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Twenty-Five Years Later: Re actions on New York City's 1989 Charter Revision Commission and on Charter Commissions in General

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Twenty-Five Years Later: Reflections on
New York City's 1989 Charter Revision
Commission and on Charter Commissions
in General

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TWENTY-FIVE YEARS LATER

I. INTRODUCTION

In 1988, Mayor Edward Koch asked me to chair what became the 1989 Charter Revision Commission. During the next year, the Commission proposed the most fundamental changes to New York City's government since 1901. By a fifty-five to forty-five percent margin, the city's voters approved the 1989 Commission's new Charter. The U.S. Department of Justice (DOJ) approved the changes under section 5 of the Voting Rights Act.¹

Ten years later, in 1998, as part of his creative and steady stewardship of New York Law School's Center for New York City Law, Professor Ross Sandler devoted two issues of the school's *Law Review* to the *One-Hundredth Anniversary of the Charter of the City of New York: Past, Present and Future, 1898–1998*.² Together with Eric Lane, the Executive Director and Counsel to the 1989 Charter Commission,³ I wrote a 282-page law review article about the 1989 Charter and Commission.⁴ This, much shorter, article draws heavily upon that work.

In Part II, I offer comments about the substantive aspects of revising a Charter. These include the breadth of the task, which has ranged from the narrow and very specific to the 1989 Commission's sweeping review. Charter Commissions must remember that they are a commission, not a legislature; a commission can lay a foundation, but others are then responsible for constructing the building. The fundamental task for all Charter Commissions is to improve government. However, at least for a Charter Commission engaged in major revisions, there are issues that are deeper than how the government does its work. The 1989 Commission, for

1. 42 U.S.C. § 1973 (2011). At the time, under section 5 of the Voting Rights Act, New York City was required to obtain pre-clearance from the DOJ for any changes to its Charter that affect voting rights because three counties—Kings (Brooklyn), New York (Manhattan), and the Bronx—had had a restriction on voting (in the form of literacy tests) that had adversely affected minorities. *But see* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (holding section 4(b) of the Voting Rights Act unconstitutional, effectively making section 5 preclearance inoperable until Congress enacts a new, up-to-date coverage formula).
2. *See* 42 N.Y.L. SCH. L. REV. 689–1265 (1998) (issues 3 & 4).
3. Eric Lane had the same position with the previous Commission, chaired by Richard Ravitch. After the Ravitch Commission began to think about reforms to the City Charter, the U.S. Supreme Court, in April 1988, surprisingly decided to review the U.S. Court of Appeals for the Second Circuit's decision affirming the U.S. district court ruling that the city's Board of Estimate was unconstitutional. Given this, the Ravitch Commission, as a practical—and political—matter, could not continue to focus on reforms that assumed the Board's unconstitutionality. It was able, however, to propose (1) strengthening the ethical rules for city officials and employees and (2) “charterizing” the new City Campaign Finance Board. These two changes were approved by city voters at a referendum held in November 1988 (when I served as Co-Chair of the supporting Citizens Committee). The Ravitch Commission then expired under the law that terminates Charter Commissions at the earlier of a referendum or two years from the Commission's appointment. N.Y. MUN. HOME RULE LAW § 36(5)(b) (McKinney 2013). Four members of the Ravitch Commission did not run for positions on the 1989 Commission. Furthermore, other considerations affected the composition of the Commission. Specifically, Ravitch wanted to run for Mayor, Frank Macchiarola wanted to run for Comptroller, former Mayor Robert Wagner did not feel up to serving on the successor 1989 Commission and Fordham President Father Joseph O'Hare believed his service as Chair of the city's Campaign Finance Board meant he shouldn't serve.
4. Frederick A.O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of the 1989 Charter*, 42 N.Y.L. SCH. L. REV. 723 (1998).

example, had to wrestle with racial tensions and concerns about Manhattan's dominance of city governance at the expense of the other boroughs.

Part III addresses the importance of process for Charter Commissions. In a democracy, process is always important. And process is particularly important for an unelected Charter Commission, which can have great power, but must ultimately persuade the public to vote for its proposals. The success of the 1989 Charter Commission was, I believe, highly correlated to it being representative and independent, as well as it having an extensive and open process of conversation with the public. By contrast, the proposals of the 1999 Commission established by Mayor Rudolph Giuliani and the 2003 Commission established by Mayor Michael Bloomberg were both overwhelmingly rejected by the voters.⁵ Without regard to whether their proposals had merit, their defeats were, I believe, in part because those Commissions were not representative, were not independent, and did not engage the public in meaningful discussions. Part IV makes a few points about the balance of power created by the 1989 Charter as seen a quarter of a century later and offers some summary thoughts on future Charter revision efforts.

II. SUBSTANTIVE ASPECTS OF CHARTER REVISIONS

A. Charter Commissions Usually Focus Narrowly, Rarely Broadly

Technically, a Charter Commission is supposed to review the entire Charter.⁶ However, Commissions generally limit their attention to those portions of the Charter they are required to, or choose to, review. Perhaps selectivity is necessary in New York City's case because of the length and complexity of the City Charter. For instance, the New York City Charter totals nearly 200,000 words. By contrast, the original U.S. Constitution totaled about 4,400 words. In general, the more recent the constitution or charter and the lower the level of government, the longer and more detailed the document will be.

In some cases, a Charter is changed because of a narrow, specific problem or issue. An example was a district court ruling that the Charter provision creating City Council Members who represented boroughs at large (two members for each borough), as opposed to representing individual districts within a borough, was unconstitutional.⁷ Similarly, sometimes a Mayor appoints a Charter Commission and hopes—or demands—that the Commission focus only on one issue. An example is Mayor

5. Elisabeth Bumiller, *The 1999 Elections: Charter Revision; New York Voters Strongly Reject Charter Revision*, N.Y. TIMES, Nov. 3, 1999, at A1, available at <http://www.nytimes.com/1999/11/03/nyregion/1999-elections-charter-revision-new-york-voters-strongly-reject-charter-revision.html>; Mike McIntire, *The 2003 Election: City Charter; Only Motivated Voters Ventured into the Voting Booth*, N.Y. TIMES, Nov. 6, 2003, at B4, available at <http://www.nytimes.com/2003/11/06/nyregion/2003-election-city-charter-only-motivated-voters-ventured-into-voting-booth.html>.

6. N.Y. MUN. HOME RULE LAW § 36 (5)(a) (McKinney 2013); see also *About the Commission*, N.Y.C. CHARTER REVISION COMM'N, <http://www.nyc.gov/html/charter/html/about/about.shtml> (last visited Aug. 15, 2013).

7. *Andrews v. Koch*, 528 F. Supp. 246 (E.D.N.Y. 1981), *aff'd*, 688 F.2d 815 (2d Cir. 1982).

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Bloomberg's creation of Commissions to examine non-partisan elections. In such circumstances, Charter Commissions have typically looked at the single issue and then perhaps considered a few other issues. For example, the 1983 Commission chaired by Michael Sovern, then the President of Columbia University, addressed the problems of the borough at-large Council Members by not altering the Charter. This effectively eliminated the posts. Yet the Sovern Commission also opted to change the method of redistricting Council seats after each decennial census.⁸

The 1989 Commission's task was unique in its breadth. The U.S. Supreme Court, in a unanimous decision, had declared unconstitutional the Board of Estimate, a pillar of the city's governing structure.⁹ The Board's power included everything from specific land use matters (e.g., the location of homeless shelters or zoning variances for particular real estate projects) to approving discretionary contracts (i.e., contracts not subject to competitive bidding). The Board also shared power over the budget with the City Council and the Mayor. The Board of Estimate had eight members. The three citywide elected officials (Mayor, Comptroller, and City Council President (now called Public Advocate)) each had two votes. The five Borough Presidents each had one vote.

The specific constitutional problem was that the Board of Estimate violated the one-person-one-vote requirement of the U.S. Constitution by, for example, giving an equal vote to the Borough Presidents from Brooklyn and Staten Island, even though Brooklyn had approximately six times as many residents as Staten Island.¹⁰ Residents of Queens were similarly underrepresented while residents of the Bronx were overrepresented. We had to fix that constitutional problem and we did so by choosing to abolish the Board. But, as I said near the outset of our work, if we merely fixed the Board, then, "if we were to grade ourselves, we would get a passing grade, perhaps a high passing grade, but we won't get high marks."¹¹ Eliminating the Board was necessary but not sufficient for the task. By aspiring for "high marks" and recognizing the interconnected structures of city government, our work resulted in fundamental and wide-ranging changes to city government.¹²

If we did not create a solution that met with the approval of the city's voters, the alternatives were bleak. Either a court would enforce a solution of its own, or another

8. Julius Genachowski, *Voters Back Proposals of Sovern Commission*, COLUM. DAILY SPECTATOR, Nov. 9, 1983, available at <http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&d=cs19831109-01.2.6&srpos=1512&dliiv=none&st=1&c=-----en-20--1504--txt-IN-student+protest-->. And only six years after the Sovern Commission's Charter revisions, the 1989 Commission changed the redistricting provisions even though a number of its members had served on the Sovern Commission. See N.Y.C. CHARTER REVISION COMM'N, FINAL REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION: JANUARY 1989–NOVEMBER 1989, at 9 (1990).

9. *Bd. of Estimate v. Morris*, 489 U.S. 688, 701–02 (1989).

10. *Id.* at 692.

11. Minutes of the N.Y.C. Charter Revision Comm'n Pub. Meeting 7 (Apr. 24, 1989) [hereinafter Apr. 24, 1989 Public Meeting].

12. For a description of those changes, see Schwarz & Lane, *supra* note 4, at Part II: The Structure and Processes of the New Government, 775–922.

Commission would have to come up with something else quickly. However, a court would have neither the power, nor the capacity, nor the will to fashion a multifaceted solution, as the 1989 Commission did. For example, even if a court transferred some of the Board of Estimate's powers to the City Council, a court could not enlarge the City Council to make it more representative and more racially diverse. As for a new Charter Commission, it would be forced to rush for a prompt special election—rather than a vote during a general election—when voter turnout would be low and the role of special interests would, therefore, be high.¹³

For these reasons, the 1989 Commission believed it should strive to present at the November 1989 general election a comprehensive solution that cured the constitutional wrong being done to millions of New York City residents. But we took it upon ourselves to go beyond curing that specific problem and sought more sweeping change. What made this task more difficult is that this comprehensive new Charter had to win support from a majority of city voters.

No other New York City Charter Commission has faced such broad and daunting challenges. The singularity of the circumstances might suggest that some of my general comments about appropriate Charter Commission characteristics—both substantive and procedural—are less applicable to other Commissions with relatively narrow challenges. Nonetheless, I believe my comments are broadly applicable. In fact, I have made similar comments about subsequent New York City Charter Commissions that were focusing on less sweeping issues.¹⁴

13. For a discussion of other problems that would have occurred if a new Charter had not been tendered to the voters in November 1989 or if the voters had rejected the proposed new Charter see Schwarz & Lane, *supra* note 4, at 760–65.

14. When Mayor Rudolph Giuliani appointed Charter Commissions in 1998 and again in 1999, I wrote very critical letters about the Commissions (1) not being representative, (2) not being independent, and (3) planning a truncated and rushed schedule which would prevent the necessary dialogue with, and dissemination of information to, the public. See Letter from Frederick A.O. Schwarz, Jr., Cravath, Swaine & Moore LLP, to Peter Powers, Chair, Charter Revision Commission (June 29, 1998); Letter from Frederick A.O. Schwarz, Jr., Cravath, Swaine & Moore LLP, to Mayor Rudolph W. Giuliani (June 30, 1999); see also, David Firestone, *Back on the Offensive for City Charter Guru*, N.Y. TIMES, July 3, 1998, at B2, available at <http://www.nytimes.com/1998/07/03/nyregion/public-lives-back-on-the-offensive-for-city-charter-guru.html>; Michael Powell & Russ Buettner, *In Matters Big and Small, Crossing Giuliani Had Price*, N.Y. TIMES, Jan. 22, 2008, at A1, available at <http://www.nytimes.com/2008/01/22/us/politics/22giuliani.html>.

With respect to Mayor Bloomberg's Charter Commissions, his first was appointed in 2002 in early July—too late to do a responsible job on anything important for that year, although the Mayor appointed a number of independent and thoughtful people to the Commission.

The Commission agreed that it should not rush to get proposals on important matters on the ballot, and instead proposed only a relatively minor change on mayoral succession, saying there was insufficient time to address other issues, such as nonpartisan elections, that the Mayor had asked the Commission to consider.

In 2003, Mayor Bloomberg, at the last minute (on March 26, 2003), appointed another Commission, chaired by Frank Macchiarola. See, Press Release, N.Y.C. Charter Revision Comm'n, Mayor Michael R. Bloomberg Announces Appointment of Frank J. Macchiarola as Chair of The Charter Revision Commission (Mar. 26, 2003), available at http://www.nyc.gov/html/charter/html/archives/pr_030326.shtml. This time, the Mayor instructed the Commission to focus on nonpartisan elections for a referendum that year. As the Commission sat down to work, Chairman Macchiarola

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B. What a Charter Commission Is and Is Not

A Charter Commission's job is to provide a structure and process for governmental decisionmaking, not to make the decisions itself. A commission is not a legislature, nor should it act as one. As I said at one of our early public meetings, "our job [is] to increase the chance of good things happening . . . not to sit as a legislature deciding, from day-to-day, what those good things may be."¹⁵ A metaphor helped explain the distinction:

[A] charter is the foundation, it is not the building. The charter allows for the building to be built, but the building has to be built by other people in future times.

Whether the building will be one that . . . is beautiful or . . . dumpy, depends on . . . whether elected officials are leaders, on their character, on their intelligence, on their visions, on their compassion. It depends on the people, on their participation, on their common sense, on their soul.¹⁶

C. Enabling the Government to Work Well

At the February 8, 2013 symposium held at New York Law School on *Process, Power, and Lessons for the Future: 25 Years of New York City Charter Revisions*, many speakers—starting with the keynote address by the current Corporation Counsel, Michael A. Cardozo¹⁷—concluded that the 1989 Charter “works” because, among other things, it provides for a “workable structure for government to get things done” and for “a process that allows things to get done that is transparent, provides for participation and dissent, holds the players accountable, and legitimizes its outcomes.”¹⁸ In the areas of budgets, land use, and procurement, Cardozo and many others referred

announced on August 25, 2003 that the Commission would put a nonpartisan election proposal on the ballot that year. See Press Release, N.Y.C. Charter Revision Comm'n, Statement from Frank J. Macchiarola, Chairman, Charter Revision Commission (Aug. 26, 2004), available at http://www.nyc.gov/html/charter/html/archives/pr_030826.shtml; see also N.Y.C. CHARTER REVISION COMM'N, ENHANCING ACCESS, OPPORTUNITY & COMPETITION: A BLUEPRINT FOR REFORM: FINAL REPORT (Sept. 4, 2003), available at http://www.nyc.gov/html/charter/downloads/pdf/final_report2003.pdf.

The rush to put the measure on the ballot was particularly appalling. In retrospect, this was sad for a few reasons. Mayor Bloomberg seems often to have an instinct for reform and the dominance by one party of all non-mayoral elections means ideas like some form of nonpartisan elections should be explored. But in this instance that instinct for reform was not coupled with an appreciation, on the part of the Mayor or the Commission Chair, for the tactics of reform or with any strategy to foster alliances in support of their proposal (beyond the Mayor spending enormous amounts of money).

15. Apr. 24, 1989 Public Meeting, *supra* note 11, at 12.

16. *Id.* at 10.

17. Michael A. Cardozo, *Reflections on the 1989 Charter Revisions*, 58 N.Y.L. SCH. L. REV. 85 (2013–2014); Michael A. Cardozo, N.Y.C. Corp. Counsel, Keynote Address at the New York Law School Law Review Symposium: Process, Powers, and Lessons for the Future: 25 Years of New York City Charter Revisions (Feb. 8, 2013), available at http://www.youtube.com/watch?v=qzriP_oeP7A.

18. See Cardozo, *Reflections on the 1989 Charter Revisions*, *supra* note 17, at 87. The Corporation Counsel also praised the Charter's provisions relating to government ethics and campaign finance. Those provisions, however, were the product of the Ravitch Commission. See *supra* text accompanying note 3.

to two basic elements the 1989 Charter established: a strong Mayor with clear responsibilities, balanced by checks from the City Council and other sources.¹⁹

That is correct.²⁰ Under the 1989 Charter, the Mayor has, for example, a strong role in budgets, land use, and contracts. On budgets, the 1989 Commission made the key decision to retain the Mayor's exclusive authority to set revenue estimates. And because the city must have a balanced budget, this puts a ceiling on city spending. This is a power not held by New York's Governor or by even the President of the United States. Retaining this critical mayoral power was one of the few instances where I essentially cut off discussion about change.²¹

On land use, the Mayor appoints the Chair as well as a majority of the members (seven of thirteen) of the City Planning Commission.²² Moreover, elimination of the Board of Estimate ended the ability of Mayors to evade responsibility for land use decisions by claiming they were approved by other officials. The same is true for discretionary contracts. The 1989 Charter granted the Mayor this responsibility.²³ Greater power was concentrated in the Mayor, but so was greater accountability.

But the Charter also strengthened checks on the mayoralty. Most importantly, it strengthened the City Council. Simply eliminating the Board of Estimate did this—more power and more attention flowed to the Council. In addition, on land use, the Council's approval would be needed for broad changes, such as in the zoning law. Even for specific land use approvals, the Council had power to call up matters for a vote in exceptional circumstances.²⁴

By definition, the Council is representative of the entire city; therefore some eighty percent of its members will not be from Manhattan. A more powerful Council would mean greater attention to the other boroughs. But we did other things to

19. Cardozo, *Reflections on the 1989 Charter Revisions*, *supra* note 17, at 86–88.

20. The detail of all the substantive changes in the 1989 Charter is set forth at great length in my previous work. *See* Schwarz & Lane, *supra* note 4, at Part II: The Structure and Processes of the New Government, 775–922.

21. N.Y.C. CHARTER § 1515 (1989). *See also* Schwarz & Lane, *supra* note 4, at 838–40 (discussing revenue estimating); Apr. 24, 1989 Public Meeting, *supra* note 11, at 104 (stating that diluting the Mayor's responsibility would be “wrong substantively” and would undermine the city's reputation with “bonding agencies and other people who judge the City of New York.”).

22. N.Y.C. CHARTER § 6 (1989). Originally, the Commission had considered having a majority of the City Planning Commission appointed by persons other than the Mayor. However, based on a number of arguments—including testimony from a group of the then-current (Robert Wagner, Jr.) and former Chairs of the City Planning Commission—we changed our mind through several steps. *See* Minutes of the N.Y.C. Charter Revision Comm'n Pub. Meeting 281–82 (June 20, 1989). For a more extensive discussion of these and related issues, *see* Schwarz & Lane, *supra* note 4, at 856–66 (The Balance Between the City Planning Commission and the City Council).

23. For a more detailed discussion, *see* Schwarz & Lane, *supra* note 4, at 880–99.

24. N.Y.C. CHARTER §§ 197-d(b)(3), 197-d(g), 192 (1989). This change to the Charter was the one that Eric Lane and I were most worried about. Specifically, would parochial—or “Not In My Back Yard” (NIMBY)—concerns by particular Council Members derail unpleasant but necessary land use placements? Fortunately, experience has not supported our worries. Moreover, the existence of the Council's role in exceptional circumstances was one factor that led us to move to the seven-to-six mayoral majority on the City Planning Commission. *See* Schwarz & Lane, *supra* note 4, at 864–66.

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assure there would be a “borough voice,” aside from Manhattan’s. These also added to checks on the mayoralty. Just continuing the Borough Presidents did some of that. But, in addition, the Borough Presidents were given specific checking and balancing roles on the budget, land use, and contracts.²⁵

Two other officials, the Comptroller and the Public Advocate, which was called the President of the City Council in 1989, also could act as mayoral checks. Elected citywide, these posts could also generate new ideas in what is essentially a one-party city. Our basic concept was that the Comptroller would concentrate on oversight of fiscal issues and the Public Advocate on program issues.²⁶

Finally, the 1989 Charter created new institutions for government transparency. By furnishing the press, the public, and public officials with more information, voters and public officials would have greater knowledge about an administration’s work and the state of the city, enabling more informed decisions.

The most important of these new institutions was the Independent Budget Office (IBO),²⁷ which was modeled on the respected Congressional Budget Office and the California Legislative Analyst. The IBO provides fiscal analyses to the public, City Council Members, and elected officials other than the Mayor. It is an independent, nonpartisan check on the Mayor’s powerful Office of Management and Budget (OMB).

Both Mayors David Dinkins and Rudolph Giuliani fought against launching the IBO. It was funded only after two courts ordered the city to comply with the Charter.²⁸ We correctly anticipated that future Mayors might seek to cripple the IBO by simply not funding it. On the day before our Commission finished its proposals, we added a provision to the Charter protecting the IBO’s budget.²⁹ It was the first time any city agency had such a shield against mayoral, or Council, interference.³⁰

25. N.Y.C. CHARTER § 82 (2013); Schwarz & Lane, *supra* note 4, at 809–15, 838–40.

26. Schwarz & Lane, *supra* note 4, at 818–21; N.Y.C. CHARTER § 93 (2013).

27. See N.Y.C. CHARTER §§ 259, 260 (2013). For a more detailed discussion of the IBO, see Schwarz & Lane, *supra* note 4, at 901–03.

28. Two cases in two years held that the Dinkins and Giuliani administrations had illegally refused to fund the IBO. See *N.Y. Pub. Interest Research Grp. v. Dinkins*, 83 N.Y.2d 377 (1994); *N.Y. Pub. Interest Research Grp. v. Giuliani*, 644 N.Y.S.2d 38 (1st Dep’t 1996). After finally bowing to these court rulings, Mayor Giuliani still made unsuccessful attempts both to get the State Legislature to amend the Charter to eliminate the IBO and to have his 1998 Charter Revision Commission do so. See Clifford J. Levy, *For Charter Panel, a Meaty Idea, but Will It Work?*, N.Y. TIMES, Aug. 7, 1998, at B4, available at <http://www.nytimes.com/1998/08/07/nyregion/for-charter-panel-a-meaty-idea-but-will-it-work.html>.

29. N.Y.C. CHARTER § 259 (2013). Section 259 guarantees that the IBO will receive minimum appropriations not less than ten percent of the appropriations available to pay for the expenses of the OMB during any given fiscal year.

30. In 1998 New York City voters approved the 1998 Charter Revision Commission’s proposal to place additional restraints on the mayoralty with respect to protecting the New York City Campaign Finance Board’s budget. See *Possible Ballot Proposal: Charter Revision Commission’s Proposal on Campaign Finance Reform*, N.Y.C. CAMPAIGN FIN. BD., http://www.nycfb.info/public/voter-guide/ballot_98/charter.htm?sm=public. Specifically, the additional protection requires Campaign Finance Board budgets to be placed on the Mayor’s executive budget without change. N.Y.C. Charter § 1052(c) (2013).

The 1989 Charter added other measures to increase public information. A new Commission on Public Information and Communication was created to enhance public information about the government's functions and workings.³¹ The new Charter also included requirements that certain information be made public.³²

Another new Charter provision required release of an annual public report on the status of the city's "social, economic and environmental health."³³ The 1989 Commission directed that the report include data using "generally accepted indices of unemployment, poverty, child welfare, housing quality, homelessness, health, physical environment, crime," and other similar issues.³⁴ In addition, the report had to show comparisons between the city's "subdivisions" and between New York City and relevant national, regional, or other standards and averages.

The philosophy, as stated in one of the Commission's public hearings, was from Saint John: "Know the truth and the truth shall set you free."³⁵ The purpose was to empower the public and public officials with facts. Doing so would serve to check all of government, particularly the city's powerful Mayors, who were responsible for administering city services.

A related new provision was the "fair share" criteria for locating city facilities.³⁶ These provisions grew out of the fact that some communities were overburdened by undesirable city facilities, while also being underserved by desirable ones. This was a particular concern of poor and minority communities.³⁷ But other communities, such as Staten Island, because of the large landfill at Fresh Kills, felt overburdened as well.

The new Charter also required the city to develop "fair share" criteria to "further the fair distribution" of facilities.³⁸ Moreover, the city had to consider the relative fairness of burdens—as well as benefits—during the land use process, much as the environmental laws of the late 1960s and early 1970s required governments to consider environmental factors, while not mandating specific results.

In addition, each year the Mayor had to submit to the Council a citywide "Statement of Needs," proposing city facilities for the next two years and using "fair share" criteria. Both the "fair share" rule and the "Statement of Needs" were designed to use the power of information to impose fairness and better planning, and to check the ability of Mayors to take unrestrained actions.

31. N.Y.C. CHARTER ch. 47 (2013).

32. *Id.* §§ 1058–1065. *See also* Schwarz & Lane, *supra* note 4, at 904.

33. N.Y.C. CHARTER § 16 (2013). *See also* Schwarz & Lane, *supra* note 4, at 906.

34. N.Y.C. CHARTER § 16 (2013). *See also* Schwarz & Lane, *supra* note 4, at 906.

35. N.Y.C. Charter Revision Comm'n Pub. Hearing 299–300 (July 20, 1989) (quoting *John* 8:32); *see also* Schwarz & Lane, *supra* note 4, at 906–07.

36. *See* N.Y.C. CHARTER §§ 203, 204 (2013) (delineating criteria for the location of city facilities, and a citywide statement of needs). *See also* Schwarz & Lane, *supra* note 4, at 870–72.

37. *See, e.g.*, N.Y.C. Charter Revision Comm'n Pub. Hearing 390–93, 488–93 (Mar. 2, 1989).

38. *See* N.Y.C. CHARTER § 203(a) (2013).

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D. A Sound Charter, However, Does More Than Enable the Government to Work Well

As I noted near the end of the second panel of the New York Law School conference, a Charter Commission can, and the 1989 Charter Commission did, address deeper questions than *how* the government should work.³⁹

It is not sufficient to have a government that works well. An efficient government that is unjust is worth little. The 1989 Charter Commission tried to focus on both effectiveness and justice. Take the information-enhancing provisions of the Charter as an example: these were meant to make the government more efficient by furnishing all city officials with more information. Moreover, while empowering all citizens and thus serving democracy, the added information also served justice by often addressing particular concerns of poor and minority communities.

As Eric Lane and I analyzed in a section of our 1998 article *The City as We Found It*,⁴⁰ we confronted a government that needed more than the fundamental structural change required by the ruling on the Board of Estimate's unconstitutionality. We saw a city beset by "worries, concerns, and anger" that ran deeper than the form of government. The two most important concerns of the public were racial tensions and Manhattan's dominance.⁴¹

As for race, "[s]omething was seriously wrong with race relations in the City. A Charter that failed to address race relations—but only to the extent Charters can—would leave behind a ticking time bomb for the City."⁴² A major theme of the Commission's work was to propose Charter revisions that would increase minority political opportunities and political participation.⁴³

When "The Chair's Initial Proposals" were released on April 24, 1989, the first of the Commission's six goals evoked the need for "fair representation."⁴⁴ The most important action in this respect—which also addressed the racial "ticking time

39. Frederick A.O. Schwarz, Jr., Chief Counsel, Brennan Center for Justice at New York University School of Law, Senior Counsel, Cravath, Swaine & Moore LLP, Panel Discussion at the New York Law School Law Review Symposium: Process, Powers, and Lessons for the Future: 25 Years of New York City Charter Revisions (Feb. 8, 2013), *available at* <https://itunes.apple.com/us/itunes-u/process-powers-lessons-for/id602324384?mt=10> (discussion beginning at 10:50 mark).

40. Schwarz & Lane, *supra* note 4, at 743–48.

41. The third broad issue of concern that Eric Lane and I perceived was that the city was "essentially a one-party city." Yes, "[n]on-Democratic mayors were occasionally elected"—today, in 2013, one would say "have often been elected." "But Democrats, from time immemorial, comprised the overwhelmingly dominant party in the City." In 1989, the Republican Minority Leader on the City Council had a title, a car, and an office—but not one other fellow Republican to lead. We believed that multiparty competition can help develop better ideas and that party competition can increase voter interest and participation. *See* Schwarz & Lane, *supra* note 4, at 747–48. Increasing the size of the City Council—which, as discussed below, was done primarily to increase minority opportunity—was hoped to also increase party diversity. Lack of party competition also reinforced some of our ideas about the importance of making more information about government available.

42. *Id.* at 744.

43. *Id.* at 744–46; *see also id.* at 778–79 (providing a description of the Charter Revision Commission's decision to increase the size of the City Council as a means to increase minority representation).

44. *See* Apr. 24, 1989 Public Meeting, *supra* note 11, at 4–7.

bomb”—was to expand the newly empowered City Council from thirty-five members to fifty-one members.⁴⁵ Our aim was to create more opportunity for minorities to elect candidates of their own choice and to shrink the size of Council districts to enhance responsiveness to constituent needs, while simultaneously maintaining a Council of manageable size.⁴⁶ The increased size of the Council did in fact lead to very substantive increases in minority representation.

The proposed Charter revisions were due to come before the voters at the 1989 election, at which time thirty-five Council Members would also be elected, along with all other city officials. Rather than wait for a new Council to be elected four years later in 1993, the 1989 Charter accelerated the next Council election by two years to 1991 so that the new body with fifty-one members would be elected sooner.⁴⁷ The 1989 Charter also created four offices related to equal opportunity and nondiscrimination.⁴⁸

The second issue on the minds of the city’s citizens was that “outer borough” residents believed they were “being shortchanged and that Manhattan was too dominant in governmental decision making.”⁴⁹ The outer boroughs “sensed that they were eclipsed, dominated and overshadowed by Manhattan.”⁵⁰ “In the view of many citizens and elected officials, the cultural, media, and financial center in Manhattan received too much of the City’s attention and money.”⁵¹ This concern led to a number of changes designed to continue a “borough voice”—which was particularly important to the four boroughs other than Manhattan.⁵²

The need to consider and respond to concerns about race and about Manhattan’s domination had a substantial impact on the 1989 Commission’s process, its substantive proposals about how to structure the new city government, and the political strategy designed to garner support in the 1989 referendum campaign.

E. Need to Focus on the City’s Fundamental Problems

The Board of Estimate had been celebrated by highly regarded—indeed almost revered—city historians as “occupy[ing] the center of gravity in the City’s political

45. For a discussion of the Council generally, see Schwarz & Lane, *supra* note 4, at 716–806. For a discussion of the size of the Council, see *id.* at 782–88.

46. For a discussion of the Commission’s consideration of expanding the Council to fifty-nine members, and its decision not to do so because that option would produce no additional majority minority seats, see *id.* at 787–88.

47. For a discussion of the acceleration of the City Council election, including testimony in support by Roscoe Brown, then-President of One Hundred Black Men and President of the Bronx Community College, and, in general, the political as well as substantive importance of what we did with the Council, see *id.* at 801–08.

48. *Id.* at 909 n.784.

49. *Id.* at 744.

50. *Id.* at 747.

51. *Id.*

52. *Id.*

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process,” “the most powerful single participant,” an “institutional success” with “extraordinary characteristics.”⁵³ However, with only one dissent, our Commission voted to abolish the Board. The decision to do so was based upon my presentation of constitutional law, in which I concluded that the one-person-one-vote problem could not be cured by “weighted voting”—a concept that would, for example, “weight” the Board of Estimate votes of the Borough Presidents of Brooklyn and Staten Island so that Brooklyn would have approximately six times the votes of Staten Island. I told my colleagues this scheme would not pass constitutional muster.⁵⁴ And I predicted the courts would hold neighboring Nassau County’s weighted voting scheme unconstitutional, which they did four years later.⁵⁵

There was a reason why we chose to emphasize the legal rationale for abolishing the Board. Because a number of the Commissioners and the institutions where they worked had important matters pending before the Board, reliance on my legal advice was safe for them. Discussions and votes based on substantive or policy problems with the Board would have been less so.⁵⁶

Nonetheless, substantive deficiencies of the Board underlay much of Eric Lane’s and my thinking about eliminating the Board. Those substantive deficiencies also influenced the Commission’s decisions about how to shape the new city government. An early exchange between Commissioner Bernard Richland (a former Corporation Counsel under Mayor Abraham Beame) who later dissented from eliminating the Board (and then dissented from all of the Commission’s recommendations) and me captures the point. Richland said the “basic problems of the City” were matters such as where homeless shelters should be located—a classic Board of Estimate issue. I responded:

The basic problems of the City are what we should be spending our money on, how we can act by legislation, or otherwise, to address our underlying social ills

The basic problem of the City is—[using the subject of homelessness to make the point]—[h]ow do we avoid so many people having to go into shelters[?] And what should we be doing to help [the new government] structure be one that causes people to focus on what [are] really the basic problems of the City and not the manifestation of that in the last minute of the process[?]⁵⁷

That last sentence was a calculated slap at the Board of Estimate which, by concentrating on individual land use matters and discretionary contracts, and doing

53. WALLACE S. SAYRE & HERBERT KAUFMAN, *GOVERNING NEW YORK CITY: POLITICS IN THE METROPOLIS* 626–27 (W.W. Norton & Co., 1965); *see also* Schwarz & Lane, *supra* note 4, at 767–68.

54. Minutes of the N.Y.C. Charter Revision Comm’n Pub. Meeting 1–78 (May 2, 1989); *see also* Minutes of the N.Y.C. Charter Revision Comm’n Pub. Meeting 14–16 (Mar. 31, 1989) [hereinafter Mar. 31, 1989 Public Meeting]; Apr. 24, 1989 Public Meeting, *supra* note 11, at 88–91.

55. *See* Jackson v. Nassau Cnty. Bd. of Supervisors, 818 F. Supp. 509 (E.D.N.Y. 1993).

56. *See* Schwarz & Lane, *supra* note 4, at 768–71.

57. Apr. 24, 1989 Public Meeting, *supra* note 11, at 36–37.

so at the very end of the process, had “contributed to the City’s tendency to move from crisis to crisis without giving sufficient attention to the fundamental problems underlying or causing the crises.”⁵⁸ The Board also threw a “stunting shadow” over the Council.⁵⁹

While newspapers and politicians firmly believed the Board was all-powerful, it actually exercised little genuine power. It did have power over *individual* city transactions, such as contracts and particular land use decisions. The media obsession with the Board’s bi-weekly late-night meetings—at which staff aides cast their bosses’ votes—fed the notion that the Board’s playing field was where the real game was played. Yet, the Board did not set *policy*. It did not consider “the basic problems of the City.” Moreover, although Mayors generally dominated the Board, they and all other Board members could duck responsibility if a decision was later criticized or turned out badly, by saying that all who voted “aye” shared responsibility. Indeed, one mayoral aide testified that Mayors’ efforts to maximize votes on Board decisions were part of an “unaccountability” policy.⁶⁰ The Board of Estimate had the problems of a multimember executive that Alexander Hamilton discussed in his *Federalist Paper No. 70*.⁶¹

The Board’s highly publicized last-minute frenzy of voting on specific deals diverted attention from the city’s underlying problems. And the Board’s prominence weakened the City Council. In addition, the evidence showed that, with respect to budgets, where the Board shared power with the City Council, it was the Council that focused more on the city’s fundamental issues.⁶²

III. PROCESS IS CRUCIAL FOR A CHARTER REVISION COMMISSION

In the 1989 Charter, substance—a strong Mayor with clear responsibilities, balanced by countervailing power in the Council and other offices, and all imbued with efforts to enhance fairness—was vital. For me, however, *how* those recommendations were formulated was equally important. The attention to process indicated the Commission’s belief that we should reach out to, and could learn from, all New Yorkers, and that our recommendations need not only gain voter approval, but that New Yorkers of all classes, races, ethnicities, and neighborhoods needed to perceive the process as just and fair. Eloquence and erudition is one thing. Winning the trust of the people is another.

58. Schwarz & Lane, *supra* note 4, at 772.

59. *Id.* at 771.

60. *See id.* at 771–74.

61. THE FEDERALIST No. 70 (Alexander Hamilton).

62. *See* Schwarz & Lane, *supra* note 4, at 754. Similarly, Eric Goldstein, an environmental attorney at the Natural Resources Defense Council (NRDC), praised the Council for having been the “major environmental catalyst in recent years.” Eric A. Goldstein, *Environmentalists Favor Revised City Charter*, N.Y. TIMES, Oct. 31, 1989, at A26, available at <http://www.nytimes.com/1989/10/31/opinion/1-environmentalists-favor-revised-city-charter-892889.html>.

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This is particularly important for an unelected Charter Revision Commission. While the public can reject a Commission's proposals at a referendum, all they can offer is "yes" or "no." A representative and independent Charter Commission that also has an open, iterative, and extensive public process builds a Commission's legitimacy. Indeed, I am convinced that the extensive changes proposed by the 1989 Commission would not have succeeded with the voters, and might well have failed with the DOJ, if the Commission had not had these qualities.

A Charter Revision Commission should be representative, independent, and open and engaged with the public. The 1989 Commission had all of these features, which I believe were essential to our success. While recognizing that the 1989 Commission's task was singularly daunting and that its reforms were uniquely far-reaching, these characteristics are appropriate for *all* Charter Commissions, and increase the likelihood that a Charter Commission's revisions will win approval at the polls.

Charter Commissions need to listen to and engage in a dialogue with the public, with experts on city government, and with elected officials. You learn. Despite the fine resumes of most Charter Commission members, a Commission has little inherent credibility or authority. If a Commission's membership is not representative of the municipality whose rules it seeks to change, it will be harder to generate public support. A Commission is also weakened if there is a perception that it is an instrument of the city's powerful officials or institutions. While a Mayor may be within his or her legal rights to try to dominate or control a Charter Commission's agenda, the effort may well prompt a backlash by the voters.

A. Representative

In 1986, shortly after the U.S. district court held the Board of Estimate unconstitutional,⁶³ and while I was still Corporation Counsel, I urged Mayor Koch to appoint a Charter Commission. My reasoning was that the court's decision was likely to be affirmed and, if it was, the city would be under pressure to cure the constitutional wrong quickly. For those reasons, I believed that a Commission should be appointed to start the complex and difficult thinking about possible reforms in the event that the decision was affirmed. Koch agreed and announced his plan to appoint a Commission—even though he knew his decision would be extremely unpopular with all his colleagues on the Board of Estimate.⁶⁴

Koch also agreed that eight other elected officials should each be asked to give him the names of three potential Commission members. From those, he would appoint eight of the fifteen members of the Commission. Yet no appointee would be

63. *Morris v. Board of Estimate*, 647 F. Supp. 1463 (E.D.N.Y. 1986), *aff'd*, 831 F.2d 384 (2d Cir. 1987), *aff'd*, 489 U.S. 688 (1989). *See also* Schwarz & Lane, *supra* note 4, at 739–40.

64. After Koch announced he would appoint a Commission, the other members of the Board came to his office to protest the decision. They were accompanied by former federal Judge Simon Rifkind of Paul, Weiss, Rifkind, Wharton & Garrison LLP, who joined the protest. The group suggested that Rifkind represent the city in further litigation. We declined the suggestion—really a demand—saying that the Corporation Council's office would faithfully represent the city, as it in fact did under my successor, Peter Zimroth.

told who had suggested his or her name. The eight other elected officials were the Comptroller, the Public Advocate, the leader of the Council (now called Council Speaker), and the five Borough Presidents. All eight suggested three names and from each list Koch appointed a Commissioner who met Koch's high standards. They, plus seven others appointed by Koch from among his own list of names, became the 1988 Charter Revision Commission, also known as the Ravitch Commission, after its Chair, Richard Ravitch.⁶⁵

Later, when I was asked to chair what became the 1989 Commission, there were three vacancies, in addition to the chairmanship that I filled. I urged Koch to include at least two minorities in those other slots. He did. This increased minority membership on the Commission from four to six, or from twenty-six percent to forty percent.

Increased minority membership clearly helped with the Commission's vital missions of reducing racial tension, developing a coalition to support the referendum, and winning DOJ approval. The effect of having eight appointees to the original Commission drawn from names suggested by other officials to the Mayor is harder to prove. However, I believe it did contribute to the diversity of views and backgrounds on the 1989 Commission.⁶⁶ This, in turn, spurred the Commission to engage in extensive discussion and debate that led to more creative and effective proposed reforms.

B. Independence

Under the law, members of a Charter Commission, once appointed, cannot be fired; they serve until the earlier of two years or placement of a proposal on the ballot for voters to consider.⁶⁷ A Mayor has the power to try to dictate what a Charter Commission should do and when it should do it. I believe, however, that such efforts are often counterproductive, and account for the voters overwhelmingly rejecting Charter proposals made by the Charter Commissions appointed by Mayors Giuliani and Bloomberg in 1999 and 2003.⁶⁸

In contrast, in 1989, with only one exception, Koch and his aides made all their suggestions and critiques in public letters to the Commission. Thus, the positions and reactions of Mayor Koch and his administration were part of the Commission's open and transparent process. As Commissioner Mario Paredes said at the end of our work, Mayor Koch "was the only public official that never called me or pressured me or talked to me about absolutely any issue"⁶⁹

65. See *supra* text accompanying note 3.

66. See Schwarz & Lane, *supra* note 4, at 1014–15 (discussing backgrounds of the members of the 1989 Commission).

67. See N.Y. MUN. HOME RULE LAW § 36 (McKinney 2013).

68. See Powell & Buettner, *supra* note 14; David Seifman, *Voters Shoot Down Mike's Vote Reform*, N.Y. POST, Nov. 5, 2003, at 2, available at <http://wirednewyork.com/forum/showthread.php?t=4216&cs=1364fb699afb2bcc3b3b0b71c3d03709>.

69. Schwarz & Lane, *supra* note 4, at 762 n.129.

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My own appointment is a further illustration of Koch's judgment to not attempt to control the Commission behind the scenes. When he asked me to chair the Commission, he said nothing about the results he wanted. In addition, while we had a trusting, close, and friendly relationship when I was his Corporation Counsel from 1982 through 1986, as well as afterward, he knew that the positions I took represented my own independent thoughts. Indeed, the last communication between us before his invitation to me to chair the Commission had been a letter from me to the Mayor criticizing him for his comments about Jesse Jackson in the 1988 presidential primary.⁷⁰

The one exception to Koch's practice of communicating on the public record occurred just six days after the U.S. Supreme Court unanimously affirmed the lower court ruling that the Board of Estimate was unconstitutional, which meant that our Commission could begin to publicly explore major reforms of the city's government. Koch invited Eric Lane and me to dinner at Gracie Mansion. Joining us were the Corporation Counsel, Peter Zimroth, and the First Deputy Mayor, Stanley Brezenoff. After the usual fine food, wine, and conversation, Koch and his colleagues said that pushing for a referendum in 1989 would be harmful. They said it would harm the city if we were to make the Charter decisions in 1989, an election year when the Mayor would be seeking a fourth term. It was inevitable, they argued, that the Charter debate would be racially polarizing. Koch indicated that he did not want, or need, that.

I replied that we could not agree to delay. The city's system of government had been held unconstitutional, and not for some technical, trivial reason, but because some four million New Yorkers' right to vote was being diluted. This unconstitutional wrong should not be allowed to fester. Moreover, if we did not place something on the ballot in 1989, no court would allow a full additional year. Therefore, we would face a special election early in 1990. To decide to go that way would be irresponsible, I said, because special elections had a history of abysmal voter turnouts. Low voter turnout tends to favor special interests, which we believed would oppose a new Charter.⁷¹ I added that I would not lead a group that would have a racially divisive impact.

When the Commission met two days later to discuss the issue of timing, we voted unanimously to "strive" to place proposed Charter revisions on the November 1989 ballot.⁷² The word "strive" reflected recognition that our task was daunting, that there was a lot of work to do, and that we should not place our proposals on the ballot in November unless they had been adequately considered.⁷³

70. See Letter from Frederick A.O. Schwarz, Jr., Cravath, Swaine & Moore LLP, to Edward Irving Koch, Mayor of the City of New York (Apr. 25, 1988) (on file with author).

71. These points and some further reasons not to delay are elaborated further. See Schwarz & Lane, *supra* note 4, 760–62.

72. See Mar. 31, 1989 Public Meeting, *supra* note 54, at 3–6, 26; Minutes of the N.Y.C. Charter Revision Comm'n Pub. Meeting 48–56 (Aug. 2, 1989).

73. Concluding that it was responsible to act in 1989 was helped by work previously done by the Ravitch Commission. When the U.S. Supreme Court decided to hear the *Board of Estimate* case, the Ravitch Commission stopped its work considering reforms to the structure of city government. Nonetheless, the

C. Openness and Engagement with the Public

Having a process that was open and engaged with the public was crucial to the success of the 1989 Commission. For the 1989 Commission, these characteristics were all related to our view of what was legitimate, as well as what would help us prevail at the polls in gaining voter approval of our proposals. Good policy was also good politics.

1. Open Meetings

At the outset, we decided every meeting of the 1989 Commission would be public and transcribed.⁷⁴ The Ravitch Commission had held closed some meetings, and Eric Lane did not believe that openness was required by New York's Open Meetings Law,⁷⁵ a view I did not fully share. Legal requirements aside, we concluded that the Commission's interests would be better served by letting the public see our work. Allowing and encouraging public observation of our efforts would demystify our actions and dampen any sense that we were "acting upon" instead of "acting for" the public. Public debate also makes narrow-minded views more difficult to express.

Initially, the idea of open meetings met some token resistance—expressed to me individually and in private—by a few Commission members who wondered whether they could speak as fully in public as they might in private, or, alternatively, questioned whether the Commission's efforts would be harmed by having Commissioners airing differences in public. In the end, however, all seemed to agree with open meetings, although the Commission took no vote on this.

In retrospect, open meetings did serve their intended purposes. Open meetings did not restrain debate; indeed, they probably sharpened it because of the constant public feedback we received. We were never criticized for making secret deals. Moreover, among those who closely followed the Charter discussions, our openness increased understanding of the issues, of the necessary trade-offs, and of the enormous complexity of what we were doing. Openness helped develop supporters, including from editorial boards,⁷⁶ and moderated the tenor of opponents' rhetoric. Our transparency also aided with the DOJ because process was an important consideration for it in granting pre-clearance of the Charter revisions under the Voting Rights Act.⁷⁷

preliminary research that the Commission had done was useful for the eleven holdover Commissioners who served on the 1989 Commission and for the many holdover members of staff, including Eric Lane, who I promptly concluded would be valuable—really essential—to retain.

74. No previous Charter Commission had held every meeting in public. Even when Commissions had held public meetings, the meetings often had not been transcribed. The 1975 (and earlier) Charter Commissions (and much of the Ravitch Commission) did not transcribe their meetings, and now there is no record of those meetings for historians, lawyers, or others to examine. *See* N.Y.C. Charter Revision Comm'n Pub. Meeting 91–92 (May 15, 1989) (remarking on the unfortunate absence of a record of the deliberations of the 1975 Goodman Charter Revision Commission).

75. *See* N.Y. PUB. OFF. LAW § 103 (McKinney 2013).

76. For our efforts with editorial boards, see Schwarz & Lane, *supra* note 4, at 974–87.

77. 42 U.S.C. § 1973c (2011).

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But openness did not mean there was no room for private conversations I had with individual Commission members. For example, I telephoned individual members, talked to them before meetings, and spoke with them in corridors at meetings. Reasons for such discussions included describing upcoming issues and why a particular course seemed sensible, asking a particular Commissioner to take the lead on a particular proposal, and indicating how a particular Charter provision might be helpful in attracting support. Openness does not prevent individual persuasion.

2. *The Extent of the 1989 Commission's Process*

When the 1989 Commission convened in January of that year, the U.S. Supreme Court still had not decided the *Board of Estimate* case. For the Commission to “choose [then] to do nothing would be to make a choice, to tie our hands as far as the option of taking action this year.”⁷⁸ Therefore, at the suggestion of Director of Research Frank Mauro, we proposed that the Commission hold a series of six “legislative hearings to examine the workings of City government.”⁷⁹ The six legislative hearings covered (1) local voice in government, (2) contracting and procurement, (3) land use decisionmaking, (4) oversight and representation, (5) franchising, and (6) budgeting. Each hearing lasted a full day. The hearing transcripts ran more than 2500 pages.

The breadth of those hearings sent an important, though unstated, message about our work: Charter revision was likely to be extensive, further suggesting a government without a Board of Estimate.

These hearings had value in addition to being informative. First, they showed the Commission's open and professional approach to its work. Second, the hearings built a record for some later proposals. For instance, what ultimately became the IBO, the “fair share” policy for the distribution of city facilities, and the remedies for the city's “slow pay” practices with contractors all stemmed from concerns aired at the hearings, as did our decisions to rectify certain weaknesses in city government that were epitomized by the Board of Estimate. The hearings also built support for enhancing the power of the City Council because they showed that the Council had recently focused more on citywide needs than had the more parochial Board of Estimate.

In the four-plus months after the Supreme Court decision, the 1989 Commission held twenty public meetings where the Commission members debated ideas, worked toward reaching conclusions, and formulated proposed Charter language,⁸⁰ and held fourteen public hearings all over the city where citizens were able to provide their

78. Minutes of the N.Y.C. Charter Revision Comm'n Pub. Meeting 3 (Jan. 20, 1989).

79. For discussion on this subject generally, see Schwarz & Lane, *supra* note 4, at 753–54.

80. The Commission's road to consensus is discussed throughout the 1998 article. *See, e.g., id.* at 925–41.

suggestions for change and comment on our tentative proposals.⁸¹ The transcripts of these meetings and hearings exceed 13,000 pages.⁸²

3. *Making the Commission's Broad Goals Public*

We wanted the public to know our goals and what we specifically wanted to attain. Eric and I decided that publicly elaborating our goals would serve several important purposes: it would provide a touchstone for the Commission's deliberations; provide logic, rationale, and context for decisions; and link Commission decisions to more universal principles, particularly those embedded in the American constitutional experience. Setting public goals would also provide the public with an instrument to measure our proposals. We decided that any danger of creating a target for the Commission's critics was far outweighed by the benefits.

The goals I announced were:

1. *First and foremost, there is the goal of fair representation.* The one-person-one-vote idea . . . is not just a formula; it is the heart of democracy. And fair representation also means the legal, but more importantly, the moral imperative that underlies the Voting Rights Act.
2. *Balancing power, checking power,* is really in the bones of Americans. That is part of the genius of our Constitution
3. *Fixing accountability and clarifying responsibility.* You do not want a government in which it is vague who has made a decision, then everybody can say they are not responsible
4. *[H]ave the government operate efficiently.* If it does not . . . then the needs of the public cannot be met because there are too many roadblocks in getting from the policy goal to the implementation of that goal.

81. At these public hearings some 679 witnesses came to press, pummel, and occasionally praise our work. But praise was generally limited and reserved until after our proposals were finalized because advocates, naturally, continued to advocate until the very end.

To help with outreach, these public hearings were not limited to Manhattan or even to traditional downtown areas in any borough. Indeed, eighty-seven percent of our public hearings (other than in Staten Island) were held in community districts with greater than fifty percent minority populations. For further discussion of our public outreach, see Schwarz & Lane, *supra* note 4, at 756–60. Two hearings were limited to representation issues. See Letter from Frederick A.O. Schwarz, Jr., Chairman, N.Y.C. Charter Revision Comm'n, and Eric Lane, Executive Director, N.Y.C. Charter Revision Comm'n, to Richard Posner, U.S. Dep't of Justice 4–5 (Sept. 26, 1989).

82. During the four-plus months between the Supreme Court's decision and when the Commission had to finish in order to assure that its proposals made the deadline for the referendum ballot, I spent about ninety percent of my time on Charter business—having luckily won the major case I was then handling for my law firm on the same day as the U.S. Supreme Court decision. The same pace continued for the DOJ submission and the referendum campaign. See Schwarz & Lane, *supra* note 4, at 942–1013. Throughout the whole period, Eric Lane and his excellent staff were, of course, devoting one hundred percent of their time to Charter issues.

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5. [C]oncentrate on the fundamental problem . . . and concentrate, at the outset, on what you can do to alleviate the problem, instead of focusing on the problem when it has arisen in crisis and you're trying to address the problem on the margins.
6. [I]ncrease the participation of all levels of government and of the people in the things [that] affect their lives.⁸³

These goals were rooted in America's constitutional history and broader thinking about constitutional government. They were also a product of the specific New York City environment in which the Commission was born. Fair representation (in the one-person-one-vote sense) created the need for the Commission; and fair opportunity for all races and groups for representation was high on the list of the city's immediate needs. In a city without a flourishing two-party system, a system of checks and balances was particularly important. Weakness in fixing accountability and clarifying responsibility had been a substantive problem with the Board, and therefore city government. The need to enhance efficiency is ever present for government. A lack of concentration on the fundamental problems, and instead a focus on crises, had been a weakness of the Board and the city in general.⁸⁴ The need to increase participation is clear for all democracies, and was particularly important given New York City's racial problems.

The early articulation of the Commission's goals in such broad terms also signaled something important for the Commission's future: while the specifics were still to be developed, we would move toward those specifics in an open way, based on an iterative exchange with the public in turn based on values and facts.

4. *The Iterative Nature of the Process*

In a compressed time, the 1989 Commission engaged in an extensive, and iterative, public process. After several months of work (including the six legislative hearings referred to above) and benefitting from extensive staff work, I laid out for the Commission and the public the Chair's tentative ideas for change in April 1989.⁸⁵ Just as was true for setting out our goals, this had risks. As we learned more, it was inevitable that Commission members, Eric, and I would come up with new or better ideas. Ultimately, the initial proposals were substantially improved. But putting the proposals forward was worthwhile to get the ball rolling, again demonstrating our openness, and lead.

83. Apr. 24, 1989 Public Meeting, *supra* note 11, at 4–7. The goals announced at the public meeting were followed by substantial ensuing discussion and elaboration, including a response by Committee Vice Chair Harriet Michel that expressed happiness that we had “rais[ed] the stakes of what we are doing to try to get at those kind of philosophical goals.” *Id.* at 58; *see also* Schwarz & Lane, *supra* note 4, at 751–52.

84. *See* Schwarz & Lane, *supra* note 4, at 751.

85. Frederick A.O. Schwarz, *New Agencies, New Rules: Excerpts from Charter Proposals*, N.Y. TIMES, April 25, 1989, at B4, available at <http://www.nytimes.com/1989/04/25/nyregion/new-agencies-new-rules-excerpts-from-charter-proposals.html>.

The Chair's initial proposals were discussed and debated by the Commission, and accepted, amended, or rejected during the course of seven public meetings. Next, the Commission offered its preliminary proposals for public comment.⁸⁶ After a month of public comment and seven public hearings on these, the Commission then met to continue its own deliberations in seven more public meetings over the course of a month. After these deliberations, the Commission issued its refined and altered proposals for another round of public comment, including five more public hearings. This was followed by still another round of public meetings, leading to our final recommendations.

In addition to being extensive and open, the Commission's process connected with real people who had varied reactions and ideas. My colleagues sometimes teased me for "listening to death." Indeed, I often permitted speakers at our public hearings to exceed the usual three-minute time limit. This resulted in many public hearings extending past midnight. Throughout, however, it was important both to listen and to appear to be listening. Even substantive critics of the Commission praised the fairness of our process.⁸⁷ In addition, in the later stages of our public hearings, we began to use responses to questions to advocate for our proposals.⁸⁸

IV. THE BALANCE OF POWER UNDER THE 1989 CHARTER FROM THE PERSPECTIVE OF TWENTY-FIVE YEARS LATER

Any Charter revisions must be evaluated in light of the need for a government that "works" and is just. The 1989 Commission intended to, and did, create a powerful, accountable Mayor with clear responsibilities. Given a strong Mayor, it also was particularly important to have other elements of government act as checks and balances. We also believed that these elements could be additional sources of creative solutions to the city's problems.

Checking power, particularly the executive's, is "really in the bones of Americans; it is part of the genius of our Constitution."⁸⁹ In addition, two of New York City's eternal concerns—racial angst and anxiety about Manhattan domination—bolstered the notion of checks and balances to a strong Mayor. This article, and our 1998 article, makes these points about the City Council, the Borough Presidents, and the Public Advocate—as well as about the IBO.⁹⁰

86. See Schwarz & Lane, *supra* note 4, at 756.

87. See *id.* at 769.

88. See *id.* at 945–46. For example, "[w]e were able to use [] quotes about the Commission's openness and responsiveness from leaders of the minority community such as David Dinkins, Roscoe Brown, and the New York State NAACP," to advocate for our proposals. *Id.* at 946.

89. *Id.* at 752.

90. For a discussion of the IBO see *id.* at 901. For a discussion of the Borough President see *id.* at 906. For discussion of the City Council see *id.* at 785. For a discussion of the Public Advocate see *id.* at 815.

TWENTY-FIVE YEARS LATER

Since 1989, the City Council's power relative to the mayoralty has been reduced by term limits.⁹¹ If there is a further look at the basic balance of power in New York City government, the first question should be whether a norm of two terms for Council Members inappropriately weakens the Council vis-à-vis the Mayor and continues the trend of Council Members, including the Speaker, being excessively focused on their next job. Any Charter revision that further increases the power of the Mayor by limiting the role of the Council, or by eliminating Borough Presidents or the Public Advocate, should and would face a high hurdle both substantively and politically.⁹²

There have been too many Charter Commissions since 1989. This does not mean that any questions should be off the table. But Charter fatigue may well make it harder to have a robust Charter revision process which the public takes seriously. And, of course, to be credible, and to increase the likelihood of prevailing, a Charter Commission should be representative and independent, and should have a serious, open, and extensive dialogue with the public.

91. See Douglas Muzzio, *Bloomberg Moves to Change the City Charter, But How?*, GOTHAM GAZETTE (Mar. 8, 2010), <http://www.gothamgazette.com/index.php/open-government/467--bloomberg-moves-to-change-the-city-charter-but->. On November 2, 2010, New York City voters approved proposals of the 2010 Charter Revision Commission to restore two term limits for elected officials. See Javier Hernandez, *Once Again, City Voters Approve Term Limits*, N.Y. TIMES, Nov. 3, 2010, at P12, available at <http://www.nytimes.com/2010/11/03/nyregion/03limits.html>.

92. For discussion of the roles of the Public Advocate and Borough Presidents in New York City government, respectively, see Lucas Anderson, *Promoting an Effective and Responsive City Government by Retaining and Strengthening the Office of the Public Advocate*, N.Y.L. SCH. L. REV. 165 (2013–2014); Gregory Perrotta, *A Case for and Against the Borough President in Twenty-First Century New York City*, N.Y.L. SCH. L. REV. 193 (2013–2014).