-free" school safety zones by making it illegal for individuals to possess or discharge any weapon (including handguns, pistols, rifles, shotguns, assault weapons and machine guns) within 1,000 feet of any school in the City. Violators would be subject to criminal and civil penalties. This proposal would provide for certain exceptions and affirmative defenses. It would not apply to police or federal law enforcement officers.

Currently, the Charter does not contain any gun safety lock requirements, but the Administrative Code provides that rifles and shotguns be sold with a safety-locking device that, if operative, would prevent individuals from pulling a weapon's trigger. This proposal would require that all weapons, including handguns and pistols, have safety-locking devices when they are purchased or obtained and that safety-locking devices be used at all times in storing all firearms. Violators would face criminal and civil penalties.

Budget

Currently, neither the Charter nor the Administrative Code require that the City maintain a Budget Stabilization and Emergency Fund (although the Charter provides for a reserve which is maintained by state law at $100 million per year), but in its adopted budget for the last two years, the City has maintained a separate budget stabilization unit of appropriation. This proposal would require that at least fifty percent of any City surplus revenue be placed in a Budget Stabilization and Emergency Fund to be transferred by joint action of the Mayor and the City Council for a City need and, if not needed by the end of the fiscal year, to prepay future year's debt service, which would include paying down long-term debt, or for financing capital projects (pay-as-you-go capital financing).

Under current Charter provisions, if the City Council seeks to increase City spending in the next fiscal year beyond the level of spending in the current year, it must establish higher real property tax rates than those for the current year, unless the Mayor's estimate of the revenue that the City will receive from other sources in the next year permits the spending increase at current

real property tax levels. This proposal would further limit year-to-year City spending increases generally to the rate of inflation as reflected in the regional Consumer Price Index. The Mayor and the City Council, upon their determination that it is in the best interest of the City, would jointly be authorized to exceed that limit for that fiscal year. This proposal would also require a written explanation for each instance where an increase in City-funded spending in an agency's budget exceeds the rate of inflation. This proposal would also require that fiscal impact statements be issued by the City Council when it passes home rule requests seeking the enactment of legislation by the State of New York affecting the City.

Currently, the Charter requires that the City Council pass local laws and resolutions by a simple majority vote and if the Mayor vetoes a local law, the City Council may then override this veto by at least a two-thirds vote. This proposal would require at least a two-thirds vote of the City Council to pass any local law or resolution to impose a new tax or increase an existing non-real property tax and, if the Mayor vetoes such a local law or resolution, a four-fifths vote to override that veto.

The Commission on Human Rights

The Charter currently does not contain any provisions regarding the establishment of a City Commission on Human Rights to protect civil rights. The Administrative Code provides for such a commission to enforce the City's Human Rights Law, which prohibits unlawful discrimination based on race, color, religion, creed, national origin, alienage, citizenship, gender, sexual orientation, disability, marital status, age and other protected classes. This proposal would establish the City's Commission on Human Rights as a Charter agency empowered to enforce the provisions of the City's Human Rights Law.

Immigrant Affairs

Currently, neither the Charter nor the Administrative Code requires the City to protect immigrants' rights to access City services, to keep confidential the immigration status of individuals or to have an office or agency dedicated to immigrant affairs. The City has maintained such an office and such policies have been in place by executive order. This proposal would establish the Mayor's Office of Immigrant Affairs and Language Services as a Charter agency to assist in the development and implementation of City policies and programs dedicated to immigrants. This proposal would incorporate into the Charter protection of immigrants' rights to access City services and would authorize the Mayor to promulgate rules to require City agencies to maintain the confidentiality of immigration status and other private information.

Special Elections and Public Advocate

Currently, the Charter provides that, in the event of a mayoral vacancy, the Public Advocate succeeds to the Office of Mayor until a general election can be held to fill the vacancy. The Charter also provides for a nonpartisan special election within sixty days to fill vacancies in the Offices of Public Advocate, Comptroller, Borough President and City Council member, with nominations by independent nominating petitions, until a subsequent party primary and general election are later held to fill the vacancy. This proposal would provide that a special election be held within sixty days to fill a mayoral vacancy, similar in format to the procedure set forth in the Charter to fill vacancies in the Offices of Public Advocate, Comptroller, Borough President and City Council member, and that in special elections for the Offices of Mayor, Public Advocate and Comptroller, where no candidate receives forty percent or more of the vote, the two candidates receiving the most votes would advance to a run-off election to be held on the second Tuesday following the special election. This proposal would also eliminate the Public Advocate's role to preside over City Council meetings or to vote in case of a tie and require that a voting member of the City Council, to be selected in accordance with rules to be promulgated by the City Council, would preside over City Council meetings. These proposals on special elections and the Public Advocate would not take effect until January 1, 2002.

Government Contracts

Currently, the Charter authorizes the City Council and Procurement Policy Board, by concurrent action, to establish dollar limits for "small purchases," which, although subject to competition, are subject to less stringent procedures. The current small purchase limits are $25,000 for goods and services, $50,000 for construction and construction-related services, and $100,000 for information technology (although on January 1, 2001, the higher limit for information technology will expire and revert to the $25,000 level). This proposal would raise the small purchase limit to $100,000 for all procurements.

Currently, the Charter authorizes the City, under limited circumstances, to procure goods, services and construction without competition through any agency of the United States or the State of New York, but does not otherwise provide for the City to procure from, with or through another governmental entity without competition. This proposal would authorize such procurements.

Currently, the Charter contains provisions regarding bid deposit requirements, multi-step sealed proposals, and the debarment of contractors and requires agencies separately to maintain lists of prequalified vendors (under which vendors qualify in advance to participate in

procurements). This proposal would eliminate these provisions and permit the Procurement Policy Board to use its rulemaking authority to address such matters. This proposal would explicitly authorize a centralized review of vendor integrity, performance and capability and centralized prequalification. It would eliminate the requirement that the Mayor approve procurements where prequalified lists are used.

Reorganizing City Government

Administration for Children's Services.

Currently, the Charter provides that the City Department of Social Services generally performs welfare functions, including those of child welfare. Pursuant to executive order, an Administration for Children's Services ("ACS") performs functions related to the care and protection of children. This proposal would establish ACS as a Charter agency to perform such functions, including the power to receive and investigate reports of child abuse and neglect, to assist families at risk by addressing the causes of abuse and neglect, to provide children and families with day care and preventative services to avert the impairment or dissolution of families, to place children in temporary foster care or permanent adoption when preventive services cannot redress causes of family neglect, to provide pre-school services, and to ensure that parents who are legally required to provide child support do so.

Organized Crime Control Commission.

Currently, the Charter does not provide any agency with centralized jurisdiction over regulatory matters relating to the influence of organized crime in specific sectors of the economy. The Administrative Code provides several City agencies with regulatory, licensing and investigatory powers in connection with public wholesale food markets, the private carting industry and the shipboard gaming industry. This proposal would consolidate the jurisdiction of these several City agencies into a single Organized Crime Control Commission, which would be one Charter agency.

Department of Public Health and Mental Hygiene Services.

Currently, the Charter provides for a Department of Health and a Department of Mental Health, Mental Retardation and Alcoholism Services. This proposal would consolidate the existing functions of these agencies into a Department of Public Health and Mental Hygiene Services. That department would have jurisdiction to regulate all matters and to perform all the functions that relate to public health in the City, including but not limited to the mental health, mental retardation, alcoholism and substance abuse services. This proposal would include provisions that address mental hygiene services in particular, including preparation of the budget

for such services, creation of a division within the department to provide such services, and review of such services by the Mayor's Office of Operations. The proposal would also require executive coordination of mental retardation and developmental disability services in the City through the Mayor's Office of Operations.

Domestic Violence Services Coordination

Currently, the Charter does not contain any provisions regarding City services to prevent domestic violence, but such services are currently coordinated by a mayoral commission to combat family violence created by executive order. This proposal would require executive coordination (through the Mayor's Office of Operations) of City services responding to domestic violence. That office would also be responsible for formulating policies and programs relating to all aspects of service delivery for victims of domestic violence.

POLITICS NEWS

Crossing Mayor Giuliani often had a price

Far more than his predecessors, Rudolph W. Giuliani's toughness as mayor edged toward ruthlessness.

Jan. 22, 2008, 7:59 AM EST / Source: The New York Times

By By Michael Powell and Russ Buettner

Rudolph W. Giuliani likens himself to a boxer who never takes a punch without swinging back. As mayor, he made the vengeful roundhouse an instrument of government, clipping anyone who crossed him.

In August 1997, James Schillaci, a rough-hewn chauffeur from the Bronx, dialed Mayor Giuliani's radio program on WABC-AM to complain about a red-light sting run by the police near the Bronx Zoo. When the call yielded no results, Mr. Schillaci turned to The Daily News, which then ran a photo of the red light and this front page headline: "GOTCHA!"

That morning, police officers appeared on Mr. Schillaci's doorstep. What are you going to do, Mr. Schillaci asked, arrest me? He was joking, but the officers were not.

They slapped on handcuffs and took him to court on a 13-year-old traffic warrant. A judge threw out the charge. A police spokeswoman later read Mr. Schillaci's decades-old criminal rap sheet to a reporter for The Daily News, a move of questionable legality because the state restricts how such information is released. She said, falsely, that he had been convicted of sodomy.

Then Mr. Giuliani took up the cudgel.

"Mr. Schillaci was posing as an altruistic whistle-blower," the mayor told reporters at the time. "Maybe he's dishonest enough to lie about police officers."

Mr. Schillaci suffered an emotional breakdown, was briefly hospitalized and later received a $290,000 legal settlement from the city. "It really damaged me," said Mr. Schillaci, now 60, massaging his face with thick hands. "I thought I was doing something good for once, my civic duty and all. Then he steps on me."

Mr. Giuliani was a pugilist in a city of political brawlers. But far more than his predecessors, historians and politicians say, his toughness edged toward ruthlessness and became a defining aspect of his mayoralty. One result: New York City spent at least $7 million in settling civil rights lawsuits and paying retaliatory damages during the Giuliani years.

After AIDS activists with Housing Works loudly challenged the mayor, city officials sabotaged the group's application for a federal housing grant. A caseworker who spoke of missteps in the death of a child was fired. After unidentified city workers complained of pressure to hand contracts to Giuliani-favored organizations, investigators examined not the charges but the identity of the leakers.

"There were constant loyalty tests: 'Will you shoot your brother?' " said Marilyn Gelber, who served as environmental commissioner under Mr. Giuliani. "People were marked for destruction for disloyal jokes."

Mr. Giuliani paid careful attention to the art of political payback. When former Mayors Edward I. Koch and David N. Dinkins spoke publicly of Mr. Giuliani's foibles, mayoral aides removed their official portraits from the ceremonial Blue Room at City Hall. Mr. Koch, who wrote a book titled "Giuliani: Nasty Man," shrugs.

"David Dinkins and I are lucky that Rudy didn't cast our portraits onto a bonfire along with the First Amendment, which he enjoyed violating daily," Mr. Koch said in a recent interview.

Mr. Giuliani retails his stories of childhood toughness, in standing up to bullies who mocked his love of opera and bridled at his Yankee loyalties. Years after leaving Manhattan College, he held a grudge against a man who beat him in a class election. He urged his commissioners to walk out of City Council hearings when questions turned hostile. But in his 2002 book "Leadership," he said his instructions owed nothing to his temper.

"It wasn't my sensitivities I was worried about, but the tone of civility I strived to establish throughout the city," he wrote. Mr. Giuliani declined requests to be interviewed for this article.

His admirers, not least former Deputy Mayor Randy M. Mastro, said it was unfair to characterize the mayor as vengeful, particularly given the "Herculean task" he faced when he entered office in 1994. Mr. Giuliani's admirers claimed that the depredations of crack, AIDS, homicide and recession had brought the city to its knees, and that he faced a sclerotic liberal establishment. He wielded intimidation as his mace and wrested cost-savings and savings from powerful unions and politicians.

“The notion that the city needed broad-based change frightened a lot of entrenched groups,” said Fred Siegel, a historian and author of “The Prince of the City: Giuliani, New York and the Genius of American Life.” “He didn’t want to be politic with them.”

He cowed many into silence. Silence ensured the flow of city money.

Andy Humm, a gay activist, worked for the Hetrick-Martin Institute, which pushed condom giveaways in public schools. When Mr. Giuliani supported a parental opt-out, the institute’s director counseled silence to avoid losing city funds. “He said, ‘We’re going to say it’s not good, but we’re not going to mention him,’ ” Mr. Humm said.

“We were muzzled, and it was a disgrace.”

Picking his fights
Mr. Giuliani says he prefers to brawl with imposing opponents. His father, he wrote in “Leadership,” would “always emphasize: never pick on someone smaller than you. Never be a bully.”

As mayor, he picked fights with a notable lack of discrimination, challenging the city and state comptrollers, a few corporations and the odd council member. But the mayor’s fist also fell on the less powerful. In mid-May 1994, newspapers revealed that Mr. Giuliani’s youth commissioner, the Rev. John E. Brandon, suffered tax problems; more troubling revelations seemed in the offing.

At 7 p.m. on May 17, Mr. Giuliani’s press secretary dialed reporters and served up a hotter story: A former youth commissioner under Mr. Dinkins, Richard L. Murphy, had ladled millions of dollars to supporters of the former mayor. And someone had destroyed Department of Youth Services records and hard drives and stolen computers in an apparent effort to obscure what had happened to that money.

“My immediate goal is to get rid of the stealing, to get rid of the corruption,” Mr. Giuliani told The Daily News.

None of it was true. In 1995, the Department of Investigation found no politically motivated contracts and no theft by senior officials. But Mr. Murphy’s professional life was wrecked.

“I was soiled merchandise — the taint just lingers,” Mr. Murphy said in a recent interview.

Not long after, a major foundation recruited Mr. Murphy to work on the West Coast. The group wanted him to replicate his much-honored concept of opening schools at night as community centers. A senior Giuliani official called the foundation — a move a former mayoral official confirmed on the condition of anonymity for fear of embarrassing the organization — and the prospective job disappeared.

"He goes to people and makes them complicit in his revenge," Mr. Murphy said.

This theme repeats. Two private employers in New York City, neither of which wanted to be identified because they feared retaliation should Mr. Giuliani be elected president, said the mayor's office exerted pressure not to hire former Dinkins officials. When Mr. Giuliani battled schools Chancellor Ramon C. Cortines, he demanded that Mr. Cortines prove his loyalty by firing the press spokesman, John Beckman.

Mr. Beckman's offense? He had worked in the Dinkins administration. "I found it," Mr. Beckman said in an interview, "a really unfortunate example of how to govern."

Joel Berger worked as a senior litigator in the city corporation counsel's office until 1996. Afterward, he represented victims of police brutality and taught a class at the New York University School of Law, and his students served apprenticeships with the corporation counsel.

In late August 1997, Mr. Berger wrote a column in The New York Times criticizing Mr. Giuliani's record on police brutality. A week later, a city official called the director of the N.Y.U. law school's clinical programs and demanded that Mr. Berger be removed from the course. Otherwise, the official said, we will suspend the corporation counsel apprenticeship, according to Mr. Berger and an N.Y.U. official.

"It was ridiculously petty," Mr. Berger said.

N.Y.U. declined to replace Mr. Berger and instead suspended the class after that semester.

'Culture of retaliation'

The Citizens Budget Commission has driven mayors of various ideological stripes to distraction since it was founded in 1932. The business-backed group bird-dogs the city's fiscal management with an unsparing eye. But its analysts are fonts of creative thinking, and Mr. Giuliani asked Raymond Horton, the group's president, to serve on his transition committee in 1993.

That comity was long gone by the autumn of 1997, when Mr. Giuliani faced re-election. Ruth Messinger, the mayor's Democratic opponent, cited the commission's work, and the mayor denounced the group, which had issued critical reports on welfare reform, police inefficiency and the city budget.

So far, so typical for mayors and their relationship with the commission. Mr. Koch once banned his officials from attending the group's annual retreat. Another time, he attended and gave a speech excoriating the commission.

But one of Mr. Giuliani's deputy mayors, Joseph Lhota, took an unprecedented step. He called major securities firms that underwrite city bonds and discouraged them from buying seats at the commission's annual fund-raising dinner. Because Mr. Lhota played a key role in selecting the investment firms that underwrote the bonds, his calls raised an ethical tempest.

Apologizing struck Mr. Giuliani as silly.

"We are sending exactly the right message," he said. "Their reports are pretty useless; they are a dilettante organization."

Still, that dinner was a rousing success. "All mayors have thin skins, but Rudy has the thinnest skin of all," Mr. Horton said.

Mr. Giuliani's war with the nonprofit group Housing Works was more operatic. Housing Works runs nationally respected programs for the homeless, the mentally ill and people who are infected with H.I.V. But it weds that service to a 1960s straight-from-the-rice-paddies guerrilla ethos.

The group's members marched on City Hall, staged sit-ins, and delighted in singling out city officials for opprobrium. Mr. Giuliani, who considered doing away with the Division of AIDS Services, became their favorite mayor in effigy.

Mr. Giuliani responded in kind. His police commanders stationed snipers atop City Hall and sent helicopters whirling overhead when 100 or so unarmed Housing Works protesters marched nearby in 1998. A year earlier, his officials systematically killed $6 million worth of contracts with the group, saying it had mismanaged funds.

Housing Works sued the city and discovered that officials had rescored a federal evaluation form to ensure that the group lost a grant from the Department of Housing and Urban Development.

Martin Oesterreich, the city's homeless commissioner, denied wrongdoing but acknowledged that his job might have been forfeited if Housing Works had obtained that contract.

"That possibility could have happened," Mr. Oesterreich told a federal judge.

The mayor's fingerprints could not be found on every decision. But his enemies were widely known.

"The culture of retaliation was really quite remarkable," said Matthew D. Brinckerhoff, the lawyer who represented Housing Works. "Up and down the food chain, everyone knew what this guy demanded."

The charter fight

The mayor's wartime style of governance reached an exhaustion point in the late 1990s. His poll numbers dipped, and the courts routinely ruled against the city, upholding the New York Civil Liberties Union in 23 of its 27 free-speech challenges during Mr. Giuliani's mayoralty. After he left office, the city agreed to pay $327,000 to a black police officer who was fired because he had testified before the City Council about police brutality toward blacks. The city also agreed to rescind the firing of the caseworker who talked about a child's death.

In 1999, Mr. Giuliani explored a run for the United States Senate. If he won that seat, he would leave the mayor's office a year early. The City Charter dictated that Mark Green, the public advocate, would succeed him.

That prospect was intolerable to Mr. Giuliani. Few politicians crawled under the mayor's skin as skillfully as Mr. Green. "Idiotic" and "inane" were some of the kinder words that Mr. Giuliani sent winging toward the public advocate, who delighted in verbally tweaking the mayor.

So Mr. Giuliani announced in June 1999 that a Charter Revision Commission, stocked with his loyalists, would explore changing the line of mayoral succession. Mr. Giuliani told The New York Times Magazine that he might not have initiated the charter review campaign if Mr. Green were not the public advocate. Three former mayors declared themselves appalled; Mr. Koch fired the loudest cannonade. "You ought to be ashamed of yourself, Mr. Mayor," he said during a news conference.

Frederick A. O. Schwarz Jr., chairman of a Charter Revision Commission a decade earlier, wrote a letter to Mr. Giuliani warning that "targeting a particular person" would

“smack of personal politics and predilections.

“All this is not worthy of you, or our city,” Mr. Schwarz wrote.

Mr. Mastro, who had left the administration, agreed to serve as the commission chairman. He eventually announced that a proposal requiring a special election within 60 days of a mayor’s early departure would not take effect until 2002, after both Mr. Giuliani and Mr. Green had left office. A civic group estimated that the commission spent more than a million dollars of taxpayer money on commercials before a citywide referendum on the proposal that was held in November 1999.

Voters defeated the measure, 76 percent to 24 percent. (In 2002, Mayor Michael R. Bloomberg advocated a similar charter revision that passed with little controversy.)

Mr. Green had warned the mayor that rejection loomed.

“It was simple,” Mr. Green said. “It was the mayor vindictively going after an institutional critic for doing his job.”

None of this left the mayor chastened. In March 2000, an undercover officer killed Patrick Dorismond, a security guard, during a fight when the police mistook him for a drug dealer. The outcry infuriated the mayor, who released Mr. Dorismond’s juvenile record, a document that legally was supposed to remain sealed.

The victim, Mr. Giuliani opined, was no “altar boy.” Actually, he was. (Mr. Giuliani later expressed regret without precisely apologizing.)

James Schillaci, the Bronx whistle-blower, recalled reading those comments and shuddering at the memory. “The mayor tarred me up; you know what that feels like?” he said. “I still have nightmares.”

By Michael Powell and Russ Buettner

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Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy

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Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy

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I. INTRODUCTION

Professor William E. Nelson has written a comprehensive, useful, and interesting history of a government law office—the Corporation Counsel's office, or, as it is formally known, the New York City Law Department.[1] All the living Corporation Counsels were invited to submit any thoughts that occurred to them based upon their service to the city, including comments on Professor Nelson's book. I was fortunate to serve for five years (from 1982 through 1986) as the second Corporation Counsel in Mayor Edward I. Koch's administration, following Allen Schwartz and preceding Peter Zimroth.

Of course, the first obligation of a leader of a government law office is to try to assure that the office operates at the highest possible level of integrity and professionalism. In this sense—the paramount importance of doing professionally excellent work—good lawyers for government should, as Professor Nelson indicates in his analysis of the Koch administration, resemble being a good lawyer for a corporation (or any other private client). However, governments have different, far broader responsibilities than businesses. Therefore, the roles of a government lawyer differ as well.

In this paper, I develop this point by discussing the opportunities that government lawyers can have to influence public policy, using some of my own experiences as Corporation Counsel as illustrations. All lawyers have an obligation to uphold the law. But government lawyers have a heightened responsibility to do so. In addition, government lawyers can have opportunities to affect public policy far beyond subjects that fall within a narrow view of "the law."

Of course, if a government lawyer is satisfied just to measure out law in spoonfuls, and narrow, little spoonfuls at that, the lawyer will fail to play a significant role on public policy issues. The same is true if the lawyer is a shrinking violet. As I put it in a *New York Law Journal* article, under the sub-heading "The Risk of Being a Shrinking Violet":

> Assuming that you, the government lawyer, remember that your authority and professional expertise is limited to law, you are not very helpful if your advice is narrowly confined to black letter law. In the first place, particularly when constitutional questions are involved, there is no bright line distinguishing law from policy. History, values, and experience all shape the law. In addition, it is simply not fair to the government you serve to refrain from commenting except within a narrow and professional context. Government has too much to do, too little time to ponder. It needs to hear many diverse perspectives, many voices. And lawyers, perhaps as individuals, perhaps because of their training, may have something useful to say.[2]

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1. William E. Nelson, Fighting for the City: A History of the New York City Corporation Counsel (2008).

2. Frederick A. O. Schwarz, Jr., *Lawyers for Government Face Unique Problems*, N.Y. L.J., May 1, 1984, at 38 (on file with New York Law School's Center for New York City Law in Selected Writings and Speeches of Frederick A. O. Schwarz, Jr., at Tab 32) [hereinafter Schwarz Writings and Speeches]. (The title of the article was chosen by the *New York Law Journal*. I would have chosen a title like this article's title.)

Part II of this article asks some preliminary questions about government lawyering. These include: who is the client of a government lawyer, whether lawyers bring anything special to the table in deliberations within government, and the balance between loyalty and independence in the way in which the chief government lawyer relates to the government's chief executive. Part III develops the distinction between and relationships among law, policy, and politics. Part IV discusses the factors that create *opportunities* for government lawyers to affect public policy. Part V gives a number of examples of impacting public policy based upon my own experience.

II. WHAT DOES IT MEAN TO BE A GOVERNMENT LAWYER?

A. Who is the Client?

Government lawyers must always face questions of who their client is. The Corporation Counsel is said by the City Charter to be counsel for "the city and every agency thereof," as well as for "the people" of the city.[3] However, the Corporation Counsel is an at-will appointee of the mayor. And, like most other mayoral appointees, the Corporation Counsel is not subject to any "advice and consent" powers of the city council.

While interesting, the Charter does not definitively answer the "who is the client" question. For all government lawyers, the answer is always, it seems to me, the overall greater governmental entity that the lawyer serves: the United States, the state, or, for Corporation Counsels, "the city." That being said, a government lawyer cannot be effective—on policy issues at least—unless there is a close relationship with the chief executive—in the city's case, the mayor—who is ultimately responsible for, and accountable for, the performance of all parts of the executive branch.[4]

The Law Department's reputation is, first and foremost, tied to the quality and integrity of the Law Department's work. That reputation is also well served by city lawyers treating the city as their client. In contrast, the Law Department's reputation (and its child: recruiting) clearly would be hurt if the Law Department were seen as devoted to serving the short-term political interests of a mayor. The same holds true for relationships between, for example, attorneys general and presidents.

That a chief government lawyer represents the governmental entity and not the chief executive does not, of course, mean that the lawyer can wander off and make on his or her own all sorts of policy judgments. Often, the lawyer will represent the entity's interests as they are defined and articulated by the chief executive. The chief

3. New York, N.Y., Charter ch. 17, § 394(a) & (c) (2004), *available at* http://www.nyc.gov/html/charter/downloads/pdf/citycharter2004.pdf.

4. This subsection is written from the perspective of a chief government lawyer analyzing whether the client is the governmental entity or the chief executive. Such questions are not limited, however, to the chief lawyer. Moreover, many government lawyers face a related question: is the client the city or an agency? Ultimately, the client is the city. But in considering how to resolve an issue involving an agency, the lawyer must understand and carefully consider the position of the agency.

executive was elected. The lawyer was not.[5] This distinction is, of course, most important when the issue is more policy than law.

One can conjure up all sorts of extreme cases that present choices for a chief government lawyer when the personal interests of the chief executive seem to be both dominating and inappropriate. (Attorney General Elliot Richardson's refusal to carry out President Nixon's order to fire Archibald Cox comes to mind.) But, as Professor Nelson's book points out, and my personal experience supports, Mayor Koch, in his relationship with his Corporation Counsels, himself emphasized the interests of the city—and was remarkably deferential to the judgments of his Corporation Counsels.

Assuming that the client is the city does not, of course, automatically answer all questions of what ought be done or what advice is the soundest. There is substantial room for judgment and for debate. The "interests of the city" must be the touchstone. But the term is not self-defining. In helping to shape policy, I believe that a government lawyer plays his or her role best by persuasively articulating the broader, deeper, and more long-term interests of the governmental entity.

There is another complication. As counsel for the city, the Corporation Counsel, as with other government lawyers, has a lawyer-like relationship with not only the mayor, but all the other "branches" of city government, most importantly the city council, but also the comptroller, public advocate, and borough presidents. The Corporation Counsel defends laws passed by the city. But what should happen if, for example, the city council passes a law, which a mayor vetoes, and the council then overrides the veto. Should the Corporation Counsel support the mayor in a lawsuit challenging the law? Clearly, if the mayor's objections are to the *policy* of the law, the Corporation Counsel is obligated to support the council. But what if the mayor also claims a legal defect in the law? Here, it seems to me that the Corporation Counsel should still support the law, unless the legal defect is crystal clear. But not having faced the question,[6] my main suggestion is that this question should be the subject of a good professional debate, perhaps under the auspices of Ross Sandler's Center on New York City Law at New York Law School.

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5. In the same *New York Law Journal* article where I warned about "the Risk of Being a Shrinking Violet," I also warned government lawyers about "the Risk of Hubris," suggesting that at least post-Watergate, a rational government official would not ignore the legal advice of his or her lawyer. *See* Schwarz, *supra* note 2, at 38. This, I suggested, was good, in that it "increases the likelihood that an informed and well-advised government will comply with the rule of law." *Id.* But, I added, "a little cautionary bell should go off in the government lawyer's head. Remember you weren't elected. In your advice distinguish between what is legal and what is wise." *Id.*

6. This sort of question did not arise during my tenure; the city council was relatively supine until after the 1989 City Charter changes. *See* Frederick A. O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter*, 42 N.Y.L. Sch. L. Rev. 723, 781–82 (1998) (Schwarz Writings and Speeches, at Tab 50).

B. How Does One Think About the Interests of the City?

Given that the client is the city, it is necessary to analyze how to think about the city's interests. The nature of the task obviously matters. Consider three different tasks: first, issuing an opinion on what the law is; second, making sensitive policy decisions in important public interest litigation; and third, giving policy advice. Law is completely controlling for the first, quite relevant for the second, and only tangentially relevant for the third—where the relationship is not strictly lawyer-client anyway. For all three, but particularly the second two, the interests of the city should provide the key.

In theory, perhaps, the same concept is true for representation of any entity, not just a government. With a corporation, for example, a lawyer is, or should be, representing the corporation, and not the personal interests of its chief executive. But for lots of reasons, the relationship is often different with a corporate client. And, most importantly, the interests of a government are far broader and deeper than the interests of a business. Teasing out those differences helps in analyzing how to think about the city's interests.

Thus, it seems to me that Professor Nelson reflects only part of the picture when he says "Mayor Koch redesigned municipal government as a business," with the Law Department being "there, too."[7] Yes, the Law Department certainly needed to be professional. And yes, it needed to help protect the city's fiscal health. But that is hardly all that lawyers for a government do, or did during the Koch administration, as I believe the examples given later in this paper, and in Peter Zimroth's paper, help to illustrate.

A business owes a duty to its stockholders. A government owes a duty to all its residents—whether or not they voted for the person(s) in power, or, indeed, whether they can vote at all. Sometimes these duties are concrete. Sometimes they touch the human spirit. Take Mayor Koch's two great early accomplishments: overcoming the fiscal crisis and restoring the city's *joie de vivre*. One highly concrete. One a matter of the spirit. Or take the importance of using leadership and words to bring races together. Not really a job for a corporate executive, but surely an important part of the job for a government leader.

Justice Louis Brandeis made a point about government that never could be made about businesses. Thus, "[o]ur government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example."[8] On a far less lofty level, the government is an institutional litigant and has long-term institutional interests in its reputation in the courts, as some of the examples given below illustrate. Decisions not to appeal a court decision for such reasons would seldom, or perhaps never, be mirrored in the deliberations of corporations, which are not institutional litigants in the same sense.

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7. Nelson, *supra* note 1, at 252; *see also id.* at xviii–xix (claiming that Ed Koch and Allen Schwartz understood government as a business).

8. Olmstead v. United States, 277 U.S. 438, 485 (1939) (Brandeis, J., dissenting).

A government's—our city's—interests must be seen through a long-term, as well as a short-term, lens. An example given below is the analysis of property tax exemptions for non-profits. Moreover, while government leaders do clearly pay attention to their short-term popularity, they face elections only every few years. [9] Thus, they are (or at least should be) generally somewhat more able to focus on the long-term and deeper interests of their entity than corporate leaders who are—particularly in recent years—preoccupied with whether they have met quarterly-earnings predictions.

Whatever the reason, it is clear to me that government leaders must think about the long-term. And because of the nature of government, the thinking should be broad and deep. Political considerations often push politicians, and too many government officials, toward short-term thinking. This is nicely illustrated by a saying I heard in city government: "Planning means thinking about this evening's *New York Post*." (Referring to the time when the *Post* was an evening paper.) "Long-term planning means thinking about tomorrow morning's *New York Times*." Sardonic and exaggerated, yes. But, nonetheless, reflecting more than a germ of truth.

As I develop in the next section, government lawyers, for many reasons, are particularly well-suited to help the government they serve think about long-term and deeper interests.

C. Do Lawyers Bring Anything Special to the Table?

Certainly there are plenty of examples of lawyers who fly too close to the ground and never stray beyond spooning out a narrow view of the law. Still, I believe that lawyers can bring something extra to the table.

Based upon their education and their training, lawyers are presumed to be able—and certainly aspire—to understand all sides of an issue. This is part of our craft. Beyond understanding all sides of an issue, a lawyer's craft also includes articulating long-term as well as short-term interests and consequences, and includes focusing on deeper as well as obvious interests.

Governmental decisions affect many interests that may not always be obvious, and affect the rights of many who may lack access to decision-makers. It is often the

9. In the midst, however, of Mayor Koch's 1985 re-election campaign, a highly controversial issue emerged: should children who were HIV-positive be allowed to go to the New York City public schools? Little then was understood by the public about how the AIDS virus is transmitted. To consider the schools' question, Koch appointed a panel consisting of Schools Chancellor Nathan Quinones, Health Commissioner David Sencer, and me. While Koch never tried to influence our views, it was obvious that he would have found it politically easier if we had recommended against HIV-positive children entering the schools. However, reflecting the administration's on-the-merits culture, focusing on the interests of all residents, our view was that the children should be allowed to go to school. This did cause an emotional, tabloid reaction. Nonetheless, after our decision was made, the Mayor backed it. For this story, and the story of our ultimate victory in court after the policy was challenged, see David L. Kirp, Learning by Heart: AIDS and Schoolchildren in America's Communities 94–132 (1989) (Chapter Four, Passion Play: New York City); Frederick A. O. Schwarz, Jr. & Frederick P. Schaffer, *AIDS in the Classroom*, 14 Hofstra L. Rev. 163 (1985) (Schwarz Writings and Speeches, at Tab 42). (Although dated in 1985, the *Hofstra Law Review* article did not come out until 1986 after the court's favorable decision.)

lawyer's role to articulate fairly those rights and interests. This is true whether the "ignored" interests are those of minorities, political or otherwise, or even of more well-established groups.

A lawyer also has a special tie to the Constitution—as well as to what I call its related values. The Constitution has a role outside the courts.[10] Not only judges, but all government officials, legislative and executive, have an obligation to support the Constitution. Indeed, they take an oath to do so.[11] It is, I believe, the obligation of executive and legislative leaders to proactively protect the Constitution and its values. And it is, I believe, improper for legislative and executive officials just to duck constitutional issues and leave them to the courts.

The Constitution casts a light far beyond its page. By values related to the Constitution, I mean attention to the interests of groups beyond those protected by the Bill of Rights, but whose interests are likely to be ignored. For example, increasing disparities between rich and poor, the devastation of inner cities by drugs, violence, disease, and failed school systems combine to turn poverty into a hopelessness so deep that it can stifle opportunity. These conditions are shameful and cloud our future; they are fundamentally at odds with our constitutional values and dreams. Similarly, preservation of the environment often represents a choice to defer development that might benefit today's majority for the sake of future generations—who are by definition unrepresented or underrepresented.

Thus, in both alleviating poverty and protecting the environment, constitutional *values* are involved, though no constitutional question is presented for litigation.

Part of a government lawyer's job, it seems to me, is to help assure that both the Constitution and its related values are considered. Not that those values always should be vindicated. But rather that government should remember to think about them. Vindication of values related to the Constitution may sometimes run counter to the interests of majorities in the short-term—but will often, I believe, serve the interests of society in the long-term. The values that emanate from the Constitution, while not necessarily amenable to protection by the courts, are in many ways what define and distinguish America and its public law.

D. Context and Consequences

The foregoing discussion is a bit abstract. Context brings it down to the concrete. Thus, when the city was engulfed by the fiscal crisis, it was obviously harder for

10. *See* Frederick A. O. Schwarz, Jr., The Constitution Outside the Courts, The Forty-Fourth Benjamin N. Cardozo Lecture, Address Before the Association of the Bar of the City of New York (Dec. 5, 1991), *in* 47 Rec. Ass'n B. City N.Y. 9 (1992) (Schwarz Writings and Speeches, at Tab 66).

11. The Constitution requires the president to "preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1, cl. 7. All other federal officials swear to "support and defend" the Constitution and to "bear true faith and allegiance to the same." 5 U.S.C. § 3331 (2006). New York State and City public officers are required to "solemnly swear (or affirm) that [they] will support the Constitution of the United States, and the Constitution of the State of New York." N.Y. Const. art. XIII, § 1; *see also* N.Y. Pub. Off. Law § 10 (McKinney 2008). And, so must state employees. N.Y. Civ. Serv. Law § 62 (McKinney 2008).

government, including the Law Department, to grapple with other needs of society. But, as the city began to emerge from the fiscal crisis, there was more scope to focus on the city's non-financial needs.

Professor Nelson makes an insightful big picture point when he notes that by Koch's time, "New York's nineteenth century monopoly position in the American economy was dead;" now the city had "to compete with other cities throughout the world to attract money and business."[12] But, with respect to the more immediate context, I believe that Professor Nelson sees a blurred picture when he then goes on to say that "Koch's philosophy matched perfectly with that of the Reagan Administration."[13] And I don't think that Allen Schwartz "put [Reagan's] philosophy into practice" in the Law Department.[14] Ronald Reagan had a vision and some real successes. But his policies were no boon to cities. Quite the opposite, as illustrated by several of the issues explored in Part V.

While recognizing that the Koch administration and the Law Department did appropriately increase encouragement of business development for, among other reasons, the competitive and fiscal needs that Professor Nelson highlights, the Koch administration also, at times, exercised its broader governmental responsibilities to curb business expansion or shift it to new locations. Thus, a major zoning change made by the City Planning Commission limited further building on Manhattan's East Side and encouraged it on the West Side. This was challenged as a "taking" by two East Side developers (both close to the Mayor) who were represented by Arthur Liman and Peter Fishbein, both well known and first-rate litigators in the city. The Second Circuit upheld the city's zoning change.[15]

There are many other examples of where the city, under Mayor Koch, while remaining business friendly, nonetheless opposed business when the broader interests of the city were at stake. Implementation of the *Penn Central* decision upholding the city's landmarks preservation law, which Professor Nelson correctly highlights, is another example.[16]

Recognizing that the "interests of the city" is not a self-defining term, the relevant context, as Professor Nelson points out, can be sweeping, covering wide periods of time (e.g., New York City's loss of its "monopoly position"), and can cover major national changes (e.g., Reagan's election). Also relevant to context are the interests and experiences of both the chief executive and the chief lawyer. As for me, no doubt the early mind-expanding experience of the civil rights movement partially explains how I thought about the interests of the city on some occasions. But still, a lawyer has to make the case that it is in the interests of the city to do, or not to do,

12. Nelson, *supra* note 1, at 251; *see also id.* at xviii–xix.

13. *Id.* at 267.

14. *Id.* at 267–68.

15. *See* Park Ave. Tower Assocs. v. City of New York, 746 F.2d 135 (2d Cir. 1984).

16. Nelson, *supra* note 1, at 281 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)).

something. And on major public policy issues, a lawyer cannot cause the government to act unless the arguments are convincing.

E. Loyalty and Independence

What should be the chief government lawyer's relationship to the chief executive? Although the client is the government entity (here, the city), the lawyer's effectiveness also depends on his or her relationship to the chief executive. Both independence and loyalty are important qualities. Neither should be carried to extremes. Both, properly understood, are necessary—and indeed work in tandem.

A lawyer who is only loyal is useless. A fawning compliance with the chief executive's initial thoughts—or perceived thoughts—removes judgment and thoughtful advice. It can also risk running up against the wise restraints of our legal system. It leads to "yes men."[17] But too much independence is also unfair and improper, as well as ineffective.

It seems to me that the right mix combines independence with loyalty. Independent thinking—leading to reasoned, respectful, and tough-minded efforts to try to persuade—is, I believe, most helpful to the administration in which a lawyer plays a part. And thus, a lawyer is then most loyal both to that administration and to the government entity it serves.

III. VARYING WAYS IN WHICH GOVERNMENT LAWYERS CAN HAVE INFLUENCE

It is important to note that "policy" is not the same as "politics." This distinction is sometimes blurred. Thus, Professor Nelson's book assumes that there is "law," and then there is "politics." It says, for example: that all three of Koch's Corporation Counsels served as "political advisors," as well as heads of the Law Department; that even though, unlike Allen Schwartz, I had not had a preexisting relationship with the Mayor, I "quickly took on a similar role as a political advisor"; and, that Peter Zimroth likewise "played important political roles."[18]

The word "political" is being used too loosely. There are really not just two, but three areas: law, *policy*, and politics. And, "policy" is, I believe, the better word to describe the major thrust of the involvement of Corporation Counsels beyond their strictly legal roles—at least during the Koch administration.

As several of the specific examples discussed in Part V illustrate, however, the lines between the three categories are not sharp. Policy often breathes life into law. And policy affects politics—for the better or for the worse.

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17. *See* Memorandum from author on Your Memorandum of November 8 ("First Two Terms as Prelude") to Edward I. Koch, Mayor, City of N.Y., 7–8 (Nov. 20, 1985) [hereinafter First Two Terms as Prelude Memo] (Schwarz Writings and Speeches, at Tab 30) (warning the Mayor about "Yes People," and suggesting the need for "Cleaning House and New Blood" after eight years).

18. *See* Nelson, *supra* note 1, at 286–87. A similar assumption was made by the questioner at the start of my interview for the Columbia University Oral History Research Office's "Koch Administration Oral History Project." *See* Reminiscences of Frederick A. O. Schwarz, Jr. (1992–1993), on pages 14–17 in the Columbia University Oral History Research Office Collection [hereinafter Schwarz, CUOHROC].

What sorts of cases to bring, what arguments to emphasize, whether to appeal, whether and how to settle, all relate to law. But these choices—which often are discretionary—are sometimes based on policy priorities or concerns. Politics can sometimes be raw and untethered to either law or policy; politics can also lead to bad policies. But good policy is—or at least usually should be—good politics.

So the categories blend into each other. And the lines are fuzzy. Nonetheless, there are lines. And government lawyers ought not, it seems to me, engage in "politics" in the sense of party politics or election campaigns.[19] In running for office, a candidate is working for him or herself, not for the larger polity—in our case, the city. And given my previous point that the government lawyer's client obligation is to the city, and not to its chief executive, dabbling in political campaigns is outside the proper scope of the lawyer's job. It also potentially involves him or her in adversarial relationships with other candidates who are, or aspire to themselves be, in the government and thus are, or may be, in a client relationship with the lawyer. And, finally, being involved in electoral politics deprives the lawyer of the independence, and the reputation for independence, that is necessary to do the job well.

I believe that during the Koch administration the Corporation Counsels did not engage in "politics" in the sense of party politics or election campaigns (although

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19. However, in the midst of *policy* suggestions, there may well be arguments based upon the effect of doing something—or not doing something—upon *politics*, that is opinions of "the people" or "voters." I can illustrate this fuzzy line by two examples from memos of mine to Mayor Koch. The first urged Mayor Koch to move to focusing more on substantive programs (such as housing and education)—thus reaching beyond his great early successes in "conquer[ing] the fiscal crisis, [bringing] good management to the city, and restor[ing] our joie de vivre." Memorandum from author on Planning for Prosperity to Edward I. Koch, Mayor, City of N.Y. 2 (June 14, 1983) [hereinafter Planning for Prosperity Memo] (Schwarz Writings and Speeches, at Tab 30); *see also* Memorandum from author on The Next Seven Years to Edward I. Koch, Mayor, City of N.Y. (Oct. 24, 1982) [hereinafter Next Seven Years Memo] (Schwarz Writings and Speeches, at Tab 30). In making this policy suggestion, it seemed useful to say that, without an increased emphasis on substantive programs, "the voters may begin to say so what else is new." Planning for Prosperity Memo, *supra*, at 2.

The second example comes from one of my memos to the Mayor urging him to do more to reduce racial tension, and to bring people of different races together. *See* Memorandum from author on Racial Relations to Edward I. Koch, Mayor, City of N.Y. (Dec. 31, 1984) [hereinafter Racial Relations Memo] (Schwarz Writings and Speeches, at Tab 29); *see also* Nelson, *supra* note 1, at 286 (referencing the memorandum). I concluded that four-page memo by saying that I was not "making a 'political' argument." Racial Relations Memo, *supra*, at 4. "For all I know," I said to the Mayor, "what you are doing is good short-term politics, though I doubt it." *Id.* But then I finished with the policy point that: "Rather the argument is that by forever emphasizing your disagreements and not leading the city in a positive direction on [race] issues, you are damaging what is otherwise a remarkable record for the history books." *Id.*

"Political" points made in aid of a "policy" argument can also be mixed with psychological points. After all, political success is a mixture of policy and personality. For example, I suggested to the Mayor that in-depth concentration on major substantive program improvements would be personally "stimulating" for the Mayor. *See* Planning for Prosperity Memo, *supra*, at 2. In another memo, I warned that: "one of the greatest dangers for an administration that has been in office for a while" is that "new ideas, reforms and changes, which at the outset were welcomed, are later perceived as implicit criticisms." First Two Terms as Prelude Memo, *supra* note 17, at 1.

Professor Nelson's book does suggest that at the very end of his tenure and months after he had announced his departure, Allen Schwartz became a political advisor to Mayor Koch by advising him to run for governor).[20] In addition, during the Koch administration, the Law Department was free from hiring pressure or patronage. There was a two-stage screening process through which anybody seeking a job had to pass before a final interview with the Corporation Counsel. Never in my tenure was there even a request for favoritism. Indeed, the hiring-on-merit assumption was so engrained that a relative of Mayor Koch was turned down before the second stage in which I would participate; nobody perceived any need to seek agreement from me.

IV. WHAT FACTORS CREATE THE OPPORTUNITY FOR A CHIEF GOVERNMENT LAWYER TO HAVE A SUBSTANTIAL IMPACT ON PUBLIC POLICY?

The threshold reason government lawyers have opportunities to influence public policy is the important role that law plays in America. But whether such opportunities actually lead anywhere depends substantially upon the relationship between the chief lawyer and the chief executive, upon the characteristics of the chief executive, and upon the breadth and nature of the lawyer's vision of his or her role.[21]

A. The Centrality of Law in America

Government lawyers in America have an enhanced opportunity to affect public policy because law is so central to the American story.[22] In America, no prince, no religious creed, no caste or clan, no normative ideology dictates our lawful conduct. Unlike in most nations historically or today, law is important to the shared sense of the American story.

Our written Constitution is one important explanation. Moreover, the Constitution generally provides only broad principles of governance and relies on broad concepts like checks and balances and "equal protection." Largely because of our Constitution, but also because of our shared sense of the law, many of the government decisions that vitally affect our society are debated, and ultimately decided, on the basis of legal analysis.

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20. Nelson, *supra* note 1, at 285.

21. Because this article reflects personal experiences, it focuses on a chief government lawyer. Moreover, there are certain matters that raise sufficiently important or controversial issues that make it extremely likely that the chief lawyer will be principally responsible for engaging the chief executive. Nonetheless, many lawyers in the Law Department focus upon public policy questions. And all our lawyers recognized, or were encouraged to recognize, that government lawyers are held to the highest standards of ethics and fairness. Indeed, we tried to teach our young lawyers that they are held to higher standards than their adversaries—that you can fight hard, and still fight fair. *See* Schwarz, *supra* note 2.

22. This section borrows from thoughts expressed in Frederick A. O. Schwarz, Jr., Becoming a Real Lawyer, Keynote Address at the Convocation on the Face of the Profession II—The First Seven Years of Practice (Nov. 11, 2002), *in* 3 N.Y. St. Jud. Inst. on Professionalism L. 10, 10–23 (2003), *available at* http://www.courts.state.ny.us/ip/ jipl/JIPL-Spring2003.pdf.

One hundred and seventy years ago, Alexis de Tocqueville referred to lawyers in America as "the sole enlightened class that people do not distrust" and added that "the American aristocracy is at the attorney's bar and the judge's bench."[23] People in America today, or in New York City when I was Corporation Counsel, would not gush to that extent. But, it is still the case—actually even more so today than when de Tocqueville wrote—that the legal lens is one of the lenses used in America to examine most public policy questions. This renders us distinct from most other democracies in Europe and elsewhere.

B. Lawyers in New York City Government

Before coming to work for the Koch administration, I had next to no personal or professional dealings with municipal government. My focus had been on the federal government with its civil rights and national security responsibilities. This was a natural consequence of the era in which I came of age, and of my own experience—particularly as chief counsel for the United States Senate's "Church Committee" investigating America's intelligence agencies from Franklin Delano Roosevelt through Richard Nixon.[24]

Working for the city opened my eyes to the intimacy of the connection between city government and the people. Every day, city government touches people in the most intimate and immediate ways: their safety, their schooling, their health, their sanitation, their housing, their transportation, their daily jobs. Directly and frequently, the city affects the lives, the aspirations, and the pocketbooks of millions of people and tens of thousands of businesses. And so does the work of the Law Department.

The city is not only subject to the federal Constitution and many federal laws, but is also a "creature" of the state subject to the state constitution and many state laws. The city also has its own constitution—the City Charter—and city laws. And New Yorkers have always demanded much of their government—and are traditionally quite litigious as well. For all these reasons, the Law Department works with an amazingly broad canvas.[25]

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23. *See* Alexis de Tocqueville, Democracy in America 269 (J.P. Mayer ed., George Lawrence trans., 1969) (1835). The British jurist and historian James Bryce also remarked on the central role of lawyers in America. *See* James Bryce, The American Commonwealth (1917).

24. For the revelations of and a summary of sources relating to the Church Committee's work, see Frederick A. O. Schwarz, Jr. & Aziz Z. Huq, Unchecked and Unbalanced: Presidential Power in a Time of Terror 21–49, 210–11 n.14 (2007).

25. Examples of the breadth and variety of Law Department work in one year are shown by my cover letter to the Department's annual report for 1984. *See* Frederick A. O. Schwarz, Jr., *Letter to the Mayor*, *in* New York City Law Department, 1984 Annual Report 2–5 (July 1985) (Schwarz Writings and Speeches, at Tab 31). Another way to gauge the breadth and variety of the Law Department's work through time is to look at the walls of the Appeals Division on which hang the cover pages of, and a brief description about, all the Department's Supreme Court cases from the mid-nineteenth century to date.

The Corporation Counsel is the city's chief counsel for litigation and advice, as well as being responsible for writing opinions, for drafting legislation, and for the legal side of matters such as economic development. The scope of the job contrasts with many other important government legal jobs. Thus, while in charge of litigation, the state attorney general—who is separately elected—is not part of the governor's cabinet, and therefore is seldom in an advisory role.[26] Conversely, the governor's counsel, while substantially involved in advice, does not litigate. Corporation Counsel combines both roles. The state attorney general and the governor's counsel therefore have less potential for influence on policy.

The attorney general of the United States also has wide responsibilities. But there are two reasons why Corporation Counsels have relatively greater influence within the smaller sphere of city government. One reason is proximity: City Hall is a two-minute walk away from the Law Department. The Justice Department is about six blocks from the White House.[27]

Second, in the federal government, the White House Counsel's office now has over twenty lawyers; it is also a substantial policy office. Its leaders have often been well known Washington figures starting with Judge Samuel Rosenman (whom FDR installed as the first White House Counsel in 1943)[28] and continuing through, for example, Lloyd Cutler and Abner Mikva. The White House Counsel has often been very important to the handling of significant public policy matters—as, for example, was Alberto Gonzales on limiting the application of the Geneva Convention, opening the door to torture, and expanding warrantless wiretapping.[29] In contrast, the city hall counsel's office, at least under Mayor Koch, was small and had a narrow mission. Its occupants were first-rate lawyers, but usually were relatively junior, often coming over from the Corporation Counsel's office.

C. The Mayor and the Corporation Counsel

Key in determining the scope of a Corporation Counsel's role is the mayor's own view of the law, as well as the relationship between the two officials and the breadth

26. The same limit applies to U.S. Attorneys' offices, which only litigate, and which are also far removed from any client.

27. Being physically close to a chief executive may increase the possibilities for influence on policy matters. However, history also tells us that being too close to the chief executive in the sense of personal fealty or lack of independence can increase the chance of bad decisions being made by the government lawyer. John Mitchell's and Alberto Gonzales's relationship to Presidents Richard Nixon and George W. Bush are recent examples.

28. *See* Robert H. Jackson, That Man: An Insider's Portrait of Franklin D. Roosevelt 64–65 (John Q. Barrett ed., 2003) (published posthumously). Jackson had been Franklin D. Roosevelt's ("FDR") attorney general, and FDR appointed him to the Supreme Court. When Jackson was on the Court and on a social visit with the president, FDR asked for his views on appointing a White House Counsel to be "his always-on-hand advisor on matters of law." Jackson said he "thought very little of it," and indeed would have resigned if done when he was attorney general. The president proceeded anyway. According to Jackson, Rosenman became "the most potent of legal advisors" because of his "long association and intimacy with" FDR. *Id.* at 64–65.

29. *See, e.g.*, Schwarz & Huq, *supra* note 24, at 69–78, 85, 116, 132–33, 145, 196–98.

and nature of the lawyer's vision of his or her role. Professor Nelson correctly devotes attention to Mayor Koch as he praises the quality of the Corporation Counsel's office during the Koch administration.

As Professor Nelson notes, Koch was confident, appointing Corporation Counsels he considered smart and professionally accomplished. And for his second and third Corporation Counsels, Koch chose individuals whom he barely knew.[30]

From our first discussion at Gracie Mansion in mid-1981 about my taking the job, it was clear to me that Koch was not looking for a "yes man." Thus, in our wide-ranging talk, I told the Mayor that I did not agree with his position on the death penalty. At that same meeting, I also said to the Mayor that more healing between blacks and whites was critical for the city and was something I cared about.

In addition to being sufficiently self-confident to pick close advisors of independence and strength, Mayor Koch, in private, was not at all what one would expect from his public persona. His public persona was brash (and humorous), and almost always sharply (or humorously) dismissive of any disagreement or criticism. But in his office, Koch enjoyed dialogue, and perhaps most surprising to many, he enjoyed—or at least respected—disagreement. Based upon discussions in his office, the Mayor would frequently change his initial positions—often strongly held positions. Another remarkable fact is that I was able to bring junior lawyers to participate in meetings related to their areas of expertise. The Mayor would be genuinely interested in their views.

Finally, Koch would accept criticism—even sharp criticism on subjects where he felt strongly. Professor Nelson's book illustrates this by discussing a memo and remarks of mine on the subject of race.[31] The concerns I expressed to Koch were focused on what he said (or didn't say), not focused on what he did.[32] I was concerned

30. Nelson, *supra* note 1, at 271, 276. My own brief contacts with the Mayor before he appointed me had been representing the city on a *pro bono* basis in two cases: (i) the constitutional challenge to the systemic undercount of city residents by the U.S. Census, and (ii) defense of the Census counting undocumented aliens. Also, I had introduced the Mayor several times at the Fund for the city of New York's annual award for outstanding city civil servants. (That, despite these contacts, the Mayor did not know me well before appointing me was shown by his referring to me as "Fred," rather than Fritz, at the Fund event after he had first spoken to me about becoming Corporation Counsel.)

31. *Id.* at 286. For the full text of the memo, see Racial Relations Memo, *supra* note 19. For the context of the remarks, see Schwarz, CUOHROC, *supra* note 18, at 99, 178–89.

32. On what the Mayor did, Ben Ward's appointment as police commissioner was a breakthrough for African Americans. As with all other appointments, the Mayor wanted to see his choice as having been made on the merits, rather than on the basis of race, even though he understood the "political" advantages of diversity in hiring. This is why Herb Sturz and I, in advocating Ward's appointment, stressed his extraordinarily broad experience. *See* Schwarz, CUOHROC, *supra* note 18, at 118–22. The Mayor's appointments of female and minority judges have been a point of acknowledgement. *See* Fund for Modern Courts, The Success of Women and Minorities in Achieving Judicial Office: The Selection Process 33 (1985); Schwarz, CUOHROC, *supra* note 18, at 188–91. The Mayor delivered a very thoughtful and balanced speech on police brutality in connection with a House Judiciary Committee Hearing. (Here the Mayor was helped when we pulled together high-ranking African Americans in his administration—all of whom the Mayor liked and respected—to sit with the Mayor and recount experiences they had had with police. *See* Schwarz, CUOHROC, *supra* note 18, at 126.) Finally, on the substantive side, the Mayor did unprecedented things with housing that helped the

that the Mayor was not "leading the city in a positive direction," was doing too little along the lines of "reducing tension, healing, [and] bringing people together," and, instead was "acting more as an advocate than as a leader of all the people."[33] As I noted to the Mayor, this was "unfair to the electorate, harmful to the city, and harmful to you."[34]

There is an important footnote to the point about the Mayor being remarkably open to criticism. Koch accepted criticism from those whom he considered basically loyal. However, from others, certainly from those he would classify as "enemies," he generally would not (or could not) see any kernel of truth that might lie within a shell of vituperation or even simple disagreement. Conversely, the Mayor did let some (like Bronx Party Leader Stanley Friedman and Queens Party Leader and Borough President Donald Manes) get too close to him because of their political support, as well as, I believe, because of their facility with flattery. Then, when they turned out to be corrupt, the Mayor was hurt by that closeness—even though the Mayor was completely honest himself.[35]

Beyond Koch's personal characteristics, the Mayor favored the Law Department in terms of budget, even at the height of the city's fiscal crisis. Some could say this was because Allen Schwartz, his first Corporation Counsel, was his close friend and former law partner. While not irrelevant, I do not believe this is the explanation. The Mayor gave similar favorable treatment to the Office of Management and Budget ("OMB").[36] Moreover, the favorable treatment continued after Allen left. Finally, giving the Law Department favorable treatment in terms of budget and personnel does not necessarily translate into respect for the law or deference to legal and policy judgments made by Corporation Counsels.

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poor—who were, of course, predominantly minorities. *See generally* Alan Finder, *New York Pledge to House Poor Works a Rare, Quiet Revolution*, N.Y. Times, Apr. 5, 1995, at A1.

33. Racial Relations Memo, *supra* note 19, at 1, 4.

34. *Id.* at 1.

35. These analyses of Mayor Koch are expanded upon in parts of my four day, nearly 400-page oral history interview given to Columbia's Koch Administration Oral History Project. *See generally* Schwarz, CUOHROC, *supra* note 18. Before those interviews started, the Mayor indicated he did not want those interviewed to hold anything back. Though the Mayor did not refer to the quote, his sentiment was similar to Oliver Cromwell's remark to the portrait painter: paint me "warts and all." Of course, given his proud and self-confident nature, the Mayor would have—deservedly, in my view—expected more "all" than "warts."

Among other corrupt acts, Donald Manes had taken bribes to help steer data processing contracts with the city's Parking Violations Bureau. (Manes committed suicide before he could be tried.) Friedman was convicted of receiving bribes in connection with the same scandal and was sentenced to twelve years in prison. For the most comprehensive analysis of the corruption scandal, see Jack Newfield & Wayne Barrett, City for Sale: Ed Koch and the Betrayal of New York (1988). (Friedman blamed his initial exposure on me. *See id.* at 274.)

36. Koch's special financial support for the Law Department and for OMB was based on Koch's view that the two agencies were the most important to protecting the city's fiscal health, a subject that, because of the fiscal crisis, dominated the Mayor's attention during all of Allen Schwartz's years and remained important during my years, particularly the early ones.

So what explains Mayor Koch's extraordinary willingness to defer to the judgments of his Corporation Counsels? The fact that Koch himself was a lawyer is not the answer. That Koch was a lawyer often facilitated back-and-forth discussions with him. But the history of both our national government and our city government teaches that a law degree is no guarantee of respect for the Constitution or even the statutory laws.

In Professor Nelson's book, Koch himself says he often deferred to the judgments of his Corporation Counsels because they were smart or more knowledgeable about the law than he was.[37] But Koch was extremely smart. Moreover, the kinds of issues that are important enough to call for the mayor's participation or decision do not depend on brain power (or on arcane legal reasoning). Rather, they turn on judgment (and often are policy matters that have little to do with law).

In Nelson's book, Peter Zimroth suggests that Koch may have deferred to his Corporation Counsels in some instances because to do so might have been "self-protective."[38] Why, Professor Nelson then speculates, should Koch take "the blame for unpopular decisions that were to some extent outside his control"?[39] Sometimes, self-protection could be an explanation. But this point does not apply to decisions based on policy judgments. Moreover, with respect to decisions linked to law, it applies only to the relatively narrow set of matters where the result depends on a clear (or at least quite clear) rule of law.

So the question remains, why was Mayor Koch so often willing to rely on the judgments of his Corporation Counsels relating to public policy questions? Based upon my experience, the underlying reason was that Koch had an open mind and enjoyed debate and discussion. He was persuadable by good arguments, particularly arguments focused on understanding where the interests of the city truly lay. But beneath this explanation lies, I believe, the deeper explanation based on Koch's self-confidence. That characteristic made him more willing to accept arguments about the city's interests, even when the result may have departed from his initial positions—or even undermined his "political" interests.

* * * *

In government, as in life, it takes two to tango. Whatever the characteristics of a chief executive may be, for the chief government lawyer to play a significant role on public policy issues, that lawyer must be interested in public policy, and must not see the job as limited to spooning out law, or be a shrinking violet. I do not think that neither Allen nor Peter nor I were shrinking violets.

Upon becoming Corporation Counsel, my first hope, expressed in an address to the Law Department, was that our reputation would continue to improve[40] so that

37. Nelson, *supra* note 1, at 276.

38. *Id.* at 278.

39. *Id.* at 278–79.

40. One sign that we were doing well is that in the only instances where we and the U.S. Attorney's Office for the Southern District of New York competed on hires, we prevailed. One such hire was Rick

ours would be regarded as the best government law office in the city.[41] I understood from the outset that our client was the city of New York. I understood that this meant helping to protect the city's fiscal health—but believed that doing so, while necessary, was not sufficient. A government has deeper interests than its economic interests. I also sensed that government lawyers, more than private lawyers, have a special responsibility to understand and articulate their client's *long-term* interests. Finally, from the outset, I sensed that analysis of the city's long-term, deeper interests would require greater attention to the needs of the city's disadvantaged.

All of these initial instincts were reinforced and substantially enriched by my experience in the ensuing five years.

V. EXAMPLES OF IMPACTING PUBLIC POLICY

The examples focus on how to think about the interests of the city—the Corporation Counsel's client. I begin with examples arising from the work of the Law Department and then move on to ones not directly tied to the Law Department.[42]

A. Creating the Affirmative Litigation Division

This is an example of how an administrative change based upon a broad vision of the "interests of the city" can substantially affect public policy. Very early in my tenure, I created the Affirmative Litigation Division with Lorna Goodman as its first chief.[43] The division was created to bring cases for the purpose of "generating

Schaffer, who had been offered the job of the chief of the Southern District's Civil Division, but who thought our work was more varied and exciting, and who also thought that working in a leadership role at the Law Department would give far greater opportunities to influence public policy. The other was for an outstanding entry-level lawyer (Peter Lehner), who chose to come to us after his circuit court clerkship because of our Affirmative Litigation Division.

41. At that initial address I expressed two other hopes. First, I expressed a desire to improve the relations of the Law Department's lawyers with the non-lawyer staff. Second, I urged the Department's lawyers to restore good relations with the city council.

42. The examples that I use are matters where I personally played a major role as Corporation Counsel—to some extent in sensitive litigation and to some extent in providing public policy advice. But such experiences were not mine alone. The successes of a Corporation Counsel's office flow from its many excellent lawyers devoted to public service. Professor Nelson's book correctly emphasizes devoted and talented public servants at the Law Department. Some, such as Jeff Friedlander, Lenny Koerner, Doron Gopstein, Judy Levitt, Joe Bruno, and Lorna Goodman, and many other superb lawyers, started before the Koch administration. In addition, as its reputation was enhanced, the office began to attract first-rate lawyers with experience in private practice such as Rick Schaffer, Nicole Gordon, and Margaret King. Finally, at least during the Koch years, and I assume since, the office has attracted good lawyers fresh from law school.

As with a private law firm, at the end of the day the key to success of a government law office is the quality of the people.

43. There was already a division by that name. But it was not particularly affirmative and rarely involved meaningful litigation—rather it focused on reimbursement of medical expenses incurred by the city. I had gotten to know Lorna Goodman prior to joining the Law Department during my time at Cravath, Swaine & Moore in the course of a case stemming from our representation of Time, Inc. The case

revenues and righting social wrongs."[44] What is important for this paper is that the creation of the division and its subsequent work show that (i) the city's interests need to be looked at broadly, and (ii) the city and its Law Department often are natural allies of the poor and disadvantaged.

Administratively, there was "one absolute organizational imperative" for successfully doing affirmative work: the division had to be protected by limiting its lawyers to representing the city as *plaintiff*.[45] Based on my litigation experience, I was sure that if the division lawyers also took on defense work it would suffocate the division's affirmative work.

Substantively, what was new as a policy matter was the "righting social wrongs" part of the division's mandate. Here, what was key was to determine which cases with that objective would serve the *city's* interest.

Traditionally, such cases were often brought by the Justice Department and by legal services lawyers. But under the Reagan administration, the Justice Department seemed "openly hostile to the interests of the poor."[46] Similarly, President Reagan and Attorney General Meese sought to hamper the federally funded Legal Services Corporation, a private, non-profit organization established by Congress to provide civil legal assistance to the poor. Those efforts "subvert the proper and traditional role [of government] in ensuring access to the legal system," and had been "substantially successful in eviscerating organized efforts to sue for the poor."[47]

But, while troubling, these points would only matter to the city and to the Law Department if the city and its residents were being hurt. I thought this was the case,

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sought to admit female sports reporters to professional sports locker rooms. The defendants were the New York Yankees, Major League Baseball, and New York City. The city was added as a defendant because it owned Yankee Stadium—and having the city in the case helped get us into federal court and make a Section 1983 claim. (We were concerned that judges in state court would be more susceptible to influence by the politically powerful Yankees.) Lorna persuaded Allen Schwartz, a huge sports fan, that the city should take a neutral position in the case. We won. *See* Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978). For a discussion of the case, see William E. Nelson, The Legalist Reformation: Law, Politics, and Ideology in New York 301–02 (2001). Lorna is now the Corporation Counsel for Nassau County.

44. Frederick A. O. Schwarz, Jr., *Letter to the Mayor*, *in* New York City Law Department, 1982 Annual Report i (Feb. 1983) [hereinafter Schwarz, Letter to the Mayor in 1982 Report] (Schwarz Writings and Speeches, at Tab 31); *see also* Frederick A. O. Schwarz, Jr., Keynote Address on Cities as Initiators of Affirmative Social Policy Litigation at Urban Education Seminar: Local and State Government Liability (Mar. 17, 1983) [hereinafter Cities as Initiators] (Schwarz Writings and Speeches, at Tab 33).

45. *See* Cities as Initiators, *supra* note 44, at 2.

46. *Id.*

47. *Id.* at 2–3. For a critique of another harmful policy of the Reagan administration, see Memorandum from author to Edward I. Koch et al., AIDS Related Discrimination (Aug. 1986) (on file with *New York Law School Law Review* and CUOHROC, Oral History Documents at Tab 64) (explaining that the advisory opinion of the Reagan administration's Department of Justice on AIDS discrimination failed to provide a "convincing and professional analysis of the law," and had indeed "exacerbate[d], rather than calm[ed] fears" by "encourag[ing] and reward[ing] irrational beliefs, unfounded in medical evidence, concerning the spread of AIDS."); Schwarz, CUOHROC, *supra* note 18, at 295–96 (discussing the Justice Department's "perverse" advisory opinion that concluded "federal law gave no protection" for people suffering from AIDS).

and I was certain that the Affirmative Litigation Division would find good cases to bring that served the interests of both the city and its disadvantaged residents.

One good example was the case we brought against the federal government relating to its new policies making it harder for disabled people to collect Supplemental Social Security payments. This policy hurt some sixty thousand New Yorkers and cost the city and state tens of millions of dollars as they assumed what had been a federal responsibility.

We won the case, culminating in a 9-0 victory in the Supreme Court.[48]

This is just one example of the many cases brought in the area of income maintenance, housing discrimination, and the city's quality of life, including the environment.[49]

As my speech at a seminar for state and local government lawyers concluded: "We are beginning to recognize the natural long term [alliance] between cities and protection of the rights and interests of the disadvantaged of this nation."[50]

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48. *See* Bowen v. City of New York, 476 U.S. 467 (1986). Justice Lewis Powell's line near the end of the Court's opinion ("While 'hard' cases may arise, this is not one of them." *Id.* at 487.) has been cited as an example of "how thoroughly the [Solicitor General's] credibility had eroded" with the Court during the Reagan Administration by its pushing "agenda" cases. Lincoln Caplan, The Tenth Justice: The Solicitor General and the Rule of Law 261–63 (1987). I am not sure this is fair. To me, the difference with the lawyers for the Reagan administration was simply that the city had a different policy agenda which it believed the law supported.

49. *See* Cities as Initiators, *supra* note 44, at 5–6; Schwarz, Letter to the Mayor in 1982 Report, *supra* note 44, at i–ii. The flavor of the division's many other cases is shown by: seeking Medicaid reimbursement for the cost of treating undocumented aliens in city hospitals; devising legal remedies against landlords who used harassment techniques to drive tenants out—often into the city's homeless shelters; suing unions who discriminated against minority workers; and bringing major environmental cases, as part of a wide effort in the Law Department to help improve the quality of life in the city, including a case against Exxon, based on illegal dumping of toxic waste in city landfills that (after seven reported decisions) led to the city recovering over $70 million in clean-up and restoration costs. *See* Peter Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 Stan. Env't'l L.J. 50 (1993).

Of course, the city cannot be on the side of legal services advocates unless the interests are common. Obviously there are occasions when they are not. One side benefit, however, of legal services lawyers recognizing that the city could sometimes be their ally was their agreement with me to notify us of any planned lawsuits against the city before they were filed. That gave the city the opportunity before lawsuits were brought to fix problems that should be fixed.

A somewhat related point is that OMB and the Law Department joined to support budget requests from other agencies that we believed would help the city fiscally while also helping poor people. One example was based on our finding that impoverished tenants facing eviction would often win with a lawyer, but without one they would usually lose—often leading to homelessness and significant costs for the city.

50. Cities as Initiators, *supra* note 44, at 8. This speech was designed to persuade other cities to emulate our Affirmative Litigation Division. I know that at least Chicago under Mayor Washington did, and I assume some other cities did as well.

B. The Mayor Changes His Mind on a Policy Denying Property Tax Exemptions to Many Non-Profit Organizations

In his first term, Mayor Koch asked all city agencies to come up with ideas to increase city revenue or reduce city expenses. The Law Department proposed denial of property tax exemptions to a substantial number of non-profits in the city. The Mayor endorsed the policy enthusiastically; the exemptions were removed by the city tax authorities.

Shortly after I took office, I heard about the policy (probably from a case where the Law Department was defending it). Sensing that the policy was contrary to the city's interests, I persuaded the Mayor to appoint a task force, which he asked me to chair, to consider whether the policy made "good sense" for the city. The Task Force Report ("Report") concluded the policy was contrary to the city's interests.[51]

The Report is an example of the need to analyze the city's *long-term* interests, and, in doing so, the importance of recognizing the breadth of a government's interests. This is also another example of Koch's willingness to change strongly-held positions. What makes this example particularly telling is that the original proponent of this proposal had been the Mayor's close friend and first Corporation Counsel, Allen Schwartz.[52]

The Task Force concluded that the benefit to the city from granting or denying the property-tax exemptions cannot be looked at "purely in terms of present dollars."[53] Short-term economics had to be balanced by an assessment of the city's "long-range economic, social and cultural interests."[54] In addition, the Task Force concluded that while the dollar loss to each of the non-profits from losing their property tax exemption would be substantial, the extra dollars for the city would be "insubstantial"—

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51. *See* City of New York, Report of City Task Force on the Exemption of Non-Profit Organizations from Real Property Tax (Oct. 4, 1982) [hereinafter Report on Property Tax Exemption] (Schwarz Writings and Speeches, at Tab 34). (The other Task Force members from the administration were primarily the highest ranking officials involved in finance and development.) The organizations that had their property tax exemptions taken away were "primarily cultural, social service, legal rights and other policy orientated, non-profit organizations." *Id.* at 2. Such organizations fell into a legal grey area between (i) non-profits that the state constitution and legislation unambiguously required to be exempt such as religious and educational institutions, hospitals and cemeteries (see N.Y. Const. art. XVI, § 1; N.Y. Real Prop. Tax Law § 420(a)), and (ii) certain other non-profits, such as social clubs, that were clearly ineligible for property tax exemptions. The report recognized that some exemption denials had been justified because they covered non-profits which, although non-profit, primarily served the economic interests of their membership. However, many other exemption denials affected organizations which served a "wider public purpose." Those organizations, just to list those whose names start with "A," included: American Academy and Institute of Arts and Letters; American Civil Liberties Union; American Field Services; American Geographical Society; American Irish Historical Society; American Jewish Committee; Anti-Defamation League of B'nai B'rith; and Asia Society. Report on Property Tax Exemption, *supra*, at 6–7.

52. This was Allen's only action that I disagreed with.

53. Report on Property Tax Exemption, *supra* note 51, at 2.

54. *Id.* at 2–3.

indeed for complicated technical reasons, could even in some years be non-existent.[55]

The report then focused on the importance of these organizations to the city: "While all cities have their schools, hospitals and churches, [which would all be automatically exempt under state law,] New York City's special spirit stems in significant part from its role as a cultural and intellectual center for the nation."[56] Organizations serving those ends (which were covered by the policy denying exemptions) were "magnets for millions of visitors," and were integral parts of the environment that "make[s] it possible to retain businesses and to attract young professionals."[57] To impose property taxes would "restrict funds available for operation . . . with a corresponding loss to this City's special and most valued characteristics."[58]

Having recommended against the policy based on an assessment that the city's interests went beyond possible short-term economic returns, the Task Force turned to a discussion of how tax-exemption for non-profits also supported "Our Democratic and Constitutional Values."[59] Property tax exemptions (as well as income tax deductions for charitable gifts) are a means by which society diverts to private decision makers a portion of its resources for public purposes. "It would be possible to conclude that only the Government should be empowered to decide what art to exhibit, what causes to promote, what ideas to research. That is not the choice this nation historically has made, and it would not be a wise choice to make now."[60] Thus, tax exemptions provided a significant mechanism for "decentralizing" choices about public purposes. And tax exemptions were "part and parcel of the traditions which [underlie] America's strength."[61]

For all these reasons, the Task Force concluded it did not make "good sense" or serve the city's interests to continue the policy of denying property tax exemptions.[62] After the report was issued and after the Mayor presided over two days of public hearings on the issue, Koch announced his agreement that the policy should be abandoned.[63]

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55. *Id.* at 2–3, 17–22.

56. *Id.* at 3–4.

57. *Id.* at 22.

58. *Id.* at 23.

59. *Id.* at 24–25. This was set up by de Tocqueville's observation that "at the head of any new undertaking, where in France you would find the Government, or in England some territorial magnate, in the United States, you are sure to find an association." *Id.* at 24 (quoting DE TOCQUEVILLE, *supra* note 23, at 513).

60. *Id. But see* NELSON, *supra* note 1, at 321–23 (discussing the Giuliani administration's position in the 1999 Brooklyn Museum case).

61. REPORT ON PROPERTY TAX EXEMPTION, *supra* note 51, at 25.

62. *Id.* at 4.

63. The hearings were suggested to me by the Mayor's chief of staff, Diane Coffey. Announcing a change of mind would be easier for the Mayor if he had had an opportunity to preside over a hearing where a number of witnesses added their testimony about harm and about the importance of the organizations

C. Consent Decrees: Wilder v. Bernstein

Professor Nelson says that Mayor Koch "opposed the City's entering [into] consent decrees."[64] On one occasion, at a press conference, the Mayor did announce that the city would not enter into any more consent decrees. I was not at the conference, but when I next spoke to the Mayor, I said what I assumed he had meant was that the city would not enter into any more consent decrees without termination and modification clauses; sometimes entering into a consent decree avoids greater risk to the city than if it were to litigate and lose. The Mayor agreed that was his position.

While consent decrees are sometimes necessary and appropriate, government lawyers should be careful in negotiating a decree, and in presenting it to a chief executive. Such decrees bind the government into the future; they may take away freedom from future executives; traditionally, and for good reasons, they are approved by the executive branch even though they have aspects akin to legislation. All these factors support the conclusion that termination and modification clauses are important. Working on consent decrees is also a good example of where it is important for a government lawyer to remember to avoid the "risk of hubris."[65]

Wilder v. Bernstein was an important case, ultimately settled by a consent decree.[66] The case was extremely interesting from a constitutional, a policy, and (for the Mayor) a political point of view. In caring for foster children, the city (and the state in general) had, for more than a century (indeed, to some extent, dating back to Dutch colonial times), used religiously-based organizations to deliver most, and generally the best, care. In the 1970s, the American Civil Liberties Union ("ACLU") sued to dismantle the system, claiming the city's use of, and payments to, religiously-based organizations violated the Establishment Clause of the First Amendment. The case also involved claims of racial discrimination as a consequence of huge demographic changes in the years since the system was created. Most city foster care children were now black. But since most blacks were Protestant and many of the better agencies were sponsored by the Catholic Church or by Jewish groups—both to

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to the city. Allen Schwartz was the only witness to testify in favor of the policy at the hearing. His testimony was an act of great courage which I admired, while disagreeing with its substance.

64. Nelson, *supra* note 1, at 277. Consent decrees are agreements used to settle litigations by addressing future behavior as opposed to the payment of money. Most often the term is used to describe settlements made by governments, though it can also be used to describe agreements made by companies who have been sued by a government. Usually they are referred to as "decrees" because of having been incorporated into a court order. For more general information about consent decrees, see the material cited in the next footnote.

65. *See* Schwarz, *supra* note 2. For more general thoughts pro and con about using consent decrees to settle public-policy cases, see Richard A. Epstein, *Wilder v. Bernstein: Squeeze Play by Consent Decree*, 1987 U. Chi. Legal F. 209 (1987); Burt Neuborne & Frederick A. O. Schwarz, Jr., *Prelude to the Settlement of Wilder*, 1987 U. Chi. Legal F. 177 (1987) (Schwarz Writings and Speeches, at Tab 40). For a general critique of consent decrees, see Ross Sandler & David Schoenbrod, Democracy by Decree (2003).

66. 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988).

varying degrees favoring admission of their own—black children had a lower chance of getting into the most desirable group homes paid for by the city.[67]

Earlier district court decisions had rejected a facial challenge to the city's reliance upon and financing of religiously-based organizations to perform a basic governmental function. But the district court had warned that the result would be different if it were shown in an as-applied challenge that the system operated in a discriminatory fashion.[68]

On the eve of trial, the three lawyers responsible for the trial and their division chief persuaded me that the extensive evidence developed over many years indicated the city was very likely to lose the case. (The evidence with respect to racial discrimination was particularly troubling.) I thought a loss would be extremely harmful; the religious agencies did good work and were important to the city; it was quite clear that care would worsen if the city took over running the foster-care group homes. On the other hand, I was troubled by the fact that some children, because of their religion (which, in turn, was highly correlated to race), had a substantially lower chance of getting into the most effective group homes financed by the city.

After convincing the Mayor that we should explore a settlement (which meant a consent decree), I worked out the essence of a settlement with Burt Neuborne, then the Legal Director of the ACLU. (The discussion was at a family dinner with our spouses.) The key terms were that (i) the ACLU would drop its Establishment Clause challenge and accept the city's continued use of the religiously-based organizations, and (ii) the city would agree that admission to the agencies would generally be on a first-come, first-served basis.[69]

A settlement was then negotiated with the participation and support of the relevant city agency. The Mayor had personally focused on how I should handle press coverage of the settlement's announcement, and expressed pleasure with how it had been covered. Two months later, however, the Mayor told me that he had changed his mind; he wanted me to withdraw the city's consent to the settlement. Koch said that on the merits, he had concluded that the agencies should be able to base their admission decisions solely on the basis of religion. It also became clear that the Mayor had been pressured extensively (and privately) by his friend and

67. For the story of the litigation and of its end with a negotiated consent decree, see Nina Bernstein, The Lost Children of Wilder: The Epic Struggle to Change Foster Care (2001). While the litigation and its settlement are well and interestingly covered, the most compelling part of the book is the Dickensian story of the travails in the foster care system of Shirley Wilder (the lead plaintiff), as well as her son and her grandson. The lengthy district court decision approving the consent decree lays out the history of the case. *See generally Wilder*, 645 F. Supp. 1292.

68. *See* Wilder v. Bernstein, 499 F. Supp. 980, 988–92 (S.D.N.Y. 1980); Wilder v. Sugarman, 385 F. Supp. 1013, 1029 (S.D.N.Y. 1974).

69. As the consent decree settlement evolved in negotiations among the parties and in the lengthy hearings before the district court, see *Wilder*, 645 F. Supp. at 1303–04, the stark simplicity of the settlement agreed to between Burt Neuborne and me became a lengthy and complex document, particularly with respect to how the placement decisions would actually be made. *See id.* at 1304–07, 1328–29. The settlement also addressed several sensitive issues with respect to "religious practices." *See id.* at 1306–07.

supporter Cardinal O'Connor and by other important supporters on behalf of some of the Jewish agencies.

I concluded that I could not continue as Corporation Counsel if the city repudiated an agreement that I had already signed and believed to be right. I let the Mayor know this indirectly through a mutual colleague.[70] But my direct response to the Mayor was in a twenty page memo that elaborated eight reasons why withdrawal of the settlement would not be in the city's interest.[71]

After reading the memo (and after a meeting with me and Chief Deputy Mayor Stan Brezenoff, with whom I had shared the memo), the Mayor withdrew his request that we abandon the settlement. This must have been hard for him because his personal instincts had probably changed to opposition and because those seeking change, like the Cardinal, were personal friends and among his most important supporters.

The Mayor agreed to disagree with the Cardinal on other matters—for example, on the litigation defending his executive order that required agencies that contracted with the city not to discriminate on the basis of sexual orientation.[72] After the Mayor's executive order was struck down on the theory that power over such matters was legislative,[73] the city council finally passed a law prohibiting discrimination against gays.[74] This law was one of many examples where the Law Department

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70. I felt that doing it indirectly was preferable because to do it directly would potentially interpose emotions on both sides, and thus might detract from discussion of the merits with the Mayor. (This colleague might have merely suggested "Fritz might feel he would have to leave if . . . .")

71. *See* Cover Memorandum from author on *Wilder* to Edward I. Koch, Mayor, City of N.Y. (May 17, 1984) [hereinafter Cover Memo to Koch on Wilder]; Memorandum from author on *Wilder v. Bernstein* to Edward I. Koch, Mayor, City of N.Y. (May 17, 1984) [hereinafter Memo to Koch on *Wilder*]; Bernstein, *supra* note 67, at 334–35 (discussing the memo). The cover memo argued that what was done was correct on the merits, that the agencies' rights would be fully protected in the district court's forthcoming hearing on the settlement, and that having made a considered judgment to sign the stipulation, we could not defend or justify attempting to withdraw. The longer memo elaborated on these and added the risk of far more drastic consequences at a trial, the *preservation* of the role of religion, and the harm to the city's general status in the courts of attempting to withdraw; moreover, withdrawal would "significantly set back [the relevant city department's] efforts . . . to strengthen its control and management of the foster care system." Also, the religious agencies had given an initial go-ahead to sign the stipulation but had waited to meet with the Mayor until after the stipulation was signed and delivered to the court. The memo closed by saying:

> For all the foregoing reasons, the City has absolutely nothing to gain by attempting to retract the settlement. What we have to lose, however, is our good standing with the Court and the public, the substantial risk of losing at trial, and a significant strengthening of [the City department's] ability to manage and improve the foster care system.

Memo to Koch on *Wilder*, *supra*, at 20.

72. *See* N.Y. City Exec. Order No. 50, N.Y. Rules, tit. 66, § 10–14 (1980).

73. Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y.2d 344 (1985).

74. *See* New York, N.Y., Local Law No. 2 (Apr. 2, 1986) (originally codified at N.Y. City Admin. Code § 8-108 ("Unlawful discriminatory practices; sexual orientation")). The council later re-codified this provision. *See* New York, N.Y., Local Law No. 39 (June 18, 1991) (combining §§ 8-107 & 8-108; codified at N.Y. City Admin. Code § 8-107).

worked with the city council in developing legislation addressing important public policy issues.[75]

D. Decisions Not to Appeal

Many positions taken by the city in litigation have policy implications. What I cover in this section are some examples of decisions not to appeal. These again illustrate two themes that run through this paper: (i) the importance of recognizing the city's long-term, broad interests, and of being sophisticated about what those interests are; and (ii) Mayor Koch's remarkable willingness to defer to the judgments of his Corporation Counsels.

Professor Nelson's book covers the decision not to appeal to the Second Circuit a decision by United States District Judge Morris Lasker that the city must release some prisoners to remedy its substantial contempt of a consent degree requiring reduction of overcrowding in Rikers Island prisons.[76]

This was a tough recommendation to make to the Mayor. First, I had to be convinced by Len Koerner (the chief of the Appeals Division who had also been charged by Allen Schwartz with responsibility for the prisons' litigation) that the city had no respectable arguments to make on appeal. Then, that to appeal with such weak arguments would hurt the city's general reputation in the Second Circuit by appearing simply to pass the buck to the courts for what would obviously be an unpopular but inevitable decision.

The discussion in the Mayor's office was hotly contested. The city's police commissioner (Ben Ward) and its criminal justice coordinator (John Keenan) strongly resisted our recommendation. Koch, in an extraordinary decision—clearly against his own short-term political interests—sided with our argument.

Another matter on which we chose not to seek further judicial review involved a City Charter provision that the city council should have two at-large members elected from each of the city's five boroughs in addition to the usual single-member districts. For each borough, the two had to be from different parties. The idea was to increase the voices in the council by assuring that at least five members on the council were not from the Democratic Party.

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75. After the Gay Rights Bill was signed into law, the Mayor gave me the pen he used to sign it because of changes in the Bill that I had helped develop. Those changes helped lead the city council to pass the law after years of refusal. In turn, I passed the pen on to NYU Law Professor Thomas Stoddard, who was also the Director of Lambda, the leading gay rights legal organization; Stoddard had worked with me on the changes. (Peter Vallone's leadership of the council was also critical. Vallone personally opposed the bill because of his strong religious beliefs; but he allowed the council to vote on the merits—unlike the practice of his predecessor, Thomas J. Cuite.) The other law that I personally worked on was the Private Clubs Bill that resulted in the admission of women to a number of the city's most prestigious clubs. Peter Zimroth argued the United States Supreme Court case that upheld that law. *See* N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988).

76. *See* Nelson, *supra* note 1, at 277; Benjamin v. Malcolm, 564 F. Supp. 668 (S.D.N.Y. 1983) (Lasker, J.).

The aim was good. However, the at-large scheme ran afoul of the one-person, one-vote doctrine because (at the extreme) it gave Staten Island the same number of at-large seats as Brooklyn, which had six times Staten Island's population.

After the city lost in both the district court and the Second Circuit,[77] the Mayor agreed the city should not seek Supreme Court review. One reason was the extreme weakness of the city's legal argument. Making such arguments would harm the Law Department's reputation, this time in the Supreme Court. A further reason was that it would be better for the city to get going on its own with a remedy by appointing a Charter Revision Commission to analyze how to fix the constitutional defect.[78]

While the Mayor agreed with the recommendations not to seek review in the Supreme Court, and to appoint a Charter Revision Commission, I was not successful ++in urging the Mayor also to use these decisions to reach out to the "minority community."[79] This was a possibility because, in addition to violating the one-person, one-vote doctrine, the at-large seats presented civil rights concerns: at-large elections traditionally tend to minimize minority voting strength; and in the eighteen years of the city's at-large system only one minority member had been elected.[80] I suggested that the Mayor "should be looking for points of symbolic importance to the minority community where you can, with self-respect, be a supporter."[81] Koch agreed to the Charter Revision approach, did not press the Commission for a revised at-large system, but told me he did not agree with my "symbolic importance" proposal.

E. "Sweet Are the Uses of Adversity": The Corruption Scandal and Governmental Reform

In 1982, I suggested to Mayor Koch that he "get out-front" on pushing for "Campaign Reform," for example, pressing for "a sharp reduction in the size of allowable contributions."[82] Progress did not, however, begin to be made until 1986. The story of what happened is a good example of how timing is everything, how context matters, and how the interests of the city can ultimately coincide with the personal interests of a mayor.

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77. *See* Andrews v. Koch, 528 F. Supp. 246 (E.D.N.Y. 1981), *aff'd*, 688 F.2d 815 (2d Cir. 1982).

78. State law gave mayors power to appoint charter revision commissions. Jeff Friedlander suggested use of this provision that had not been used previously. Mayor Koch appointed Columbia University President Michael Sovern as commission chair. After its analysis, the commission voted simply to abolish at-large council members. In addition, the commission proposed a change in the city council's system for redistricting after each decennial census. City voters approved both proposals.

79. Next Seven Years Memo, *supra* note 19, at 3; *see also* Memorandum from author on City Council (At-Large) (Charter Revision Commission) to Edward I. Koch, Mayor, City of N.Y. (Jan. 10, 1983) (on file with *New York Law School Law Review* and CUOHROC, Oral History Documents at Tab 13).

80. *See Andrews*, 528 F. Supp. at 248 (explaining that the at-large system went into effect "on January 1, 1963, and thus has governed the manner of electing at-large council members for some 18 years"). The court notes that "during the entire history of the at-large system, only one ethnic minority council member at-large has ever been elected and there are none in that group now." *Id.* at 252.

81. Next Seven Years Memo, *supra* note 19, at 3.

82. *Id.* at 5.

When the corruption scandal burst forth in early 1986,[83] the Mayor went into a tailspin. Despite his personal honesty, he felt under the gun. He feared that Governor Mario Cuomo might move (as then Governor Franklin Roosevelt had done with Mayor Jimmy Walker in 1932) to oversee aspects of city government. He also felt menaced by U.S. Attorney Rudy Giuliani.[84] The Mayor was, by his own admission, deeply depressed. Perhaps, despite his personal honesty, he felt guilt at having become too close to the likes of Stanley Friedman and Donald Manes.

The strategy that I suggested to the Mayor was to take advantage of the situation by advocating good government reforms, which now might have a better chance of being realized. At the same time, advocating reforms would help with how people thought about Koch; it would help to have the public see him rise above the scandal. Thus, his ultimate view of his own self-interest, indeed his political interest, reinforced what was good for the city from a policy point of view.

In all of my memos and speeches on the subject, I used Shakespeare's "Sweet are the Uses of Adversity" as support for the concept of taking advantage of the scandal.[85]

Interestingly (and fortunately), the Mayor, while silent about campaign finance reforms in response to my recommendation a year after his 1981 reelection, had begun to suggest limiting individual campaign contributions shortly after his 1985

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83. *See generally* Newfield & Barrett, *supra* note 35.

84. We had several contacts with the U.S. Attorney. One matter led me to the conclusion that despite all his good work in fighting corruption, Giuliani in one respect actually had made it *harder* to deter corruption.

How to treat business executives who had paid bribes was a subject on which Giuliani and I disagreed. The city had power to sue those who had bribed city officials. We could seek substantial damages, as well as a bar on the companies doing business with the city. Giuliani continually pressed me *not* to bring these cases, threatening (unspecified) consequences if we did not agree with him. His argument was that he needed to make deals with the bribe givers to induce their cooperation. My answer was that: (i) he had plenty of incentives already through use of his office's power to decide whether or not to indict the executives for their criminal conduct; and (ii) failing to sanction those who paid bribes would lead to *more* corruption in the future. Thus, if Giuliani's pattern were followed, most business executives who were inclined to consider paying bribes to public officials—probably believing that they would not get caught—would conclude that, if they were caught, they could always make favorable deals with a prosecutor to avoid any real pain for themselves and their companies.

Giuliani continued to opt for the short term benefit—one I thought was unnecessary. Perhaps he had already made promises, unaware that the law gave the city the power to sue the bribe makers civilly. After discussing the issue with the Mayor—who already had developed a very powerful aversion to Giuliani—we backed down. The Mayor, probably correctly, did not want Giuliani to turn his hot breath on him more than he had already done. I continue to believe that ours was the better side of the argument, and that a renowned, and generally effective, crime fighter had, without a sufficient short-term reason, undermined the long-term fight against future corruption.

85. *See, e.g.*, Frederick A. O. Schwarz, Jr., Corruption: Stimulus for Reform, New York County Lawyers Association Charles Evan Hughes Memorial Lecture 1 (Mar. 20, 1986) (referencing William Shakespeare, As You Like It act 2, sc. 1) (Schwarz Writings and Speeches, at Tab 44); *id.* at 1–2, 25–26 (explaining how the history of corruption is really the history of reform).

reelection (and thus *before* the scandal broke).[86] In any event, a couple of weeks after the scandal broke, I sent the Mayor a thirty-page memorandum detailing twelve proposed reforms, starting with substantial changes in campaign finance laws.[87]

The day of, or the day after, getting the memo, Koch released it to the press, saying he agreed with all of it. Most of the reforms happened—some quickly and some later, as with Peter Zimroth's breakthrough solution to the campaign finance issue as described in Professor Nelson's book.[88]

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86. *See* Memorandum from author on Campaign and Government Reforms to Edward I. Koch, Mayor, City of N.Y. (Feb. 10, 1986) (Schwarz Writings and Speeches, at Tab 43).

87. *See id.*

88. Nelson, *supra* note 1, at 291–95. Under state law, permissible contributions were obscenely high. For example, up to $50,000 ($100,000 if a spouse also donated), could be donated to candidates for city-wide office. There was also at least the appearance of corruption since the largest contributions tended to come from people doing business with the city, or seeking to do so—particularly real estate developers whose major deals often required approval by the city's Board of Estimate. Because the contribution limits were set by state law, we thought, at that time, the city could not directly legislate to limit the size of contributions.

In 2003, a paper on the city's campaign finance program reviewing the 2001 elections suggested that this view of state law was not correct. *See* Paul Ryan, Center for Governmental Studies, A Statute of Liberty: How New York City's Campaign Finance Law is Changing the Face of Local Elections 41 (2003), *available at* http://www.cgs.org/ images/publications/nycreport.pdf; Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & Pol. 1 (2006); Memorandum from Richard Briffault, Professor of Law, Columbia Law Sch., on New York City's Authority to Regulate Campaign Finance in Municipal Elections (Dec. 2, 2003).

The Campaign Finance Act was subsequently amended to apply the disclosure requirements and contribution limits and prohibitions to all candidates for covered municipal offices regardless of participation in the voluntary public finance program. *See* New York, N.Y., Local Law Nos. 59 & 60 (Dec. 15, 2004). (I had the opportunity to work on these matters while serving as chair of the city's Campaign Finance Board.)

My proposed solution in 1986 had been to have the city pass a law that prohibited the city from taking any discretionary action—such as land-use approvals—that favored a contributor of more than $3,000 to a campaign. This would have had the effect of deterring the overwhelming majority of the excessive—and questionable—contributions. *See* Memorandum from author on Local Power to Address Campaign Contributions to Edward I. Koch, Mayor, City of N.Y., & Peter F. Vallone, Vice Chairman, N.Y. City Council (Aug. 21, 1986) (Schwarz Writings and Speeches, at Tab 45).

Shortly after Peter Zimroth took office, he came up with a more elegant and comprehensive solution: a program where the city would provide matching funding to candidates who agreed to accept limits on the size of contributions, as well as their total expenditures. Because the program was voluntary, it avoided any conflict with state law. By the matching formula, it also magnified the effect of smaller donors, all the more so with later amendments. *See* New York City Campaign Finance Board, Dollars and Disclosure: Campaign Finance Reform in New York City (1990). Also, because of the wide support for the city's Campaign Finance Law in the media and elsewhere, candidates found it difficult politically to ignore its limits.

But a problem remained with people doing business with the city making donations, albeit smaller ones. While I was chair of the New York City Campaign Finance Board, Mayor Michael Bloomberg and City Council Speaker Christine Quinn led a movement to further strengthen the Campaign Finance Act by implementing strong restrictions on contributions from those who do business with the city, thus after two decades meeting the goals of the 1986 effort described above. *See* New York, N.Y., Local Law No. 34 (Jul. 3, 2007) (codified at N.Y. City Admin. Code § 3-702 *et seq.*).

Another example of the sweet-are-the-uses-of-adversity idea was our proposal of a joint State-City Commission on Integrity in Government. This was both a part of our strategy of taking advantage of the scandal to build the case for reform, and an idea of the Mayor's that joining together with the Governor might alleviate the Mayor's concern that Governor Cuomo might intervene to oversee city government.

Because the Governor and the Mayor were not at ease in talking to each other, almost all of the work in setting up the commission was done by conversations between Evan Davis, the governor's counsel, and me.

The commission included three members from city government, three from state government, and nine private citizens, including Columbia University's President Michael Sovern as its chair. The commission did a lot of good analysis of the nature of the problems, and presented ideas for reform particularly on campaign finance.[89]

The commission's final recommendation was to set up a new commission with subpoena power to look at issues across the state. Interestingly, the three "state" members resisted that recommendation internally, although they did not dissent publicly.[90]

F. South Africa

By chance, at some event or party, I told David Dunlap, then a *New York Times* reporter covering city hall and now the paper's architecture critic, that many years earlier, I had worked to undermine South Africa's apartheid.[91] David then told me that Mayor Koch had recently derided efforts to take action against South Africa, saying there were many other bad countries.

After hearing Dunlap's remark, I went to see the Mayor, telling him why I thought South Africa was different, and persuading him to appoint a panel to consider the city's position. Although I do not remember more about that conversation, it seems I made some headway because Koch asked me to chair the panel. In addition, the Mayor's terms of reference for the panel (which I helped to draft) asked the panel to make recommendations about how to fulfill the city's "moral responsibility to lead the fight against discrimination here and abroad," adding that South Africa's apartheid policies make it a "pariah nation."[92] The Mayor went on to ask the panel to consider options for doing "all that is responsible, reasonable and

89. *See, e.g.*, State-City Commission on Integrity in Government, Final Report, The Quest for an Ethical Environment II (1986) (endorsing my approach to deterring large contributions from people "doing business" with the city) (Schwarz Writings and Speeches, at Tab 42); *see also* Editorial, *Good Counsel for New York City*, N.Y. Times, Jan. 1, 1987, at 26 (endorsing my approach also).

90. The new commission, chaired by Fordham Law School Dean John Feerick, produced some powerful reports. (It was also ultimately helpful in supporting various 1989 City Charter changes that it concluded would reduce opportunities for corruption.)

91. *See, e.g.*, Frederick A. O. Schwarz, Jr., *The United States and South Africa: American Investments Support and Profit from Human Degradation*, Christianity and Crisis, Nov. 28, 1966, at 265–69 (Schwarz Writings and Speeches, at Tab 9).

92. Report of the Mayor's Panel on City Policy with Respect to South Africa 3 (July 11, 1984) (Schwarz Writings and Speeches, at Tab 10).

within our power to foster change in this abhorrent system of government," while at the same time taking into account the city's "fiduciary responsibility" to its citizens and its pension fund beneficiaries to manage the city's finances "prudently."[93]

The thirty-five page Panel Report is another example of taking a broad view of the city's interests. The report first concluded that while "cities do not have the authority to conduct foreign policy, foreign events may, at some point, become a matter of civic and municipal concern," particularly where it is "reasonable to be concerned about repercussions—either immediate or in the future—in the city of New York from injustices" in a foreign country.[94] Second, South Africa was a "special case." It was appropriate to take prudent action with respect to South Africa because the apartheid system was "evil and unjust," was official government policy, had endured for many years, and showed no sign of basic change. Given that the city was "multi-racial and pluralistic," it had an "interest in asserting the fundamental importance of racial, equality, and tolerance, in avoiding connections to racial injustice and strife, and in trying, in these unusual circumstances, to use the city's financial strength to help achieve a peaceful transition to racial justice in South Africa."[95]

Given all these conclusions, the report recommended action be taken in three separate respects: (i) a phased program of divestment from companies doing business in South Africa, starting with companies that provide products to the South African military, police, and other instruments of apartheid; (ii) legislation authorizing the city to restrict purchases of goods made in South Africa; and (iii) identification of other ways to express the city's solidarity with South Africans seeking change, such as encouraging local educational institutions to offer fellowships.[96]

The panel's recommendations were accepted by the Mayor and the City Council. The end result was that the city took "responsible actions in its own enlightened self-interest and that of its citizens . . . to use its financial strength to increase the pressure for fundamental and peaceful change in South Africa."[97]

Of course, Koch's (eventual) vociferous support for the policy of putting pressure on South Africa did help him with one of his key political needs for the forthcoming mayoral election: the need to address the feeling articulated by a number of blacks that the Mayor did not care about issues important to them. Nonetheless, I know the Mayor would not have accepted the panel's recommendations if he had not been convinced they served the interests of the city. I am certain that he was proud of being an early leader in the pressure against apartheid from America, which clearly

93. *Id.* As with the task force on property tax exemption, this panel included among its members three of the administration's leading financial and development officials. *See id.* at 28–32 (discussing fiduciary responsibility).

94. *Id.* at 2; *see also id.* at 5.

95. *Id.* at 2; *see also id.* at 5–11.

96. *Id.* at 2–5, 11–34.

97. *Id.* at 34–35.

helped accelerate change in South Africa and helped assure that the change was peaceful.

G. Getting Started on Major Charter Change

While the 1989 City Charter changes ultimately went far beyond the elimination of the city's Board of Estimate, the Charter Revision Commission was initially appointed in response to a district court holding that the Board of Estimate violated the one-person, one-vote doctrine.[98] The Board of Estimate gave each borough president the same vote despite the substantial population variants among the boroughs.[99]

In 1986, after the city lost the Board of Estimate case in federal district court,[100] but when further appeals were available, I advised the Mayor to appoint a Charter Revision Commission to begin to analyze possible changes even though the city would continue to press its appeal. The reason for this was because it was clear that, if the decision stood (as was very likely even though not inevitable), it would be irresponsible for the city not to begin what would clearly be a lengthy and complex process of analyzing possible changes necessary to address the constitutional problem and all the many other changes that would have to be considered if the board were eliminated.

From a political point of view, this was a difficult decision for the Mayor to make. Establishing a Charter Revision Commission would clearly be resented by the other members of the Board of Estimate. The Mayor still needed to be able to muster majorities in votes at the board. But the Mayor accepted the judgment that the interests of the city called for appointing a Commission even though the city would continue vigorously to defend the board in court.[101]

The Charter Commission initially appointed by the Mayor had Richard Ravitch as its Chair. After the Ravitch Commission had done a substantial amount of initial preparatory work, the Supreme Court surprisingly granted certiorari in the Board of

98. Morris v. Bd. of Estimate, 647 F. Supp. 1463 (E.D.N.Y. 1986), *aff'd*, 831 F.2d 384 (2d Cir. 1987), *corrected by* 842 F.2d 23 (2d Cir. 1987), *aff'd*, 489 U.S. 688 (1989).

99. The Board of Estimate decided land-use issues and awarded discretionary contracts. Its voting structure gave two votes to each of the three city-wide officials—the mayor, the comptroller, and the city council president (now public advocate)—and one vote to each of the five borough presidents. After the Supreme Court unanimously affirmed the Second Circuit's holding that this structure violated the one-person, one-vote doctrine, those who found virtue in the board suggested that it could be kept by "weighting" the votes of the borough presidents according to their population. The 1989 Charter Commission voted 13 to 1, however, to eliminate the Board of Estimate. By this time, I had concluded not only that the board would still be unconstitutional even with weighting, but also that it was, as a policy matter, on balance bad for the city. Some of the Charter Commission members who had ties to various Board of Estimate members, or even had matters pending before the board, felt more comfortable relying on the constitutional argument, which they asked me to stress in my remarks and a paper before the vote to eliminate the board. *See* Schwarz & Lane, *supra* note 6, at 765–74.

100. *See Morris*, 647 F. Supp. 1463.

101. For the city's subsequent defense of the board, see Peter L. Zimroth, *Reflections on My Years as Corporation Counsel*, 53 N.Y.L. Sch. L. Rev 409, 416–20 (2009).

Estimate case, causing the Ravitch Commission to suspend its work considering possible fundamental changes. Ravitch later decided to run for Mayor and resigned as Charter Chair. (At this point, I was back in private practice and, in late 1988, the Mayor asked me to become the new chair.)

This is not the place to tell the story of the 1989 Charter Revision Commission.[102] However, two points further illustrate the Mayor's respect for independence and his willingness to hear critical comments.

Before the Mayor appointed me as chair, my most recent communication with him had been a letter expressing concern about the tone of his remarks about Jesse Jackson during New York's 1988 presidential primary. I had said that he should have expressed his opposition to Jackson without "heightening tensions." And that, without suggesting a new Ed Koch, all sweetness and light, insipid, restrained, dull, it was important for him to be "the Mayor of every single New Yorker of every race, religion and ethnicity."[103] As Mayor, he should use "[a]ll [his] energy, all [his] talent . . . to bringing people together, to reducing tensions, to building bridges."[104]

The other event occurred in March 1989, a few days after the Supreme Court unanimously upheld the decision that the Board of Estimate's voting scheme was unconstitutional.[105] Mayor Koch invited me to Gracie Mansion for dinner. I came with Eric Lane, the Charter Commission's Staff Director and General Counsel. The Mayor came with Peter Zimroth and Chief Deputy Mayor Stan Brezenoff. After the usual good food and drink, the Mayor told us why he had asked for the meeting. I hope, Koch said, you will not finish the Commission's work this year. Why, I asked. Because, said Koch, the Charter debate will split the city racially, and this would harm him (1989 being a mayoral election year). My response had two parts: (i) I cannot agree because the city government has been held unconstitutional in diluting the votes of large groups of citizens; therefore, our obligation is to fix it as soon as we can, and that means completing our work in 1989 *if* we can do so responsibly; and (ii) I believe our work will be done in a way that does *not* split the city on racial grounds.[106]

In the enormous amount of Charter Commission work that followed, the Mayor did not try to persuade by individual, behind-the-scenes lobbying. Rather, he

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102. For that story, see Schwarz & Lane, *supra* note 6; Schwarz, CUOHROC, *supra* note 18, at 320–81. (*The New York Times* from March through December 1989 is also a good source for Charter issues. *Times* editor Max Frankel assigned two excellent reporters, Todd Purdum and Alan Finder, to work full time on the Charter.)

103. Letter from author to Edward I. Koch, Mayor, City of N.Y. 2 (Apr. 25, 1988) (Schwarz Writings and Speeches, at Tab 29).

104. *Id*.

105. *See* Bd. of Estimate v. Morris, 489 U.S. 688 (1989).

106. *See* Schwarz & Lane, *supra* note 6, at 761–62; Schwarz, CUOHROC, *supra* note 18, at 334–35 (discussing this issue). As an initial step toward that end, upon my appointment I had asked the Mayor to fill with minorities the two other vacancies on the commission (that had been created by resignations from the Ravitch Commission). The Mayor did that, giving the new commission six minorities out of fifteen members.

submitted detailed written arguments on many points (many were persuasive; some were not). All were made public.

VI. CONCLUSION

Life opens doors to share in the action and passion of your time.[107] There are many paths through those doors. One is lawyering for government.

I am often asked to compare being a lawyer in government with being in private practice. In two respects, the similarities outweigh the differences. Thus, the thrill of a good cross examination or oral argument, or writing a powerful reply brief, are simply joyous parts of our craft wherever practiced. Also, the satisfaction of helping people in trouble is similar—whether it involves a Tom Watson of IBM or a Dr. Edwin Land of Polaroid when their company's existence was threatened, or a *pro bono* client challenging his death sentence, or an Ed Koch seeking to overcome the corruption scandal and foster government reform. But other satisfactions of a responsible high-level job in the public sector, or in the public interest generally, cannot be matched by the private sector. The subjects are more varied. And what you can do often matters much more, particularly in influencing public policy.

Professor Nelson has done a real service by his comprehensive study of one government law office. In my view, in order to be a "real lawyer," all lawyers should aspire to do public service, at least for some portion of their career. It is my hope that Professor Nelson's book, and this and the other papers from other Corporation Counsels, will bring home to a wide group of lawyers more knowledge of the extraordinary breadth of the work at the Law Department and the unusually great challenges and opportunities that await lawyers working there.

107. Justice Oliver Wendell Holmes, Jr. made this point, but in a somewhat more judgmental (and gender-limited) fashion, in a speech: "As life is action and passion, it is required of a man that he should share in the passion and action of his time, at peril of being judged not to have lived." Memorial Day Address before John Segwick Post No. 4, Grand Army of the Republic (May 30, 1884), *in* Oliver Wendell Holmes, Jr., Speeches 3 (1891); *see also* Schwarz, *supra* note 22, at 16.

PUBLIC LIVES

PUBLIC LIVES; General in Giuliani Reserve Hears the Call

By Abby Goodnough
June 17, 1999

AFTER four grinding years in the Giuliani administration, Randy M. Mastro resigned as Deputy Mayor last summer, saying that he sorely missed practicing law. Now, it seems, he sorely misses wielding influence over public policy.

On Tuesday, Mayor Rudolph W. Giuliani announced that Mr. Mastro would lead a new commission in the complicated task of considering changes to the City Charter. This followed last week's announcement that Mr. Giuliani had nominated his former deputy as a trustee at the City University of New York, an institution that the Republican Mayor is eager to overhaul.

It is hardly surprising that the Mayor has once again enlisted Mr. Mastro, who was known in City Hall for his intense devotion to Mr. Giuliani, and still reverently describes him as "the best mayor this city has ever had."

In his office at the law firm of Gibson, Dunn & Crutcher, where photographs of Mr. Giuliani are prominently displayed, Mr. Mastro said yesterday that life had been good since he left City Hall: he has collected about 50 clients, and even found time

to vacation in Rio de Janeiro. So why is Mr. Mastro being lured back into public service?

Because the Mayor asked him, of course. But also because Mr. Mastro is one of those rare people who enjoy such potentially eye-glazing jobs as poring over the City Charter, even (or perhaps especially) if the job is controversial. ''I can think of no more important issue than to improve the governmental structure of New York City,'' intoned Mr. Mastro, a soft-spoken man who probably has the shaggiest hair of any past or present Giuliani aide. ''It's about how this city will be governed into the next century.''

Mr. Giuliani's critics theorize that there is a less lofty goal in the commission's work: changing the line of mayoral succession to insure that Mark Green, the city's Public Advocate, does not take over if Mr. Giuliani wins election to the United States Senate in 2000. Under the current Charter, if Mr. Giuliani leaves early, Mr. Green, a liberal Democrat, gets the job for 10 months (until the next election), a prospect for which the Mayor has expressed increasing contempt.

But while Mr. Mastro confirmed yesterday that the commission would examine the issue of succession, he insisted that Mr. Giuliani had not instructed him to do so.

''I can tell you flat out that Mayor Giuliani has not given me any special instructions on how to resolve any specific issue,'' Mr. Mastro said. ''We will review the entire Charter, not simply the issue of succession but many, many issues.''

Mr. Mastro says he knows the 300-page City Charter intimately, after two years as Mr. Giuliani's Deputy Mayor for Operations and two as his Chief of Staff. As Deputy Mayor, he supervised day-to-day city government and played a pivotal role in some of Mr. Giuliani's most high-profile initiatives, like fighting organized crime in the Fulton Fish Market and cracking down on sex shops.

Mr. Mastro's close relationship with the Mayor goes back to 1985, when he was an assistant United States attorney under Mr. Giuliani, specializing in investigating organized crime. He left in 1989 for private practice, joining Gibson, Dunn, but his

career changed abruptly after a chance meeting with Dennison Young Jr., who had also worked in the United States Attorney's office. It was 1993, Mr. Giuliani was running for Mayor and Mr. Young was working in the campaign.

''I just happened to run into Denny Young at a sports auction at Sotheby's,'' Mr. Mastro said. ''He encouraged me to get involved, and I did.''

Besides Mr. Giuliani, Mr. Mastro says his role models include his father, Julius Mastro, who for years taught political science at Drew University in Madison, N.J. The elder Mr. Mastro, who died this spring, also served on the Borough Council in Bernardsville, N.J., the wealthy, bucolic town where Mr. Mastro grew up.

Young Randy sat in on his father's political science lectures, and he accompanied his father to meetings with such political figures as Millicent H. Fenwick, the late Republican Congresswoman from Bernardsville, and Thomas H. Kean, the former New Jersey Governor.

''The most profound influence in my life was undoubtedly my father,'' Mr. Mastro said, adding, ''What he taught me most of all was the difference you can make as an individual, if you really set your mind to it.''

MR. MASTRO, who graduated from Yale in 1978, said he almost went into journalism after spending a summer as an intern at The Washington Post. But he decided that he could have more sway over public policy as a lawyer, he said, and he went to law school at the University of Pennsylvania that fall.

People who know Mr. Mastro say he comes across as exceedingly warm, greeting friends and even some foes with bear hugs and kisses on both cheeks. He was known for offering fervent defenses of Mr. Giuliani's policies from his office at City Hall, where he adopted the habit of wielding a baseball bat to make a point.

Mr. Mastro said he wanted the Charter commission to study the city's land-use and procurement laws, and budget and electoral process, among other things. The point, he said, is to recommend changes that will insure that the policies with which Mr. Giuliani has transformed the city will continue into the new millennium.

''It's an important time because we have been going through a unique period of change for the city,'' he said. ''Now what we should be focusing on are ways to leave a positive, permanent legacy.''

A version of this article appears in print on , Section B, Page 2 of the National edition with the headline: PUBLIC LIVES; General in Giuliani Reserve Hears the Call

BEYOND EFFICIENCY AND EQUITY: EXPLORING THE ROLE OF THE CORPORATION COUNSEL TO SEEK JUSTICE

Ryan D. Budhu[*]

I. INTRODUCTION

In 1869, four years after the Civil War,[1] the New York Times reported on a small controversy in the independent city of Brooklyn.[2] The dispute, stemming from the construction of a canal on Third Avenue,[3] involved questions about the appropriate role of the Brooklyn Corporation Counsel.[4] The Corporation Counsel and the Mayor of Brooklyn disagreed over the construction's legality, and the mayor sought to hire independent counsel.[5] In response, the Corporation Counsel claimed that "he represented the great body of the citizens, and was independent of the direction or control of the officers of the city." The New

[*] Ryan Budhu is a Judicial Law Clerk in the Eastern District of New York. [This article was previously published at 12 ALB. GOV'T L. REV. 149. Due to errors in Issue 2 of Volume 12 as originally published, the articles from that issue have been reprinted. We regret any confusion this causes. -Eds.]. Prior to his current position, he served as an Assistant Corporation Counsel in the Executive and Tort Divisions of the New York City Law Department. He earned his JD from Hofstra University School of Law and his BA from St. John's University. The opinions expressed herein are those of the author in his private capacity and do not represent the views of any organization or entity with which he is or has been affiliated. Thanks to Thomas Giovanni, Steven Stein Cushman and Spencer Fisher of the New York City Law Department for providing useful feedback and improving the analytical clarity of the article's arguments. Special thanks to Malavika Rao for her unending support and Nariza and Robert Budhu for their unconditional love.

[1] *See Civil War Facts*, AM. BATTLEFIELD TR., https://www.battlefields.org/learn/articles/civil-war-facts (last visited Mar. 30, 2020).

[2] *See The Powers of a Corporation Counsel*, N.Y. TIMES (Aug. 11, 1869), https://timesmachine.nytimes.com/timesmachine/1869/08/11/87586415.html?pageNumber=4.

[3] *Id.*

[4] *Id.*

[5] *Id.*

York Times concluded that this "new view of the prerogatives of [a] Corporation Counsel in the State of New York" was a "question of no small importance."[6]

In 1940, forty-two years after the independent city of Brooklyn was consolidated into the Greater City of New York (the "City"), the New York Times reported on another controversy.[7] This dispute, stemming from the revocation of Bertrand Russell's appointment as a professor at City College, again involved questions about the appropriate role of the Corporation Counsel.[8] After a loss in the trial court,[9] the Corporation Counsel, an appointed official, following the Mayor's orders, did not appeal on behalf of the City.[10] The Board of Higher Education, however, did appeal, hiring former United States Attorney for the Southern District Emory Buckner and future Supreme Court Justice John Marshall Harlan as counsel.[11] While the Appellate Division ultimately dismissed the appeal,[12] the conflict between the City and the Board once again raised questions about the appropriate role of the Corporation Counsel.[13]

Today, just as it was in 1869 and 1940, the role of the Corporation Counsel in representing the City is a question of no small import. The public's attention to the work of the Corporation Counsel is limited to a few events. These events can range from high profile legal filings, such as the Corporation Counsel's suit seeking $180,000,000 from the United Parcel Services, Inc., for the alleged illegal shipment of cigarettes,[14] or large-scale settlements, such as the $41,000,000 settlement of the Central Park Five lawsuit.[15] At times, they can also encompass a

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[6] *Id*.

[7] *See School Board Loses Appeal for Russell: Appellate Division Bars Action in Higher Court*, N.Y. TIMES (Oct. 5, 1940), https://timesmachine.nytimes.com/timesmachine/1940/10/05/112764359.html?pageNumber=15.

[8] *See* Kay v. Bd. of Higher Educ. of N.Y.C., 20 N.Y.S.2d 898, 901(N.Y. App. Div. 1940).

[9] *See* Kay v. Bd. of Higher Educ. of N.Y.C., 18 N.Y.S.2d 821, 831 (N.Y. Sup. Ct. 1940).

[10] *School Board Loses Appeal for Russell: Appellate Division Bars Action in Higher Court*, *supra* note 7.

[11] *Id*.

[12] *Id*.

[13] *See*, *e.g.*, Note, *The Bertrand Russell Litigation*, 8 U. CHICAGO L. REV. 316, 318 (1941) (noting that the Appellate Division found that the Corporation Counsel had exclusive and binding authority over the City's legal affairs).

[14] *See* New York v. United Parcel Serv., 253 F. Supp. 3d 583, 597, 685 (S.D.N.Y. 2017).

[15] Ray Sanchez, *Judge Approves $41M Settlement in Central Park Jogger*

sensational trial verdict, such as the $104,700,000 verdict against ExxonMobil for contaminating the City's groundwater.[16]

The Corporation Counsel is also extensively involved in City governance, tasked with maintaining, defending, and establishing the rights of the City, its various subdivisions, and its inhabitants in the local, state, and federal legal systems.[17] Outside the ambit of their own specific needs, other City agencies may not be aware of the totality of the Corporation Counsel's legal work for the City.

Given this level of involvement in municipal affairs, questions about the Corporation Counsel's role are essential for both government actors and the people they serve. Who is the Corporation Counsel's client? How broad or narrow should the Corporation Counsel define the overall public interest? Is there any role for the Corporation Counsel to seek justice?

These are complex questions, and this article provides a preliminary context for a broader discussion. To that end, this article will discretely analyze the structures and interests that orient the Corporation Counsel to consider questions of justice.

The Corporation Counsel, like all attorneys, has a special responsibility for the quality of justice.[18] But the Corporation Counsel is not only an attorney but also a government official.[19] Thus, together with his or her general duties as an attorney, the Corporation Counsel should also appropriately consider concepts of democratic self-government and the rule of law.[20]

This article suggests that the Corporation Counsel pursue these concepts as both a government official and as one of the City's gatekeepers.[21] This paradigm provides a useful baseline

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Case, CNN (Sept. 7, 2014), https://www.cnn.com/2014/09/05/justice/new-york-central-park-five/index.html.

16 Mireya Navarro, *City Awarded $105 Million in Exxon Mobil Lawsuit*, N.Y. TIMES (Oct. 19, 2009), https://www.nytimes.com/2009/10/20/science/earth/20exxon.html.

17 *See Corporation Counsel's Message*, N.Y.C. LAW DEP'T. (last visited Feb. 28, 2020), https://www1.nyc.gov/site/law/about/corporation-counsels-message.page.

18 *See* N.Y. RULES OF PROFESSIONAL CONDUCT, pmbl. ¶ 1 (2009) ("A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with ***special responsibility for the quality of justice***.") (emphasis added).

19 *See* Orville H. Schell, Jr. et al., *Professional Responsibility of the Lawyer in Government Service*, *in* PROFESSIONAL RESPONSIBILITY OF THE LAWYER: THE MURKY DIVIDE BETWEEN RIGHT AND WRONG 93, 94 (1976).

20 *See id.*

21 For the sake of brevity, this article will mainly refer to the Corporation

from which the Corporation Counsel may consider questions of justice. As will be discussed, this framework can be adapted to different client identification models that may be used during the Corporation Counsel's litigation, counseling, or transactional work.

This article is divided into three sections. First, it generally discusses the duties and power of the Corporation Counsel. Second, it examines the municipal corporation of the City. Finally, it considers the Corporation Counsel's dual roles as a government official and organizational gatekeeper.

II. THE CORPORATION COUNSEL OF THE CITY OF NEW YORK

Turning first to the Corporation Counsel, the City Charter charges the office with broad powers and responsibilities.[22] The Charter provides that "the [c]orporation [c]ounsel shall be attorney and counsel for the City and every agency thereof and shall have charge and conduct of all the law business of the City."[23] The Charter also states that:

> The Corporation Counsel shall have the right to institute actions in law or equity and any proceedings provided by law in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof, or of the people thereof, or to collect any money, debts, fines or penalties or to enforce the laws.[24]

Moreover, while the power to compromise, settle or adjust claims is reserved to the Comptroller, the Charter explicitly states that:

> [T]his inhibition shall not operate to limit or abridge the discretion of the corporation counsel in regard to the proper conduct of the trial of any action or proceeding or to deprive such corporation counsel of the powers and privileges ordinarily exercised in the courts of litigation by attorneys-at-law when acting for private

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Counsel, but the principles discussed here can be employed by any Assistant Corporation Counsel.

[22] *See* NEW YORK CITY CHARTER ch. 17, § 394(c).

[23] *See* NEW YORK CITY CHARTER ch. 17, § 394(a).

[24] NEW YORK CITY CHARTER ch. 17, § 394(c).

clients.[25]

While appointed by the Mayor,[26] the Corporation Counsel ultimately serves the City.[27]

The City Charter charges the Corporation Counsel to be the attorney and counsel for the City.[28] This charge takes three primary forms.[29] First, the Corporation Counsel functions as an advocate in litigation.[30] Second, the Corporation Counsel functions as a transactional lawyer.[31] Finally, the Corporation Counsel functions as a counselor to proposed legislation and government decision-making.[32] Of course, regarding larger legal matters, these functions may overlap. These three functions position the Corporation Counsel at the crossroads of public and private values; a modulated form of counseling and vigorous advocacy with a general view toward maintaining processes of accountability and political stability.[33]

The specific charge, to be attorney and counsel "for the City and every agency,"[34] formally provides the Corporation Counsel and the New York City Law Department with some bureaucratic discretion in implementing the City's legal policy.[35] Ultimately, elected officials are tasked with overall policy decisions, with the Corporation Counsel providing independent legal analysis with

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25 NEW YORK CITY CHARTER ch. 17, § 394(c).

26 *See* NEW YORK CITY CHARTER ch. 1, § 6(a) ("The mayor shall appoint the heads of administrations, departments, all commissioners and all other officers not elected by the people, except as otherwise provided by law.").

27 *See* Frederick A.O. Schwarz, Jr., *Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy*, 53 N.Y. L. SCH. L. REV. 375, 377 (2008) ("For all government lawyers, the [client] is always, it seems to me, the overall greater governmental entity that the lawyer serves: the United States, the state, or, for Corporation Counsels, 'the city'."). *See also* Michael A. Cardozo, *The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer*, 22 PROF. LAW 4, 9 (2014) (stating the Corporation Counsel's client is the City of New York and the Corporation Counsel's first obligation is to the City itself); MODEL RULES OF PROF'L CONDUCT r. 1.13(a) (AM. BAR ASS'N 2013).

28 *See* NEW YORK CITY CHARTER ch. 17, § 394(a).

29 *See* NEW YORK CITY CHARTER ch. 17, § 394.

30 *See* Schwarz, *supra* note 27, at 387.

31 *See id.*

32 *See id.*

33 W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 78, 79 (1999).

34 *See* NEW YORK CITY CHARTER ch. 1, § 394(a).

35 Cardozo, *supra* note 27, at 6 ("The means by which the entity pursues these objectives remains within the professional judgment of the lawyers.").

an emphasis on advancing or defending the institutional interests of the City.[36] Broadly, the Corporation Counsel is tasked with pre-decisional questions about the legal implications of implementing municipal policy or post-decisional legal effects of policy.

The Corporation Counsel's grant of authority over legal affairs affords some bureaucratic discretion to consider multiple theories of justice in advocacy and counseling about the City's legal policy.[37] While it is impossible to simplify the operating philosophies of various Corporation Counsels to a singular theory or aspect of justice, history shows that some Corporation Counsels have emphasized varying elements of justice in their policies. Some Corporation Counsels, such as Allen Schwartz,[38] have promoted justice by emphasizing the wealth-maximizing resolutions of legal disputes and organizational efficiency.[39] Other Corporation Counsels, such as O. Peter Sherwood and Paul Windels,[40] have sought justice through inclusive hiring practices, seeking out groups previously excluded from participating in City

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[36] Jeffrey D. Friedlander, *The Independence of the Law Department*, 53 N.Y. L. SCH. L. REV. 479, 483, 484 (2009).

[37] *See* BRUCE F. BERG, NEW YORK CITY POLITICS: GOVERNING GOTHAM, 244, 245 (2007) (generally discussing the exercise of municipal bureaucratic discretion).

[38] *See* WILLIAM E. NELSON, FIGHTING FOR THE CITY: A HISTORY OF THE NEW YORK CITY CORPORATION COUNSEL, at xviii (2008) [hereinafter NELSON, FIGHTING FOR THE CITY] (noting that Schwartz "understood his task to be helping the Mayor to increase the size of the city's economic pie, not worrying about what share different groups should get or what power they should have to affect distribution").

[39] *See* Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 254 (1998) ("Richard Posner suggests that a law and economics analysis allows decision makers to promote justice by deciding disputes with the object of the greater social good through wealth-maximizing resolutions.").

[40] *See* NELSON, FIGHTING FOR THE CITY, *supra* note 38, at 164 (noting that Corporation Counsels Windels and Chanler had hired an usually high percentage of female Assistant Corporation Counsels). *See also* O. Peter Sherwood, *Implementing a New City Charter: Thoughts on My Tenure as Corporation Counsel in a Time of Transition*, 53 N.Y.L. SCH. L. REV. 429, 434 (2008) ("Within the Law Department, I took the challenge of persuading career executives and managers of the importance and urgency of increasing diversity. In a city where African Americans and Hispanics constituted over fifty percent of the population, few members of either group could be found in the Law Department."); Anna Blackburne-Rigsby, *Black Women Judges: The Historical Journey of Black Women to the Nation's Highest Courts*, 53 HOW. L. J. 645, 667, 668 (2010) (detailing Paul Windel's hiring of Jane M. Bolin, the first black female Assistant Corporation Counsel).

government.[41] Other Corporation Counsels, such as Frederick Schwarz, Lee Rankin, and Norman Redlich,[42] have sought justice through the protection of minority interests.[43]

Whereas, different Corporation Counsels, such as John O'Brien and Paul Crotty,[44] have sought justice through enhancing democratic policies.[45] History demonstrates that the demands of democratically elected officials and the then-existing needs of the City influenced these operating philosophies.[46] These demands and needs consistently evolve, reflecting the changing demographics and priorities of the City. As a result, a Corporation Counsel probably will not be able to identify an overarching theory of justice that fully satisfies the complex interests of the City. But engaging in a broader discussion about varying concepts of justice does not mean that a Corporation Counsel must ignore established law.[47] And the Corporation

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41 *See*, *e.g.*, Sherwood, *supra* note 40, at 434, 435, 436. This practice of including various groups who had previously been excluded is consistent with overall 20th century trends to create a more inclusive City government, discussed in detail below.

42 *See* Schwarz, *supra* note 27, at 379 ("A government owes a duty to all its residents—whether or not they voted for the person(s) in power, or, indeed, whether they can vote at all.").

43 The need to protect minority interests has been, and continues to be, a significant concern of the American constitutional system. *See* THE FEDERALIST NO. 10, at 47 (James Madison) (Clinton Rossiter ed., 1961). "[M]easures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." *Id.* *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and [so] may call for a correspondingly more searching judicial inquiry.").

44 *See* NELSON, FIGHTING FOR THE CITY, *supra* note 38, at 145, 146, 147 (describing the lawsuits initiated under Corporation Counsel John P. O'Brien as an attempt to please the political majorities). *See also* Honorable Paul A. Crotty, *A Response: Why William Nelson's Analysis of the Law Department 1946–1965 Is Wrong*, 53 N.Y. L. SCH. L. REV. 519, 525 (2008) ("But the Law Department is not a free agent. It did what the law requires: operate within the legal framework and enforce the law, especially laws that, on challenge, are found to be constitutional by the highest court in the land."). *See also* Honorable Paul A. Crotty, *The Giuliani Years: Corporation Counsel 1994–1997*, 53 N.Y. L. SCH. L. REV. 439, 440 (2008) (detailing various litigations that advanced the mayor's agenda).

45 *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 15, 17 (1996) (advocating for the majoritarian principles of democracy).

46 *Id*. at 17.

47 *See* Cardozo, *supra* note 27, at *The Conflicting Ethical, Legal, and Public*

Counsel is rarely, if ever, the final arbiter over legal outcomes. Instead, judges and policymakers mainly occupy that role.[48]

The Corporation Counsel's decision-making is often coordinated with various municipal entities and elected officials. Engaging in a broader discussion on the public interest and justice will tend to enhance the ability of the Corporation Counsel to counsel decision-makers as to underlying competing interests and improve the quality of judgments about the fairness of legal processes and outcomes. Yet to adequately advise policymakers, the Corporation Counsel must understand the City.

III. THE MUNICIPAL CORPORATION OF THE CITY OF NEW YORK

The City is a municipal corporation.[49] This corporate status gives the City the legal capacity to own property and to sue and be sued.[50] It also allows the City the "unique ability to transcend [both] time and the changing composition of its membership." The corporate structure provides unity, a continual legal identity, and perpetual succession.[51]

According to modern legal theory, cities are "mere subdivisions of the state; their only powers are those given by state statutes, which courts construe strictly and state legislatures may modify at any time."[52] "When the state plays with the specific structures,

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Policy Obligations of the Government's Chief Legal Officer, 22 PROF. LAW. 4, 7 (2014) (advocating that the Model Rule of Professional Conduct doesn't allow government lawyers to "elevate moral concerns above sound legal analysis," but such Rule is "permissive and puts the law first[,]" allowing government lawyers to engage in a broader morality judgment).

[48] *See* Cardozo, *supra* note 27, at 6 (summarizing that the government lawyer's job is to advance the objectives of those in charge of making the final decision, and "it follows that these democratically elected or duly appointed officials, after receiving appropriate legal advice, should make the key decisions"). *See also* Michael Cardozo, *Remarks from the Inaugural Fordham Dispute Resolution Society Symposium: "ADR as a Tool for Achieving Social Justice": The Use of ADR Involving Local Governments: The Perspective of the New York City Corporation Counsel*, 34 FORDHAM URB. L.J. 797, 806 (2007) (arguing that judicial supervision of government agencies and programs is bad social policy; mediators and outside monitor should not run the government).

[49] *See*, *e.g.*, David C. Hammack, *Reflections on the Creation of the Greater City of New York and Its First Charter*, 1898, 42 N.Y. L. SCH. L. REV. 693, 700 (1998) (discussing the role of the municipal corporation of the City of New York).

[50] Gilbert Tauber, *Corporation of the City of New York*, *in* THE ENCYCLOPEDIA OF NEW YORK CITY 316 (Kenneth T. Jackson ed., Yale Univ. Press 1995).

[51] *Id.*

[52] Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Chance*, 34 AM. U.L. REV. 369, 370 (1985). *See also* Charles S. Rhyne, THE LAW OF LOCAL GOVERNMENT OPERATIONS 50–51 (1980) (discussing

services, or practices of local government, it is not interfering with the workings of an autonomous entity."[53] Generally, the preceding sentence is correct over the relationship between New York State and the City.[54]

The tension between the City and State shapes the City's corporate identity,[55] serving as the backdrop to the City's consistent desire for local autonomy in governance and policy-making.[56] Historically, local freedom in policymaking has allowed the City to be a pioneer in areas such as public health, education, parks, libraries, water supply, sanitation, street paving, lighting, and public transit. At the same time, in the pursuit of these policies, the City has had to cope with fundamental questions about government power and private personal autonomy.[57] This concern with local economic and social

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the power the state has over municipalities, and that municipal corporations are not sovereign, are without any inherent power of legislation, and are only free to enact ordinances authorized by the state); William R. Grace, *The Government of Cities in the State of New York*, HARPER'S NEW MONTHLY MAGAZINE, September 1883, at 609–16, https://babel.hathitrust.org/cgi/pt?id=coo.31924079630525&view=1up&seq=619 ("[O]ur cities have no actual legal right to govern themselves free of interference, and if they have any appearance of possessing municipal liberties, it is by the grace of the Legislature, and not because they have title to it.").

[53] HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 4 (1983).

[54] *See* Demarest v. New York, 74 N.Y. 161, 166 (1878) ("[T]he [New York City] [C]harter] is always subject to amendment or alteration by the legislative power, except as restrained by some constitutional inhibition."). *See also* People *ex rel.* Metro. St. Ry. Co. v. State Bd. Of Tax Comm'rs, 67 N.E. 69, 72 (1903) (explaining that the management of local political business of localities is entrusted to local officers selected by the communities where officers act, through which their jurisdiction extends).

[55] *See* HARTOG, *supra* note 53, at 24 (discussing the tension and power struggle related to property, where property was a way to resist change imposed by external authority and create an individual future).

[56] *See id.* at 23 (explaining that New York City's legal identity was formed by the property which created the public and political character of boroughs). *See also* Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 58 (1990) (discussing the inherent need of local governments to protect and advance parochial interests).

[57] *See* HARTOG, *supra* note 53, at 9 ("The positioning of the line between freedom and necessity, public power and private autonomy, and individuality and community has changed over the past two hundred years (although not so much as some may think)."). *See also* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1076 (1980) (analyzing cities as vehicles used for the exercise of the coercive power of the state but also as groups of individuals who aimed to control their own lives free of state domination).

interests leads to the political economy of New York City focusing on areas such as wealth differences, public service disparities, and competition with regional governments.[58]

The primary interest is the City's ability to compete in the local and global economic marketplace as a conduit of labor,[59] commodities,[60] culture,[61] and information.[62] Since the Dutch arrived on the island of Manhattan, New York's role in the local and global economic marketplace has been a fundamental interest.[63] This has also led to political conflicts between those who have more and those who have less over the disbursement of the benefits of the City's economic success.[64] As an organizational gatekeeper, the Corporation Counsel must enhance the corporate

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[58] *See* Briffault, *supra* note 56, at 5 ("In a setting of interlocal and interpersonal wealth inequalities, not only does the value of local autonomy turn on the wealth of the locality, but such autonomy often tends to exacerbate the disparities between rich and poor.").

[59] *See, e.g.*, ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 267, 268 (8th ed. 1920) (arguing that individuals and firms locate in cities with deep labor markets with many potential specialized workers). An example of this is the proliferation of specialized businesses in New York City. *See*, *e.g.*, Lauren Weber, *The Diamond Game, Shedding Its Mystery*, N.Y. TIMES (Apr. 8, 2001), https://www.nytimes.com/2001/04/08/business/the-diamond-game-shedding-its-mystery.html (noting the high concentration of diamond-related businesses in New York City).

[60] *See*, *e.g.*, Jonathan Bowles et al., *The Start of a NYC Manufacturing Revival?*, CTR. FOR AN URBAN FUTURE (Mar. 2014), https://nycfuture.org/data/info/the-start-of-a-nyc-manufacturing-revival (finding that manufacturing sector jobs have increased since 2010).

[61] *See*, *e.g.*, Elizabeth Currid, *How Art and Culture Happen in New York: Implications for Urban Economic Development*, 73 J. OF THE AM PLAN. ASS'N 454, 457 (2007) (finding that cultural production heavily depends on social mechanisms and densely agglomerated artistic and cultural producers in New York City).

[62] *See* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 148 (1961) ("[C]ities may fairly be called natural economic generators of diversity and natural economic incubators of new enterprises."). *See also* Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, 22 J. MONETARY ECON. 3, 38–39 (1988) (arguing that the high level of creation, diffusion, and adoption of ideas developed amongst various industry competitors in New York City is essential in a competitive economy. "New York City's garment district, financial district, diamond district, advertising district and many more are as much intellectual centers as is Columbia or New York University.").

[63] *See* SUNY LEVIN INST. & CTR. FOR AN URBAN FUTURE, NEW YORK IN THE WORLD: THE IMPACT OF THE GLOBAL ECONOMY ON NEW YORK STATE AND CITY 100 (2011), https://nycfuture.org/pdf/New_York_in_the_World.pdf. *See*, *e.g.*, Simon Middleton, *Legal Change, Economic Culture, and Imperial Authority in New Amsterdam and Early New York City*, 53 AM. J. LEGAL HIST. 89, 94–95 (2013) (noting the colony's emphasis on increased trade, as opposed to acquisition of land).

[64] *See* Middleton, *supra* note 63, at 100–101.

well-being of the City. Thus, the Corporation Counsel has a unique interest in legal matters that affect the City's ability to compete in the global economic marketplace.

This occurrence manifests itself in the Corporation Counsel's sensitivity to procedural fairness in the application of the law. It is critical to government actors and private market participants for certainty in the form of municipal law, such as the application of business permits and land use regulations.[65] For the City to attract foreign direct investment, and remain an attractive locality for business, there must be consistency and certainty in these processes and outcomes. As the custodian of the City's local legal landscape, the Corporation Counsel is one of the City agencies tasked with ensuring a requisite level of legal certainty.[66]

Legal matters that implicate this economic interest can range from simple tort case payouts to large-scale municipal public works.[67] For example, the Corporation Counsel may, in his or her transactional function, structure the sale of City-owned land for redevelopment for commercial purposes. As a matter of general legal practice, the Corporation Counsel can guide policymakers through the requisite transactional legal framework from the vantage point of the office's institutional knowledge of the relevant agencies.[68] The Corporation Counsel should also be able

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[65] *See* Chaz R. Ball, *Ethics: Representing Municipalities and Municipal Employees*, AM. BAR ASS'N (Aug. 9, 2017), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/municipal-law/ethics_representing_municipalities_and_municipal_employees/ ("Municipal lawyers or those representing the municipality or its employees play a necessary role in providing legal protections for our nation's towns, cities, and counties.").

[66] *See* THE ASS'N OF THE BAR OF THE CITY OF N.Y., PROFESSIONAL RESPONSIBILITY OF THE LAWYER: THE MURKY DIVIDE BETWEEN RIGHT & WRONG 94–95 (1976).

[67] LORAINE KENNEDY ET AL., THE POLITICS OF LARGE-SCALE ECONOMIC AND INFRASTRUCTURE PROJECTS IN FAST-GROWING CITIES OF THE SOUTH 3 (2011), http://chance2sustain.eu/fileadmin/Website/Dokumente/Dokumente/Publications/C2S_WP2_litRev_The_Politics_of_Large-Scale_Economic.pdf. *See also* OFFICE OF THE N.Y.C. COMPTROLLER, CLAIMS REPORT: FISCAL YEAR 2018 2–4 (2019), https://comptroller.nyc.gov/wp-content/uploads/documents/Claims-Report-FY-2018.pdf; Frank B. Cross, *Tort Law and the American Economy*, 96 MINN. L. REV. 28, 30, 31 (2011).

[68] Bernadette Bulacan, *Building Blocks of Institutional Memory in the Legal Department*, THOMSON REUTERS: CORPORATE COUNSEL CONNECT COLLECTION (February 2016), https://store.legal.thomsonreuters.com/law-products/news-views/corporate-counsel/building-blocks-of-institutional-memory-in-the-legal-department [https://perma.cc/TRJ4-9FXR].

to counsel policymakers as to extralegal, moral, economic, social, and political impacts about resulting legal processes.

In his or her litigation function, the Corporation Counsel may also impact this economic interest.[69] For example, the Corporation Counsel may institute a policy that declines to settle any alleged personal injury cases. Because of the large volume of personal injury suits against the City, the aggregated effect of this policy would also upend this interest as well. While appearing to maximize efficiency and reduce overall payouts, such a system may have collateral consequences. For instance, this policy may deter frivolous lawsuits, but also create a backlog of meritorious cases, delaying resolutions, and damaging procedural fairness norms.

While it may be tempting to solely frame this interest as "efficiency" and "wealth maximization,"[70] these concepts are difficult to define,[71] and sometimes mask or obscure deep societal inequities.[72] Nor does a macro view of the City's overall economic well-being adequately consider or address structural problems, such as segregated housing or job markets. Thus, the Corporation Counsel's counseling and advocacy must also include considerations beyond efficiency, wealth maximization, and economic competition.

The second interest is the City's role in promoting and maintaining its unique brand of pluralist values and policies.[73]

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[69] *See* NELSON, FIGHTING FOR THE CITY, *supra* note 38, at 44.

[70] *See id.* at 137 (arguing for the need for economic efficiency and emphasizing policies that maximize the City's total wealth).

[71] *See* Edward A. Purcell, Jr., *The Making of a Legal Historian: Reassessing the Work of William E. Nelson: Semi-Wonderful Town, Semi-Wonderful State: Bill Nelson's New York*, 89 CHICAGO-KENT L. REV. 1085, 1107–08 (2014) ("To truly and honestly calculate the 'general' welfare, in other words, one must examine not just the 'general' welfare of a city or a society as a whole but also the welfare of all of the varied and unequal groups and interests in that city or society.").

[72] *See*, *e.g.*, JACOB RIIS, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK 2, 3 (1971) (For instance, a macro view of the City's total wealth fails to consider the inadequacy of basic public services and inhospitable urban conditions.). *See also* Colin Gordon, *Developing Sustainable Urban Communities: Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 308 (2004).

[73] Since its inception, the City has been a pluralist society, serving as a progressive laboratory for the nation. *See*, *e.g.*, PATRICIA BONOMI, A FACTIOUS PEOPLE: POLITICS AND SOCIETY IN COLONIAL NEW YORK 22, 24, 25 (1971) (arguing that diversity has always been present in New York City). *See also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("A state may, if its citizens

In supporting these pluralist values and policies, two themes emerge: first, the City's desire for local autonomy; and second the centralization of authority within the office of the mayor, and including borough and community-level institutions into city governance.[74] To be clear, the laws and policies of the City have not always efficiently or directly promoted pluralism.[75] Since the arrival of Sephardic Jews in 1654, however, the City has, in varying degrees, had to deal with governing a pluralist society.[76] Since that time, the City has had to cope with the evolving practical political effects of this increased emphasis on pluralism.[77] At the same time, the City has become an incubator of social and political attitudes for the rest of the country.[78]

When serving the overall governmental client, the Corporation Counsel should be aware of the City's inherent interest in promoting political and social pluralism. Unlike elected political officials, the Corporation Counsel's advocacy and counseling should be less directly influenced by majoritarian concepts of equity.[79] It is the Corporation Counsel, as the chief legal officer for the City, who can counsel policy-makers as to the interests of groups not represented by majoritarian political forces.[80]

For instance, prisoners' rights litigation provides a useful example of a politically disfavored group that cannot attract

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choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

74 *See* Joseph P. Viteritti, *The Tradition of Municipal Reform: Charter Revision in Historical Context*, 37 PROC. ACAD. POL. SCI. 16, 16 (1989).

75 For instance, the heavy taxation of businesses and corruption of Tammany Hall were not geared towards achieving economic efficiency, but rather, exploiting the City's market position. *See* NELSON, FIGHTING FOR THE CITY, *supra* note 38, at 40.

76 *See* RUSSELL SHORTO, THE ISLAND AT THE CENTER OF THE WORLD 275 (2005) ("In 1654, twenty-three Jews, some of whom had fled the fall of Dutch Brazil, showed up [in New Amsterdam] seeking asylum.").

77 *See* Michael Walzer, *Pluralism in Political Perspective*, *in* THE POLITICS OF ETHNICITY 13 (Stephen Thernstrom et al. eds., 1980) ("The practical meaning of ethnic pluralism . . . is still being hammered out, in the various arenas of political and social life. Little theoretical justification exists for any particular outcome.").

78 *See id.*

79 Lucas Anderson, *Promoting an Effective and Responsive City Government by Retaining and Strengthening the Office of the Public Advocate*, 58 N.Y.L. SCH. L. REV. 165, 185 (2014).

80 For instance, the New York Public Advocate cannot "initiate a special proceeding and sue for injunctive relief in any matter relating to its broader role as an ombudsperson and an oversight official." *Id.* at 186.

sufficient influence to participate in the political process.[81] While unable to meaningfully participate in the political process, prisoners can litigate civil rights violations, which the Corporation Counsel must defend against. Because the Corporation Counsel is the sole entity tasked with representing the City in these actions, he or she can explain the relevant prisoners' rights and interests or systemic failures that may not be considered by elected public officials or agency policy-makers.[82]

That said, these minority interests might conflict with the Corporation Counsel's baseline responsibility to uphold and enforce existing law.[83] The ability of the Corporation Counsel and the Law Department to identify these situations requires an extralegal understanding of the complex interplay between law, justice, and governance. For instance, while the Corporation Counsel must counsel as the status quo, he or she should also be able to advise as to evolving societal views and interests, which in turn, may affect the development of new political or legal doctrines.

The Corporation Counsel may highlight issues ripe for a change in policy. For example, the Corporation Counsel represents the City in various class action lawsuits. In select instances, the Corporation Counsel can advocate for a change in current policies before the initiation or verdict of a class-action lawsuit. Yet while the Corporation Counsel may be able to identify and highlight these situations, his or her actions remain appropriately limited by the policy choices of elected officials. Thus, the Corporation Counsel's operating theory of justice must also include considerations beyond mere equity and fairness as discussed below.

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[81] *See* James E. Robertson, *The Jurisprudence of the PLRA: Inmates as Outsiders and the Counter Majoritarian Difficulty*, 92 J. CRIM. L. & CRIMINOLOGY 187, 203–04 (2001) (discussing that prisoners are not a suspect class but comprise a politically vulnerable and underrepresented group which must be protected by the federal judiciary).

[82] *See* Schwarz, *supra* note 27, at 399 (discussing the politically unpopular decision not to appeal the District Court decision in *Benjamin v. Malcolm*). *See also* Benjamin v. Malcolm, 564 F. Supp. 668, 691 (S.D.N.Y. 1983) (finding that the Department of Corrections cannot implement alternative programs to deal with prison overcrowding without the support of officials in other components of the criminal justice system).

[83] *See* Schwarz, *supra* note 27, at 376 (analyzing the obligations of Corporation Counsel to uphold the laws due to their opportunity to affect public policy beyond the narrow view of "the law").

IV. THE DUAL ROLES OF THE CORPORATION COUNSEL TO SEEK JUSTICE AS A GOVERNMENT OFFICIAL AND AN ORGANIZATIONAL GATEKEEPER

While the City Charter sets out a diverse set of factors that the Corporation Counsel is obligated to consider,[84] the Corporation Counsel's first responsibility "is to the governmental entity itself and . . . not simply to advocate on behalf of individual members of the executive or legislative branch."[85] History demonstrates the City's need for a responsive local government. Structuring legal matters to efficiently provide public sector goods and services requires an understanding as to their historical context and the current needs of the general populace. The previous sections have attempted to suggest the scope of interests relevant to such an understanding. The growth of the City's population and social interdependence has required large-scale coordination of public transportation, welfare, and health systems, as well as efficient land use regulations.

This history has seen the City morph from a private corporation, controlled by private property interests, to a public municipality, sharing power amongst a diffuse amount of stakeholders. This diffusion amongst a multitude of stakeholders often makes it difficult to discern a clear consensus as to the public-sector needs of the City. Moreover, these public-sector needs have often generated a rural-urban conflict between City and State over the size and scope of government, "as well as conflicts over the degree of autonomy that city government should have."[86] Though not often the final decision-maker, the Corporation Counsel stands at the center of these conflicts, tasked with counseling policymakers, coordinating legal transactions, and litigating societal differences.

Throughout the office's four-hundred-year old history, the Corporation Counsel has been the chief architect of the City's municipal legal landscape, developing case law through litigation and shaping how law fulfills the public interest. Within the

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84 *See* NEW YORK CITY CHARTER ch. 17, § 394(c).

85 Cardozo, *supra* note 27, at 5.

86 Robert F. Pecorella, *The Two New Yorks Revisited: The City and The State*, *in* GOVERNING NEW YORK STATE 7, 8 (Jeffrey M. Stonecash ed., 2001).

City's local government structure, the Corporation Counsel, as chief legal officer of the City, should consider questions of justice. Unlike elected officials, who are mainly concerned with constituent interests, the Corporation Counsel has a Charter mandate to advocate and counsel on behalf of all the inhabitants of the City. Therefore, it is incumbent upon the Corporation Counsel to consider, advocate, and counsel as to varying concepts of justice in the pursuit of the public interest.

Of course, the Corporation Counsel is not an island unto himself; rather, the Corporation Counsel and the Law Department also serves various elected and appointed officials. While the Corporation Counsel serves the larger overall governmental entity, final policy decisions are reserved for these officials.[87] Moreover, the Corporation Counsel is appointed by the Mayor and is subject to the Mayor's authority. In regard to democratic accountability, this structure provides a necessary check as to the Corporation Counsel's consideration and counseling as to justice. Because the Corporation Counsel does not retain final decision-making power, he or she cannot unduly usurp the power of the elected officials to make dispositive policy decisions.

The legal function that the Corporation Counsel is fulfilling creates additional informal checks. For instance, regardless of public interest or agency models of client identification, when the Corporation Counsel is engaged in the counseling or transactional function, his or her decision-making is relatively defined towards achieving discrete policy objectives. The counseling function is mainly preoccupied with interpreting law or legislation before decision-makers take action. The transactional function is also generally tasked with achieving discrete policy objectives through deal-making. Outside of determinations of ultimate legality, and nuanced analysis of underlying interests, the Corporation Counsel is structurally relieved from ultimate decision-making.

The Corporation Counsel's litigation function is also constrained by the structure of municipal governance. As mentioned above, the Corporation Counsel is the sole judge of the City's litigation. However, also mentioned above, the Corporation

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[87] *See* Peter L. Zimroth, *Reflections on My Years as Corporation Counsel*, 53 N.Y. L. SCH. L. REV. 409, 425 (2009) ("[T]the Corporation Counsel operates at the center of city government which, by its nature, is concerned with both policy and politics. . . . The line between policy and politics is not always clear.").

Counsel is appointed by the mayor, and serves at his or her pleasure. Moreover, pursuant to the City Charter, the Corporation Counsel is not empowered to settle any claims without prior approval from the Comptroller.[88] As to potential injunctive relief, the Corporation Counsel also cannot act unilaterally. Rather, he or she must coordinate with affected agencies as to whatever policy changes are levied against the City. Regardless, in serving municipal entities, the Corporation Counsel and Assistant Corporation Counsels should remember their roles as government officials and gatekeepers for the City.

As a government official of the City, the Corporation Counsel, has an inherent and unique interest "to govern impartially . . . [and see] that justice shall be done."[89] The Corporation Counsel, as a government official, has a responsibility to consider procedural and distributive justice norms,[90] a responsibility that does not similarly attach to private practitioners.[91] This government official role imposes two main responsibilities upon the Corporation Counsel. First, the Corporation Counsel should consider fairness and equity within legal processes and outcomes and should attempt to only engage in meritorious legal tactics or defenses.[92] Second, the Corporation Counsel should also seek to eliminate implicit bias and disparities in treatment in the office's internal policies as to hiring, retention, and promotion, in order

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88 *See* NEW YORK CITY CHARTER ch. 17, § 394(c).

89 Berger v. United States, 295 U.S. 78, 88 (1935). *See also* Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 275 (2000) ("[T]he government lawyer has an independent legal duty to faithfully carry out the law. This duty may be distinct from (and possibly, at times, paramount to) the ordinary duty of a lawyer to render zealous representation."); Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 Brandeis L. J. 13, 17, 18 (Fall 2003) (discussing the different boundaries that apply to representation by civil government lawyers versus private practitioners).

90 *See* Schwarz, *supra* note 27, at 379.

91 *See* Green, *supra* note 89, at 275.

92 *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 817–18 (2000) [hereinafter Berenson, *Public Lawyers*]. This heightened standard should apply even in the context of the government as a tortfeasor. *See* Steven K. Berenson, *Hard Bargaining on Behalf of the Government Tortfeasor: A Study in Governmental Lawyer Ethics*, 56 CASE W. RES. L. REV. 345, 357–58 (2005). "No matter what type of activity it engages in, the government retains its obligations to pursue the public interest and to treat all of its constituents fairly; obligations that do not similarly attach to private actors." *Id.* at 379.

to foster an inclusive City government.[93]

As an independent professional with a primary responsibility to protect an organizational client, namely the City, the Corporation Counsel also functions as one of the City's gatekeepers, protecting against organizational wrongdoing.[94] This responsibility is derived from the City Charter's explicit determination that the Corporation Counsel shall act as both the attorney and counsel for the City.[95] This role imposes two main responsibilities upon the Corporation Counsel. First, it imposes a risk management responsibility on the Corporation Counsel to report wrongdoing within the organizational client's hierarchy.[96] Second, it requires the Corporation Counsel to counsel on the competing short term and long-term institutional interests and policy factors that are presented in various legal strategies.[97]

The gatekeeping and government official roles both orient the Corporation Counsel to seek justice in a broader discussion of the competing facets of the public interest. As a government official, the Corporation Counsel seeks justice through the adoption and implementation of legal strategies and internal policies. As an organizational gatekeeper, the Corporation Counsel ensures that justice is done by protecting against organizational wrongdoing and counseling as how to achieve the long-term institutional interests of the City. The following section briefly describes various considerations that attach to the dual roles.

A. The Corporation Counsel Seeking Justice as a Government

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93 "Implicit biases are the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement. Indeed, social scientists are convinced that we are, for the most part, unaware of them." Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010).

94 *See*, *e.g.*, JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 2 (2006). *See also* Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155, 160 (1966) ("If there is wrongdoing in government, it must be exposed. The law officer has a special obligation not to permit a cover-up of illegal activity on the ground that exposure may hurt his party.").

95 *See* NEW YORK CITY CHARTER ch. 17, § 394(a).

96 *See* Note, *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1415 (March 2008) (discussing the role of attorneys as organizational gatekeepers).

97 *See id.* at 1417 (discussing the failure of Enron attorneys in "confus[ing] the role of advocate in litigation or adversary negotiation with the need of corporate clients for independent, objective advice").

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The Corporation Counsel and Assistant Corporation Counsels should seek justice through fairness in external legal tactics and strategies and internal operating policies. As a matter of democratic accountability, and general legal practice, the Corporation Counsel and Assistant Corporation Counsels must use existing law as their baseline for considering justice. Moreover, the actions of the Corporation Counsel and Assistant Corporation Counsels are subject to the New York Rules of Professional Conduct. Beyond these baselines, the Corporation Counsel and Assistant Corporation Counsels exercise varying degrees of discretion in making everyday interpretations of legality based on norms of legal practice. The interpretation of these legal rules and private conceptions of morality are not mutually exclusive dichotomies. Rather, the exercise of discretion inherently demands an appeal to extralegal moral principles in the application of legal rules to an uncertain factual scenario. This appeal to extralegal moral principles should be directed towards enhancing the legitimacy of local government and promoting just governance.

This results in Assistant Corporation Counsels potentially viewing their legal work, not as binary win-loss transactions, but rather, as opportunities to seek just processes and outcomes. Assistant Corporation Counsel's should engage in discussions with mid-level and senior management to consider "the relevant circumstances of the particular case [that] seem likely to promote justice."[98] The severity and intensity of these discussions are directly related to the existence of established law and precedent. "[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility [he or] she needs to assume for substantive justice."[99]

In cases where there is no clear precedent or established law, this affords Assistant Corporation Counsels some degree of discretion. The limits of an Assistant Corporation Counsel's ability to exercise discretion is based on his or her respective role

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[98] WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 138 (1998).

[99] *Id.* at 140.

within the Law Department. In exercising discretion, they should be aware of the City's previously discussed social and economic interests, as well as its general history. They should also be able to consider questions of procedural justice, as well as the fairness of outcomes and its impact on the City.

A potential risk of ignoring extralegal moral principles is that legal decisions may be unduly influenced by the private and implicit biases of individual Assistant Corporation Counsels. Assistant Corporation Counsels, like most lawyers, make decisions about a particular legal doctrine, often with little thought as to the rationales underlying that same doctrine. Assistant Corporation Counsels are consistently tasked with making these decisions while efficiently allocating limited resources. Simply, Assistant Corporation Counsels often have too much to do and too little time to do it in. As a result, many successful Assistant Corporation Counsels hone the ability to make quick decisions in fast-moving environments. In order to counteract the decision-making process from being unduly influenced by implicit biases, Assistant Corporation Counsels should also be cognizant of their responsibility to promote fair processes.

As government officials, the Corporation Counsel and Assistant Corporation Counsels have a unique interest in promoting fair processes by which legal decisions are made. Because it is possible that the Corporation Counsel's adversary may also be a subset of his or her overall governmental client, it is incumbent that the Law Department treat all participants in a fair manner. This results in an inherent interest in promoting procedural justice norms in the course of formulating external legal strategies. Constitutionally, the Corporation Counsel and Assistant Corporation Counsels are also oriented to consider questions of procedural justice. This is due, in part, to the fact that the Corporation Counsel is sworn to uphold the United States and New York State Constitutions, both of which contain clauses mandating equal protection under the law.

The Corporation Counsel and Assistant Corporation Counsels should also consider the outcomes and the resulting impact of legal matters. As discussed, the Corporation Counsel is in a unique position to enhance the legitimacy of institutions by counseling decision-makers with alternative paths forward that are consonant with the City's shared values. This counseling does not end once a legal matter ends; rather, the Corporation

Counsel is able to provide decision-makers with a continuous feedback loop that incorporates the resulting impact on various stakeholders in different legal matters.

The Corporation Counsel's concern for fairness as to processes and outcomes influences how he or she exercises discretion in asserting litigation tactics and strategies.[100] For instance, it has been observed that government attorneys face heightened standards in the following contexts: first, a heightened duty to disclose certain factual information to the court; and second, a prohibition against asserting unmeritorious, yet not technically frivolous, litigation tactics.[101] An exact determination as to whether these heightened standards should be imposed upon the work of the Corporation Counsel is beyond the scope of this article. However, these standards can be used to frame larger discussions as to how legal strategies and tactics implicate procedural justice norms as to the work of the Corporation Counsel.

For instance, a potential duty to disclose certain information to the court highlights a larger conversation as to the role of Assistant Corporation Counsels in representing an institutional litigant and promoting fair processes and outcomes. As an example, assume that a court *sua sponte* erroneously dismisses a meritorious lawsuit against the City on procedural grounds, and opposing counsel is unlikely to detect the error.[102] First, as to the plaintiff, this is an unfair outcome because he or she has a meritorious claim and has been turned away from the court due to erroneous information.[103] Second, as to the assigned Assistant Corporation Counsel, this not an optimal result, as the plaintiff, who generally will be a citizen of the City, has also suffered an injury through a judgment that renders his or her allegations unanswered.

Failing to bring this error to the attention of the court is premised upon the supremacy of the adversarial model. The "adversary system rests on the unproven and often erroneous assumption that each side in a lawsuit has equal representation

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100 *See* Berenson, *Public Lawyers*, *supra* note 92, at 816.

101 *See id.* at 805.

102 This example is derived from the examples that Professor Catherine J. Lanctot has previously proposed. *See* Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 952 (1991).

103 *See* RONALD DWORKIN, LAW'S EMPIRE 1–2 (1986).

and equal resources."[104] Advocates of the adversary model argue that, "[i]f limited candor is acceptable from private counsel, then there is no principled reason for requiring a greater duty of disclosure from government lawyers."[105] However, few, if any, of the Law Department's adversaries have the equal institutional knowledge or resources.

In this scenario, the Assistant Corporation Counsel has not actively brought about this unjust result but is "a passive recipient of [a] favorable judgment."[106] Of course, there is also an inequality of consequences as to the parties. The Assistant Corporation Counsel, as a representative of an institutional litigant, the New York City Law Department, and generally insulated from litigation and judgment costs, suffers minimal harm from this error. The Assistant Corporation Counsel has no personal stake in the matter; generally, because of the volume of his or her practice, he or she is oriented to efficiently determine the merits of, and resolve, the matter. Simply, as to this favorable judgment, he or she will move on to the next case. However, as to the plaintiff, this is a relatively rare direct interaction with local government, with the potential to enhance the legitimacy of the civil justice system. Instead, this error has permanently deprived him or her from an ultimate determination as to the alleged government wrongdoing.

Bringing this error to the attention of the court may also be of some benefit to the Law Department, even if there is no explicit ethical duty to do so. Specifically, while the responsibility for this error lies with the court, the Law Department may benefit from enhancing its reputation for institutional candor. To paraphrase former Solicitor General Archibald Cox,

> If [the Law Department is] willing to take a somewhat disinterested and wholly candid position even when it means surrendering a victory, then all [of the Law Department's] other cases will be presented with a greater degree of restraint, with a greater degree of candor, and with a longer view, perhaps, than otherwise.[107]

As to the individual Assistant Corporation Counsel

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104 Lanctot, *supra* note 102, at 994.

105 *Id.*

106 *Id.* at 993.

107 LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 10 (1987) (quoting Archibald Cox).

highlighting this error will increase his or her reputation for presenting objectively correct factual and procedural information. While bringing this error to the court's attention may, in the short term, add another matter to the Corporation Counsel's immense docket of pending cases, it may also, in the long-term, enhance the reputation of the Law Department and the individual Assistant Corporation Counsel.

The Corporation Counsel is oriented to fulfilling the policy objectives of these elected officials for two reasons. First, as elected officials make ultimate policy decisions, to have coordinated City governance, the Corporation Counsel litigation decisions should attempt to mirror current policy choices.[108] Second, regardless of public interest or agency-client representation models, democratically elected officials best represent the popular will of the overall governmental client.[109] So, in serving the governmental client, the Corporation Counsel must heavily consider the current policy objectives of elected officials.

But to be clear, this attempt to align with current policies should not prevent the Corporation Counsel from providing independent legal advice, grounded in established law, justice, and the broader public interest. The Corporation Counsel makes the ultimate final decision over questions of legality; "[u]ltimately the mayor can fire the Corporation Counsel. But he cannot substitute his legal judgment for the Corporation Counsel's."[110] As a result, it is incumbent that the Corporation Counsel advise elected officials over a particular case's lack of merit and recommend the avoidance of unfair litigation.[111] It is also the responsibility of Assistant Corporation Counsels to provide the Corporation Counsel with relevant moral, economic, social, and political factors in making this decision. This structure should lead to a robust internal conversation between the Corporation

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108 *See* Zimroth, *supra* note 87, at 410. (discussing the intersection of law and policy faced by the Corporation Counsel's office).

109 *See id.* at 410–11 (discussing the consequences the City Charter faces in governing the city and the importance of resolving conflicts between several agencies and officers of city government).

110 *Id.* at 411.

111 *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (AM. BAR ASS'N 1980) ("A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to the lawyer should so advise his or her superiors and recommend the avoidance of unfair litigation.").

Counsel and City officials.

Periodically, this may lead to a difference of opinion between the Corporation Counsel and City officials with the course of litigation. In these instances, the ultimate determination of whether litigation is unmeritorious should be reserved for the Corporation Counsel. Unfortunately, when there are irreconcilable differences about the course of the City's litigation, the Corporation Counsel faces two options: resignation or termination. Neither choice is ideal.

Rather, an example of how these conflicts should be resolved is the City's ultimate decision not to appeal a decision by Judge Morris Lasker in *Benjamin v. Malcolm*.[112] In *Benjamin*, because of its "substantial contempt of a consent decree requiring reduction of overcrowding in Rikers Island prisons,"[113] the City was ordered to release some prisoners.[114] Former Corporation Counsel F.A.O. Schwarz, Jr. recommended that the City not appeal the decision.[115] The City's police commissioner, Ben Ward, and its criminal justice coordinator, John Keenan, strongly opposed this recommendation.[116] At first, the Mayor Edward Koch also opposed the Law Department's proposal. But the consensus within the Law Department was that the City could present no winning arguments on appeal.[117] In Schwarz's view, an appeal "would hurt the City's general reputation in the Second Circuit by appearing simply to pass the buck to the courts for what would be an unpopular but inevitable decision."[118] Because of the lack of a legitimate legal argument, it would be evident to the Second Circuit that the appeal was based on political, rather than legal, reasons.[119] Ultimately, Mayor Koch agreed with the Law Department's assessment and the City did not appeal the decision.[120]

The Law Department should also hesitate to exploit the relative power disparity between parties to bring about unjust

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112 *See* Schwarz, *supra* note 27, at 399.

113 *Id.*

114 *See id. See also* NELSON, FIGHTING FOR THE CITY, *supra* note 38, at 277 (describing how the Law Department and Mayor Koch came to an agreement not to appeal the consent decree).

115 *See* Schwarz, *supra* note 27, at 399.

116 *See id.*

117 *See id.*

118 *See id.*

119 *See id.*

120 *See id.*

settlement or results. This should not be construed as a restraint on Assistant Corporation Counsels in choosing strategies that reflect the litigation preferences of opposing counsels. Rather, the Law Department should not seek to delay or burden legal processes to deter or exploit the social or economic vulnerabilities of their adversaries. As referenced above, the Law Department should be concerned with procedural justice norms.

The Corporation Counsel should also seek justice through fairness in internal policies. The Corporation Counsel is subject to the City's various anti-discrimination and equal employment opportunity statutes. These statutes, as well as the recent history of City governance, mandate a more diverse and inclusive workforce. Thus, the Corporation Counsel is also inherently interested in promoting procedural justice norms in formulating internal operating policies. This orientation to seek justice through internal systems flows from the Corporation Counsel's status as a government official, unlike specific obligations imposed by the New York Rules of Professional Conduct. As a baseline, per the New York City Charter, the Corporation Counsel must ensure that the New York City Law Department "does not discriminate against employees or applicants for employment" in any way prohibited by federal, state, and local law.[121] Also, "the Charter requires agency heads to establish measures, programs, and annual EEO Plans that communicate each agency's efforts to provide equal employment opportunity ("EEO") to City employees and applicants for employment within City government."[122]

Generally, the practice of law is "one of the least racially diverse professions in the nation."[123] Blacks, Latinos, Asian Americans, and Native Americans "make up fewer than [seven] percent of law firm partners and [nine] percent of general counsels of large corporations. In major law firms, only [three] percent of associates and less than [two] percent of partners are

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121 *See* NEW YORK CITY CHARTER ch. 35, § 815(h).

122 CITY OF NEW YORK, EQUAL EMPLOYMENT OPPORTUNITY POLICY 1 (2014), https://www1.nyc.gov/assets/dcas/downloads/pdf/agencies/nyc_eeo_policy.pdf.

123 Deborah L. Rhode, *Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That.*, WASH. POST (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that.

African Americans."[124]

Because of a specific emphasis on inclusive hiring, promotion, and retention, the Law Department is relatively diverse. As to gender, the Law Department has a majority of female supervising and staff Assistant Corporation Counsels. The Law Department also outperforms private firms on racial diversity.[125] That said, setting diversity and inclusion benchmarks against private firms or of the legal industry, in general, should not be the Law Department's overall goal. Instead, because the Law Department represents the City, it should be representative of the diverse variety of viewpoints.

As a result, the office's internal policies, such as organizational culture, should be periodically evaluated to ensure against implicit bias and disparities in treatment. Ignoring internal policies subjects the Office of Corporation Counsel to these risks: first, jury verdicts inconsistent with internally developed narratives;[126] second, increased attrition and replacement costs for departing Assistant Corporation Counsels;[127] third, decreased leadership development resulting in organizational succession disruption;[128] and fourth, social capital erosion at one of the leading municipal law firms.[129] The Office of Corporation Counsel's internal diversity norms shape litigation and internal narratives regarding the previously mentioned areas of concern.[130] Thus, the Corporation Counsel must oppose

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[124] *Id.*

[125] *See Diversity, Inclusion and Community*, N.Y.C. LAW DEP'T, https://www1.nyc.gov/site/law/about/diversity-inclusion-and-community.page (last visited Mar. 23, 2020) (stating the Law Department is one of the most diverse law offices in the country, with over sixty percent of female attorneys and twenty-nine percent minorities).

[126] Jessica Blakemore, *Implicit Bias and Public Defenders*, 29 GEO. J. LEGAL ETHICS 833, 838 (2016) (discussing the role implicit bias plays during jury selection which results in a high presence of white jurors in many courtrooms).

[127] Nicole E. Negowetti, *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, 15 NEV. L.J. 930, 942 (2015) (discussing the impact of race on hiring of new attorneys).

[128] Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945–46, 951 (2006) (stating that "[i]mplicit biases are discriminatory biases based on implicit attitudes or [] stereotypes" and can lead to men being favored for management positions).

[129] Charles J. Santangelo, *Why Do Law Firms Fail*, 14 LEGAL MGMT. 45, 48 (1995) (discussing the disparate impact an outdated management system has on the success of a law firm).

[130] *See*, *e.g.*, Greenwald & Krieger, *supra* note 128, at 945; Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit*

situational pressures, standard conventions, and managerial assessments that reinforce historical practices of discrimination and exclusion in hiring, retention, promotion, and narrative building.

B. The Corporation Counsel Ensuring that Justice Is Done as a Gatekeeper for the City

The Corporation Counsel ensures that justice is done by acting as one of the City's gatekeepers and protecting against organizational wrongdoing. The Corporation Counsel's gatekeeping function is achieved in four ways: first, counseling for the long-term institutional interests of the City; second, advising against organizational wrongdoing; third, reporting of internal wrongdoing within the City; and fourth, screening of claims and legal arguments made against and for the City.[131] The Corporation Counsel fails as a gatekeeper when he declines to advise city officials and agencies on how a short-term legal battle might affect the City's long-term interests.[132] Similarly, it would be a gatekeeping failure to decline to report and appropriately act in response to organizational wrongdoing. Essentially, this role refocuses the Corporation Counsel's connection to broader views of the City's public interest.[133]

Bias and the Law, 58 UCLA L. REV. 465 (2010); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006).

131 *See* Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1394–95 (2004) (discussing the imposition of sanctions such as personal civil liability, discipline, and fines for lawyers who fail to properly screen clients or bring frivolous claims).

132 *See*, *e.g.*, Brooklyn Inst. of Arts & Scis. v. City of New York, 64 F. Supp. 2d 184, 186 (E.D.N.Y. 1999) (citing, in *Brooklyn Institute*, the City had withheld funds appropriated to, and was attempting to eject, the Museum due to a controversial art exhibit, whereby the museum filed a preliminary injunction.) Despite Mayor Giuliani's claims that the presiding judge had "lost all reason," the museum prevailed in attaining a preliminary injunction. David Barstow, *A Ruling Against Giuliani*, N.Y. TIMES (Nov. 7, 1999), https://www.nytimes.com /1999/11/07/weekinreview/oct-31-nov-6-a-ruling-against-giuliani.html. *See also* Alan Whyte, *New York's Mayor Giuliani and the Brooklyn Museum Reach a Settlement*, WORLD SOCIALIST WEB SITE (Mar. 31, 2000), https://www.wsws.org /en/articles/2000/03/muse-m31.html (stating the Law Department initially filed an appeal but, despite considerable political pressure, was ultimately able to settle the litigation. The settlement restored all City funding previously allocated, and committed an additional $5.8 million dollars, to the Museum. Fiscally, the lawsuit was a loss for taxpayers.).

133 *See* Schwarz, *supra* note 27, at 379 (discussing the duty the government

The Corporation Counsel, as a gatekeeper, can monitor and potentially influence the conduct of his or her corporate client, the City. This potential influence is normally conducted in the context of the Corporation Counsel's pre-decisional legal counseling about proposed policies or legislation by municipal policymakers. It can also be undertaken in response to recurring systemic trends that may lead to litigation. Generally, the Corporation Counsel is expected to accept the policy decisions of municipal policymakers, even when those decisions may not appear to be the best plan. The Corporation Counsel must be, however, candid in presenting all possible legal and non-legal considerations. These functions implicitly impose a duty to exercise independent judgment and do not allow the Corporation Counsel to favor the personal interests of an individual elected official over those of the City.[134]

As a gatekeeper, a Corporation Counsel should offer counsel about how best achieve the long-term institutional interests and policy objectives for the City.[135] History and shared societal values all shape the policy behind black letter law and expresses a richer understanding of the relevant competing rights and interests.[136] As a result, the Corporation Counsel must counsel as not just to the black letter law, but also on shared public values.[137] While these values ultimately serve the long-term interests of society, they may also conflict with existing law or the short-term interests of majorities.[138]

While the Corporation Counsel is bound to follow and interpret

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owes to all of its residents despite whether or not they received their vote into office).

134 *See* JOHN H. GREENER, A HISTORY OF THE CORPORATE COUNSEL OF THE CITY OF NEW YORK 32 (2015) (discussing an example of prioritization of mayoral interest above the City's interest).

135 *See* Schwarz, *supra* note 27, at 379 (discussing the needs of the city as a client: first, "issuing an opinion on what the law is;" second, "making policy decision in important public interest litigation," and third, "giving policy advice").

136 *See* Schwarz, *supra* note 27, at 376 ("[T]here is no bright line distinguishing law from policy. History, values, and experience all shape the law.").

137 *See* Schwarz, *supra* note 27, at 381 ("The Constitution casts a light far beyond its page. By values related to the Constitution, I mean attention to the interests of groups beyond those protected by the Bill of Rights, but whose interests are likely to be ignored.").

138 *See id.* ("Vindication of values . . . may sometimes run counter to the interests of majorities in the short term—but will often, I believe, serve the interests of society in the long-term.").

existing law, it is incumbent that he or she ensures that justice is done by counseling on underlying short and long-term policy and institutional interests implicated in legal strategies.[139] The public interest, just like justice, is a shared social construction, and it is doubtful that it can be viewed in only one way.[140] As Professor W. Bradley Wendel has expressed:

> Moral diversity should be accommodated not by leaving moral questions to a multiplicity of nonpolitical associations but by charging political institutions with the responsibility of fashioning principles of justice that speak directly to the normative concerns of these respective communities and which seek to discover the deeper moral commitments that diverse constituencies share.[141]

As a gatekeeper, the Corporation Counsel should use current legal norms, along with historical trends and government structures, to consider issues regarding aspects of social and distributive justice. The social meanings of the City's public-sector goods, and their distributions among the City's diverse populace, are best understood with their historical evolution.[142]

This role requires a nuanced understanding of the local government structure and the institutional interests of the City. This understanding provides the Corporation Counsel, and Assistant Corporation Counsels with enough background to navigate a local government position within a state-federal system and assert parochial interests on behalf of the City. As mentioned above, these interests have been characterized by the City's desire to continue to promote its particular brand of pluralist values and policies and continued ability to compete in the global economic marketplace. Understanding the City's interest in pluralism allows the Corporation Counsel to contextualize the City's disbursement of power across different

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139 *See id.* at 378 (discussing the interests of the city as a "touchstone" but not all encompassing and requires a government lawyer to articulate the broader, deeper, long-term interests of the city).

140 *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 5 (1983) (stating that ordinary people even if committed to impartiality cannot help but make decisions based on their current position and values).

141 Wendel, *supra* note 33, at 45.

142 *See id.* at 45–46 (discussing the need for lawyers to apply norms developed in nonprofessional activities because they are a rich source of moral understanding).

borough and community levels and emphasis on diversity and inclusion. Additionally, context over the historical reasons for the current increased focus on economic development provides a useful metric for determining what overall interests are implicated in a specific legal strategy or policy. Understanding history and government structure inform the Corporation Counsel's advocacy and counseling about a collective sense of justice and just governance.

Ensuring that justice is also done periodically requires a Corporation Counsel to urge government officials to change course.[143] Every legal strategy adopted by a Corporation Counsel is an affirmative choice to emphasize specific values over others.[144] Even a determination to exercise discretion in a way that preserves the status quo is an affirmative choice that advances a particular point of view about the best path forward for New York City.[145] The Corporation Counsel should not assume that municipal policymakers wish to maximize, or are even aware of, the varying economic or social interests of the overall City. Unlike elected officials, the Corporation Counsel can articulate and give counsel as to the rights and interests of certain disfavored groups that do not enjoy protection within the majoritarian political process. As a result, when municipal policymakers may be uninformed, the Corporation Counsel should identify and explain all the legal or non-legal ramifications of a particular strategy. In these certain instances, as a matter of gatekeeping to protect the institutional interests of the City, it may be imperative that the Corporation Counsel urge other government officials to change policy.

As to organizational wrongdoing, the Corporation Counsel has a direct and indirect role within City governance. In his or her advising position, the Corporation Counsel is directly responsible

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143 *See*, *e.g.*, Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 441 n.21 (1986) (citing in *Local 28*, the City filed a brief supporting civil sanctions for a construction firm that had failed to meet affirmative action quotas, but also including a statement that Mayor Koch did not personally support such quotas).

144 *See*, *e.g.*, Kay v. Bd. of Higher Educ. of N.Y.C., 20 N.Y.S.2d 898, 901 (N.Y. App. Div. 1940) at 901 (citing despite City's Board of Higher Education formal request for an appeal, the Corporation Counsel declined to appeal the denial of Bertrand Russell's appointment as the chair of philosophy at City College due to allegations of Russell's moral impropriety).

145 *See* Schwarz, *supra* note 27, at 403–04 (arguing to Mayor Koch that the City had a moral responsibility to divest from South Africa due to its apartheid regime).

for advising against organizational wrongdoing. As a matter of professional responsibility, the Corporation Counsel has an ethical obligation to warn against, and may not participate in, illegal conduct. Indirectly, the Corporation Counsel also has a responsibility for reporting possible organizational wrongdoing to responsible investigative agencies within the City.

The Corporation Counsel, as the leader of an institutional litigant, should screen legal claims asserted against the City to identify emerging legal trends and patterns. A quantitative and qualitative review of relevant litigation data can identify patterns of possible government misconduct. This review of relevant data provides policymakers with a greater understanding of the effects of overall policy choices, as well as highlighting opportunities for additional training or other risk management responses.

Finally, the Corporation Counsel should also act as a gatekeeper towards the legal claims and arguments asserted on behalf of the City. The New York City Law Department is an institutional litigant, and thus has a long-term institutional interest in its reputation before the courts and in front of the citizenry of the City.[146] At the simplest level, ACCs should not assert frivolous positions, novel legal claims or arguments should be pursued only after internal deliberations that include considerations such as cost-benefit analyses regarding underlying public values, as well as the City's finite resources and overall policy objectives.

V. CONCLUSION

As stated above, interplay between the work of the Corporation Counsel and the role of justice is significant. The City Charter tasks the Corporation Counsel to provide the legal architecture for the policy prerogatives of the City. In this regard, the Corporation Counsel pursues the broader public interest. Implicit within the public interest are notions of justice. Thus, the Corporation Counsel necessarily considers justice within his or her work.

Considering the varied stakeholders and interests, the

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[146] *See* Schwarz, *supra* note 27 at 407 (discussing the City's decision not to seek United States Supreme Court review in *Andrews v. Koch* due to institutional reputation concerns before the Court). *See also* Andrews v. Koch, 528 F. Supp. 246, 247 (E.D.N.Y. 1981), *aff'd*, 688 F.2d 815 (2d Cir. 1982).

Corporation Counsel can efficiently pursue justice through the dual paradigm as both a government official and a gatekeeper as described above. In doing so, the Corporation Counsel will be better able to advise municipal policymakers on the long and short-term interests of the City and litigate with a consistent emphasis on just processes and outcomes.

PAGES 181 THROUGH 198 HAVE BEEN INTENTIONALLY OMITTED